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Human Rights Violations and Corporate Criminal Liability: An Analysis of the New Indonesian Criminal Law

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Article	Abstract
<p>Keywords: Corporate Criminal Liability; Criminal Complicity; Gross Human Rights Violations; International Human Rights; International Criminal Law.</p> <p>Article History Received: Mar 21, 2024; Reviewed: Jul 6, 2024; Accepted: Jul 30, 2024; Published: Jul 31, 2024.</p> <p>DOI: 10.28946/slrev.Vol8.Iss2.3687.pp230-248</p>	<p>In light of the increasing role of corporations in facilitating gross human rights violations, this article seeks to evaluate the implementation of the Indonesian Criminal Law in addressing corporate criminal liability. Notably, the recently amended Indonesian Criminal Law recognizes corporations as subjects of criminal law, but Law No. 26 of 2000, which regulates gross human rights violations, does not. Consequently, this research specifically scrutinizes the Indonesian Criminal Code, Law No. 26 of 2000, and international legal standards to answer the issues: rules of aiding and abetting under international criminal law and the applicability of corporate culture theory, and the implementation of Indonesian Criminal Law in addressing corporate criminal liability for gross human rights violations. Examining these issues relies on three methodologies, namely the statutory approach, conceptual approach, and case approach. The results of this article uncover that the recognition of corporations as subjects under the new Indonesian Criminal Code and rectification of the <i>ratione materiae</i> of Law No. 26 of 2000 open the avenue for corporations to be held criminally liable for gross human rights violations based on aiding and abetting. Furthermore, the theory of corporate culture envisaged in the new Indonesian Criminal Code renders the plausibility of holding corporations liable if they are deemed to cultivate a culture that pushes or encourages a gross human rights violation.</p>

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INTRODUCTION

The issue of corporate criminal liability is a subject of intense debate, generating varying approaches. Some States have rendered it possible for corporations to be held liable based on the 'identification approach', while others depend on the 'organisational approach'. Although this sufficiently provides a solution for legal practitioners to address criminal liability for most crimes, the potential of ensuring corporate liability for gross human rights violations remains ambiguous, primarily because such crimes are usually linked with individual perpetrators rather

than corporations. The Rome Statute of the International Criminal Court, for instance, regulates individual criminal liability for gross human rights violations,¹ when in reality, companies have a similar capability to commit such crimes. In fact, some are found to have systematically and repeatedly executed destructive criminal acts intended to maximise profits.²

The transition of corporations into multinational enterprises has opened the door for their involvement in countries where foreign subsidiaries are established. Businesses are not far from acts of lobbying with state governments or even armed groups to ensure that their operations are not impeded. A report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes identified that companies have deliberately facilitated governments, armed groups, or others to commit gross human rights abuses by providing them money, weapons, vehicles, and air support, in exchange for concessions and security.³ These are then utilised by government or armed rebel groups to execute attacks on civilians.⁴ Recognizing the capacity of corporations to commit such crimes and inflict social harm, it is possible to hold them criminally liable.

Several cases have illustrated the influence that corporations have in the execution of war crimes or crimes against humanity. In the case of Lundin Energy, for instance, the Swedish company is currently facing charges of complicity in the war crimes in Sudan relating to an agreement it made with the Sudanese Government in 1997. The agreement permitted the corporation to explore and produce oil in southern Sudan.⁵ However, the area where it operated was impacted by the civil war. Subsequently, Lundin Energy demanded that its exploration zone be secured by the Sudanese regime forces, even though the military and militia were conducting gross violations of international humanitarian law.

On-going cases such as the conflict between Palestine and Israel further illustrate the need to address the corporate criminal liability of corporations for gross human rights violations. In the context of the Palestine-Israel conflict, companies are reported to have sent funds and/or facilitated the operations of the Israeli forces.⁶ For instance, in 2009-2010, Lima Holding BV were brought to the court for its alleged complicity in war crimes in Israel by providing machinery and services, which facilitated the construction of the annexation wall and Israeli settlements in the Occupied Palestinian Territory.⁷

In Indonesia, the participation of corporations in human rights violations is a pertinent issue. The most notable case would be ExxonMobil's hiring of soldiers who committed human

¹ "Rome Statute of the International Criminal Court" (1998).

² James R. Elkins, "Corporations and the Criminal Law: An Uneasy Alliance," *Kentucky Law Journal* 65, no. 1 (1976): 74.

³ Danielle Olson, "Corporate Complicity in Human Rights Violations Under International Criminal Law," *DePaul International Human Rights Law Journal* 1, no. 1 (2015): 2.

⁴ International Commission of Jurists, "Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes," 2008.

⁵ Fauve Kurnadi and Jonathan Kolieb, "The Importance of the Laws of War to Companies," Australian Red Cross, accessed February 1, 2024, redcross.org.au/stories/ihl/the-importance-of-the-laws-of-war-to-companies/.

⁶ AFSC, "The Companies Profiting from Israel's 2023-2024 Attacks on Gaza," accessed February 1, 2024, <https://afsc.org/companies-2023-attack-gaza>.

