



**Addis Ababa University  
School of Law and Governance  
Post Graduate Studies, Public International Law Stream**

**ASSESSMENT OF CORPORATE CRIMINAL RESPONSIBILITY  
FOR COMPLICITY IN INTERNATIONAL CRIMES:**

**THE CASE OF DEMOCRATIC REPUBLIC OF CONGO**

**By**

**Dagmawi Gosaye Kebede**

**January 2018  
Addis Ababa, Ethiopia**

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**By**

**Dagmawi Gosaye Kebede**

**A Thesis Submitted in Partial Fulfillment of the Requirements of Masters of  
Laws (LL.M) Degree in Public International Law**

Advisor: Elias Nour (PhD, Associate Professor)

**January 2018  
Addis Ababa, Ethiopia**

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## **Declaration**

I, the undersigned, declare that, this thesis is my original work, and has not been presented for a degree in any other University, and that all source of materials used for the thesis have been fully acknowledged.

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## Approval Sheet

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“I will give thanks to you, LORD, with all my heart; I will tell of all your wonderful deeds.”

*Psalm. 9:1*

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## Acronyms

ACCI	Canadian Association against Impunity
ACJHR	African Court of Justice and Human Rights
ACRI	African Court Research Initiatives
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo-Zaire
AU	African Union
CTC	Center on Transnational Corporations
ACIDH	Action Against impunity for human Rights
ASADHO	African Association for the defense of Human Rights
DRC	Democratic Republic of Congo
FARDC	The Congolese Armed Forces
FDLR	Democratic Forces for the Liberation of Rwanda <i>(the Forces Démocratiques pour la Libération du Rwanda),</i>
FNI	the Nationalist and Integrationist Front
FPLC	Patriotic Force of Congolese Liberation <i>(Force Patriotique pour la Libération du Congo)</i>
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICTR	International criminal tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labor Organization
IMT	The international Military tribunal
M-23	March 23 Movement
MDM	Mamans Du Monde
MLC	Congolese Liberation Movement ( <i>Mouvement pour la Libération du Congo,</i> )
MNC	Multi-national Companies
MONUC	the United Nations Organization Mission in the Democratic Republic of the Congo
MRLK	Revolutionary Movement for the Liberation of Katanga
NGOS	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
RAID	Rights and accountability in Development
RCD Goma	The Congolese Rally for Democracy-Goma
RCD-ML	The Congolese Rally for Democracy-Liberation Movement ( <i>Rassemblement Congolais pour la Démocratie-Mouvement de Libération</i> )
RTLM-	Radio Television Libre des Mille collines
SA 8000	Social Accountability Standard
SOCOMI	South Cost Lumber Company and affiliates
SOMO	Centre for Research on Multinational Corporations
UK	United Kingdom
UNDP	United Nations Development Program
UNSC	United Nations Security Council
UN	United Nations
UPC	Congolese Union of Patriots ( <i>Union des Patriotes Congolais</i> )
USA	United States of America

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## Abstract

*Presently, the possibility of assistance being extended to the perpetrators of the core international crimes has increased. Especially, MNCs operating in conflict areas are often found complicit for War Crimes, Crime against Humanity, and Genocide alleged to be committed by armed groups. This research tries to assess corporate criminal responsibility for complicity in international crimes by taking the case of DRC as a demonstration. It analyzes the conceptual framework on criminal responsibility of complicit Corporations for international crimes. The research examines the prosecution of such Corporations in DRC at different judicial forums. In DRC, since conflict over controlling natural resource prevails, the complicity of Corporations operating in the extractive industry is high. Corporations assist government and armed rebel groups by providing finance, weapons, vehicles and air support that facilitate the commission of international crimes. However, owing to the absence of corporate criminal responsibility under the Congolese Criminal Code and due to the ineffectiveness of the judicial system and other economic and political factors, complicit Corporations in international crimes are not brought to justice. Corporate criminal responsibility for international crimes has been included under the protocol of the African Court of Justice and Human Rights. Although the protocol articulates Criminal Section of the ACJHR as potential fora to prosecute Corporations, it is yet in force. There are also challenges in establishing jurisdiction, and organizing evidence for prosecution in DRC. Thus, the prosecution of Corporations before the International Criminal Court becomes relevant, but this is contingent up on the inclusion of corporate criminal responsibility under the Rome Statute of International Criminal Court. Therefore, it is suggested that, corporate criminal responsibility should be included under the Rome statute and in the Congolese criminal code, in addition to which such laws in the home states of the MNCs are necessary if they are not existent. Moreover, the investigation, prosecution and judicial system of DRC should be improved commensurate with the tasks involved in such prosecution and adjudication. The DRC government should sign and ratify the African Court of Justice and Human Rights protocol, thereby creating possible future court for holding Corporations liable. The home states of MNCs as part of their international obligations and based on their own criminal laws should also punish complicit Corporations.*

### **Key words;**

***International crimes, Complicity, Multinational Corporations, Criminal responsibility, Prosecution***

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## CHAPTER ONE

### INTRODUCTION

This chapter briefly presents the general framework within which the research is conducted. It sets the background of the study, and provides the nature and extent of the problem under study. It specifies the major research questions to be addressed. The main and specific objectives of the research coupled with the research methods, and methodology employed are shortly provided. Furthermore, the significance of the study and the limitations encountered in due course of conducting the study has been discussed.

#### 1.1 Background of the study

In the contemporary international order, core international crimes such as Crime against Humanity, War Crimes, and Genocide are mainly perpetrated by natural persons. However, in due course of conducting business, Corporations may also participate in the commission of international crimes. There is growing evidence of the role that, Multinational Corporation"s play in massive human right violations, which may amount to „international core crimes“.<sup>1</sup> Complaints about complicity of multinational businesses in human rights violations have increased significantly in the last sixty years.<sup>2</sup> Especially, in areas like the Democratic Republic of Congo (DRC), where conflict over controlling natural resource prevails, the complicity of Corporations is high. Corporations assist governments and armed rebel groups by providing finance, weapons, vehicles and air support that are used by government military forces or rebel groups in the course of committing international crimes.<sup>3</sup>

Traditionally International Criminal Law does not recognize the responsibility of Corporations for international crimes. International Criminal Law rather attributed guilt only to individuals.<sup>4</sup> So far, except the International Military Tribunal (IMT) under the Nuremberg Charter<sup>5</sup>, no international

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<sup>1</sup>Robert Cryer, Prosecuting International Crimes , (2005), P. 1

<sup>2</sup>Jessie Chella, The Complicity of Multinational Corporations in International Crimes: an Examination of Principles, (2012, Unpublished, Faculty of Law, Bond University), P.1

<sup>3</sup>Ibid.

<sup>4</sup>International Commission of Jurist Expert report, Corporate Complicity and Legal Accountability ; Criminal law and international crimes, ( 2008, Unpublished, ICJ), P. 56

<sup>5</sup>The Nuremberg Charter, The Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, Art. 9, provide that, "At the trial of any individual

criminal tribunal has acquired jurisdiction to try a company as a legal entity for crimes under international law. The ICTR, ICTY and the ICC statutes all provide jurisdiction only over natural persons.<sup>6</sup> Yet, there are instances by which individuals involved in corporate crimes were prosecuted.<sup>7</sup>

However, criminal responsibility for legal entities is a well-known concept in many national legal systems<sup>8</sup>. But, national systems may prove inadequate or may not be reliable for a variety of reasons. For instance, *inter alia*, the judiciary of a host state of a corporation like that of DRC, might be too weak to control a powerful corporation, or the state might be corrupt, or sanctioning extraterritorial corporate behavior might be a low-priority task in the home state.<sup>9</sup>

Currently, driven by several related developments, there is a steadily growing demand from victims and their representatives regarding the accountability of companies when they are involved in gross human rights abuses.<sup>10</sup> First, the complex relationship between business, and individuals, communities and governments mean that business operations can and do severe impact on human beings.<sup>11</sup> Second, we have seen the emergence of a broadening concept of ethical responsibility in our interconnected world, which extends up to scrutinizing the distant and most complex actions of businesses.<sup>12</sup>

Third, victims of human rights abuses and groups working on their behalf have increasingly turned to hold those responsible for abuses accountable and to seek remedies and reparations.<sup>13</sup> Hence, these developments have led to a search for how different branches of national and international law can be harnessed to hold increasingly powerful non-state actors accountable.<sup>14</sup> This research mainly

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member of any group or organization the Tribunal may declare that, the group or organization of which the individual was a member was a criminal organization.” But, detail issues are not provided.

<sup>6</sup> Olson Danielle, “Corporate Complicity In Human Rights Violations Under International Criminal Law”, International Human Rights Law Journal, vol.1, Issue 1, (2015), P.4

<sup>7</sup> Fauchald Ole Kristian and Stigen Jo, Corporate Responsibility Before International Institutions, George Washington International Law Review, vol.40,( 2009), P.1036

<sup>8</sup> Id., P. 1035

<sup>9</sup> Id., P. 1028

<sup>10</sup> International Commission of Jurist Expert Report, Corporate Complicity and Legal Accountability ; Facing the facts and charting the legal path (2008, Unpublished, ICJ ), Vol.I, P.1

<sup>11</sup> Id., P.2

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

examines the responsibility of Corporations operating in DRC for complicity in international crimes and the factors that hinder the prosecution of such Corporations before different judicial forums.

## 1.2 Statement of the Problem

The fact that, the current International Criminal Law imposes criminal responsibility on natural persons has created an impunity gap on the liability of Corporations soliciting business while being complicit in the commission of international crimes. As a result of the impunity, Corporations continue to work their business in the state were they had assisted the commission of international crimes. Though there are landmark cases involving business leaders, introducing corporate criminal responsibility *per se* is challenged by many factors. Some scholars suggest that, international law cannot impose obligations on Corporations because Corporations do not possess international legal personality.<sup>15</sup>

On the other hand, some writers argue that, without the precondition on the prior existence of legal personality, any existence of rights and duties under international law implies that a holder of these rights and duties has international legal personality.<sup>16</sup> Despite this contention, imposing criminal responsibility on Corporations in general, would be subject to the agreement of sovereign states, which may possibly be affected by political, economic (development) and social dynamics.

Moreover, there are notional objections forwarded against corporate criminal responsibility. First, corporate entities are considered to be incapable of possessing the requisite *mens rea*; they are amoral, and have no will of their own.<sup>17</sup> Secondly, Corporations are legal fictions and cannot operate independently.<sup>18</sup> Apart from these, there are concerns raised over the punishment of Corporations.<sup>19</sup> But, these objections can be addressed by alternative academic discourses.

Notwithstanding the absence of corporate criminal responsibility under the Rome Statute on the International Criminal Court and customary international law, models of corporate criminal responsibility can be found in domestic jurisdictions. Especially in areas where conflict such as

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<sup>15</sup> Malcolm N. Shaw, International Law (5th Ed. 2003), , P.224-225

<sup>16</sup> Ijalaye D. Adedayo, The Extension of Corporate Personality In International Law (1978), P.2-3

<sup>17</sup> Guy Stessens, "Corporate Criminal Liability: A Comparative Perspective," International and Comparative Law Quarterly, Vol. 43, (1994), P. 493

<sup>18</sup> Ibid.

<sup>19</sup> Jessie Chella, Cited Above at Note 2, P.84

civil war prevails, the necessity of criminal responsibility for complicity of MNC in international crimes is vital.

According to reports, multinational Corporations operating in conflict-affected areas or weak-governance zones are likely to be complicit in human rights violations.<sup>20</sup> For instance, a research conducted by Maplecroft in 2009, ranked the DRC as the worst record of human rights globally.<sup>21</sup> Based on a set off risk indicators, it ranked the DRC as an Extreme Risk Country for complicity.<sup>22</sup> Likewise, as per the 2014 human rights risk index atlas of Maplecroft, DRC is ranked third globally.<sup>23</sup> Moreover, in countries where many extractive industries exist the complicity of Corporations is higher.<sup>24</sup> The impact of business enterprises and commercial actors in situations of armed conflict have not changed in recent times, as armed conflict in various part of the world reveals that corporations and commercial actors fuel conflicts by trading in illicit conflict commodities<sup>25</sup>. Given the existence of natural resource and conflict sensitiveness of the continent, complicit of corporation for international crimes is/can be a situation in different parts of Africa Thus, unless legislative and other measures are taken it would be a threat to the peace and security of the continent in general.

The DRC's Military Criminal Code and the Military Procedural Criminal Code, excludes the criminal liability of Corporations for complicity in international crimes.<sup>26</sup> Specifically, Article 73 of the Military Procedural Criminal Code says "The Military Courts and tribunals shall have full jurisdiction to try individuals."

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<sup>20</sup>Maplecroft Media Release, Human Rights Risk Extreme throughout much of Asia and Africa, ([http://www.maplecroft.net/HR09\\_Report\\_Press\\_release.pdf](http://www.maplecroft.net/HR09_Report_Press_release.pdf)), last visited, March 26<sup>th</sup> 2017

<sup>21</sup>Ibid.

<sup>22</sup> Ibid.

<sup>23</sup>Maplecroft media Release; World Human Rights Extreme Map Atlas 2014, ( <http://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/>) last visited, March 26<sup>th</sup> 2017

<sup>24</sup> United Nations Special Representative of the Secretary-General on the Issue of Human Rights in Transnational Corporations and other Business Enterprises Interim Report, Promotion and Protection of Human Rights (2006 Unpublished, UN Doc: E/CN.4/2006/97), P. 24-25

<sup>25</sup> University of Oslo, Ensuring Responsibility under International Law for Transnational Corporations for Crimes Committed in Situations of Armed Conflicts Candidate ( 2017, Unpublished, University of Oslo Faculty of law, Norway), P.26

<sup>26</sup>The DRC Military Criminal Code, 2002, Law No. 024/2002 and, the DRC Military Judicial Code, 2002, Law No. 023/2002.

Hence, the absence of corporate criminal responsibility under the Congolese law coupled with the omission of the concept under the International Criminal Court Statute,<sup>27</sup> to which DRC is a party has aggravated the impunity of Corporations. But, in the DRC, and other jurisdictions, there are attempts made to criminally prosecute complicit Corporations in international crimes such as War Crimes and crime against humanity. Yet, owing to different reasons these attempts were almost unsuccessful. The Kilwa trial is the only prosecution that has taken place in the DRC in which a company and its employees were indicted for international crimes. In 2006, an Australian/Canadian based Mining Company, Anvil Mining, and three of its employees were charged for complicity in the War Crimes committed by government forces.<sup>28</sup> Unfortunately, the Military court acquitted the employees of the company, and the Military prosecutor withdrew the charge against the company *per se*<sup>29</sup>. This case is considered as an example of political interference in the military justice system of DRC.<sup>30</sup>

Apart from DRC, there are cases filed before a corporation's home states, against the corporation's manager. For instance, in 2013, the European Centre for Constitutional and Human Rights and Global Witness, lodged a criminal complaint before German High Court against Denzer Group Manager for complicity in the attack on the village of Bongulu, by the Congolese army and the police. But, the case was discontinued by the prosecutor of Germany.<sup>31</sup>

The current international human rights related regulation of MNCs acts, which are usually referred as „soft law“ mechanism do not address the problem of corporate complicity for international crimes in general or those committed in DRC.<sup>32</sup> In addition to the legal gaps in the criminal responsibility of Corporations, there are also severe obstacles which will hinder the realization of complicit corporate responsibility for international crimes. The link between the illegal exploitation of natural resources of the DRC, and the commission of international crimes places a higher hindrance.<sup>33</sup> The United Nations Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of

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<sup>27</sup>Rome Statute of the International Criminal Court, July 1, 2002, Art. 25(1)

<sup>28</sup>The ICJ, Access to Justice: Human Rights Abuses Involving Corporations in the Democratic Republic of the Congo, ICJ, (2012, Unpublished, the International Commission of Jurists), P.35

<sup>29</sup>Ibid.

<sup>30</sup>Id., P. 35

<sup>31</sup>Business and Human Right Resource Center, Danzer group and SIFORCO lawsuits (DRC), (<https://business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rp-congo>), Last visited ,March 19 2017

<sup>32</sup>Jessie Chella, Cited Above at Note 2, P. 14

<sup>33</sup>The International Commission of Jurists, Cited Above at Note 28, P.25

Wealth of the Democratic Republic of the Congo found that, a number of businesses and Corporations have been involved in the illegal exploitation of the DRC's resources in a direct or indirect way by associating with the elite networks. They have contributed to fuelling the ongoing armed conflict and grave violations of human rights and Humanitarian laws.<sup>34</sup> Moreover, lack of independence of the judiciary, corruption, lack of capacity and resource, problems on evidences and enforcement of judgments, and weak witness protection mechanisms are challenges in the prosecution of complicit Corporations.

### **1.3 Research questions**

The study addresses the following research questions;

1. When do we say that, a corporation is complicit in the commission of an international crime?
2. Whether and why corporate criminal responsibility for complicity in international crimes should be introduced under the current International Criminal Law or Congolese law?
3. Whether and, how Corporations operating in DRC are complicit for international crimes?
4. What are the efforts made so far, if any, and the challenges in prosecuting Corporations in DRC for their complicity in international crimes?
5. Where is the appropriate judicial forum to prosecute Corporations which are complicit for international crimes in DRC?

### **1.4 Scope of the study**

The scope of the research is limited to assess corporate criminal responsibility for complicity to the core international crimes in the DRC. The study focuses on the complicity of Corporations for Crime against Humanity, War Crimes and Genocide. In doing so, the need and development of corporate criminal responsibility under International Criminal Law is analyzed. The study especially focuses on Multinational Corporations operating in DRC having a relevant connection with the conflict and the extractive industry. The participation of corporation in international crimes by a primary capacity is not the concern of this study.

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<sup>34</sup> UN Security Council Expert Panel Reports, [the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo](#), ( 23 October 2003, unpublished, Report S/2003/1027)

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## **1.5 Objectives of the study**

The study is conducted with the view to attain the following General and Specific objectives;

### **1.5.1 General Objective**

The main objective of the research is to assess the criminal responsibility of Corporations operating in DRC for their complicity in international crimes.

