THE COMPLICITY OF MULTINATIONAL CORPORATIONS IN INTERNATIONAL CRIMES: AN EXAMINATION OF PRINCIPLES

A thesis submitted in fulfilment of the requirements for
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Presented by

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CERTIFICATE

This thesis is submitted to Bond University in fulfilment of the requirements for the Doctor of Philosophy degree.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

…….

Jessie Chella

Bond University

For my family

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Gold Coast, Australia

THESIS SUMMARY

This thesis examines issues relating to the complicity of legal persons in international crimes. Specifically, this thesis addresses multinational corporations (hereafter MNCs) that aid and abet international crimes such as crimes against humanity, war crimes, and genocide. This thesis discusses these issues with reference to MNCs in the extractive industries, that is, oil, gas or mining MNCs, that operate within conflict-affected areas or weak-governance zones in Africa.

Currently, international criminal law does not recognise the complicit liability of corporations or any other legal persons. This is of grave concern at a time when business enterprises are increasingly being accused of complicity in international crimes. Models of corporate liability can be found in most domestic jurisdictions, but international jurisdictions have yet to develop instruments that address the issue. Regrettably, the domestic jurisdictions, where these kinds of crimes occur, have not been known to enforce criminal sanctions on culpable persons – whether natural or legal persons. Therefore, these issues should be addressed in international forums where domestic jurisdictions prove inadequate. There is a need for a doctrine of corporate liability in international criminal law to address this issue. Hence, this thesis recommends that the International Criminal Court (hereafter ICC) is the preferred institution to deal with the problem of complicit organisational liability in international crimes. This thesis further recommends that the *ICC Rome Statute* should be revisited by the ICC State Parties in order to develop an appropriate framework of liability which takes into account the characteristic forms of corporate complicity in international crimes.

Chapter 1 of this thesis provides an overview of the extent of the research problem.

Chapter 2 examines whether there should be criminal liability for business complicity in international crimes. Chapter 3 discusses the rationale for corporate criminal liability with respect to corporate complicity in the commission of international crimes in the ongoing exploitation of natural resources in conflict-affected areas or weak-governance zones in Africa. Chapter 4 investigates the jurisdictional forums to deal with the problem of corporate complicity by investigating *where* a corporate entity complicit in international crimes could be prosecuted. This thesis examines existing international, regional, and domestic forums. Chapter 5 commences the discussion on *how* a corporate entity complicit in international crimes could be prosecuted by examining organisational liability doctrine. Chapter 6 continues this discussion by examining complicity doctrine, focusing on liability for aiding and abetting international crimes. Chapter 7 concludes the discussion on *how* to deal with corporate complicity in international crimes; Chapter 7 proposes draft legislation to address the research problem at an international forum such as the ICC. Chapter 8 provides the thesis conclusion.

Thesis keywords: organisational complicity, organisational liability, multinational corporations, legal persons, international crimes, international criminal law, criminal law, human rights law, tort law, extractive industries, conflict-affected areas, weak-governance zones, Africa.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACrtHPR	African Court on Human and Peoples' Rights
APEC	Asian Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATS	Alien Tort Statute
AU	African Union
CCL 10	Control Council Law No. 10
CoE	Council of Europe
Draft Codes	Draft Code of Offences against the Peace and Security of Mankind
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
ECCC Agreement	The Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
EITI	Extractive Industries Transparency Initiative
ECHR	European Court of Human Rights
EU	European Union
GAAT	General Agreement on Tariffs and Trade
Guidelines	OECD Guidelines for Multinational Enterprises
HRIA	Human Rights Impact Assessment
HRW	Human Rights Watch
ICC	International Criminal Court

ICC Rome Statute	Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Italy, 15 June–17 July 1998
IACHR	Inter-American Court of Human Rights
ICJ	International Commission of Jurists
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute for the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Republic of Yugoslavia
ICTY Statute	Statute for the International Criminal Tribunal for the former Yugoslavia
IHT	Iraq High Tribunal (officially known as the Supreme Iraqi Criminal Tribunal)
IHT Statute	Law of the Supreme Iraqi Criminal Tribunal
ILC	International Law Commission
IMT	International Military Tribunal
IMT Charter	Charter for the International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IMTFE Charter	Charter for the International Military Tribunal for the Far East
MCCOC	Model Criminal Code Officers' Committee
Model Penal Code	American Law Institute Proposed Official Draft of the Model Penal Code
MNCs	Multinational corporations
Norms	United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights
NCP	National Contact Point
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
Panels of Judges	Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor

Regulation No. 2000/15	Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor
Rome Conference	Conference of Plenipotentiaries held in Rome from 15 June to 17 July 1998
SCSL	Sierra Leone Special Court
SCSL Statute	Statute of the Special Court for Sierra Leone
UNCTAD	United Nations Conference on Trade and Development
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNDP	United Nations Development Programme
UN	United Nations
UNHRC	United Nations Human Rights Council
UNSRSG	United Nations Special Representative of the Secretary-General on the Issue of Human Rights in Transnational Corporations and other Business Enterprises
UNTAET	United Nations Transitional Administration for East Timor
US	United States
Voluntary Principles	Voluntary Principles on Security and Human Rights
WTO	World Trade Organisation

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STYLISTIC GUIDELINES

The following stylistic guidelines have been used in writing this thesis:

- The referencing style of the Australian Guide to Legal Citation (3rd edition) has been adopted.
- Australian English Language spellings have been used unless the primary or secondary sources relied upon other spellings. For example: offen*c*e not offen*s*e; organisation not organization; and conceptualise not conceptualize.
- The word 'Judgment' is deliberately capitalised in this thesis to comply with the way in which the *ad hoc* Tribunals use the word.
- Different spellings are used for the word 'Judgment' to reflect the practices of the institutions under discussion. In the *majority* of instances:
    - The ICTY uses 'Judgment';
    - The ICTR uses 'Judgement';
    - The ICC and the Panels of Judges use both spellings.
- The phrase 'international institutions' is used to collectively describe judicial bodies such as: Panels of Judges, Extraordinary Chambers, Special Courts, and Special Tribunals. Granted, the Iraq High Tribunal and the Sierra Leone Special Court are hybrid institutions in that they largely blend international and domestic criminal law in their legal instruments; however, for ease of reference, the collective phrase 'international institutions' will be applied throughout this thesis.
- The term 'international legal instruments' is used when referring to the legal documents pertaining to international institutions. The *ICC Rome Statute* is an international treaty; however, it is described as an international legal instrument for ease of reference when collectively discussing all the documents pertaining to the international institutions.