⁷ Al-Haq, "Prosecutor Dismisses War Crimes Case against Riwal," accessed February 1, 2024, <https://www.alhaq.org/advocacy/6753.html>.

rights abuses, from murder to torture.⁸ The company's involvement was highlighted by its payment of over US\$500.000 to the Indonesian National Armed Forces, which were tasked with protecting their business operations at that time.⁹ In addition to this, a state-owned company producing armed weapons was recently suspected to have provided arms to Myanmar's military junta, whose acts have been described to amount to genocide and crimes against humanity.¹⁰ In 2023, a group of activists filed a complaint to the Indonesian National Human Rights Commission, alleging that three state-owned arms makers had been selling equipment to Myanmar since the coup.¹¹ While these companies have affirmed that they have never been in contact with nor sold their arms to Myanmar, such an event raises questions on how criminal responsibility could be addressed if an Indonesian corporation is discovered to have provided arms or any form of assistance to a group or government who is deemed to be the main perpetrator of a gross human rights violation.

Corporation involvement in gross human rights violations is often described as complicity or aiding and abetting. Although they are not direct perpetrators, a corporation could be held accountable for knowing that its assistance and encouragement have a substantial effect on the commission of the crime.¹² This, however, should not eliminate the possibility of corporations' involvement outside of aiding and abetting. The theory of corporate culture responds to this concern. It enforces the idea that corporations shall be held liable as they are deemed to cultivate a culture that pushes or tolerates a criminal act or is recognized to have failed to foster a culture that could prevent the commission of a crime. By implementing these two concepts, it becomes possible for corporations to be held liable for gross human rights violations.

Implementing these gross human rights violations concepts is inseparable from the recently revised Indonesian Criminal Code, Law No. 1 of 2023. Both aiding and abetting and the corporate culture theory are essentially reflected in the new Indonesian Criminal Code. On top of that, the new Indonesian Criminal Code has amended several provisions under Law No. 26 of 2000 on Ad Hoc Human Rights Court, specifically Articles 8 and 9, which respectively regulate genocide and crimes against humanity. In connection with this, as the new Indonesian Criminal Code acknowledges corporations as subjects of criminal law,¹³ it entails whether the new Indonesian Criminal Code could be used to prosecute corporations for their involvement in gross human rights violations. Finding the answer to this question is pivotal to ensuring that Indonesia possesses a robust legal framework when responding to corporate involvement in gross human rights violations.

⁸ Al Jazeera, "Oil Giant ExxonMobil Settles Long-Running Indonesia Torture Case," accessed February 1, 2024, <https://www.aljazeera.com/news/2023/5/16/oil-giant-exxonmobil-settles-long-running-indonesia-torture-case>.

⁹ Ainal Zahra Nabila and Lena Farsia, "Corporate Social Responsibility (CSR) for the Remedy of Affected People in Crimes Against Humanity Case in North Aceh Indonesia," *Student Journal of International Law* 2, no. 1 (2022): 15.

¹⁰ Kate Lamb and Ananda Teresi, "Activists Say Indonesian State Weapons Makers Supplying Myanmar," Reuters, accessed February 1, 2024, www.reuters.com/world/asia-pacific/activists-say-indonesian-state-weapons-makers-supplying-myanmar-2023-10-03/.

¹¹ Lamb and Teresi.

¹² Commentary of Principle, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Rem-Edy' Framework," 2011.

¹³ "The Law No. 1 of 2023 on Criminal Code" (2023).

The proliferation of corporations involved in gross human rights violations in the international community serves as a wake-up call for Indonesia. Its law must be ready for increased involvement amongst corporations in assisting the commission of crimes or engendering a culture that fails to recognize its extent and role in preventing the tolerance of a gross human rights violation. With this in mind, this paper aims to assess how the Indonesian Criminal Law addresses such an issue. Given that genocide and crimes against humanity are classified as international crimes, this paper will first assess the rules of aiding and abetting under international criminal law. The exploration of corporate culture theory will follow. Lastly, it will evaluate how the Indonesian Criminal Law, particularly its new Criminal Code, could be implemented to address corporate criminal liability for gross human rights violations.

RESEARCH METHODS

This legal research is normative. It does not utilise a quantitative approach and adopts a qualitative method instead. The three research methods that are primarily implemented are 1) statute approach, 2) conceptual approach, and 3) case approach. This article will depend on statutory laws, namely the Indonesian Criminal Code, including Law No. 1 of 2023 and Law No. 26 of 2000. To provide a greater understanding on the concept of aiding and abetting, this research extracts interpretation and elaboration stipulated in international case laws, specifically those adjudicated in the International Criminal Court and Ad Hoc International Criminal Tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It then assesses Indonesian law by examining how corporate criminal liability is regulated. In supporting and enriching its analysis of aiding and abetting, this paper relies on literature study, with books and journal articles used. Subsequently, this paper uses these findings to extend its analysis by comparing the standards of aiding and abetting under the Indonesian Criminal Law with those upheld in international criminal tribunals. Additionally, to comprehend other relevant legal concepts, particularly the corporate culture theory, this paper studies journal articles explaining the implementation of such a theory in Indonesian Criminal Law.