### **1.5.2 Specific objectives**

- a) To explain the concept of corporate criminal responsibility for complicity in the core international crimes.
- b) To explain the need for corporate criminal responsibility for international crimes and its potential advantages.
- c) To analyze the challenges encountered in introducing corporate criminal responsibility for international crimes.
- d) To examine the complicit participation of Corporations in the commission of international crimes in the DRC.
- e) To examine the efforts made in prosecuting complicit corporates in the DRC; and
- f) To examine the forum which is appropriate to prosecute complicit Corporations for international crimes committed in the DRC.

## **1.6 Significance of the study**

The research can be a contribution to the legal scholarship on the themes that are addressed. It will contribute to the discourse on the introduction of corporate responsibility for international crimes. It would also assist in enhancing conceptual clarity on corporate complicity for international crimes and the responsibilities thereon.

## **1.7 Research methodology and methods**

The study is doctrinal, and qualitative approach is used to address the research questions and the issues raised throughout the research. Laws, international treaties, and secondary sources such as books, journals, excerpts, unpublished materials, and reports of international organizations are employed to analyze the main themes. Review and consultation of domestic and international laws related with corporate criminal responsibility for complicity have been made. Among DRC's domestic laws, the 2006 Constitution of DRC, the 2002 DRC's Military Criminal Code, the DRC

Military Judicial Code (2002), Investment Code of DRC (2002), the Criminal Code of DRC (Code Penal Congolese 1940), the Mining Code of DRC (2002), and the draft legislation on the establishment of special Mixed Tribunal for DRC (2014) have been appraised. Likewise, the Criminal Code of Canada (1985) and the Criminal Code of Australia (2002) coupled with other jurisdictions, incorporating the notion of corporate responsibility for international crimes have been analyzed.

Review and analysis of international laws include the Rome Statute of the International Criminal Court (2002), the African Union „Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, and the Nuremberg Charter, the Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945. Cases decided by domestic jurisdiction of various states, and the cases of the IMT, ICTR, ICTY, ICC as well as the International Court of Justice have been consulted based on their relevance to the study. Moreover, the researcher has gone through resolutions and reports of the UNSC and GA, and decision of the AU dealing with the themes of the study.

### **1.8 Limitations of the Study**

Given the development of the concept of corporate criminal responsibility for international crimes, there are no sufficient researches specifically addressing the research problem. Moreover, the shortage of a comprehensive book addressing the issue of corporate criminal responsibility is the limitation of this research. But, the writer has tried to solve this, by resorting to sufficient journal articles, papers and reports of various international organizations.

### **1.9 Definition of Terminologies**

The following definitions are provided for the major terminologies:

#### **a) Corporations**

It is a business entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely, or, it is a group of persons established in accordance with legal rules into a legal or juristic person that has a legal

personality distinct from the natural persons who make it up.<sup>35</sup> A corporation differs from other business entities in that it is treated as a separate legal entity by the law.<sup>36</sup> Thus, incorporated legal entities bearing a different name may fall under the definition of Corporations. For instance, companies, partnerships, joint-stock company, and associations running a business can be considered as Corporations provided they have a separate legal personality.<sup>37</sup>

Under DRC's law, in order to carry out their business activities, foreign investors should set up a Congolese entity.<sup>38</sup> Article 23(b) of the Mining Code obliges foreign companies to form Congolese subsidiary.<sup>39</sup> Companies in DRC, have a legal personality which is distinct from its members.<sup>40</sup>

Thus, Corporations with a distinct legal existence are the subject of this study, and other entities under international law, such as States or International Organizations are not Corporations and henceforth excluded.

## **b) Multinational Corporations**

It is a corporation engaged in business activities in more than one State.<sup>41</sup> It is also referred as a transnational corporation or transnational enterprise. This study will make an emphasis on MNCs operating in the extractive industries of DRC.

## **c) International Crimes**

International Crimes are those crimes of serious gravity, which are defined by International Criminal Law. The categories of international crimes include, Crime against Humanity<sup>42</sup>, War Crimes,<sup>43</sup> Genocide,<sup>44</sup> and Aggression.<sup>45</sup> However, this study focuses on the Crime against

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<sup>35</sup> Bryan. A. Garner, Black's Law Dictionary, (2009, 9<sup>th</sup> ed.), P.391

<sup>36</sup> Peter Butt (eds.), Butterworth's Concise Australian Legal Dictionary(2004, 3<sup>rd</sup> ed.), P.99

<sup>37</sup> Jessie Chella, Cited Above at Note 2, P.23 *See also*, B. A. Garner, Cited Above at Note 34, P.318

<sup>38</sup> Investment Code of Democratic Republic of Congo, Law N° 004, 2002, Art. 8,

<sup>39</sup> The Mining Code of Democratic Republic of Congo, Law No 007, 2002,

<sup>40</sup> The decree of 27 February 1887, "L'article 1er du decret du 27 fevrier 1887 reconnait aux societees" une personnalite juridique distincte de celle des associes", Art. 1

<sup>41</sup> P. Fischer, Encyclopedia of Public International Law(1985, Volume VII), P. 515

<sup>42</sup> The Rome Statute of the ICC, Cited Above at Note 27, Art.7

<sup>43</sup> *Id.*, Art.8

<sup>44</sup> *Id.*, Art.6

<sup>45</sup> *Id.*, Art.5. Accordingly, Aggression would be considered under the jurisdiction of the court after agreement on its definition and activation decision by the Assembly of State Parties. Thus, in 2010 the Kampala review conference has adopted an amendment subject to ratification by state parties and activation decision. In January 2017 review

Humanity, War Crimes, and Genocide committed in DRC and by which corporations become complicit thereof.

#### **d) Criminal Responsibility**

Criminal responsibility is the capacity to be blamed - and therefore punished – which animates our conception of the notion of responsibility.<sup>46</sup> There are two steps to consider in the attribution of responsibility. The first is that the subject must possess the aptitudes of a potential subject of punishment.<sup>47</sup> This is a necessary precondition to the second step, which corresponds to the transformation of this potential liability into actual liability through the occurrence of an event capable of generating responsibility.<sup>48</sup> Writers contend that, the imposition of responsibility upon an individual flows naturally from the principle of autonomy- freedom to make rational choices about actions and behavior.<sup>49</sup>

However, in case of attributing corporate criminal responsibility the ability to go beyond the confines of the human person and identify other attributes which enable an entity to be capable of being a responsible actor is the first challenge to any theory of corporate criminal liability.<sup>50</sup>

#### **e) Complicity**

In a broader context, the word „complicity“ has been used to describe the different ways in which one actor becomes involved in an undesirable manner in something that someone else is doing.<sup>51</sup> But, in criminal law complicity has a particular and limited legal meaning.<sup>52</sup> Complicity can be defined as, association or participation in a criminal act.<sup>53</sup> In International Criminal Law there are various forms of complicity. These modes of participation include, aiding and abetting, instigating,

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conference in New York, the minimum ratification has been met and the assembly of state parties has activated Aggression as a crime under the jurisdiction of the ICC effective on July 17, 2018. See, the Resolution RC/Res.6 Adopted at the 13th plenary meeting, on 11 June 2010, Kampala Uganda, and Resolution ICC-ASP/16/Res.5 adopted at the 13<sup>th</sup> plenary meeting on 14 December 2017, New York.

<sup>46</sup>Jennifer A. Quaid., “ The Assessment Of Corporate Criminal Liability On The Basis Of Corporate Identity: An Analysis”, McGill Law Journal, Vol. 43, (1998), P.70

<sup>47</sup>Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Celia Wells, Corporations and Criminal Responsibility(1993) , P. 63

<sup>50</sup> Jennifer A. Quaid., Cited Above at Note 46, P.71

<sup>51</sup>International Commission of Jurist Report (V.1), Cited Above at Note 10, P.3

<sup>52</sup> Id., P.4

<sup>53</sup>Bryan A. Garner, Cited Above at Note 35, P. 324

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ordering, planning or conspiring to commit a crime and the responsibility of a superior who fails to prevent or punish the commission of a crime.<sup>54</sup>

### **1.10 Organization of the study**

The paper is organized in to five chapters. The first chapter is the introduction of the research. The Second chapter addresses, the prospects and challenges in introducing corporate criminal responsibility for international crimes. It tries to analyze the need for corporate criminal responsibility for international crimes coupled with the rationales, and challenges thereon. It also gives a brief discussion on criminal law theories on attributing guilt to Corporations. The third chapter is allotted to explain complicity of Corporations in the commission of international crimes in the DRC. The fourth chapter analyzes the current and prospective prosecution of complicit Corporations for international crimes committed in DRC. In doing so, it will assess the responsibilities of the complicit Corporations. Finally, the fifth chapter forwards conclusions and recommendations.

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<sup>54</sup> International Law Commission, *Yearbook of the International Law Commission*, (1996, Vol. II), P. 18-20

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## CHAPTER TWO

### INTRODUCING CORPORATE CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES: CHALLENGES AND PROSPECTS

It has been underscored that, except in some domestic jurisdictions, Corporations are not criminally liable for complicity in international crimes. The proposal of holding Corporations criminally responsible for international crimes before international tribunals or domestically is an evolving phenomenon. Thus, as a new subject area of International Criminal Law, there are conceptual as well as practical concerns which needs detail explanations.

This chapter addresses the conceptual frameworks in introducing corporate criminal responsibility for international crimes. The chapter highlights the involvement of Corporations in international crimes as a complicit. The conceptual and legal framework of complicity in international crimes, in line with Corporations is analyzed. The current need and rationale for corporate criminal responsibility and the challenges in introducing corporate criminal responsibility under International Criminal Law and domestic criminal laws are also evaluated in this chapter. Furthermore, the various theoretical approaches to establish the criminal responsibility of Corporations<sup>55</sup> or the attribution of mental and material elements to Corporations are discussed.

#### 2.1 Corporate Involvement in International Crimes

Corporations can possibly be involved in the commission of international crime either in a primary capacity or as complicit. Despite the existence of an impunity gap, the following sections will discuss the allegations showing corporate involvement in international crimes in the past and present time.

##### 2.1.1 Historical Accounts

The concept of criminal enterprise is as old as that of International Criminal Law itself.<sup>55</sup> The involvement of Corporations in gross human rights violations, which amounts to international crimes stretches back over the last sixty years.<sup>56</sup> During the Second World War, German Corporations were complicit in the War Crimes and Crime against Humanity, committed by the Nazi regime. In the German Industrialist cases, before the Nuremberg trial, the prosecution of

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<sup>55</sup> Lynn Verrydt, The Quest for International Criminal Liability with regard to Corporations, (2011-2012, Unpublished, Faculty of Law, Ghent University), P.17

<sup>56</sup> International Commission of Jurists Report(V.1), Cited Above at Note 10, P.1

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company officials implies the existence of corporate involvement in international crimes.<sup>57</sup> The officials were responsible for the acts conducted by their Corporations.

In the USA vs. Carl Krauch, *et al* trial, the officer of the *Interessen-Gemeinschaft Farben industrie AG chemical Company*, were convicted for Crime against Humanity and War Crimes *inter alia* by supplying Zyklon B gas to Nazi concentration camps and providing experimental medicines.<sup>58</sup> Likewise, officials of Friedrich Krupp AG, arms and ammunition manufacturing Company, and the *Flick Kommandit gesellschaft*, a collective steel producing corporation were charged with War Crimes and Crimes against Humanity including enslavement of civilians, deportation and coercing Jewish plant owners to surrender their property.<sup>59</sup> Generally, German Corporations, such as I.G. Farben, Hoeschst, Flick, Krupp, Ford Werke and others, were prosecuted and convicted for contribution to the persecution of Jews, slave labor in the concentration camps and the destruction in the extermination camps.<sup>60</sup>

In the post-world war II period there was also evidence which shows corporate complicity in international crimes. In the *Nahimana Case* before the International Criminal Tribunal for Rwanda, two directors of the RTLM Radio Station were convicted for incitement to Genocide committed as part of the corporate activity of the station.<sup>61</sup> This implies the involvement of a legal person *per se* in a commission of the Genocide was not punished by the tribunal though the entities were complicit.

### **2.1.2 Contemporary Corporate Involvement**

With the advent of globalization, the expansion of MNCs has a dark side as well.<sup>62</sup> Cognizant of existing regulatory deficiencies, enterprises increasingly venture into business which constitutes or borders on criminal behavior.<sup>63</sup> Usually MNCs operating in conflict or war areas find it hard to resist opportunities for financial gain, and engage in international crimes by assisting governments

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<sup>57</sup> Lynn Verrydt, Cited Above at Note 55, P.17

<sup>58</sup> UN War Crimes Commission, Law Reports of Trials of War Criminals, Volume X: The I.G. Farben and Krupp Trials Count III, (1949, Unpublished, former UN War Crimes Commission -London), P.4-5

<sup>59</sup> *Id.*, Volume IX, P.2, and 69-70

<sup>60</sup> Baar Annika Van and Huisman Wim, "The Oven Builders of The Holocaust ;A Case Study of Corporate Complicity in International Crimes", British Journal of Criminology, ( 2012), P.3

<sup>61</sup> Fauchald Ole Kristian and Stigen Jo, Cited Above at note 7, P.1037

<sup>62</sup> Desislava Stoitchkova, Towards Corporate Liability in International Criminal Law (2010, Unpublished, School of Human rights research Series V. 38, Utrecht University, Netherlands), P.2

<sup>63</sup> *Ibid.*

or armed groups via supply of arms, finance, and vehicles.<sup>64</sup> Throughout the world, there are allegations and records of Corporations being complicit in international crimes, majority of which are those operating in the extractive industry. For instance, Royal Dutch Shell Petroleum Company was alleged for being complicit to the Nigerian dictator regime in Crime against Humanity, and torture, committed against the Ogoni people.<sup>65</sup> Likewise, the Mining Corporation Rio Tinto was alleged to have offered logistic assistance to the Papua New Guinean government in the civil war against Bougainville Revolutionary Army, which claimed 15,000 lives.<sup>66</sup> The case of Anvil Mining Company in DRC can also be recalled here.

As implied above, apart from the complicity, a corporation can also be a primary perpetrator in international crimes. For instance, there are allegations that, private military companies may directly commit international crimes. A case in point is, Black Water Security Company shooting civilians in, Baghdad, Iraq in 2007.<sup>67</sup>

## **2.2 Complicity in International Crimes; Legal framework**

It has been mentioned in the definitional part that, complicity is the involvement of one person in the criminal acts committed by another person. In International Criminal Law *inter alia* complicity includes aiding and abetting. Article 25(3) of the ICC Rome Statute is the first International Criminal Law treaty to provide detailed provisions on modes of criminal liability.<sup>68</sup> There are liabilities for primary participation and complicity of natural persons in international crimes. Despite this, the mode of complicity most often alleged against multinational Corporations is aiding and abetting.<sup>69</sup> The material element of aiding and abetting in International Criminal Law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.<sup>70</sup> The act may occur before, during or after the principal crime has been committed.<sup>71</sup> Under the ICC statute, a person will be guilty where, for the purpose of facilitating the

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<sup>64</sup> Ibid.

<sup>65</sup> Lynn Verrydt, Cited Above at Note 55, P.19

<sup>66</sup> Pak Natala. S., and Nussbaumer James P, Beyond Impunity: Strengthening The Legal Accountability of Transnational Corporation For Human Rights Abuses, (2009, Unpublished, Hertie School of Governance),P.2

<sup>67</sup> Lynn Verrydt, Cited Above at Note 55, P.18

<sup>68</sup> Robert Cryer, Cited Above at Note 1, P. 312

<sup>69</sup> Jessie Chella, Cited Above at Note2, P. 224

<sup>70</sup> Prosecutor v. Anto Furundzija, (Case No. IT-95-17/I-T, ICTY, 10 December 1998), para 235

<sup>71</sup> Prosecutor vs. Blagojevic and Jokic, (Case No. IT-02-60, ICTY Appeals Chamber, 9 May 2007), para. 127; Prosecutor vs. Simic, (case No. IT-95-9, ICTY Appeals Chamber 28 November 2006), para. 85

commission of a crime, the person aids, abets or otherwise assists in its commission or its attempted commission, including by providing the means for its commission.<sup>72</sup> Here, the requirement of substantial effect (the extended assistance resulting in major effect in the commission of the crime), seems absent. The assistance given to the primary perpetrator should be significant in the overall commission of the crime. But, the word “otherwise assists” shows the inclusion of assistance with less substantial effects, let alone the substantial effects.<sup>73</sup>

The specific acts, which can be considered as aiding and abetting, *inter alia* include the provision of goods or services used in the commission of crimes, the provision of information which leads to the commission of crimes, the provision of personnel to commit crimes, the provision of logistical assistance to commit crimes, the procurement and use of products or resources (including labor) in the knowledge that the supply of these resources involves the commission of crimes, and the provision of banking facilities so that the proceeds of crimes can be deposited.<sup>74</sup> Such cases as those of Corporations purchasing unpolished diamonds from conflict zones (like DRC) and as such providing rebel groups that engage in Crimes against Humanity with funds can be practical examples of corporate aiding and abetting.<sup>75</sup>

However, unless an adjustment is made, applying the aiding and abetting provision of the Rome Statute to Corporations is challenging. Article 25(3) (c), adopts „a purpose test“ for establishing *mens rea*. The aider or abettor will be responsible if he gave assistance with „the purpose of facilitating the commission of international crimes. But, the *ad hoc* tribunals had used „Knowledge“ as a test of establishing *mens rea* of secondary participants, emphasizing that the complicit perpetrators must have „knowledge“ that, their actions would assist the commission of the offence.<sup>76</sup> The purpose test, poses a major barrier to the prosecution of the corporate entities through which individual business persons commonly operate. MNCs could simply argue that whatever assistance they provided the principal perpetrators was in the normal course of their business activities, and

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<sup>72</sup>The Rome Statute of the International Criminal Court, Cited Above at Note 27, Art. 25(3) (c)

<sup>73</sup> Lynn Verrydt, Cited Above at Note 55, P.59

<sup>74</sup> International Commission of Jurists Expert Legal Panel Report, Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes, (Geneva, 2008), P.19

<sup>75</sup> Lynn Verrydt, Cited Above at Note 55, P.60

<sup>76</sup> Jessie Chella, Cited Above at Note 2, P.225

done for the purpose of making a profit, not to perpetrate crimes.<sup>77</sup> Hence, the knowledge test opens a wider possibility for establishing complicity *mens rea* of Corporations.