ANALYSIS AND DISCUSSION

Aiding and Abetting

The concept of aiding and abetting, also known as ‘accomplice liability’, refers to the provision of assistance that leads to the physical perpetration of a crime.¹⁴ While aiding and abetting does not hold the party responsible as a principal perpetrator, it does not, in any event, diminish its legal responsibility.¹⁵ Those who aid and abet the commission of a crime must still be held accountable, but the threshold to establish their liability is evidently lower. For instance, a company can be held criminally liable for aiding and abetting a crime against humanity by providing funds or trucks that are subsequently used by the principal perpetrator to carry out its attack.¹⁶

As mentioned above, statutes of international criminal courts have limited their jurisdictions to only individuals. As such, the current standards of *actus reus* and *mens rea*

¹⁴ “International Commission of Jurists” (n.d.).

¹⁵ International Commission of Jurists.

¹⁶ International Commission of Jurists.

under the mode of aiding and abetting are constructed with individual criminal responsibility in mind. However, this shall not erase the opportunity for the standards of aiding and abetting under international criminal law to be used against corporations.

Actus Reus

In the Rome Statute, aiding and abetting is envisaged in Article 25(3)(c), which emphasizes the Court's jurisdiction to hold an individual criminally responsible and liable for facilitating the commission of a crime through aiding, abetting, or otherwise assisting in the commission or attempted commission of a crime. The Pre-Trial Chamber in the *Blé Goudé* case stated that the main *actus reus* requirement of Article 25(3)(c) is that there exists the provision of assistance to the commission of the crime.¹⁷ Although several ICC decisions have utilised the concept of 'causality', it does not indicate that the assessor should directly cause the commission of the crime but rather refers to its contribution to the act and the aid having an effect on it.¹⁸

Case laws of *ad hoc* international criminal tribunals further provide comprehensive guidance in dissecting the *actus reus* of aiding and abetting. The International Criminal Tribunal of Yugoslavia (hereinafter, 'ICTY') acknowledges aiding and abetting in Article 7 paragraph (1) of the ICTY Statute. In the Appeal Judgment of the *Radoslav Brdanin* case,¹⁹ the Tribunal emphasized that an individual can be convicted for aiding and abetting a crime as long as it can be evidenced that the '...conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.'²⁰ The elements of tacit approval and encouragement can be inferred from the mere non-interference of the accused.²¹

Moreover, in elucidating the *actus reus* of aiding and abetting, the Appeals Chamber in the *Blaškić* case²² cited the *Vasiljević* judgment, which provides that 'the aider and abettor carry out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime...'²³ In addition to this, the standard of aiding and abetting is further set out in the case of *Furundžija*,²⁴ wherein the Tribunal defined its *actus reus* as '*practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime*'.²⁵

The Trial Chamber in the *Blaškić* case then affirmed that a cause-effect relationship is not required in proving the conduct of the aider and abettor.²⁶ In other words, it is unnecessary to prove that the crime would only have occurred with the assistance. It is nonetheless required to prove that such assistance *substantially contributed* to the commission of the crime. While

¹⁷ ICC, "The Prosecutor v. Charles Blé Goudé," Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 2014.

¹⁸ Marina Aksenova, "Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen," *Washington International Law Journal* 30, no. 2 (2021): 262.

¹⁹ Radoslav Brdanin, "Case No. IT-99-36-A, Appeals Chamber, Judgment," ICTY, 2007.

²⁰ Brdanin.

²¹ Brdanin.

²² Tihomir Blaškić, "Case No. IT-95-14-A, Appeals Chamber, Judgment," ICTY, 2004.

²³ Blaškić.

²⁴ Anto Furundžija, "Case No. IT-95-17/1-T, Trial Chamber, Judgment," ICTY, 1998.

²⁵ Furundžija.

²⁶ Blaškić, "Case No. IT-95-14-A, Appeals Chamber, Judgment."

there is no clear standard defining ‘substantial effect’, a perpetrator would fulfil such an element as long as the assistance facilitated the commission of the crime.²⁷

To further exemplify the element of ‘substantial effect’, the International Commission of Jurists presents several possible instances of aiding and abetting that may be particularly apposite when the aider and abettor is a company. They include, *inter alia*, providing goods or services utilised in the commission of crimes, providing information that is useful for the commission of the crime, and providing banking facilities that allow the proceeds of crimes to be deposited.²⁸ Remembering that tacit approval and encouragement are sufficient, it can be further inferred that the standard of substantial effect is relatively low.

Additionally, no specific direction is needed to establish aiding and abetting. This was affirmed in the case of *Prosecutor v. Nikola Sainovic*,²⁹ in which the Appeals Chamber observed that customary international law only requires proof of practical assistance, encouragement, or moral support which has a substantial effect.³⁰ It subsequently cited the *Zyklon B* case, adjudicated before a British military court, which examined whether three members of a private firm that supplied poison gas named Zkylon B were guilty of aiding and abetting in the extermination of allied nationals interned in concentration camps.³¹ In regard to the *actus reus* of aiding and abetting, the British Court only considered i) ‘whether allied nationals had been gassed by means of Zyklon’ and ii) ‘whether this gas had been supplied by the firm,’³² hence providing that the provision of assistance by the firm was enough without having to dig further into whether the defendants had specifically directed the gas supply about the commission of the crime.

Ad hoc international criminal tribunals acknowledged the possibility of aiding and abetting by omission but refused to explain further. In *Mrskic and Sljivancanin*, the Appeal Chamber emphasized that aiding and abetting by omission requires that ‘the accused had the ability to act but failed to do so.’ The Trial Chamber of the ICTR in the *Muvunyi* case asserted that liability for aiding and abetting may arise from omission when there is an ‘approving spectator’, inferring to ‘a person in a position of authority is present at the scene of the crime or within the immediate vicinity, under circumstances where his presence leads the perpetrators to believe that he approved, encouraged, or was giving moral support to their actions.’³³ Applying aiding and abetting by omission in the context of corporations would be particularly apposite if the company officials with authority to prevent, stop, or mitigate a crime were present when the corporation, located in the vicinity of where the crimes against humanity or genocide occurred, or even remotely, concluded a decision that could facilitate the commission of a crime. The International Commission of Jurists uses an example of an event where company officials with authority to prevent, stop, or mitigate a crime were present when the corporation, located in the vicinity of where the crimes against humanity or genocide occurred, concluded a decision that

²⁷ International Commission of Jurists.

²⁸ International Commission of Jurists.

²⁹ Nikola Sainovic, “Case No. IT-05-87-A, Appeals Chamber, Judgment,” ICTY, 2014.

³⁰ Sainovic.

³¹ Sainovic.

³² Sainovic.

³³ Tharcisse Muvunyi, “Case No. ICTR-2000-55A-T, Trial Chamber II, Judgment,” ICTR, 2006.

could facilitate the commission of a crime.³⁴ Unfortunately, the number of precedents in *ad hoc* international criminal tribunals that assess aiding and abetting by omission is lacking, which can only sufficiently highlight the importance of assessing whether the assistance given substantially affected the commission of the crime.

However, the approving spectator approach has garnered several criticisms due to its incoherence regarding its classification as an omission.³⁵ The Appeals Chamber in the *Brdanin Radoslav* case tried to distinguish the elements of ‘tacit approval and encouragement’ from omission. It asserted that the conviction for aiding and abetting based on tacit approval and encouragement of a crime does not strictly indicate criminal responsibility for omission.³⁶ In fact, the key to establishing aiding and abetting pursuant to tacit approval and encouragement is the physical presence of the aider and abettor at or near the scene of the crime, but it can also be fulfilled remotely.³⁷

The precedents of *ad hoc* international criminal tribunals subsequently show the tendency to connect the concept of omission with the failure to execute a legal duty and the requirement for an elevated degree of ‘concrete influence’.³⁸ Omission due to the inability to fulfil a legal duty is best explained by the failure of a superior to stop the commission of crimes conducted by his subordinate. It, therefore, would be erroneous to use the approving spectator approach or ‘tacit approval and encouragement’ within the premise of aiding and abetting by omission. Hence, when applying this to corporations, demonstrating that the corporation concerned possesses the power to stop or influence the commission of a crime is indispensable.

Mens Rea

While corporations are legal subjects known to possess no mind to determine their actions, the *mens rea* element remains pivotal in establishing corporate criminal liability, especially when the identification theory is enforced. As such, a theory emphasizes that a corporation's actions reflect the decisions of the parties managing it, and their *mens rea* unequivocally reflects its mental element. The same approach is evidently applied within the context of Indonesian law as it is further supported by the construction of Article 46 of Law No. 1 of 2023, which clearly accentuates that what is meant by the phrase ‘criminal acts by corporations’ essentially refers to the actions taken by those holding a functional position in the corporation or those acting on behalf of the corporations. Consequently, the *mens rea* of the corporation must still be analysed.

Regarding the *mens rea* of aiding and abetting, it shall be determined whether mere knowledge, rather than purpose, is sufficient to establish the mental element. The threshold of knowledge is certainly lower than the purpose. With the former as a basis to establish the *mens rea* of aiding and abetting, it would be sufficient to assess whether a corporation had known or had information indicating that its assistance would facilitate the commission of crime. On the other hand, if purpose is a prerequisite to prove that the *mens rea* of aiding and abetting has been satisfied, the intent of the accused to facilitate the commission of crime is necessary.

³⁴ International Commission of Jurists.

³⁵ Jessie Ingle, “Aiding and Abetting by Omission before the International Criminal Tribunals,” JICJ 14, n.d.

³⁶ Brdanin, “Case No. IT-99-36-A, Appeals Chamber, Judgment.”

³⁷ Lukić, “Case No. IT-98-32/1-A, Appeal Chamber, Judgment,” ICTY, n.d.

³⁸ Mrkšić and Šljivančanin, “Case No. IT-95-13/1-A, Appeal Chamber, Judgment,” 2009.