Furthermore, the presence of the „substantial effect“ requirement under article 25(3) (c) of the statute is uncertain. Though there are views that, the ICC would adopt the ICTY and ICTR approach on this requirement, its clear rejection,<sup>78</sup> will widen the corporate liability for aiding and abetting.<sup>79</sup> The writer of this research is of the view that, Corporations should be considered as complicit for international crimes if the assistance they extended to the principal perpetrator had a substantial effect in the perpetration of the international crime.

### **2.3 International Mechanisms to Regulate MNC’s vis-à-vis Human rights Standards**

Though irresponsibility for crimes exists, it does not mean that Corporations are totally left unregulated. There are international mechanisms aimed at disciplining MNC’s activities that have negative impact on human rights. These mechanisms are market based initiatives which target company brands, and thereby force Corporations to comply with human rights standards.<sup>80</sup> There are voluntary codes of conduct by the Corporations *per se*, and international initiatives such as, UN Global Compact, ILO Tripartite Declaration of Principles, Kimberly Process Certification Scheme, the Extractive Industries Transparency Initiative, SA 8000, and OECD Guidelines.<sup>81</sup> The most relevant standards are the guidelines of the International Labor Organization (ILO) and the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development (OECD).<sup>82</sup> The former is concerned with protection of workers’ rights, and the latter is an intergovernmental agreement which includes a set of recommendations to multinational Corporations providing “voluntary principles and standards for responsible business conduct in the areas of employment, environment, human rights, combating bribery and others.”<sup>83</sup>

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<sup>77</sup> Ibid.

<sup>78</sup> William A Schabas An Introduction to the International Criminal Court, (2007,3rd ed.),P. 213

<sup>79</sup> Jessie Chella, Cited Above at Note2, P.226

<sup>80</sup> Pak Natala. S., and Nussbaumer James P, Cited Above at Note 66, P.10

<sup>81</sup> Ibid.

<sup>82</sup> Kaleck Wolfgang and Saage-MaaB Miriam , “Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges” , Journal of International Criminal Justice, Vol.8, (2010), P.710

<sup>83</sup> Id., P. 712

These mechanisms lack the binding character of legal norms and are therefore called 'soft Law'.<sup>84</sup> Moreover, due to different drawbacks, this system is inefficient.<sup>85</sup> First, most of the codes of conduct are voluntary and ambiguous declarations which are not legally enforceable.<sup>86</sup> Second, there are varying voluntary regulations by Corporations.<sup>87</sup> Besides, the procedures are not adopted with the aim of holding Corporations accountable for international crimes. The International Council on Human Rights Policy proposes that such voluntary approaches alone are not sufficient.<sup>88</sup> It reports that, to date the implementation of voluntary approaches has not shown evidence of diminishing instances of human rights abuses by corporation.<sup>89</sup> Despite this, the recent UN Guiding Principle on Business and Human rights can be taken as a stronger move towards stricter regulation of corporations' activities vis-à-vis human rights. It requires states to take legislative measures aimed at controlling corporation's human rights violations. Specifically, it provides that, because the risk of gross human rights abuses is heightened in conflict affected areas, states should help ensure that business enterprises operating in those contexts are not involved with such abuses, among other things by ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.<sup>90</sup> States should explore civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses.<sup>91</sup> Furthermore, it calls states to take appropriate steps to investigate, punish and redress business-related human rights abuses.<sup>92</sup>

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<sup>84</sup> Id., P.709

<sup>85</sup> Joanna Kyriakakis(PhD), "Freeport In West Papua: Bringing Corporations To Account For International Human Rights Abuses Under Australian Criminal And Tort Law", Monash University Law Review, vol.31, No.1,(2005), P. 103

<sup>86</sup> Pak Natala. S., and Nussbaumer James P Cited Above at Note 66, P.11

<sup>87</sup> Ibid.

<sup>88</sup> International Council on Human rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of companies, February 2002, P.7 (<http://www.cleanclothes.org/ftp/beyond>), last visited on July 12, 2017

<sup>89</sup> Ibid.; see also Joanna Kyriakakis, Cite Above at Note 85, P.103-104

<sup>90</sup> The UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, (2011, Unpublished, the human rights council resolution 17/4), Operational principles 7, page 9

<sup>91</sup> Ibid

<sup>92</sup> Id, Access to Remedy Foundational principles, p.27

## 2.4 The Need for Corporate Criminal Responsibility under International Criminal Law

It's understandable that, the activities of MNCs can have a negative effect such as human rights violations and environmental problems amounting to international concern. As a result of these negative consequences and because many states notoriously fail to control such Corporations, regulating corporate behavior seems, intuitively, an obvious task of international law.<sup>93</sup> Furthermore, the increased complicity of Corporations in international crimes, coupled with the failure of domestic jurisdictions to prosecute has augmented the need for criminalizing corporate complicity at international level. The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses.<sup>94</sup> Consequently, there are repeated insistences by victims and their representatives on accountability when companies are involved in gross human rights abuses.<sup>95</sup>

## 2.5 The Rationale for Corporate Criminal Responsibility

All persons who are involved in the commission of international crimes should be held responsible. However, apart from the individual culpability, punishing a corporation *per se* may have its own benefits. There are reasons which urge for the criminal responsibility of Corporations for international crimes. These reasons may work across prosecution of Corporations at any appropriate forum. First, imposing criminal sanctions on corporate entities is necessary to indicate society's condemnation of the corporate wrongdoing.<sup>96</sup> Second, imposing corporate criminal liability is necessary to deter Corporations from engaging in criminal activities.<sup>97</sup> The punishment against perpetrator Corporations will halt the same and other Corporations from involvement in commission of crimes. Moreover, the prospective corporate prosecutions invites reflection on the obvious influence that the stigmatic risks of prosecution might exert on transnational corporate

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<sup>93</sup>Fauchald Ole Kristian and Stigen Jo, Cited Above at Note 7, P.1029

<sup>94</sup> International Commission of Jurist Report v.1, Cited Above at Note 10, P.1

<sup>95</sup> Ibid..

<sup>96</sup> Beale Sara Sun and Safwat Adam. G., "What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability", *Buffalo Criminal Law Review*, Vol.8,(2004), P.103

<sup>97</sup> Jessie Chella, *The Complicity of Multinational Corporations in International Crimes: An Examination of Principles*,(2012, Unpublished, Faculty of Law, Bond University), P.68

behavior by generating risks to international reputation, to accessing global markets, and to the accessibility and movability of corporate assets.<sup>98</sup>

Third, criminal liability of Corporations is important in order to be able to secure payment of compensation to victims, since corporate assets are by far greater than assets owned by individuals.<sup>99</sup> Fourth, due to corporate veil, identifying individuals to prosecute is costly in terms of time and money. In such scenarios, prosecuting the corporation would be the best alternative.<sup>100</sup> Likewise, in situation where employees are either deceased or escaped prosecution, criminal liability of the legal person is important.<sup>101</sup> Lastly, imposing liability on the corporate actor can provide a greater symbolic sense of justice. Mostly, the crimes enrich the companies and in the presence of their possible liability, mere criminal liability against the managers or employees only poses a question on the justice aspect.<sup>102</sup>

## **2.6 Challenges on the Development of Corporate Criminal Responsibility for International Crimes**

The inclusion of corporate criminal responsibility under International Criminal Law or under domestic criminal laws is challenged by many factors of legal and practical nature. The following discussion highlights these major factors.

### **a) Difficulty in establishing ‘*Mens rea*’ and ‘*Actus reus*’**

There are concerns that, since Corporations are not real persons they don't have the *mens rea*, for committing a crime, and establishing the material elements of a crime is difficult.<sup>103</sup> Because a corporation lacks a mind of its own, establishment of corporate guilt (intention or negligence) is a major challenge.<sup>104</sup> Whether and how, a certain corporation is involved in actually committing a

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<sup>98</sup>Joanna Kyriakakis (PhD), International Criminal Courts And Tribunals: Corporations Before International Criminal Courts: Implications For the International Criminal Justice Project, Leiden Journal of International Law, Vol.30, (2017)P. 237

<sup>99</sup> Mordechai Kremnitzer, “A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law, Journal of International Criminal Justice, vol. 8(3), (2010), P. 913.

<sup>100</sup> Lynn Verrydt, Cited Above at Note 55, P. 23. See also, International Commission of Jurists Expert Legal Panel Report, Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes,( Geneva, 2008), P.56

<sup>101</sup> Clough Jonathon and Mulhern Carmel, The Prosecution of Corporations (2002),P. 6

<sup>102</sup> Lynn Verrydt, Cited Above at Note 55, P.24

<sup>103</sup> Caroline Kaeb “The Shifting Sands of Corporate Liability Under International Criminal Law”, The George Washington International law review, vol.49 (2016), P.384

<sup>104</sup> De Maglie Cristina, Models of Corporate Criminal Liability in Comparative Law, Washington University Global Study Law Review, vol.4 (2005),P.547

crime is also contestable. But, there are theories of criminal attribution which provide alternatives to hold Corporations responsible. These theories will be discussed in detail in the coming section.

**b) Principle of complementarity:**

Part of the negotiations in the establishment of the ICC, were focused upon the French proposal for the inclusion of legal persons under the jurisdictional ambit of the Rome Statute.<sup>105</sup> However, a consensus was not reached due to division of perspective.<sup>106</sup> Apart from lack of political will, the principle of complementarity, evidentiary challenges probably faced by the court, and possible prolongation of negotiation were the reasons for rejection of the proposal.<sup>107</sup> The Complementarity principle provides that, the ICC will have jurisdiction if the national state is „unwilling and unable“ to genuinely prosecute international crimes.<sup>108</sup> Given the fact that, ICC is a court of last resort, states which did not recognize corporate criminal liability were raising concern that they would be deemed „unable to prosecute“, thus forfeiting their right to firstly try the case before their domestic Courts and automatically providing the ICC with jurisdiction, whenever the defendant is a legal person.<sup>109</sup> However, due to political and economic reasons states may not want to transfer Corporations to the International Criminal Court.

However, currently the hurdles of complementarity are increasingly diminishing.<sup>110</sup> First, international instruments containing provisions recognizing corporate criminal liability have been adopted.<sup>111</sup> Second, increasing numbers of domestic laws are prescribing liability of corporation for international crimes.<sup>112</sup> In the last decades many countries have included corporate criminal liability in their criminal laws.<sup>113</sup> Yet, the researcher is not arguing that, the concept of corporate criminal

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<sup>105</sup> Par Saland, International Criminal Law Principles, in the International Criminal Court: The Making of The Rome Statute. Issues, Negotiations, Results, (1999),189

<sup>106</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records Vol. 3, at 31 n.71, (June 15–July 17, 1998, Unpublished, UN Doc. A/CONF.183/ 13)

<sup>107</sup> Carolie Kaeb , Cited Above at Note 103, P.378

<sup>108</sup> The Rome Statute of the International Criminal Court, Cited Above at Note 27, Art. 17(a),18, and 19

<sup>109</sup> Kathryn Haigh, "Extending the International Criminal Court's jurisdiction to Corporations: overcoming Complementarity concerns", Australian Journal of Human Rights, Issue 1, (2008), P. 204.

<sup>110</sup> Caroline Kaeb , Cited Above at Note 103,P.381

<sup>111</sup> Bert Swart, "Discussion: International Trends towards Establishing Some Form of Punishment for Corporations", Journal of International Criminal Justice, (2008) P. 947-948; see also, The 1997 Second Protocol to European Convention on the Protection of the European Communities' Financial Interests, Arts. 3–4, the Convention against Transnational Organized Crime, Art. 10(2), (Nov. 15, 2000); Council of Europe Convention on the Prevention of Terrorism, Art. 10(2), May 16, 2005.

<sup>112</sup> Caroline Kaeb , Cited Above At Note 103, P.380

<sup>113</sup> Joanna Kyriakakis (PhD), "Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge", Netherlands International Law Review, Vol.56 (2009), P. 336–39. Accordingly, the countries are, The Netherlands

responsibility has reached the status of customary international law. Rather, the adoption of corporate liability under the laws of state parties to the Rome Statute would create a uniform application of complementarity and thereby, catalyze the amendment of the statute.

### **c) Lack of International legal personality**

An entity is said to have „international legal personality“ if it is the beneficiary of rights under international law, is subject to international obligations, is able to enter into legal relations on the international plane, and has the capacity to enforce international law sourced rights and obligations.<sup>114</sup> Traditionally states, and recently individuals, and international organizations possess international legal personality. Yet, some scholars suggest that international law cannot impose obligation on Corporations because they do not possess international legal personality.<sup>115</sup> The MNCs had no separate status under international law, aside from that enjoyed by its constituent entities by virtue of domestic law.<sup>116</sup> In Barcelona traction case, the International Court of Justice has implied that, Corporations do not have international legal personality.<sup>117</sup> Accordingly, the legal relation between companies and state is governed by a national law. In other words, just because a state chooses to act with a non-state body or a company does not confer any degree of international personality on the latter.<sup>118</sup> International personalities do exist only when relationships are governed by international laws. So, a contract between Ethiopian government and Chinese company for construction of rail road would not ordinarily confer international legal personality to the company. The contract would be governed by the national law of either Ethiopia or China and both the government as well as the company would be subject to the national law.

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(1976), Indonesia (since the 1980s), Portugal (1983), Norway (1991), France (1992), Iceland (1993), Finland (1995), Denmark (1996), China (1997), Belgium (1999), South Africa , Switzerland (2003), Argentina, and Austria(2006).

<sup>114</sup> Jennifer A. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law, (2006), P.73

<sup>115</sup> Fauchald Ole Kristian and Stigen Jo, Cited Above at Note 7, P. 1028

<sup>116</sup> Jennifer A. Zerk, Cited Above at Note 114, P.75

<sup>117</sup> Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970(Belgium vs. Spain), P. 33, paragraph 38, it provide that, “international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction or law. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”

<sup>118</sup> Ibid.

Despite this, there are arguments forwarded in favor of corporation's international legal personality. First, though states are the sole source of authority and law in the international system, it does not mean that states are the only subjects of international law.<sup>119</sup> Corporations do possess rights and obligations under international law.<sup>120</sup> Moreover, there is nothing preventing states from jointly regulating corporate behavior through international law, provided, of course, that the behavior falls within their respective jurisdictions at the outset.<sup>121</sup> Second, the mere fact that Corporations are key participants in the international legal system *ipso facto* implies that they have international legal personality.<sup>122</sup> For instance, they have greater power in the realization of human rights. Besides, since some states are notoriously unable or unwilling to hold Corporations accountable, impliedly, there must be direct corporate responsibilities under international law.<sup>123</sup> Furthermore, an increasing amount of practice has been evident on the international plane dealing with such Corporations, taking a form of guidelines governing the major elements of their international conduct.<sup>124</sup> Among these guidelines, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy are the major ones.<sup>125</sup> In August 2002, the UN Sub-Commission on the Promotion and Protection of Human Rights' has come up with, the Draft Norms on Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>126</sup> However, progress has been slow and several crucial issues remain to be resolved, including the legal effect, if any, of such guideline.<sup>127</sup>

#### **d) Corporate sanction**

Although Corporations can be prosecuted for international crimes, there is a reservation on the appropriateness of the monetary penalties to be imposed. Financial sanctions may only have a minor deterring effect on corporation, because Corporations often factor possible fines into their

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<sup>119</sup> Fauchald Ole Kristian and Stigen Jo, Cited Above at Note 7, P.1029

<sup>120</sup> Jennifer A. Zerk, Cited Above at Note 114, P.74

<sup>121</sup> Fauchald Ole Kristian and Stigen Jo, Cited Above at Note7, P. 1029

<sup>122</sup> Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, (Feb. 9, 2007, Unpublished, The UN Human Rights Council, U.N. Doc. A/HRC/4/035), P.20

<sup>123</sup> John G. Ruggie, Corporate Social Responsibility Initiative, Business and Human Rights: The Evolving International Agenda (2007, Unpublished, Harvard University Working Paper. No.RWP07-029 ), P. 8-9

<sup>124</sup> Malcolm N. Shaw, Cited Above at Note 15, P.224

<sup>125</sup> OECD Guidelines for Multinational Enterprises, 1976 and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977

<sup>126</sup> Malcolm. N. Shaw, Cited Above at Note 15, P.224

<sup>127</sup> *Id.*, P. 224-225

cost-benefit analysis in advance.<sup>128</sup> However, the pecuniary penalties will serve as means of compensating victims. Moreover, there are alternative sanctions such as, restraints (geographic exclusion, prohibiting the corporation from operating in a certain region), structural injunctions (adjusting faulty decision making process), adverse publicity, equity shares (awarding shares for victims), probation (functioning under supervision), and dissolution (corporate death penalty) which can be applicable against criminal Corporations.<sup>129</sup> But, it doesn't mean that the proposed penalties will not have a negative side. For instance, awarding shares for the victims may defeat the objectives of criminal punishment by itself.

#### **e) Economic and Political challenges**

The introduction of corporate criminal responsibility for international crimes would be challenged by economic and political factors arising from the international economic order or individual states. To start with, the question of state support to actualize the extension of an International Criminal Court's jurisdiction to include Corporations is, of course, the great political challenge.<sup>130</sup> This can be resulted from the state's economic position influencing their national and international political decision making power. The higher economic value of foreign direct investments made by MNCs in domestic jurisdictions can create vested interests in the developing or global south states, in accommodating economic interests which outweigh the pursuits of prosecuting them.<sup>131</sup> Thus, such states would tend to have a lesser political commitment in domestically criminalizing corporate involvement in international crimes, and supporting the corporate criminal responsibility proposal at the international level.

However, the growing convergence towards corporate criminal liability across domestic systems in response to the pragmatic need for such laws and the diminishing influence of individualism in criminal law theory make the prospect of corporate criminal responsibility increasingly viable.<sup>132</sup> Some scholars argue that, there is political consensus among the global south states favoring the development of corporate criminal responsibility for international crimes or transnational economic crimes.<sup>133</sup> For instance, the proposed jurisdiction of the international

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<sup>128</sup>Lynn Verrydt, Cited Above at Note 55, P.33

<sup>129</sup> Id., P.35-36

<sup>130</sup> Joanna Kyriakakis(PhD), cited Above at Note 98, P.235

<sup>131</sup> Id., P.224

<sup>132</sup> Brodowski Dominik, Monteros de la parr Manuel Espinoza de los, Tiedemann Klaus, and Vogel Joachim (eds.), Regulating Corporate Criminal Liability ( 2014), P. 53

<sup>133</sup> Joanna Kyriakakis (PhD), Cited Above at Note 98, P. 235

criminal chamber of the ACJHR over Corporations suggests amenability among African states to this development.<sup>134</sup>

Secondly, given the risks it generates as to their corporate nationals being brought before international courts or the domestic courts of other states there will be a continued opposition to the corporation proposal by some Northern states.<sup>135</sup> While such concerns are, in principle, vitiated by complementarity and the capacity for states to avoid the forfeiture of corporate nationals to international institutions by acting themselves, there is ample record of the lengths to which states able to do so will go in order to protect their nationals from international criminal prosecutions.<sup>136</sup> Indeed, such concerns may be more pronounced with regard to protecting corporate nationals, which may be viewed as agents of a state's economic policies and goals.<sup>137</sup>

## **2.7 Theoretical Models of Attributing Criminal Liability to Corporations**

Since a legal entity cannot express a criminal intent or physically engages in performing elements of a crime, attribution of *mens rea* and *actus reus* from natural persons will be necessary. Hence, in order to establish the criminal responsibility of a corporation, four dominant models of attribution are developed. Below, each of the models will be discussed in brief.

### **a) The Vicarious Liability Model**

The vicarious liability model is a derivative liability model, by which it ascribes to the corporation, those offences committed by the corporation's agents, regardless of their rank and responsibility.<sup>138</sup> Derivative liability is a common law concept, which denotes, deriving the elements of criminal responsibility from natural persons and attributing it to Corporations. Two conditions must be fulfilled, to establish the criminal responsibility of the corporation vicariously. Firstly, it is necessary for the employee to have acted within the scope of his or her employment and secondly, the perpetrator must have intended for his or her criminal actions to benefit the corporation.<sup>139</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Id., P.237

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Towards Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review*, Issue 1 Vol.641, (2000), P. 651

<sup>139</sup> Celia Wells, *Corporations and Criminal Responsibility*, (London, Clarendon Press, 2001), P. 135

### **b) The Aggregation Model**

This approach is an expansion of the vicarious liability model and it allows for corporate criminal liability to be incurred, even when the different elements of the crime are not united in one employee.<sup>140</sup> It creates the possibility of connecting the thought patterns and knowledge of several of the corporate entity's actors in order to achieve the required criminal intent.<sup>141</sup> Alternatively, it is possible for the *mens rea* of one agent and the *actus reus* of another to be linked and attributed to the corporation, once again providing all necessary elements for its criminal liability.<sup>142</sup> In short, the mental and material element of a criminal act can be distributed among the employees of a corporation, but will be united in the corporate entity, resulting in its criminal liability.

### **c) Identification Model/Theory of Corporate Organ/Direct Liability Approach**

Unlike the previously discussed approaches, this model entails corporate criminal liability for acts committed by high-ranking corporate officers and management, those who are the „brains“ of the corporation.<sup>143</sup> Accordingly, when specific individuals that take part in the corporate activity as organs of the corporation (corporate brains) involved in a criminal conduct then, the corporation will be criminally responsible.<sup>144</sup> But, the question is, who are the organs of the corporation? It refers to senior officers, who enjoy authority and control over the corporation and are endowed with the power to direct or influence the corporate policy.<sup>145</sup> But, the actions of the corporate organs are considered as that of the Corporations, if it's made with respect to the corporation's function. The corporate organs action is assimilated with that of the corporation.

### **d) The Self-Identity Model/Organizational Liability Model**

This model is based on primary liability of a corporation. It states that, corporate criminal liability is incurred as a result of the internal structures and policies of the corporation, rather than the actions of its human agents.<sup>146</sup> The corporation is seen as having its own, separate identity and its

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<sup>140</sup>Eli Lederman, Cited Above at Note 138, P.652

<sup>141</sup> Id., P.662

<sup>142</sup> Lynn Verrydt, Cited Above at Note 55, P.47

<sup>143</sup> Id., P.49

<sup>144</sup> Eli Lederman, Cited Above at Note 138, P.655

<sup>145</sup> Id., P.656

<sup>146</sup>Robinson A. Arthur, The United Nations Special Representative of the Secretary General On Human Rights and Business Report, "Corporate culture" as a basis for the criminal liability of Corporations, (February 2008) P. 4

responsibility stems from its internal workings, referred to as corporate culture or ethos.<sup>147</sup> In determining whether the „corporate culture“ encouraged the commission of the offence, the corporation“s policies, its control mechanisms, the instruction (incitement) of the high managers (toward the commission of the crime), ethical codes as well as its *ex-post facto* reaction to the offence will be considered.<sup>148</sup>

According to this theory, the *mens rea* is inferred from the corporation“s rational choice, not from attribution of natural persons. In order to hold a corporation criminally responsible, either a direct causal link between the corporate culture and the commission of the crimes should exist, or the internal system of the corporation fails to prevent a criminal activity.<sup>149</sup> Yet, this model is debatable and practical application at the national level is limited.<sup>150</sup>

## **2.8 Which model of attribution is appropriate for Corporate Responsibility in international crimes?**

It is obvious that, each of the attribution models has its own merits and weakness. For the purpose of introducing corporate criminal liability for international crimes, most scholars suggest either the *identification model* or the *organizational liability model of attributing criminal responsibility*.<sup>151</sup> Most of the domestic criminal laws incline towards either of these approaches. The major arguments that are raised in favor of both models and their relevance to the corporate criminal responsibility are briefly indicated below.

The inclusion of the corporate organs theory of attribution for corporate responsibility (under International Criminal Law treaties or in domestic criminal laws) is favored for three main reasons. Firstly, for *mens rea* (knowledge and intent requiring) offences such as Crime against Humanity, War Crimes and Genocide, the identification model will allow for both the required knowledge and intent to exist in respect of the corporation itself, rather than be imputed to it on the basis of the

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<sup>147</sup>Bucy H. Pamela, "Corporate ethos: A standard for imposing corporate criminal liability", Minnesota Law Review (1991), P. 1121

<sup>148</sup>Robinson A. Arthur, Cited Above at Note 146, P. 1

<sup>149</sup>Ronald Slye C, "Corporations, veils, and international criminal liability", Brooklyn Journal of International Law, Issue 3,(2008), P. 967.

<sup>150</sup>Vermeulen G, De Bondt W. & Ryckman C, Liability of legal persons for offences in the European Union.(2012, Unpublished, Maklu Antwerp University) P.59,

<sup>151</sup>Ibid.

criminal conduct of another.<sup>152</sup> Because, the corporate officers are considered as representing the corporation. In comparison to the vicarious liability approach and the aggregation model, its advantage lies in the assimilation of the individual perpetrator and the corporation, rather than the attribution of the former's conduct to the latter.<sup>153</sup>

Secondly, the identification model offers a wide consensus as to its form and content and would inspire the least amount of controversy than the other models.<sup>154</sup> Unlike the other models, the scope of its applicability is narrower and it can be politically acceptable by states.<sup>155</sup> Whereas, the organizational liability approach has an implication on the economic development of states, since it discourages investment, and as a result states may refuse to accept.<sup>156</sup> Lastly, the identification model makes the amendment of the Rome Statute easy. Article 25(3) (a) and (b) of the Rome statute, provides for criminal liability in case of commission via another person, and ordering another person to commit an international crime. Accordingly, corporate officers can be held criminally liable for the perpetration of international crimes by means of their subordinates. The identification approach provides assimilation between the high-ranking corporate officer and the legal person at the moment of the crime. As such, the missing element required for the international criminal liability for the corporate entity itself, appears limited to the inclusion of „legal persons“ in article 25 (1) of the Rome Statute.<sup>157</sup>

However, there are strong arguments forwarded for the adoption of organizational liability model. This model is preferable because, rather than focusing upon the conduct and state of mind of specific individuals within the corporation and deriving the corporation's fault from there, corporate culpability is instead deemed to be situated within the corporation itself.<sup>158</sup> This culpability is reflected in the corporation's formal and informal policies (of compliance or non-compliance) and via aggregation of knowledge held across the full range of corporate personnel, which is then attributed to the company.<sup>159</sup> Organizational model arguably have the greatest potential to

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<sup>152</sup>Vermeulen G, De Bondt W. & Ryckman C, Cited Above at Note 150, P. 57.

<sup>153</sup>Ibid.

<sup>154</sup>Id., P.55

<sup>155</sup>Id., P.56

<sup>156</sup>Vermeulen G, De Bondt W. & Ryckman C, Cited Above at Note 150, P.59

<sup>157</sup>Lynn Verrydt, Cited Above at Note 55, P.55

<sup>158</sup>Joanna. Kyriakakis (PhD), Corporate Criminal Liability at the African Criminal Court (2016, Unpublished, Briefing Paper – ACRI Meeting, Arusha-Tanzania), P.4

<sup>159</sup>Ibid.

incentivize good structural corporate practices, such as embodied policies of compliance and solid information sharing systems.<sup>160</sup>

Most modern domestic corporate criminal responsibility models adopt an organizational approach, which in turn have emerged in direct response to the problems and limitations associated with the alternative derivative models.<sup>161</sup> Likewise, the recent ACJHR protocol by introducing corporate criminal responsibility has also adopted the organizational liability approach.<sup>162</sup>

Therefore, so as to establish their criminal liability, the most appropriate model for attributing guilt to corporation's involved in international crimes falls on either the identification or the organizational liability model. But, the model which puts lesser challenge on the introduction of corporate criminal responsibility at the international or national level should be given preference.

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> The African Union, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (The Malabo Protocol), adopted on 27 June 2014, Art. 46 C

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## CHAPTER THREE

### CORPORATE COMPLICITY FOR INTERNATIONAL CRIMES IN DEMOCRATIC REPUBLIC OF CONGO

This chapter presents instances of international crimes committed by the government security forces and various armed groups in DRC and the complicity of MNCs in such crimes. The discussion begins from the social, political, economic and geographic context of DRC. Following this, the major international crimes alleged to be committed in DRC are explained. Then, instances which will demonstrate complicity of Corporations in the international crimes committed by the Government and armed groups of DRC are analyzed, followed by a brief assessment of the major factors affecting the complicity of MNCs in international crimes committed in DRC.

#### 3.1 Country Context; Brief Explanation

With an area of 2.34 million square kilometers and a population of about 71 million inhabitants, the DRC has the fourth largest population from Africa and is the second biggest in terms of area.<sup>163</sup> Located at middle of the continent, it shares common borders with nine other countries.<sup>164</sup> DRC is a country with vast natural resources, in particular minerals and forests, which have been the object of illegal or unregulated exploitation, perpetrating armed conflicts and serious human rights violations by all participants.<sup>165</sup> Despite its enormous natural resources, the DRC is ranked 186 on the Human Development Index, bottom out of 187 countries.<sup>166</sup>

After DRC's independence from the Belgian Colonial Rule on June 1959, series of leaders took office in a relatively unstable government.<sup>167</sup> Two bloodiest wars were fought in DRC. The first began in 1996, when the Rwandan army invaded Eastern DRC, backing the rebel leader Laurent-

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<sup>163</sup> African Development Bank, Country Strategy Paper for DRC, 2013-2017 (June 2013, Unpublished, African Development Fund, Regional Department Centre), P.1

<sup>164</sup> Ibid.

<sup>165</sup> International Commission of Jurists, Access to Justice: Human Rights Abuses Involving Corporations in DRC, (2012, Unpublished, ICJ), P.2, see also, The Sentry, Country Briefs: Democratic Republic of Congo. ( July 2015, Unpublished), P.3

<sup>166</sup> United Nation Development Program, Human Development Report 2014, The Rise of the Global South: Human Progress in a Diverse World(2014, Unpublished, UNDP), P.147, (<http://hdr.undp.org/en/reports/global/hdr2013/>) last visited on April 8, 2017

<sup>167</sup> Veronica Jane Winters, State-Corporate Crime in the Democratic Republic of Congo,(2013, Unpublished, University of South Florida), P.7

Désiré Kabila, who eventually toppled President Mobutu Seseseko.<sup>168</sup> The second Congo war began in August 1998, between Kabila, (backed by Zimbabwe, Angola, and Namibia), and the rebel groups backed by Rwanda and Uganda so as to overthrow Kabila.<sup>169</sup> By July 10, 1999, a ceasefire agreement in Lusaka, Zambia ended the war. Then, in January 2001, Kabila died and his son, General Joseph Kabila, became president of the country. Joseph Kabila remains in power until today.

Being a concern for international peace and security, the United Nations Observation Mission in the Democratic Republic of Congo (MONUC) was established by the Security Council on 30 November 1999,<sup>170</sup> to ensure the implementation of the Lusaka agreement and later on expanded its mandate towards civilian protections including disarmament, demobilization, repatriation and reintegration.<sup>171</sup> The MONUC is still operating in DRC.

Currently, there is political unrest in DRC due to protests against Kabila, as he kept extending the election period.<sup>172</sup> Moreover, armed conflicts continued in the east and armed groups committed numerous abuses against civilians.<sup>173</sup> The fighting groups are alleged to commit international crimes in the Eastern DRC. The armed groups include national rebel groups such as the MLC, the RCD-ML, RCD-Goma, the Mai Mai Militias, FDLC, and M-23.<sup>174</sup>

### 3.2 International Crimes in Democratic Republic of Congo

*“Some lives matter more than others: the hierarchy of death, they call it. The millions killed, maimed, and traumatized in DRC are surely at the bottom of this macabre pile.”<sup>175</sup>*

There has been tremendous violence in the DRC, and War Crimes and Crimes against Humanity were and continue to be committed by armed groups and complicit Corporations.<sup>176</sup> During the first

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<sup>168</sup> Amnesty International Report, Profits and Loss: Mining and Human Right in Katanga DRC, (July 2013, Unpublished, Amnesty International), P.6

<sup>169</sup> Veronica Jane Winters, Cited Above at Note 167, P.11,

<sup>170</sup> United Nations Security Council Resolution, UNSCR 1279, (1999)

<sup>171</sup> United Nations Security Council Resolutions, UNSCR 1291, (February 2000), UNSCR 1376 (November 2001), See also, Xavier Zeebroek, The United Nations Mission In The Democratic Republic Of Congo: Searching For The Missing Peace, (July 2008, Unpublished) P.2-4

<sup>172</sup> Amnesty International Report, the State of the World’s Human Rights (2016/2017, Unpublished, ), P.137

<sup>173</sup> Ibid.

<sup>174</sup> Jan Wouters and Sten Verhoeven,, Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda And Darfur Before the International Criminal Court, (July 2005, Unpublished, Institute for International Law- Working Paper No 81), P.4

<sup>175</sup> Owen Jones, “Opinions, Let’s be Honest. We ignore Congo’s atrocities because it is in Africa”, The Guardian, 6<sup>th</sup> March, 2015, (<https://www.theguardian.com/commentisfree/2015/mar/06/ignore-congo-atrocities-africa-drc-horror>)

and second Congolese war, as well as in the current conflict in Eastern DRC, the conflict saw a deliberate targeting of civilian populations, with many, if not all, sides regularly committing gross violations of human rights, amounting to international crimes.<sup>177</sup> In recent times, armed conflicts continued in the east and armed groups committed numerous abuses against civilians, including summary executions, killings, abductions, acts of sexual violence and looting of property; and security forces carried out extrajudicial executions.<sup>178</sup>

The crimes committed, in the Eastern DRC can be qualified as Genocide, Crimes against Humanity or War Crimes.<sup>179</sup> For instance, Human Rights Watch estimates that at least five thousand civilians died from direct violence in Ituri between July 2002 and March 2003, often simply because of their ethnicity, which brings the violence under the heading of the crime of Genocide.<sup>180</sup> Furthermore, the crimes committed can be certainly regarded as Crimes against Humanity, since they involved a widespread or systematic attack against a civilian population. Lastly, the crimes could be qualified as War Crimes committed in an international or internal armed conflict.<sup>181</sup>

After the referral of the situation in DRC to the ICC<sup>182</sup>, some of the leaders of the armed groups were punished, while others are being prosecuted for international crimes. In 2012, Thomas Lubanga Dyilo, the former leader of the UPC, and its military wing, FPLC was sentenced to 14 years imprisonment for War Crimes of enlisting and conscripting of children under the age of 15 as a soldier.<sup>183</sup> Bosco Ntaganda, the former officer of UPC/FPLC, accused of War Crimes and Crimes against Humanity committed in Ituri (DRC) and his trial is pending since 2013.<sup>184</sup> Furthermore, as the alleged Supreme Commander of FDLR, the ICC ordered a warrant of arrest against Mr. Mudacumura, for nine counts of War Crimes, allegedly committed from 20 January 2009 to the end

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<sup>176</sup> Antoniatta. Trapani, Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of DRC, (2011, unpublished, DOMAC ), P.31

<sup>177</sup> Fernando Borello, A First Few Steps, the Long Road to a Just Peace in the Democratic Republic of the Congo, (2004, Unpublished, the International Center for Transitional Justice ), P. iii

<sup>178</sup> Amnesty International Report, Cited above at Note 172, P.137

<sup>179</sup> Jan Wouters and Sten Verhoeven, Cited Above at Note 174, P.6

<sup>180</sup> The Human Rights Watch Report(2003, Unpublished),(<http://hrw.org/reports/2003/ituri0703>) See also MONUC Report(2003), (<http://www.monuc.org/home.aspx?lang=en>)

<sup>181</sup> Ibid.