Precedents in *ad hoc* international criminal tribunals reflect adopting a knowledge test. The ICTY in the *Vasiljević* judgment states that '...in the case of aiding and abetting, the requisite mental element is the *knowledge* that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal.'³⁹ Subsequently, preference for the knowledge test is further affirmed in the *Furundžija* case, in which the ICTY Trial Chamber asserted that the *mens rea* is contingent on 'the knowledge that these acts assist in the commission of the offence.'⁴⁰

On the other hand, the parlance of Article 25(3)(c) of the Rome Statute insinuates that it employs the purpose test as it stipulates 'for the *purpose* of facilitating the commission of such a crime, aid abets, or otherwise assists...' Following such wording, the ICC Pre-Trial Chamber in the *Blé Goudé* case confirmed that the accused must *intend* to facilitate the commission of the crime. Furthermore, in the case of *Mbarushimana*, the Pre-Trial Chamber affirmed the difference between the ICC and jurisprudence of the *ad hoc* tribunals as the former requires purpose to facilitate the crime, hence making knowledge insufficient.⁴¹ The precise definition of 'purpose' remains unclear due to the limited cases in the ICC concerning aiding and abetting.⁴² In *Bemba*, however, the Court uttered that 'the accessory must have lent his or her assistance to facilitate the aim.' Knowledge that his or her conduct would assist in committing a crime is needed.⁴³ Therefore, the ICC sets a higher bar than the knowledge test.

However, the contrasting standard provided in the Rome Statute of the ICC can be challenged by the fact that the knowledge test reflected in the case law of the ICTY, ICTR, and the ILC Draft Code has garnered the status of customary international law.⁴⁴ The distinct approach taken by the ICC should not be viewed as an evolution of custom but rather as a departure from custom, tailoring the *mens rea* standard with its role as an international court of last resort.⁴⁵

Corporate Culture Theory

Although the separate legal entity principle binds corporations, corporate criminal liability has been made possible for several reasons, mainly in line with deterrence. With the increasing number of crimes committed by corporations, the plausibility of holding them as subjects recognized under criminal law may deter and prevent other corporations from conducting the same crimes.⁴⁶ In addition, the difficulty in identifying the guilty individual due to a corporation's complex structure further necessitates criminal corporate liability.⁴⁷ Rather than

³⁹ Blaškić, "Case No. IT-95-14-A, Appeals Chamber, Judgment."

⁴⁰ Furundžija, "Case No. IT-95-17/1-T, Trial Chamber, Judgment."

⁴¹ Callixte Mbarushimana, "Case No. ICC-01/04-01/10, Pre-Trial Chamber I, Decision on the Confirmation of Charges," ICC, 2011.

⁴² Oona A. Hathaway et al., "Aiding and Abetting in International Criminal Law," *Cornell Law Review* 104, no. 6 (2019): 1616.

⁴³ Bemba, "Case No. ICC-01/05-01/08-3343, Trial Chamber III, Judgment Pursuant to Article 74 of the Statute," ICC, n.d.

⁴⁴ Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts," *Northwestern Journal of International Human Rights* 6, no. 2 (2008): 310.

⁴⁵ Hathaway et al., "Aiding and Abetting in International Criminal Law."

⁴⁶ Bruce Coleman, "Is Corporate Criminal Liability Really Necessary," *SMU Law Review* 29, no. 4 (1975): 919.

⁴⁷ Coleman.

identifying the guilty officer behind the act, it would be easier and more efficient to hold the corporation liable instead.⁴⁸

However, several obstacles impede the acknowledgement of corporations as subjects to be held liable. First, traditionally, corporations are deemed to lack a soul and mentality.⁴⁹ In contrast to individuals, legal entities cannot act alone and must require the participation of someone. For corporations to be held liable, the actions of the individual acting on their behalf must be imputed to them.⁵⁰ The second obstacle relates to the prerequisite of a mental element or intent. Lastly, regarding the separate legal personality and *ultra vires* principles, whether the actions are binding to the corporation or fall outside of its scope of operations must be determined.⁵¹

Given such barriers, utilising either the identification or organisational approach makes addressing the attribution of actions, intent, and negligence of corporations possible.⁵² According to the identification theory, the actions and intentions of corporate officers holding managerial or 'senior' positions in a corporation are recognized as the corporation's directing minds.⁵³ With this, the corporation is directly liable for the crime it committed.

On the other hand, the organisational approach recognizes that the crime may have resulted from collective failures, such as a lack of communication or poor organization.⁵⁴ Australia, for instance, employs this approach as it examines fault by looking into the corporate culture and whether it “directed, encouraged, tolerated, or led to non-compliance with the relevant provision... proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.”⁵⁵ Corporate criminal liability based on corporate culture is fundamentally intended to encourage corporations to improve internal controls, as failure to do so would precipitate an increase in prosecution.⁵⁶ Its emphasis on corporate management, control or supervision is further seen when regulating negligence, in which it considers 'a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.’⁵⁷

⁴⁸ Coleman.

⁴⁹ Randikha Prabu Raharja Sasmita, Sigid Suseno, and Patris Yusrian Jaya, “The Concept of Reasons for Eliminating Corporate Criminal Law in Indonesia,” *Heliyon* 9, no. 1 (2023), <https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e21602>.

⁵⁰ V. S. Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?,” *Discussion Paper No. 169 Harvard Law School*: 9., n.d.

⁵¹ Khanna.

⁵² Jennifer Zerk, “Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies,” Office of the UN High Commissioner for Human Rights, 2012.

⁵³ Gerry Ferguson and ICCLR, “Corruption and Corporate Criminal Liability,” accessed February 1, 2024, <https://icclr.org/wp-content/uploads/2019/06/FergusonG.pdf?x21689>.