<sup>182</sup> International Criminal Court, press release, 6/19/2004, ICC-OTP-20040419-50, ([www.legaltools.org/do/342978/pdf](http://www.legaltools.org/do/342978/pdf)) last visited on April 20, 2017

<sup>183</sup> The ICC prosecutor vs. Thomas Lubanga Dyilo, (case File no. ICC-01/04-01/06, the International Criminal Court, 2016)

<sup>184</sup> ICC prosecutor Vs. Bosco Ntaganda, (Case File no. ICC-01/04-02/06, the International Criminal Court, 2006)

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of September 2010, in the context of the conflict in the Kivus.<sup>185</sup> The prosecutor has indicated that, investigation is being made in armed groups in Ituri other than the UPC, for alleged commission of international crimes.<sup>186</sup>

### 3.3 Involvement of Corporations on international crimes in DRC

MNCs operating in DRC mainly fall in to two categories; mineral-extracting MNCs and, resource-trading MNCs.<sup>187</sup> There are also services providing MNCs.<sup>188</sup> Many of these Corporations participate in the international crimes in DRC, by being complicit to the primary perpetrators. Especially, MNCs in the extractive industries conduct their operations through mining concessions granted to them by some of the key Congolese political actors, either the government or the armed group controlling the resource area.<sup>189</sup>

This can be demonstrated by different factual scenarios. For instance, AngloGold Ashanti, one of the largest gold mining companies in the world, in order to operate in its gold concession in Mongbwalu, in 2003, had made payments and provided logistics to the FNI, one of the most murderous armed groups in Ituri, alleged to have committed War Crimes and Crimes against Humanity.<sup>190</sup> In Walikale territory, businessmen linked to the RCD-Goma and the Rwandan Army systematically bought Coltans from FDLR rebels, some of whom had been involved in the 1994 Genocide in Rwanda, or from Mayi-Mayi groups, to finance their rebel activities.<sup>191</sup> On the other hand, the Mayi Mayi armed group and FDLR, are said to have killed innocent civilians.<sup>192</sup> Furthermore, the comptoir MDM, for example, which supplied the Belgian Company Sogem, tried

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<sup>185</sup>ICC prosecutor Vs. Sylvester Mudacumara, (Case File no.01/04-01/12, The International Criminal Court, 2012)

<sup>186</sup> Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo, ICC press release, March 17, 2006, (<http://www.iccpi.int/press/pressreleases/133.html>), last visited 12, June 2017.

<sup>187</sup>Ayo Whetho (PhD) , Natural Resources, Profit and Peace: Multinational Corporations and Conflict Transformation In The Democratic Republic Of Congo, (2014, unpublished, University Of Kwazulu-Natal, South Africa ) P.194

<sup>188</sup>Ibid.

<sup>189</sup> Id.,P.195

<sup>190</sup> The global witness, Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 to 2003, (2009, unpublished), P.23. See Also, The Human Rights Watch Report, The Curse of Gold( 2005, HRW); International Network For Economic, Social & Cultural Rights,Corporate Accountability Working Group Joint NGO Submission, Consultation On Human Rights And The Extractive Industry ( Nov. 2005, Geneva, ), P.15

<sup>191</sup>United Nation Human Rights Office of the High Commissioner , Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, ( August 2010, Unpublished) , P.353

<sup>192</sup>Francoise Joly, The Responsibility to Protect: From Doctrine to Practice „R2P“ and Protection of Civilians:Case Study, DRC (2014, unpublished, Dublin City University), P.7

to enter into an agreement of mineral extraction with the RCD in 2000.<sup>193</sup> The UK registered company, Afrimex also bought cassiterite from RCD controlled parts of Eastern DRC during the war; it operated in South Kivu through the Congolese registered Société Kotecha and SOCOMI.<sup>194</sup>

After the second Congo war, in June 2000, the UN panel of experts on the illegal exploitation of the natural resources of the DRC (herein after, the panel) was established to examine and report the plundering of DRC's resource and it came up with recommendations thereof.<sup>195</sup> Accordingly, as many as 85 companies were considered as having had connections with the DRC conflict.<sup>196</sup> Among other things, the Corporations have participated in commission of crimes, by supplying arms to either rebel or government forces or even participating in military action, through buying minerals from former foreign or rebel-controlled areas without conducting due diligence tests as to where the minerals came from or who was profiting from the trade, and payment of taxes to rebel formations and militias.<sup>197</sup>

In some cases, payment to rebel forces took the form of a barter in which companies supplied arms in return for mining rights or access to minerals.<sup>198</sup> Thus, these participations can be considered as the complicity of the Corporations in the commission of international crimes in different conflict areas of DRC. Some of the leaders of the armed groups are wanted by the ICC for being a war criminal. For instance, the FDLR military leader, Sylvester Mudacumura is sought on an arrest warrant by the court.<sup>199</sup> Likewise, the M23 officer Bosco-Nataganda is on ICC trial for Crime against Humanity and War Crimes.<sup>200</sup>

As the conflict in the Eastern DRC gets worse, the UNSC has passed several resolutions to address the situation and established a committee concerning DRC<sup>201</sup>, and an expert working group

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<sup>193</sup>Jeroen Cuvelier and Maekers Tim Raey, Supporting the war economy in the DRC: European companies and the Coltans trade", (2002, Unpublished, International Peace Information Service ), P. 6

<sup>194</sup> Global Witness, Under-mining peace. Tin: the explosive trade in cassiterite in Eastern DRC, (9June 2005, unpublished) P. 23, *Seealso*, Global Witness, Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, ( February 2007, Unpublished)

<sup>195</sup>Final Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, , (16 October 2002 , Unpublished, UN-S/2002/1146), P.4

<sup>196</sup>Ayo Whetho (PhD) Cited Above at Note 187, P.194

<sup>197</sup>Final Report of the UN Panel of Experts, Cited Above at Note 195, P.10

<sup>198</sup> Ibid.

<sup>199</sup> Human Rights watch, Report on DRC's Human rights status ( 2016), (<http://www.hrw.org/world-report/2016/country-chapters/democratic-republic-congo>), last visited on April 8, 2017

<sup>200</sup> ICC prosecutor Vs. BoscoNataganda, Cited Above at Note 184

<sup>201</sup> United Nations Security Council Resolution, UNSCR 1533/2004

reporting to the Committee.<sup>202</sup> The working group has reported the overall situation and violations of human rights in the Eastern DRC, and the financing of armed groups by traders or entities involved in the illicit trade of natural resources.<sup>203</sup> Furthermore, the UNSC committee on DRC has listed sanctioned Corporations which are found to assist armed groups via illicit trade of minerals and fuel the conflict. These include Butembo Airlines (BAL), *Compagnie Aérienne Des Grands Lacs* (CAGL); Great Lakes Business Company (GLBC), Congomet Trading House, Machanga Ltd, and Uganda Commercial Impex (UCI) Ltd.<sup>204</sup>

Apart from the implication of companies in the illicit exploitation of natural resources, which are the basis of armed group's atrocities, there are also instances by which a corporation had provided direct logistic assistance to the Congolese Armed Forces. For instance, Anvil Mining Limited Company has provided logistics and vehicles for the Congolese government Military in a counter-offensive to crush insurgents in Kilwa, in October 2004, by which more than 100 civilians were killed.<sup>205</sup>

In the complex conflict in Eastern Congo, with many, if not all, sides are regularly alleged to have committed international crimes.<sup>206</sup> Furthermore, all the main parties in the conflict in Eastern DRC; armed groups as well as the Congolese army are financing themselves via the exploitation and trade of Eastern DRC's mineral wealth, by which companies and individual traders are actively involved. Hence, the participation of companies in illicit exploitation and trade of natural resources, which will benefit armed groups, can be taken as an illustration of complicity for those international crimes committed by the armed groups.

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<sup>202</sup> United Nations Security Council Resolution, UNSCR 1533/2004, *See Also* ,UNSCR 2021 (2011) ando Report of the group of Experts on DRC, Annex I (Complete overview of the Security Council mandate of the Group of Experts) S/2012/843, Nov.15, 2012

<sup>203</sup>Report of the Group of Experts on DRC, (Nov.15, 2012, Unpublished, UN S/2012/843), P.2. Accordingly, For instance, Machanga Ltd, Gold Company is alleged to work with criminal armed groups.

<sup>204</sup> The UN Security Council Committee on DRC, The List established and maintained pursuant to UNSCR 1533 (2004),( Generated on: 13 April 2017, Unpublished), P.7-8,See Also, The Global center for the responsibility to protect, (<http://www.global2P.org/regions/democratic-republic-of-the-congo-drc>) last visited on April 13, 2017

<sup>205</sup> International Network For Economic, Social & Cultural Rights, Corporate Accountability Working Group Joint NGO Submission, Consultation on Human Rights And The Extractive Industry (10-11 November 2005, Unpublished, Geneva ),P.14 See Also, Accountability in Development (RAID) and Congolese Action control'impunité pour les droitshumains (ACIDH),Joint Report on Kilwa: A Year After the Massacre of October 2004,( Oct. 2005, Unpublished)

<sup>206</sup> Fernando Borello, Cited Above at Note 177, P. iii

### **3.5 Factors affecting complicity of corporation for international crimes in DRC**

Corporations may be implicated in international crimes committed by state or non-state actors owing to diverse reasons. In 2011-2012, there were 29 extreme risk countries for corporate complicity in human rights violations, globally.<sup>207</sup> Among these, DRC is put at the forefront.<sup>208</sup> There are various factors that contribute towards the complicity of Corporations for international crimes in DRC. To start with, Multinational Corporations operating in conflict-affected areas or weak-governance zones, such as DRC are likely to be complicit in human rights violations.<sup>209</sup> In these regard, a state may be unable or even unwilling, to regulate a company involved in human rights abuses, particularly where the government itself is causing the abuses<sup>210</sup>

Second, the illicit exploitation of natural resources and the illegal trade in the DRC, involves interaction between companies and rebel groups or state authorities.<sup>211</sup> Thus, in the interest of soliciting profits the Corporations may assist the groups in the conflict, thereby implicated in the atrocities committed by the groups. Companies closest to the source of minerals or timber dealt directly with rebel groups, either by trying to strike deals with them or by paying them taxes, licenses and various other fees to enable them to stay in business.<sup>212</sup> As rebel groups took over the tax collecting functions of the state, companies continued making payments to them by ignoring the human rights abuses being perpetrated by the groups.<sup>213</sup>

Third, the illicit exploitation of natural resources is intertwined with arms trafficking, which is profitable for the Corporations and benefits the armed groups.<sup>214</sup> Fourth, the existence of impunity gap (which is explained by the failure of the soft law mechanism, the absence of responsibility by home states of MNCs and the lack of liability under the Congolese Judicial system) has also contributed to an increased complicity of Corporations.<sup>215</sup>

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<sup>207</sup>Maplecroft, Media release, 2011-12, (<http://www.maplecroft.com>) , Last visited on April 12 2017

<sup>208</sup> Ibid.

<sup>209</sup>Jessie chella. Cited above at Note 2, P.24

<sup>210</sup>Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses " Hastings International & Complicity Law Review, Vol. 21 (2001), P.339

<sup>211</sup>The global witness, Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 to 2003, Cited above at Note 187, (2009, unpublished),P.21

<sup>212</sup>Ibid.

<sup>213</sup>Id., P.22

<sup>214</sup>Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Wealth"s in the Democratic Republic of Congo, Cited above at note 195, Para. 46-47

<sup>215</sup>The global Witness, Cited Above at Note 190, P.22-23

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## CHAPTER FOUR

### ANALYSIS OF CURRENT AND PROSPECTIVE PROSECUTION FOR CORPORATE COMPLICITY IN INTERNATIONAL CRIMES IN DRC

The previous chapter has dealt with instances by which Corporations, have been implicated in the international crimes committed by armed groups in the DRC. This chapter assesses the possible options to establish the criminal responsibility of complicit Corporations for international crimes. In doing so, the actual and potential prosecution of complicit Corporations in various judicial forums and the challenges thereon will be discussed.

To this end, the treatment of corporate criminal responsibility under the criminal laws of DRC, and other home States of MNCs coupled with possible prosecutions thereof will be analyzed. Furthermore, the inclusion of corporate criminal responsibility for international crimes under the African Court of Justice and Human Rights Statute and its relevance to prosecute complicit Corporations in DRC will be addressed in this chapter. Finally, the proposal to include corporate criminal responsibility under the Rome Statute of the International Criminal Court, and the prosecution thereof would be analyzed.

#### 4.1 Is there corporate criminal responsibility under the Congolese criminal code?

The DRC is a monist legal system and the Constitution of 2006 stipulates the primacy of duly ratified international law over domestic law and the crimes prescribed by international treaties to which the DRC is a party are directly incorporated into the domestic legal code.<sup>216</sup> The DRC has transposed many of the norms of International Criminal Law in its corpus of domestic law. Congolese criminal law can be divided into two parts: the ordinary Criminal Code<sup>217</sup> prescribing ordinary crimes on one hand and the Military Criminal Code<sup>218</sup> and Military Judicial Code<sup>219</sup>,

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<sup>216</sup> The Constitution of Democratic Republic of Congo, 2006, Art. 153. Accordingly, “The courts and tribunals, both civil and military, shall apply duly ratified international treaties, laws and with custom, provided this is not contrary to public order or good morals”. See also, Art. 215 of the Constitution, which provides “Duly concluded international treaties and agreements shall have, following publication, higher authority than laws, provided each treaty or agreement is applied by the other party.”

<sup>217</sup> The Criminal Code of DRC (*Code Penal Congolais*), 1940, as amended, *Journal Officiel N° Special 30*, November 2004

<sup>218</sup> The Military Criminal Code of DRC (*Code Penal Militaire*), 2002, Law N° 024

<sup>219</sup> The Military Judicial Code of DRC, 2002

prescribing international crimes.<sup>220</sup> The DRC has also ratified the Rome Statute in 2002.<sup>221</sup> The ordinary Criminal Code, other than in relation to specific provisions relating to economic crimes, does not establish criminal liability for legal persons.<sup>222</sup> However, company directors are responsible for the way in which they discharge their obligations and wrongful acts committed under their management.<sup>223</sup>

In DRC, only military courts and tribunals have jurisdiction to try crimes under international law.<sup>224</sup> The Military Courts and tribunals shall have full jurisdiction to try individuals,<sup>225</sup> excluding juristic entities. Their jurisdiction extends to soldiers in the Congolese armed forces, police, civilians employed by the armed forces, and Ministry of defense and intelligence agencies.<sup>226</sup> Furthermore, even where a person is not part of the army, anyone who provoke, engage or assist one or more of the above mentioned persons to commit a crime that is against the law can be tried before the court.<sup>227</sup> The Military Criminal Code punishes the individual criminal responsibility of perpetrators and co-perpetrators, accomplices, and perpetrators of attempted crimes.<sup>228</sup>

#### **4.2 Introducing Corporate Criminal Responsibility under DRC's Criminal Code: Rationale**

In the DRC, „foreign companies are perceived as playing a predatory role and „stealing“ the country's natural resources.<sup>229</sup> 75% of mining resources in the DRC are owned by foreign companies and the profit is only going to the companies, not the Congolese people“.<sup>230</sup> Furthermore, the associated perpetuation of human rights abuses related with the resource extraction goes largely unreported in international press.<sup>231</sup> Thus, apart from the advantages of introducing corporate criminal responsibility discussed under chapter two, specifically its inclusion

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<sup>220</sup> Antoniatta Trapani, Cited Above at Note 176, P.22-23

<sup>221</sup> The International Criminal Court website, on 11 April, 2002 DRC deposited its instrument of ratification, ([https://asp.iccpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.iccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)), last visited June 23, 2017

<sup>222</sup> The International Commission of Jurists, Cited Above at Note 165, P.9

<sup>223</sup> Id., p 7

<sup>224</sup> The Military Criminal Code of DRC, Cited Above at Note 26.

<sup>225</sup> The Military Judicial Code of DRC, 2002, Cited Above at Note 26, Art. 73

<sup>226</sup> Id., Art. 108

<sup>227</sup> Id., Art. 112 (7)

<sup>228</sup> The Military Criminal Code of DRC, Cited Above at Note 26, Art. 4, Art.5, and Art.6

<sup>229</sup> Global Witness Report, „digging in Corruption: Fraud, Abuse and Exploitation in Katanga's copper and cobalt mines“ (July 2006, unpublished), P. 34.

<sup>230</sup> Dent Geordie G., Mining the Congo: Canadian Mining Companies in the DRC (2007, Unpublished) (<http://www.dominionpaper.ca/articles/1195>), last visited on April 7, 2017

<sup>231</sup> Van A. Woudenbergh, a New Era for Congo? , (2006, Unpublished, Human Rights Watch), P. 7

under the Congolese legal system will have the following merits. First, in Conflict affected areas, the involvement of MNCs in gross human rights abuse often results in creating or exacerbating conflict.<sup>232</sup> Situations of conflict can in fact be exacerbated by the presence of lucrative extractive industries, as competing factions strive to control rents from the operation to fund their own struggles.<sup>233</sup> The conflict in DRC will continue to be fueled by the mineral trade unless national and international action is taken.<sup>234</sup> Hence, punishing such Corporations *per se* criminally would be a mechanism for at least reducing a conflict.

Second, international guidelines and principles governing corporate behavior are voluntary and lack accountability mechanisms. In Conflict-affected areas this is even worse due to the absence of strong government, providing a power vacuum in which companies can often operate freely and without being held accountable.<sup>235</sup> Thus, filling the gap of the soft law mechanism is important. Third, the illegal exploitation of natural resources, in DRC, is a central issue for a peace-building in DRC and the Great lakes region.<sup>236</sup> Hence, punishing Corporations involved in the illegal exploitation of resources thereby being complicit in international crimes committed by armed groups is vital for the peace building process. Prosecutions would contribute to the fight against impunity.<sup>237</sup> Prosecutions can serve as a form of comfort and redress for victims.<sup>238</sup> Conflicts are driven either by financial enrichment or ideology: a thorough investigation of the finances behind a conflict therefore helps to identify suspects and develop a more complete picture of responsibility.

Lastly, in addition to the soft law regulatory frameworks, many companies impose their own voluntary codes of conduct under corporate social responsibility programs.<sup>239</sup> But, since companies are profit oriented corporate social responsibility becomes a saleable marketing tool rather than one encouraging or denoting moral responsibility and standards of ethical conduct.<sup>240</sup> If multinationals

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<sup>232</sup> Mark Van Dorp, Multinationals and Conflict: International principles and guidelines for corporate responsibility in conflict affected areas, ( 2014, Unpublished, Centre for Research on Multinational Corporations Netherlands), P.18

<sup>233</sup> Id., P. 2

<sup>234</sup> Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other of Wealth in the Democratic Republic of Congo, Cited above at note 195, P.24

<sup>235</sup> Id., P.19

<sup>236</sup> Fernando Borello, Cited Above at Note 176, P.15

<sup>237</sup> Ibid.

<sup>238</sup> Ibid

<sup>239</sup> Frynas Jędrzej G, “Corporate Social Responsibility and International Development: Critical Assessment” Corporate Governance International Review, Vol. 16 (4),(2008), P.274.

<sup>240</sup> Paul Kapelus, “Mining, Corporate Social Responsibility and the Community: The Case of Rio Tinto,Richards Bay Minerals and the Mbonambi”, Journal of Business Ethics Vol.39, ( 2002) , P.275

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in the new order have the power, monetarily, politically and in terms of their ability to organize society as the old order States, then these new powers should take on responsibilities proportionate with this power.<sup>241</sup> Unless corporate accountability is aided by national legislation on due diligence standards, the legal function and importance of international corporate instruments is unclear.<sup>242</sup> Thus, introducing corporate criminal responsibility would serve as means of ensuring corporate due diligence to respect human rights and create a sense of moral responsibility. Companies have a responsibility, both moral and socio-economic, that they choose their source countries wisely. Where they choose to source from countries such as the DRC, they must be held to a higher standard of corporate awareness.<sup>243</sup>

### **4.3 Prosecution of Complicit Corporations before Congolese Domestic Courts: Challenges**

It has been mentioned that, though corporate complicity for international crimes subsists, there is an impunity gap. Except the unsuccessful attempt made to prosecute Anvil Mining Company and its employees, Corporations in DRC are not criminally responsible for their involvement in international crimes committed by the armed groups. Thus, the absence of responsibility for such Corporations can be traced to different challenges which perpetuate impunity in the DRC in general.

To start with, except the imposition of criminal liability for minor economic offences, the Congolese Criminal law excludes responsibility of legal persons for complicity in international crimes.<sup>244</sup> As a result, there is no legal basis for prosecuting Corporations before courts and they remain a dominant actor in the conflict and commission of international crimes. Furthermore, the absence of corporate criminal responsibility under the Rome Statute of the International Criminal Court has exacerbated the impunity of Corporations in DRC.

Apart from the absence of a legal ground for prosecuting complicit Corporations in international crimes, the challenges faced by the judicial system of the country coupled with the other factors

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<sup>241</sup> Backer Larry Catá, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order", *Indiana Journal of Global Legal Studies*, Vol.18, (2011), P.763-4

<sup>242</sup> Alexander L. Carleton, "The Gathering Storm Around Corporate Liability In Natural Resource Investment: Re-Examining The Recent Past", *African Journal of Environmental Law*, Vol. II (2015), P.120

<sup>243</sup> The Report of Africa Confidential, "Congo-Kinshasa: 8 ways to clean up minerals";(2010), P. 51

<sup>244</sup> The International Commission of Jurists, Cited Above at Note 160, P.9, See also, Art. 4, 5 and 6 of the Military Criminal Code of DRC, 2002.

would ultimately affect the prosecution though corporate criminal responsibility would be included under the criminal code of DRC. Unless these problems are tackled, prosecuting complicit Corporations would be difficult. First, the judicial system has been marred by political influence and the over broad power of the executive.<sup>245</sup> A lack of political will among local authorities at times due to pressures intended to attract foreign investment, are common concerns.<sup>246</sup> Furthermore, the slow pace of the judicial system, which lacks capacity<sup>247</sup>, material and financial resources,<sup>248</sup> would also have a bearing on the prosecution of complicit Corporations. The judicial system is rarely effective, corrupted and most serious crimes are left unpunished.<sup>249</sup>

Second, though the number of involvement of armed groups in international crimes is higher, the opening of a criminal investigation or the referral to a court remains very low.<sup>250</sup> This is mainly due to the volatile security situation in the affected areas, which complicates investigations, particularly in terms of identifying the victims and the alleged perpetrators.<sup>251</sup> Hence, the prosecution of complicit Corporations for international crimes would be limited by the level of punishing the principal perpetrators or armed groups. Third, the lack of security in the DRC is one of the most serious obstacles to prosecutions. Some regions, like Ituri, are still largely under the control of lawless armed groups.<sup>252</sup> Thus, Corporations operating in such areas may escape prosecution due to lack of evidence. Fourth, the prosecution of international crimes falls under the jurisdiction of the Congolese Military court.<sup>253</sup>

But, the military judicial system is alleged to lack independence, since it remains dependent on the military hierarchy.<sup>254</sup> The senior officers refuse to bring their men before military tribunals, and

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<sup>245</sup> Van Der Plancke Véronique, Van Goethem Valérie, Paul Geneviève, Wrzoncki Elin, and Marion Cadier, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms, (2016, 3rd ed.) P.345

<sup>246</sup> Ibid.

<sup>247</sup> International Federations for Human rights, Democratic Republic Of Congo : "Breaking The Cycle Of Impunity"(2007, Unpublished, the international federations for human rights-Paris),P.3

<sup>248</sup> Report of UN Human Rights Office of the High Commissioner and MONUSCO, Accountability for Human Rights Violations and Abuses in the DRC: Achievements, Challenges and Way forward,( Jan. 2014 - 31 March 2016, unpublished), P. 13

<sup>249</sup> Leandro Despouy, Report of the Special Rapporteur on the Independence of Judges and Lawyers: Preliminary Note on the Mission to the Democratic Republic of the Congo Delivered to the Human Rights council and the General Assembly, (May 24, 2007, unpublished, U.N. Doc. A/HRC/4/25/Add.3 ),P.4

<sup>250</sup> Report of UN human Rights Office of the High Commissioner and MONUSCO, cited above at note 245, P. 11

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> The Military Criminal Code of DRC, Cited Above at Note 26

<sup>254</sup> Leandro Despouy, Cited Above at Note 249, P. 4

they put pressure during the trial process.<sup>255</sup> Furthermore, the military courts are corrupted and lack independence.<sup>256</sup> The most pervasive forms of interference within the military justice system is from the military command and hierarchy.<sup>257</sup> Thus, so long as the prosecution of military officer before the military courts is difficult, punishing Corporations for being complicit in international crimes committed by these military officers or armed groups would be limited. However, the introduction of a new bill which incorporates the Rome Statute in to the domestic judicial system may relieve this concern <sup>258</sup> by conferring the jurisdiction to try international crimes to civil courts.<sup>259</sup> But, the overall problem of the judicial system remains a challenge for the prosecution of complicit Corporations before civil courts.

With respect to the MNC's business operations system or their structure, there are concerns which may pose a challenge for prosecutions. It is not uncommon for MNC's implementing local intermediaries (subsidiaries, subcontractors or business partners) to be insolvent or uninsured.<sup>260</sup> The parent company often perpetrates the alleged crime, or at least makes decisions that lead to the violation, since evidence is often located in the multinational's country of origin or domicile.<sup>261</sup> Furthermore, Corporations having a higher financial position may bribe actors in the justice and law enforcement sectors, and may also intimidate witnesses.

#### **4.4 The Kilwa Trial: Signal for Corporate Impunity or Responsibility?**

On October 14, 2004, the armed members of MRLK (Revolutionary Movement for the Liberation of Katanga), attacked and occupied the town of Kilwa, in the province of Katanga, Southeast of DRC.<sup>262</sup> The armed group had approached Anvil Mining Company and claimed to talk.

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<sup>255</sup> Ibid.

<sup>256</sup> The Human Rights Committee of International Convention on Civil and Political Rights, Concluding Observations on the Democratic Republic of the Congo, (Apr. 26, 2006, unpublished, U.N. Doc. CCPR/C/COD/CO/3), P.21

<sup>257</sup> Amnesty International, The time for justice is now :New strategy needed in the Democratic Republic of the Congo, ( June 2011, Unpublished, Amnesty International), P.38

<sup>258</sup> Antoniatta Trapani, Cited Above at Note 176, P.33

<sup>259</sup> Ibid.

<sup>260</sup> Van Der Plancke Véronique, Van Goethem Valérie, Paul Geneviève, Wrzoncki Elin, and Marion Cadier, Cited Above at Note 245, P.348

<sup>261</sup> Ibid.

<sup>262</sup> The Kilwa Trial: a Denial of Justice. A Chronology (October 2004 – July 2007), ( 2007, Unpublished, Global witness, RAID., Action Against impunity for human rights(ACIDH) and African Association for the defense of Human Rights(ASADHO), P.3

Unfortunately, the company refused and the rebels stole fuel, trucks, and batteries.<sup>263</sup> The following day, a Congolese military contingent, commanded by Colonel Adamar Ilunga, launched a counter attack against the MRLK in Kilwa. However, after crushing the insurgents within two hours, the Congolese soldiers engaged in War Crimes such as summary executions, rape, and looting civilian's property.<sup>264</sup> So as to carry these attacks, the FARDC soldiers used the vehicles of Anvil Mining Company.<sup>265</sup> Anvil Mining has stated that, it had complied with requests of logistic support received from the Governor of Katanga and Colonel Adamar.<sup>266</sup> The support included the provision of vehicles and drivers, food rations, as well as airplanes chartered by Anvil, to transport Congolese troops.<sup>267</sup> It has also contributed to the payment of the soldiers.<sup>268</sup>

As a result of a higher international pressure from MONUC and civil societies, in July 2005, Congolese authorities commenced an investigation, and thereafter, the Military court commenced trial in Kilwa town.<sup>269</sup> In October 2006, a military judge confirmed charges of War Crimes incorporated into Congolese military law against Colonel Adamar and eight of his subordinates.<sup>270</sup> Charges were also laid against three employees of Anvil Mining for knowingly facilitating the crimes perpetrated by the military.<sup>271</sup> Anvil mining as a juridical person were charged and later cleared in the pretrial proceeding.<sup>272</sup>

The trial process and the decision of the military had been subjected to critics by NGOs, and international organizations. First, the replacement of the original prosecutor in March 2007 had

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<sup>263</sup>ASADHO, Report on Human Rights Violations Committed in Kilwa in the Month of October 2004, (2005, unpublished), P.8,

<sup>264</sup>The United Nations Mission in the Democratic Republic of the Congo, Report On the Conclusions Of the Special Investigation Into Allegations Of summary Executions And Other Violations Of Human Rights Committed by The FARDC in Kilwa,(2005, Unpublished), P.14, (<http://www.raiduk.org/work/anvildikulushi.htm>) ,last visited June 13,2107

<sup>265</sup> Ibid.

<sup>266</sup> Id., P.39

<sup>267</sup> Id., P.36

<sup>268</sup> Id., P.36

<sup>269</sup>Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector", Yale Human Rights and Development Journal, Volume 11, Issue 1, 2014, P.17

<sup>270</sup> Congolese Public Prosecutor v. Colonel Adamar Ilunga, *et al*(Case No. RP 010/06, Military Court of Katanga, Dec. 2006)

<sup>271</sup> Ibid.

<sup>272</sup>ACIDH, Proceedings Of the Military Court Of Katanga in the Case of the Congolese Public Prosecutor and Parties Civiles Vs. Colonel Ademar Ilunga and Associates, ( 2005, Unpublished, Associacio Catalana D'integracio Desenvolupament Human), P.34

been condemned by NGOs as a political interference.<sup>273</sup> This can be strengthened by the prior report of the MONUC, which emphasized the political pressure over the prosecutor so as to drop the charges against Anvil employees.<sup>274</sup> Second, the independence of the court and the fairness of the trial process had been questioned. The MONUC trial observers had expressed concern about the impartiality of the presiding judge, the conduct of cross examinations and the failure to summon key prosecution witnesses.<sup>275</sup> The judge was alleged to have harassed some of the prosecution witnesses or refused to listen to them.<sup>276</sup> Furthermore, the then governor of Katanga, Moïse Katumbi, who is a former business associate of Anvil, had publicly urged the people not to make “gratuitous allegations” against Anvil Mining, “which was working for their benefit”, and also pressured traditional chiefs to “dissuade victims from participating in the trial.”<sup>277</sup>

Third, at the conclusion of the trial, the prosecutor called for life imprisonment to all the military defendants save one, and acquittal of the three Anvil employees because there is no sufficient evidence for complicity in War Crimes.<sup>278</sup> On June 28, 2007, the court’s verdict acquitted all the charges relating to the Kilwa incident, but punished Colonel Adamer and three military defendants for another incident.<sup>279</sup> The court concluded that, the deaths in Kilwa were caused by fighting between rebels and the military and did not amount to War Crimes.<sup>280</sup> It stated that, Anvil employees were coerced to provide support, and were not liable for aiding and abetting War Crimes.<sup>281</sup>

The judgment of the court has been criticized on various grounds. The court’s conclusion is commented as being contrary to substantial eyewitness’s testimony and evidences which are at the trial.<sup>282</sup> Furthermore, the assumption of jurisdiction by the Military court over civilians has been considered as inappropriate, since it is contrary to the DRC's international obligations.<sup>283</sup> While

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<sup>273</sup>The Press Release by RAID (Mar.12,2007), (<http://www.raid-uk.org/docs/PressReleases/PRKilwaTrialENG12MAR07.pdf>), Last visited on April 19, 2017

<sup>274</sup>The MONUC Report, The Human Rights Situation in the Democratic Republic Of the Congo (2007, Unpublished), P.100

<sup>275</sup>Ibid.

<sup>276</sup>Ibid., See also Adam Macbeth, Cited Above at Note 269, P.18

<sup>277</sup>The Kilwa Trial: a Denial of Justice, Cited Above at Note 262, P.23

<sup>278</sup>The Public Prosecutor of DRC vs. Colonel Adamar Ilunga, *et al*, Cited Above at Note 270.

<sup>279</sup>Ibid.

<sup>280</sup>Ibid.

<sup>281</sup>Ibid.

<sup>282</sup>Adam Macbeth, Cited Above at Note 269, P.19

<sup>283</sup>Ibid.

military personnel can in principle be charged by court martial, civilians should be tried before civilian courts.<sup>284</sup> The Congolese Military Court is alleged to be partial, weak, and dependent on the military hierarchy.<sup>285</sup>

In the main, though the Kilwa trial has been condemned to be unfair, at least it can be taken as a test for international jurists and academicians regarding corporate accountability for complicity in international crimes.<sup>286</sup> Of course, whether the company or its employees are criminally liable or not, is an issue to be decided by the court. But, the legal and political constraints forwarded against effective prosecution of complicit Corporations, can work for future similar cases. Thus, the Kilwa trial serves as the inception of the notion of criminal responsibility for complicit Corporations in DRC though it's an unsuccessful attempt. However, given the condemnations forwarded by the UN and others up on the trial, unless the legal ground of prosecuting corporate complicity is bridged with political stability and independence of the judiciary, prosecuting Corporations in DRC would be complex and the impunity gap may persist.

#### **4.5 The Draft Legislation towards Specialized Mixed Tribunal for DRC and Corporate Criminal Responsibility**

As a response to the UN panel of experts report findings and recommendations, in 2014 the DRC's Ministry of Justice and Human rights has prepared a draft legislation, for the establishment of specialized mixed tribunal for international crimes committed in DRC since 1990.<sup>287</sup> Article 24 of the draft law, provides that legal persons under private or public law, excepting the government, are subjects of the tribunal's jurisdiction.<sup>288</sup> Though the provision is aimed at punishing private companies involved in international crimes, it fails to deal with the criminal liability approaches for legal persons.<sup>289</sup> However, the bill was rejected by the Parliament for noncompliance with formal requirements, without a debate on the merits and another text is currently under discussion within

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<sup>284</sup> Ibid.

<sup>285</sup> Leandro Despouy, Cited Above at Note 249, P.4

<sup>286</sup> Human Rights Watch, Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes in the Democratic Republic of Congo Common Position Resulting from the Workshop Held in Goma( April 6-8, 2011, unpublished, HRW), P.1

<sup>287</sup> The Draft Legislation on the establishment of Special Mixed Tribunal for DRC (2014), Art. 19

<sup>288</sup> Human Rights watch, Comments on the second version of the Draft Legislation to Establish Specialized Chambers within the Congolese Judicial System for the Prosecution of Grave International Crimes, ( 2011, Unpublished, HRW), P.12

<sup>289</sup> Ibid.

the Ministry of Justice.<sup>290</sup>The specialized mixed tribunal is to be established as per Article 169 of DRC's constitution as having a special jurisdiction under the national judicial system.<sup>291</sup>It would have international judicial officers and staffs.<sup>292</sup>

Thus, the inclusion of corporate criminal responsibility under the tribunal is vital to prosecute complicit Corporations in DRC. The fact that the jurisdiction of the Court extends to the past ten years would render it more effective in prosecuting complicit Corporations involved in all the atrocities committed by armed factions in DRC. Nevertheless, the tribunal would be temporary, and unless the conflict in DRC ended up, it cannot fill the existing impunity gap, because as the conflict continues the Corporations may become complicit in the international crimes perpetrated by the armed groups.<sup>293</sup>Moreover, the absence of corporate criminal liability model in the draft law would create a difficulty in attributing responsibility to Corporations. Finally, despite the above raised concerns, the coming in to existence of the court is still dependent up on the political will of the DRC's government.