⁵⁴ Jennifer Zerk, “Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies.”

⁵⁵ “Australian Criminal Code Act,” Division 12, section 12.3. § (n.d.).

⁵⁶ Allens Arthur Robinson, “Corporate Culture’ As A Basis for the Criminal Liability of Corporations,” Business & Human Rights Resource Centre, n.d.

⁵⁷ Australian Criminal Code Act.

Theoretically, the corporate culture theory surrounds the idea that a corporation could still be held accountable if it indirectly allows or cannot prevent the commission of a crime.⁵⁸ It focuses on the existence of explicit and implicit corporate policies that influence the operations of a corporation.⁵⁹ In essence, 'corporate culture' refers to attitudes, policies, rules, course of conduct or practices generally embedded within the corporation or within the area of the corporation wherein the relevant activities occur.⁶⁰ It reflects the acts and policies of the company rather than individual choices, hence strengthening the decision to prosecute the corporation as a whole instead of just certain individuals or officers. Considering the characteristics of corporate culture, the theory becomes effective when it can be proven that the culture upheld in the corporation opens the opportunity for the commission of crime.

Corporate Criminal Liability Under Indonesian Law

Under Article 45 paragraph (2) of Law No. 1 of 2023, the scope of 'corporations' includes limited liability companies, foundations, cooperatives, State-owned companies, Region-owned companies, or anything that can be equated with these, such as firms, CV, or partnerships that are legal entities or non-legal entities. Moreover, Article 46 of Law No. 1 of 2023 defines the element of 'Criminal Acts by Corporations' as criminal actions conducted by those who possess a functional position in the corporation's organisational structure or those that act on behalf of the name of the corporation or for the interests of the corporations. The latter's relationship, in particular, arises from a work agreement or other relationship. Despite its adoption of the identification theory, examining the degree of control may remain relevant when addressing a criminal act executed individually or collectively. This is extended in Article 47 of Law No. 1 of 2023, acknowledging the plausibility that Criminal Acts by Corporations are done by those outside of the corporate structure, such as instructors, controllers, or beneficial owners.

It is nonetheless important to note that Law No. 1 of 2023 is determined to take effect in 3 years, namely in 2026. Laws still bind crimes that have taken place during such a given year before the enactment of Law No. 1 of 2023. In the scope of corporate criminal liability, it is thus essential to look into the current implementation of Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations (hereinafter, 'SC Regulation No. 13/2016'). Several of its provisions are now embodied in Law No. 1 of 2023, particularly concerning the definition of 'Criminal Acts by Corporations', while some additions and changes have also been made. For instance, Article 4 paragraph (2) of SC Regulation No. 13 of 2016 provides that a corporation can be held criminally responsible when: 1) it obtains profits or benefits from the criminal act or when such an act is executed for its interests; 2) it allows the criminal act to be committed; *or* 3) it does not take concrete steps needed to prevent, avert impacts, and ensure compliance towards the relevant laws to hinder the criminal act from being committed. Article 48 of Law No. 1 of 2023 changes this provision, except for the second and third points, allowing corporations also to be criminally responsible when: 1) the

⁵⁸ Budi Suhariyanto, "Corporate Criminal Liability Based on Corporate Culture Model and Implications for Welfare of Community," *Jurnal RechtsVinding* 6, no. 3 (2017): 454.

⁵⁹ Suhariyanto.

⁶⁰ Herlin Manullang and Riki Yanto Pasabiru, "*Pertanggungjawaban Pidana Korporasi*," (LPPM UHN Press, 2022).

criminal act is a part of the business operation or its activity as specified in its Articles of Association or other regulations that bind the corporation; 2) the criminal act benefits the corporation based on an unlawful act; 3) the criminal act is accepted as the corporation's policy. Furthermore, while Article 4 paragraph (2) of SC Regulation No. 13 of 2016 uses the term 'or', signifying its disjunctive nature, Article 48 of Law No. 1 of 2023 utilises 'and/or', allowing the plausibility that the elements are fulfilled cumulatively. The Elucidation of Article 48 of Law No. 1 of 2023 also clarifies that the prosecution for a commission of crime done by and for a corporation can be imposed on the corporation alone or the corporation and its management, or solely the management.

Along with SC Regulation No. 13 of 2016, another relevant legal basis that addresses corporate criminal liability is the Regulation of the Attorney General of the Republic of Indonesia Number: Per-028/A/JA/10/2015 concerning Guidelines for Handling Criminal Cases with Corporate Legal Subjects (hereinafter, Perja 28/2014).⁶¹ Similar to SC Regulation No. 13 of 2016, Perja 28/2014 regulates corporate criminal responsibility in a general sense and addresses more about the procedural aspects. Greater discretion is still given to legislations above these regulations that acknowledge corporations as subjects of criminal law. Whilst the current Indonesian Criminal Code (hereinafter KUHP) does not recognize corporations, it does not make it entirely inapplicable. Article 103 of the KUHP allows its first book to apply for crimes regulated in special laws unless otherwise determined. These special laws include, among others, the Law No. 31 of 1999 on Anti-Corruption Law (hereinafter Anti-Corruption Law) as well as Law No. 32 of 2009 on Environmental Law (hereinafter Environmental Law), both regulating specific sets of crimes and explicitly stipulating that corporations can be held liable. For further context, the Anti-Corruption Law recognizes that corporations and/or their supervisors could be held criminally liable for corruption. To provide greater clarity, Article 20, paragraph (2) of the Anti-Corruption Law affirms that corruption by a corporation occurs when it is carried out by individuals based on employment or based on another relation who act within the environment of the corporation alone and together. Similarly, Article 116 paragraph (1) of the Environmental Law explicitly states that corporations could face criminal liability if the crimes are conducted on behalf of the corporation.