#### **4.6 Foreign Jurisdiction Prosecution of complicit Corporations for International Crimes in DRC**

The first option of holding Corporations criminally liable for complicity in international crimes, which is domestic prosecution, is difficult due to legal gap coupled with potential political factors. The influence of private companies on domestic court action may prevent justice being done, even where the country has shown decisive action in acting in the interests of its population.<sup>294</sup> But, the DRC's government action to hold various entities and individuals accountable is far from adequate.<sup>295</sup>Thus, where national courts are unwilling or unable to hold companies and their individuals accountable for their role in resource plunder and the conflict surrounding it, courts of „third“nations or international courts and tribunals should hold such entities accountable.<sup>296</sup>

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<sup>290</sup> Report of UN Human Rights Office of the High Commissioner and MONUSCO, Cited Above at Note 248, P.7

<sup>291</sup>The draft legislation on the Special Mixed tribunal for DRC (2014), Preamble, Para. 6

<sup>292</sup>Id., Art.1, Art.9,and Art.14.

<sup>293</sup> Id. Art. 19, provides that, “the tribunal shall cover crimes falling within its subject matter jurisdiction committed from 1990 to the present, until a law is passed transferring this jurisdiction to ordinary criminal courts.” In addition to this, Sub-Article (2) of the same Article limits the life Span of the specialized mixed tribunal to be 10 years.

<sup>294</sup>Alexander L. Carleton, Cite Above at Note 242, P.105

<sup>295</sup>Id., P.106

<sup>296</sup>Id., P.105

However, the fact that MNCs operating in DRC have some legal link with their home states may render them criminally responsible for their extra-territorial acts under criminal laws of the home state. Below, the efforts made in prosecuting complicit Corporations of DRC, in Australian and Canadian jurisdiction will be assessed.

#### **4.6.1 The Prosecution of Complicit Corporations in DRC before Australian Courts**

The Australian Criminal Code imposes criminal responsibility up on legal persons involved in the commission of the core international crimes mentioned under the ICC Rome statute.<sup>297</sup> With respect to Division 268 crimes (the core international crimes), the Criminal Code provides that, anyone, anywhere, regardless of citizenship or residence, can be tried for an offence committed anywhere in the world before Australian courts, without the availability of a foreign law defense.<sup>298</sup> In short the criminal code allows Australian courts to have a universal jurisdiction over crime against humanity, War Crimes and Genocide committed by natural or legal person.

Thus, given the fertile legal ground under the criminal code, in June 2005, the Australian Federal Police began investigating Anvil Mining as to whether there was sufficient evidence of Anvil's complicity in crimes against humanity in the Kilwa incident, in DRC. The basis for this investigation is the pressure from NGOs urging the government to prosecute Anvil Mining Company,<sup>299</sup> because it is incorporated in Canada but has major operations, including its principal headquarters, in Australia. In 2004 the company re-domiciled from Australia to Canada for the purpose of allowing a joint listing on the Australian and Canadian stock exchanges.<sup>300</sup>

However, the investigation ceased when the Australian Federal Police recommended closing the case for lack of evidence on October 2007.<sup>301</sup> But, there are allegations that, the proper

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<sup>297</sup> The Criminal Code of Australia, 2002, Division 268 and the Criminal Code Act 1995, Part 2.5, Section 12.1. The former provides for the inclusion of crime against humanity, Genocide and War Crimes listed under the ICC statute in to the Australian criminal law. Whereas, the later provides for the application of the criminal code up on bodies corporate.

<sup>298</sup> The Australian Criminal Code, 2002, Sections 14.1-15.4

<sup>299</sup> Joanna Kyriakakis(PhD) , "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code", *Journal of International Criminal Justice*, Vol. 5 (2007), P.813

<sup>300</sup> Anvil Mining Ltd, Annual Report 2004, P. 14, ([http://www.anvil.com.au/inv\\_financial.shtml](http://www.anvil.com.au/inv_financial.shtml)) last visited on June 17, 2017

<sup>301</sup> RAID., Ten Years on Trial: Still No Justice for Kilwa Victims, (<http://webcache.googleusercontent.com/search?q=cache:http://www.raid-uk.org/sites/default/files/kilwa-10-years.pdf>) last visited on April 10, 2017

eyewitnesses and evidences have not been consulted, the pending trial before the Congolese Military tribunal was not observed, and the case was reassigned among many investigators.<sup>302</sup> Thus, a charge of complicity for international crimes has not been instituted before the Australian courts. Though the legal ground is concrete, practically prosecuting the corporation is unsuccessful.

#### **4.6.2 The prosecution of Complicit Corporation in DRC before Canadian Courts**

The Criminal Code of Canada allows legal persons to be prosecuted for Genocide, Crimes against Humanity, and War Crimes.<sup>303</sup> Complicity in the commission of Genocide, Crime against Humanity or War Crime is itself a crime.<sup>304</sup> Although the principle of territoriality is given priority, it is possible to establish a real and substantial connection with Canada (Such as Canada's jurisdiction to prosecute) and the alleged offence.<sup>305</sup> Furthermore, there is a possibility to prosecute Corporations by universal jurisdiction if they are incorporated in Canada.<sup>306</sup>

With respect to Anvil Mining MNC operating in DRC, a class action was filed on 08 November 2010, by ACCI for Crime against Humanity, because the criminal procedure law allows for institution of a proceeding by an authorized person.<sup>307</sup> On 28 April 2011, the Supreme Court of Quebec ruled that the case can proceed to the next stage by rejecting Anvil Mining's position that there were insufficient links to enable the court to have jurisdiction over the case.<sup>308</sup> The court found that should jurisdiction be denied, the victims would have no other forum for redress having already been denied justice in two appropriate forums; the DRC and Australia.<sup>309</sup>

On 25 January 2012, the Quebec Court of Appeal reversed the decision of the Superior Court Honorable Judge Benoît Emery, and thus refused jurisdiction to hear the class action.<sup>310</sup> The Court of Appeal stated that, there was insufficient connection to Quebec due to the fact that Anvil

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<sup>302</sup> Ibid.

<sup>303</sup> The Criminal Code of Canada, 1985, An Act respecting the Criminal Law (R.S.C. 1985, c. C-46, as amended), Art. 2

<sup>304</sup> Id., Art. 4(1) and Art. 6(1)

<sup>305</sup> Id., Art. 6(2)

<sup>306</sup> Id., Art. 7

<sup>307</sup> Van Der Plancke Véronique, Van Goethem Valérie, Paul Geneviève, Wrzoncki Elin, and Marion Cadier, Cited Above at Note 245, P. 380

<sup>308</sup> Ibid.

<sup>309</sup> International Crimes Database, Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd. (2013) (<http://www.internationalcrimesdatabase.org/Case/210/CAAI-v-Anvil-Mining/>) last visited on June 14 2017

<sup>310</sup> Van Der Plancke Véronique, Van Goethem Valérie, Paul Geneviève, Wrzoncki Elin, and Marion Cadier Cited Above at Note 245, P. 380

Mining's office was not involved in managerial decisions leading to its alleged role in the massacre (which contradicts earlier findings by Judge Emery).<sup>311</sup> The Court also found that it had not been proven that victims could not access justice in another jurisdiction (the DRC or Australia).<sup>312</sup> Therefore, unlike that of the Australian, the prosecution of complicit Corporations for international crimes in DRC before the Canadian Courts faced a legal or jurisdictional challenge.

#### **4.7 Prosecution of Complicit Corporations before International Criminal Courts in General**

Apart from the call for corporate criminal responsibility or prosecution at national level, there are reasons which urges for the International Criminal Court jurisdiction over Corporations. Firstly, contemporary conflict studies demonstrate that many wars today are rooted in competition over resources and in economic under-development, with the result that calls for a new generation of International Criminal Law addressing economic actors and economic crimes are being made.<sup>313</sup> If a goal of International Criminal Law is to support durable peace, then addressing economic networks that sustain local conflicts should be a crucial feature of international criminal practice<sup>314</sup>, under International Criminal Courts.

Secondly, human rights scholars claim for the existence of *lacuna* in corporate governance.<sup>315</sup> Transnational Corporations are enjoying *de facto* impunity from accountability for human rights abuses related to their global business activities, particularly in the global South.<sup>316</sup> From an International Criminal Law perspective, where abuses overlap with violations of international criminal norms, such systemic impunity ought to be significant.<sup>317</sup> Thus, so as to narrow the existing impunity gap, international courts should have institutional competence over Corporations committing international crimes.

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<sup>311</sup> Ibid.

<sup>312</sup> Global Witness, Press Release, 6 November 2012, [No Justice in Canada for Congolese Massacre Victims as Canada's Supreme Court Dismisses Leave to Appeal in Case Against Anvil Mining](http://www.globalwitness.org/archive/no-justice-canada-congolese-massacre-victims-canadas-supremecourt-dismisses-leave-appeal.pdf), (<http://www.globalwitness.org/archive/no-justice-canada-congolese-massacre-victims-canadas-supremecourt-dismisses-leave-appeal.pdf>) last visited on August 12, 2017

<sup>313</sup> Joanna Kyriakakis (PhD), Cited Above at Note 83, P.222-223

<sup>314</sup> Ibid., see also M. Delas-Marty, "Ambiguities and Lacunae: The International Criminal Court Ten Years On" 11 [Journal of International Criminal Justice](#) Vol. 11(2013), P.557

<sup>315</sup> Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights", [Netherlands International Law Review](#), Vol. 46(2), (1999), P.171

<sup>316</sup> Ibid.

<sup>317</sup> Joanna. Kyriakakis (PhD), cited above at note 85, P.223

Thirdly, International Criminal Law is justified in terms of its expressive function to communicate core values reflective of, and perhaps even themselves constitutive of, the international community.<sup>318</sup>The expressive function of International Criminal Law refers to the unique positioning of institutions such as the ICC to communicate and express norms to audiences at both the global and local levels.<sup>319</sup>It is the unique role of international criminal institutions in the assignation of international stigma to certain types of behavior (distributing social opprobrium) that best accounts for their activity.<sup>320</sup> Thus, by prosecuting and punishing both legal (Corporations) and natural persons, International Criminal Courts would protect the international community from heinous crimes such as Crime against Humanity, War Crimes, and Genocide.

Fourthly, scholars applauding third world approach to international law, claims for the inclusion of corporate criminal responsibility under the jurisdiction of International Criminal Courts. Many of the claims used to justify the application of International Criminal Law to Corporations are either drawn from conflict studies that demonstrate the relationship between global commerce and modern conflicts, or from human rights discourse that illustrates the North–South qualities of corporate impunity for human rights abuses in the context of a globalized economy.<sup>321</sup> Moreover, transnational Corporations continue to be primarily headquartered in the global north, while the dynamics that press against corporate accountability for business-related human rights abuses, are most pronounced in the global South.<sup>322</sup> An International Criminal Court indirectly addressing this phenomenon in its practices through appropriate prosecutions provides the opportunity for international criminal jurisprudence to construct more complete narratives of power, law and responsibility for otherwise apparently localized conflicts.<sup>323</sup>

Lastly, the enforcement of International Criminal Law, by International Criminal Courts would widen the scope of responsibility of Corporations, and it may serve as a response to some legal challenges. Legal arrangements have developed to maximize the immunity of parent Corporations from risks associated with their global operations.<sup>324</sup>Tiers of distinct corporate entities insulate the

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<sup>318</sup> Id., P. 229. See also, Mark Drumbl, Atrocity, Punishment and International Law (2007), P.173–6;

<sup>319</sup> Ibid.

<sup>320</sup> Ibid.

<sup>321</sup> Joanna Kyriakakis (PhD), Cited Above at Note 85, P.231

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Jonathan Clough, „Not-so-innocents Abroad: Corporate Criminal Liability for Human Rights Abuses“, Australian Journal of Human Rights, Vol.11(1),(2005), P. 9

parent company from liability through the doctrines of separate corporate juridical personality and limited liability in corporation law.<sup>325</sup> While prosecutions that focus upon local agents or subsidiaries in atrocities may be simpler, in terms of linking the entity to the wrong, this approach may fare no better in exposing the influence of external actors and structures in conflict.<sup>326</sup> By contrast, prosecutions that target the parent corporation necessarily direct attention to the modes of integration that operates in our global economic order.<sup>327</sup> An enterprise approach to this challenge, whereby courts focus on the reality of economic integration within a corporate group is necessary.<sup>328</sup> Thus, the discursive narratives that might be generated from international criminal prosecutions of corporation would be a solution to such kind of challenges.<sup>329</sup>

Therefore, the prosecution of Corporations before International Criminal Courts may serve to address the above mentioned, economic, political and legal concerns. But, there is no actually functioning International Criminal Court having jurisdiction over Corporations. The ICC jurisdiction is restricted to natural persons. Yet, the recent introduction of the criminal law section of the African Court of Justice and Human Rights may become a future forum for prosecuting Corporations. In the following sub-sections, the legal frameworks of corporate criminal responsibility under the ACJHR protocol, and the future prosecution of corporation before the ICC coupled with its significance will be discussed and analyzed.

#### **4.8 Corporate Criminal Responsibility under the Statute of the African Court of Justice and Human Rights**

As a result of the contention between the ICC and the African Union, the latter claiming that the ICC is unfairly attacking Africa and is being obstacle to the peace making process and, its neo-colonial western court,<sup>330</sup> etc. the AU, has proposed International Criminal Law section of the African Court of Justice and Human Rights in 2014.<sup>331</sup> The proposed Criminal Law section will

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<sup>325</sup>Joanna Kyriakakis (PhD), Cited Above at Note 85, P. 239

<sup>326</sup>Ibid.

<sup>327</sup>Ibid.

<sup>328</sup>Ibid.

<sup>329</sup>Ibid.

<sup>330</sup>Terence McNamee, The ICC and Africa Between Aspiration and Reality: Making International Justice Work Better for Africa (2014), p 6

<sup>331</sup>The African Union, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Cited Above at Note 162, Art. 16

have a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.<sup>332</sup> The Court has expanded its jurisdiction towards transnational and international crimes *inter alia* Genocide, Crimes against Humanity, aggression and War Crimes.<sup>333</sup>

Furthermore, it shall have jurisdiction over legal persons, with the exception of States.<sup>334</sup> Article 1 of the Statute of ACJHR, provides that, the term „person“ means „a natural or legal person“. The ACJHR would exercise jurisdiction over conducts committed on the territory of a state party, where the victim or offender is a national of a state party, or where the conduct in question threatens a vital interest of a state party.<sup>335</sup> Thus, as inferred from Article 46E *bis* of the protocol, Corporations doing business in Africa, whether or not they are also headquartered or incorporated in states that are a party to the Court can be prosecuted before the court for committing or complicity in the crimes mentioned therein.<sup>336</sup>

With respect to attributing criminal liability for Corporations, Article 46C adopts a progressive „organizational liability model“.<sup>337</sup> This means, rather than focusing upon the conduct and state of mind of specific individuals within the corporation and deriving the corporation’s fault from there, corporate culpability is instead deemed to be situated within the corporation itself.<sup>338</sup> This culpability is reflected in the corporation’s formal and informal policies (of compliance or non-compliance) and via aggregation of knowledge held across the full range of corporate personnel, which is then attributed to the company.<sup>339</sup> Though the organizational liability approach has its own merit to incentivize good structural corporate practice,<sup>340</sup> its appropriateness for international crimes is questionable.

The Malabo protocol suggests that, a limited range of legal persons: entities incorporated under domestic laws would be subject to prosecution.<sup>341</sup> But, there is no limitation as to the type of Corporations or the kinds of activities they are involved in.<sup>342</sup> Thus, state-owned or private

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<sup>332</sup> Id., Art. 19 *bis*

<sup>333</sup> Id., Art. 28A

<sup>334</sup> Id., Art. 46C

<sup>335</sup> Joanna Kyriakakis (PhD), Cited Above at Note 153, P.3

<sup>336</sup> Joanna Kyriakakis(PhD), Cited Above at Note 83,P.222

<sup>337</sup> Id., P.4

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Id. P.5

<sup>341</sup> Id., P. 3

<sup>342</sup> Ibid.

Corporations can be the subject of prosecution irrespective of the degree of state control over the corporation.<sup>343</sup> This would have relevance in prosecuting fully or partly state owned mining Corporations operating in DRC.

#### **4.9 Prosecution of Complicit Corporation in DRC before the African Court of Justice and Human rights: the Possibilities and Relevance**

Complicit Corporations for international crimes in DRC would be subject to prosecution before the ACJHR provided that, the court becomes operational and the DRC's government ratifies the Malabo protocol. The issue whether the Court comes in to reality is dependent up on the political commitment of the African states to ratify the Statute of the court, and on the outcome of the political tension between the International Criminal Court and the AU. Firstly, the maximum ratification required for the Malabo protocol to enter into force is fifteen (15), and till now, only nine States are signatory to the protocol.<sup>344</sup> Hence, the tendency of ratification seems low. Secondly, the contention between the ICC and the African Union has become serious and the latter has reached to the extent of calling for non-cooperation.<sup>345</sup> In 2016, Kenya received support at an AU meeting for mass state withdrawal from the ICC<sup>346</sup> and some African states like Burundi, South Africa and the Gambia formally announced their intentions to withdraw even if the latter two reversed their withdrawal move.<sup>347</sup> But, these views of African states regarding noncooperation with the ICC are not uniform, and states like Botswana, Nigeria, Cape Verdi and Malawi, have shown discontent with the AU's call for noncooperation.<sup>348</sup>

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<sup>343</sup>Joanna Kyriakakis (PhD), Cited Above at Note 85, P.6

<sup>344</sup>The African Union, „Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Cited Above at Note 162, Art.11. The status list of the protocol, Shows that, Benin, Chad, Congo, Ghana, Sierra Leone, Guinea Bissau, Kenya, Mauritania, Sao Tome and Principe, have signed the Protocol. Democratic Republic of Congo is not signatory to this protocol, (<https://www.au.int/web/sites/default/files/treaties/7804-sl-protocol-on-amendments-to-the-protocol-on-the-statute-of-the-african-court.pdf>), Last visited on August 7, 2017

<sup>345</sup>Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal(1 July 2009, Unpublished, Assembly/AU/Dec. 245(XIII) Rev.1)

<sup>346</sup>Matiangie Sirleaf, “The African Justice Cascade and the Malabo Protocol”, International Journal of Transitional Justice, 2017, vol. 11, P.24. See also, “African Union Members Back Kenyan Plan to Leave ICC”, The Guardian February 2016.

<sup>347</sup>Fletcher Simwaka, “Africa’s Retreat from International Criminal Court Is about Impunity, Not Dignity,” Washington Post, 8 November 2016.

<sup>348</sup>African Union Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, (27 May 2013, unpublished, Assembly/AU/Dec .482(XXI). In this decision Botswana made a reservation, whereas Malawi requires for Monitoring ICC Withdrawals.

Apart from the above mentioned concerns on the future existence of the court, the regionalization of International Criminal Justice System would have its own implication on the viability of the ACJHR to prosecute international crimes (including corporation) committed in Africa generally or particularly those in DRC. Regional approach to International Criminal Law violations would be useful since it considers the reality of regional conflicts, and prosecution could examine all aspects of criminality.<sup>349</sup> First, the creation of the ACJHR International Criminal Law section may allow the ICC to concentrate on the most severe situations and thereby fill the justice gap.<sup>350</sup> Second, the court may better respond to International Criminal Law violations because it will have an ability to develop more familiar systems of redress.<sup>351</sup>

Although the ICC has similar provisions on compensation and reparation, the ACJHR may be better placed to fashion remedies that resonate such as communal reparations.<sup>352</sup> Third, prosecution of international crimes by the ACJHR may promote norms of International Criminal Law.<sup>353</sup> It may also serve as a resource and help hybrid courts and domestic prosecutions by providing jurisprudential guidelines.<sup>354</sup> Furthermore, the introduction of corporate criminal liability under the court's jurisdiction may also push the scope of applicability of International Criminal Law and contribute to the development of the jurisprudence on corporate criminal responsibility.

However, the jurisdiction of the court over international crimes including those perpetrated by Corporations in DRC may face a challenge attributable to lack of political will and resource constraints.<sup>355</sup> The judicial capacity of the court is also questionable.<sup>356</sup> The combination of the civil and criminal division under the ACJHR may also result in the ineffectiveness of the court to deal with complex international crimes perpetrated by individuals and Corporations.<sup>357</sup> Above all, the coming in to operation of ACJHR cannot adequately fill the impunity gap with respect to DRC,

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<sup>349</sup>Matiangie Sirleaf, Cited Above at Note 341, P. 28

<sup>350</sup>Id., P. 29

<sup>351</sup>Id., P.31

<sup>352</sup>Id., P.32

<sup>353</sup>Id., P. 33

<sup>354</sup>Ibid.

<sup>355</sup>Joanna Kyriakakis(PhD), Cited Above at Note 85, P.227

<sup>356</sup>Max du Plessis, Implications of the AU decision to give the African Court Jurisdiction over International Crimes (2012, Unpublished, Institute for Security Studies, Paper No. 235) P. 6.

<sup>357</sup>Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges", European Journal of international law, vol.24, No.3, (2013), p 944, See also, Article 16 of the Malabo protocol.

because the court's jurisdiction only applies with respect to crimes committed after the entry into force of the protocol.<sup>358</sup>

#### **4.10 Assessing the future Prosecution of Complicit Corporation in DRC before the International Criminal Court**

When the ICC was established, states considered whether it should have jurisdiction over legal persons or not.<sup>359</sup> The proposed draft articles envisaged ICC's competence over Corporations whose objective is seeking profit by committing or being complicit in international crimes.<sup>360</sup> But, the proposal was dropped on the basis that, it would shift the focus of the ICC away from individual criminal liability and, there is not yet a common international standard for corporate liability.<sup>361</sup> Furthermore, it was argued that, there were numerous state concerns that would not be resolved in the time available.<sup>362</sup> As a result, the ICC has *jurisdiction racione personae* limited to natural persons.<sup>363</sup>

Despite the failure of the proposal, the call for International Criminal Court with competence over Corporations has continued.<sup>364</sup> The case is most often made to expand the jurisdiction of the ICC, given its existing institutional framework, broad geographical coverage, and future-oriented mandate.<sup>365</sup> Moreover, there are scholars who argue that the „debate is perhaps no longer whether to have corporate liability but what form it should take“.<sup>366</sup> The development of domestic criminal laws imposing criminal responsibility over Corporations has also been substantial in enriching the concept at the international level.<sup>367</sup> To this end, the International Commission of Jurists (ICJ) Expert Legal Panel on Corporate Complicity in International Crimes claims in its report that corporate liability should be included in the ICC jurisdiction, since domestic law proves that all

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<sup>358</sup>The African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Cited Above at Note 162, Art.11 cum. 28

<sup>359</sup>Joanna Kyriakakis (PhD), Cited Above at Note 85, P.222

<sup>360</sup>Working Paper on Article 23 of the Rome Statute, (3 July 1998, UN Doc. A/CONF.183/C.1/WGPP/L.5/Rev.2)Para. 5 and 6

<sup>361</sup>Wayne Bruce W , “Imposing of Criminal liability on Corporations in International Criminal Law” , Journal of International Criminal Justice, , vol.8, (2010), P.917

<sup>362</sup>Joanna Kyriakakis(PhD), Cited Above at Note 85, P.223

<sup>363</sup>The ICC Rome Statute, Cited Above at Note 27, Art. 25

<sup>364</sup>Joanna Kyriakakis(PhD), Cited Above at Note 85, P.1- 221

<sup>365</sup>Id., P.222

<sup>366</sup>Celia Wells and Juanita Elias, Catching the Conscience of the King: Corporate Players on the International Stage(2005), P.160

<sup>367</sup>Ibid.

legal obstacles can be overcome.<sup>368</sup> Thus, the ICC Statute state Parties should revisit the Rome Statute in order to amend its provisions to include jurisdiction over complicit legal persons, specifically MNCs, and alternatives has been provided as to the manner of amendment.<sup>369</sup>

Therefore, if the statute of the court is amended to accommodate corporate criminal responsibility, the ICC can be taken as the appropriate forum for prosecuting complicit Corporations because of various reasons. First, we have seen that, though the domestic courts may have primary jurisdiction over international crimes, there is lack of legal capacity; and the conflict and weak governance in DRC has resulted in numerous administrative and socio-legal challenges<sup>370</sup>. Moreover, the nature of foreign direct investments made by MNCs in domestic jurisdictions such as DRC can create vested interests in accommodating economic interests which may outweigh the pursuits of prosecuting them.<sup>371</sup> Second, with respect to foreign jurisdiction prosecution, the reality seems to be that given the lagging prosecutions to date, the states where MNCs are headquartered appear disinterested.<sup>372</sup> Third, even if, the ACJHR has incorporated corporate criminal responsibility the above mentioned challenges may create difficulties to prosecute Corporations.

Furthermore, had there been corporate criminal responsibility provision in the Statute of the International Criminal Court, the court's pending trials and investigations over the situation in DRC could have possibly included complicit Corporations in DRC. It has been indicated that, some of the leaders of armed groups in DRC which are now in trial in the ICC, were involved in illicit exploitation of natural resource and illegal trade with Corporations.<sup>373</sup> Thus, the ICC can be a viable organ for trials against the complicity of the Corporations which were alleged to be complicit with the armed leaders such as Bosco Nataganda, and Sylvester Mudacumura.

However, the former Chief Prosecutor of the ICC, Luis Moreno-Ocampo, in reference to the first situation investigated by the ICC in 2003, pertaining to the atrocities committed in the Democratic Republic of the Congo had stated that, "the international crimes appear to be directly linked to the control of resource extraction sites, those who direct mining operations, sell diamonds or gold

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<sup>368</sup>International Commission of Jurists Expert Legal Panel Report, Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes, (2008, Unpublished, ICJ-Geneva), P.56.

<sup>369</sup>Jessie Chella, Cited Above at Note 2, P.155

<sup>370</sup>Ibid.

<sup>371</sup>Id., 154

<sup>372</sup>Ibid.

<sup>373</sup>For further explanation on this point, See, Chapter Three, sub title 3.4

extracted in the conditions could also be authors of the crimes, even if they are based in other countries.”<sup>374</sup> But, let alone charges against Corporations, investigations against corporate officers and directors for their involvement in atrocity crimes in DRC is not made till now.<sup>375</sup> At least the prosecutor should investigate and prosecute corporate officers who participated as an accomplice to the international crimes committed in DRC.

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<sup>374</sup> Louis Moreno-Ocampo (Prosecutor of the ICC), Report of the Prosecutor of the ICC, the Second Assembly of State Parties to the Rome Statute of the International Criminal Court, (Sept. 8, 2003, Unpublished)

<sup>375</sup> Caroline Kaeb, Cited Above at Note 103, P.375

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## CHAPTER FIVE

### CONCLUSION

International crimes are those serious and heinous acts which are considered to be committed against the international community. The elements of the core international crimes are provided under the sources of International Criminal Law such as the Rome Statute of the International Criminal Court, and customary international law. Domestic criminal codes may also provide for what constitutes international crimes. Mostly, the core international crimes like Crime against Humanity, Genocide, and War Crimes have been committed by physical persons either as a primary perpetrator or in a secondary capacity. As a result individual criminal responsibility has been adopted under international or domestic criminal laws.

However, a human being is not the only perpetrator of international crimes. There were/are facts which show the participation of legal persons like Corporations in the commission of these crimes. During the Second World War Corporations in Germany were alleged to be complicit in the atrocities committed by the Nazi. For instance, though the official of the company alone is held responsible, Interessen-Gemeinschaft Farben Industrie AG chemical company, under the Nuremberg trials were alleged to be complicit in the Crime against Humanity committed in Nazi concentration camps.

Currently, upon the expansion of investment and international trade, MNCs operate across different states, especially in conflict affected and weak governance areas in the global south. The profit oriented objective of these Corporations coupled with the security situations of their areas of operation have created a fertile ground for their potential involvement in War Crimes, Crime against Humanity, and Genocide committed by the armed groups in the state concerned.

Likewise, MNCs operating in DRC were alleged to be complicit in a wide range of international crimes committed in the country during the First and Second Congo war as well as in the pending conflict in the Eastern DRC. Various reports of the United Nations as well as researches show that the illegal exploitation of natural resources and the illicit trade thereof is highly linked with the conflict in the DRC. Thus, Corporations so as to solicit their business interest have been involved in illegal exploitation of natural resources and illicit trade by dealing or transacting with criminal

armed groups, or with the leaders of these groups some of whom are being prosecuted before the International Criminal Court. The Corporations especially those in the extractive sector have been complicit in international crimes by supplying arms to either rebel or government forces, through supplying logistics and vehicles, and via payment of taxes to rebel formations and militias.

Despite the existence of corporate involvement in international crimes in DRC or other locations, the concept of corporate criminal responsibility for complicity in international crimes under International Criminal Law or domestically is developing. However, it does not mean that, corporate criminal responsibility is totally absent from the domain of criminal law. The Nuremberg International Military Tribunal Statute provides for the jurisdiction of the tribunal over organizations though it was not practical. Thereafter, though various soft law mechanisms have developed to regulate the actions of MNCs with respect to human rights, the need for corporate criminal responsibility internationally and domestically has increased. This can be demonstrated by the inclusion of the concept in the criminal codes of many states. For instance, Australia, Canada, France, and England have included the concept of corporate criminal responsibility for international crimes. Moreover, though it was dropped in the final version, the draft proposal of the ICC Statute had included the corporate criminal responsibility of Corporations for international crimes. The recent introduction of the concept in the Statute of the African Court of Justice and Human Rights shows the concern for regulating the criminal behavior of Corporations.

The issue of attributing criminal intent (*mens rea*) to Corporations, the lack of international legal personality, and concerns as to the appropriate sanctions against Corporations are among the legal questions which encountered the introduction of corporate criminal responsibility. But, scholars have tried to address these legal questions via alternative approaches. Apart from these legal challenges, the inclusion of corporate criminal responsibility in the International Criminal Courts statutes or domestically can be affected by, the conflict between punishing Corporations and the investment need of developing states, and lack of political commitment. However, these can be compromised by taking the identification model of attributing guilt to corporations as a ground of prosecution and by developing a carefully designed prosecution policy.

In DRC though there are facts which shows the existence of corporate complicity in international crimes committed by the armed groups in the pending conflict, there is an impunity gap resulted from lack of corporate criminal responsibility for complicity in international crimes under

Congolese Criminal Code. Even if, the concept of corporate criminal responsibility is included under the criminal code of DRC, the security situation in the country, the weaknesses of the judiciary, the lack of political commitment, and interference from government would be a barrier for effective prosecution. The unsuccessful attempt in prosecuting Anvil Mining Company for allegations of complicity in the War Crimes committed by the Congolese Military force represents the practical challenges of prosecuting Corporations. Thus, strengthening the independence of the judicial system, and improving the capacity of the domestic courts, in terms of resource, prosecutors and judge's capacity to entertain cases involving international crimes, is vital for an effective prosecution of complicit Corporations. It's in the fulfillment of this background that, prosecution before the domestic jurisdiction would be important in terms of collecting evidence, enforcing a judgment against corporate assets, reducing costs and showing justice to the harmed society.

However, including corporate criminal responsibility for international crimes under DRC's law coupled with selective and careful prosecution thereof, would reduce the exacerbations of conflicts, and strengthen the peace building process. The non-binding and weaker nature of the soft law mechanisms to control Corporations would necessitate existence of strong responsibility mechanism. Furthermore, in terms of creating a deterrence effect and providing a means for victim's compensation, prosecution of Corporations is of a greater importance.

Hence, the researcher has analyzed the actual and prospective prosecution of Corporations at different judicial forums. Of course, had there been corporate criminal responsibility the Congolese court would have a primary jurisdiction over the matter. But, the absence of such laws in DRC may not let the Corporations irresponsible in another state or under international criminal tribunals. Even after the introduction of corporate liability under DRC's criminal code, other courts may assume jurisdiction.

To start with, the draft legislation on the establishment of Specialized Mixed Tribunal for DRC, which was proposed by the government in 2014, empowers the tribunal to prosecute Corporations for international crimes. But, the future existence of this tribunal is dependent up on the political will of the DRC's government, and the availability of resource and support from the international community. It may also face challenges *inter alia* of organizing evidence against complicit Corporations. Despite this, once the proper attribution model (Identification model) is adopted the

Special Mixed Tribunal would be a decisive forum to prosecute complicit Corporations in DRC. Once corporate criminal responsibility is included under the legal system of DRC, Parallel prosecution before the ordinary courts and the future specialized mixed tribunal would serve as a means of filling the impunity gap as to complicit corporations.

Secondly, so to address the problem of MNCs impunity in a comprehensive way the inclusion of corporate criminal responsibility for international crimes under the laws of MNCs home states is important. Likewise, the home states of MNCs as part of their international obligations and based on their own criminal laws should punish complicit Corporations. The challenges which can be faced in terms of establishing jurisdiction and collecting evidences can be solved by cooperation with the government of DRC in the form of bilateral or multilateral treaty.

Third, despite the political contention over its future existence, the Statute of the African Court of Justice and Human Rights (the Malabo protocol) has included corporate criminal responsibility for international crimes by choosing the organizational liability approach. The prosecution of Corporations, at the continental or regional level would be better in terms of expertise and creating a norm respecting International Criminal Law across the continent provided that, the attribution model is reconsidered. Thus, in terms of the advantage it bring in filling the impunity gap of corporation and facilitating the peace building process the DRC's government should sign and ratify the Statute of the Court.

Third, currently though the ICC lacks jurisdiction over complicit corporation, scholars have been insisting for the inclusion of the concept under the Rome Statute, and consider the court as the most appropriate forum to prosecute Corporations involved in international crimes. Hence, the writer of this research also proposes for the inclusion of corporate criminal responsibility under the Rome ICC statute by the adoption of the identification model of attributing criminal guilt. Accordingly, amendments should be made to Article 25(1) of the statute to include Corporations. Adjustment should also be made to the modes of participation in international crimes and instances of corporate complicity in international crimes should be incorporated. However, the principle of complementarity under the Statute should be followed in the prosecution of complicit corporations for international crimes as well.

Moreover with respect to DRC, after referral by the government in 2003, the International Criminal Court has been conducting an investigation and prosecution of the situation in DRC. Accordingly, some of the leaders of armed groups have been prosecuted for War Crimes and Crime against Humanity. Thus, since there are claims which shows the complicity of Corporations over the crimes committed by these leaders, jointly prosecuting the Corporations with the individual perpetrators would be more relevant. But, the inclusion of corporate criminal responsibility under the ICC statute would be time taking and subject to political decision.

Generally, Corporations in the DRC, especially those operating in the extractive industry are alleged to be complicit in the international crimes perpetrated by the armed groups participating in the conflict. Despite this, the absence of corporate criminal liability under the Congolese criminal code, coupled with the omission of the concept from the Rome Statute of the International Criminal Court has resulted in impunity of Corporations.

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