Although the KUHP does not acknowledge corporations, its first book remains applicable in conjunction with special laws that do recognize corporations. This has been reflected in the practice of Indonesian courts that have accepted the use of Article 64 paragraph (1) of the KUHP concerning continuing acts in holding corporations criminally liable.⁶² For instance, in the *Kalista Alam* case,⁶³ the Court allowed the application of Article 64 paragraph (1), considering that the corporation persisted in committing the misconduct within four months. This thus sparks the possibility of the KUHP being used to address corporate complicity, particularly regarding the concept of aiding and abetting governed in the first book of the KUHP. The implementation of Article 103 of the KUHP, specifically about aiding and abetting

⁶¹ Budi Suhariyanto and Cecep Mustafa, "Contradiction Over the Application of Corporate Liability in Corruption Court Decisions in Indonesia," *Indonesia Law Review* 13, no. 1 (2023): 56.

⁶² Maradona, "Corporate Criminal Liability in Indonesia: Regulation, Implementation and Comparison with The Netherlands" (Erasmus School of Law, 2018).

⁶³ Meulaboh District Court Decision, "131/Pid.B/2013/PN.MBO, No." (n.d.).

by corporations in gross human rights violations, will be further explored in the subsequent sections.

Aiding and Abetting under The Indonesian Criminal Law

Within the KUHP, aiding and abetting is addressed in Article 56, underscoring two alternatives that must be proven for an accomplice to be held liable: 1) the persons deliberately aid in the commission of the crime, or 2) the persons deliberately provide opportunity, means or information for the commission of the crime. Regarding the *mens rea* element, R. Soesilo affirmed that the accused must intend to provide the facilitation at the time or before the crime was committed.⁶⁴ Subsequently, Wirjono contended that the facilitator's intent is limited to helping the principal perpetrator, emphasising that the former does not share the latter's intent.⁶⁵

Similarly, Article 21 of Law No. 1 of 2023 states that aiding and abetting is established if it is proven that the accused intentionally 1) provides an opportunity, means, or information to commit a crime *or* 2) provides assistance during the commission of the crime. The Elucidation of Article 21 of Law No. 1 of 2023 adds a temporal limit in the first paragraph of the Article, namely that the assistance is to be conducted before and since the commission of the crime through the provision of opportunity, means, or information.

Based on the provisions above, it can be inferred that while the construction of the wording for the criteria for the *actus reus* of aiding and abetting in Indonesian criminal law does not strictly mention elements such as 'tacit approval and encouragement', it may still cover them. The 'opportunity' given by the facilitator, as stipulated in the Indonesian criminal law, can be construed as equivalent to tacit approval and encouragement as the silence of the aider and a better essentially opens an opportunity for the principal perpetrator to execute his or her crime.

However, several differences exist, specifically in terms of the interpretation of the provision of encouragement or moral support. The ICC in the *Bemba et al.* case affirmed that encouragement or moral support does not need to be directly given to the principal perpetrator.⁶⁶ It may be directed to an intermediary as long as it is proven that it subsequently assisted the commission or attempted commission of a crime.⁶⁷ On the contrary, the KUHP and Law No. 1 of 2023 do not provide the extent of opportunity that can be considered aiding and abetting. Ultimately, it shall also be noted that Indonesian criminal law, both in the KUHP and Law No. 1 of 2023, does not explicitly recognize the element of 'substantial effect' as prominently seen in the case laws of international *ad hoc* tribunals.

Subsequently, several polarities concern the *mens rea* element between Indonesian and international criminal law. The provisions regarding aiding and abetting in the KUHP and Law No. 1 of 2023 convey that possessing knowledge is insufficient to fulfil the *mens rea* element. This substantially differs from the standard upheld in the case law of *ad hoc* international criminal tribunals that have become customary international law. As elaborated *supra*, Article 56 of the KUHP requires that there is an intention to assist the commission of a crime. Additionally, the word 'deliberately' prior to the phrase '... providing opportunity...' and '...

⁶⁴ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politeia, 1991).

⁶⁵ Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana Di Indonesia* (PT Refika Aditama, 2003).

⁶⁶ Jean-Pierre Bemba Gombo, "Case No. ICC-01/05-01/08-3836-Red, Appeals Chamber, Judgment," ICC, n.d.

⁶⁷ Gombo.

providing assistance...' in Article 21 of Law No. 1 of 2023 showcases the purpose test, indicating that it is insufficient that the accused knew that its assistance would facilitate the commission of a crime. Instead, the accused must hold the purpose to facilitate the commission of a crime.

Moreover, compared to the standard of aiding and abetting recognized in international statutes and case laws, a difference in temporal limit is reflected in Indonesian criminal law. For instance, Article 56 of the KUHP and Article 21 of the Indonesian Criminal Code set forth a temporal limit for aiding and abetting – that is, 'prior to, since, or during the commission of the crime'. On the other hand, under international criminal law, the accused's participation may occur before, during, or after the act is committed.⁶⁸ In fact, such participation can also be geographically separated.⁶⁹ The ILC shares the same standard regarding the temporal limit in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, adding that it could be established especially if the assistance was agreed upon prior to the commission of the crime.⁷⁰

Corporate Criminal Liability for Gross Human Rights Violations by Virtue of Aiding and Abetting

As mandated by Law No. 26 of 2000 concerning the Human Rights Court, an Ad Hoc Human Rights Court is initiated to deal with gross violations of human rights, limited to genocide and crimes against humanity.⁷¹ Exercising the jurisdiction of the Ad Hoc Human Rights Court represents an exhaustion of local remedies. Article 1 of the Rome Statute affirms that the International Criminal Court constitutes a permanent institution complementary to national criminal jurisdictions. Such principle is also applied to other Ad Hoc international criminal courts. With this, it can be interpreted that the establishment of an Ad Hoc Human Rights Court within the domestic jurisdiction demonstrates Indonesia's efforts in fulfilling its obligation as a State in responding to international crimes or *crimina juris gentium*,⁷² including genocide and crimes against humanity, which both have obtained the status of *jus cogens* in international law.⁷³

The specific crimes under the classification of genocide and crimes against humanity are similar to those written in Articles 6 and 7 of the Rome Statute. Moreover, the formulation of an Ad Hoc Human Rights Court derives from the recommendation of the House of Representatives for incidents occurring before the enactment of Law No. 26 of 2000, as stipulated in Article 43 of Law No. 26 of 2000. As for its *ratione personae*, Article 6 of Law No. 26 of 2000 states that the Ad Hoc Human Rights Court only has jurisdiction over gross violations of human rights committed by an Indonesian citizen. This becomes an issue as it does not facilitate the opportunity to hold corporations criminally responsible for gross human rights violations. In any event, Article 1 paragraph (4) of Law No. 26 of 2000 defines the

⁶⁸ Blaškić, "Case No. IT-95-14-A, Appeals Chamber, Judgment."

⁶⁹ Blaškić.

⁷⁰ International Commission of Jurists.

⁷¹ "The Law No. 26 of 2000 on Ad Hoc Human Rights Court" (2000).

⁷² Oentoeng Wahjoe, "Pengadilan Hak Asasi Manusia (HAM) Ad Hoc Dalam Penegakan Hukum Pidana Internasional Di Indonesia," *Jurnal Hukum Pro Justitia* 26, no. 4 (2008): 336–41.

⁷³ General Assembly, "Report of the International Law Commission on Its Seventy-First Session (A/74/10)," n.d.

element of 'Every Person' to include 'groups of people'. Hence, those responsible for the corporation's operations may be brought to the Ad Hoc Human Rights Court as individuals who have acted on behalf of the corporation.

To address gross human rights violations, utilizing the first book of the KUHP in establishing corporate criminal liability is contingent on whether the special criminal law regulations outside of the KUHP determine that corporations may be held criminally responsible. Special laws must explicitly state their applicability to corporations. For example, Law No. 31 of 1999 concerning Anti-Corruption Law details that the element of 'Every Person' encompasses corporations. This is not seen in Law No. 26 of 2000, as it limits itself to only individuals. Thus, aiding and abetting envisaged in the first book of the KUHP cannot be used in conjunction with Law No. 26 of 2000 on corporations.

On the other hand, Law No. 1 of 2023 directly regulates provisions regarding gross human rights violations, as reflected in Articles 598 and 599, which each respectively outlines the list of crimes within the category of genocide and crimes against humanity. Article 598 regulates genocide, defining it as a crime intended to destroy, in whole or in part, a national, ethnic, racial, belief or religious group. Subsequently, Article 599 enshrines provisions regarding crimes against humanity, which are defined as actions committed as part of a widespread or systematic attack directed against any civil population. Furthermore, Article 622, paragraph (1) letter m, further affirms the inapplicability of Articles 8 and 9 of Law No. 26 of 2000, which both regulate the *ratione materiae*. While both Articles use the phrase 'Every Person', it shall be read along with Article 145 of Law No. 1 of 2023, stipulating that the element 'Every Person' encompasses not only individuals but also corporations. Additionally, it shall be underscored that no additional provisions addressing the inapplicability of such Articles to corporations are seen in Law No. 1 of 2023. This thus confirms that Articles 598 and 599 may be implemented on corporations. Unifying such Articles in Law No. 1 of 2023 consequently opens the opportunity to attribute corporations to aiding and abetting gross human rights violations by applying Article 21 of Law No. 1 of 2023.

Article 612 of Law No. 1 of 2023 subsequently prescribes that “provisions concerning criminal conspiracy, plotting, or aiding and abetting as regulated in the Law regarding gross human rights violations... apply in accordance with the provisions of such law.” This fundamentally refers to Article 41 of Law No. 26 of 2000, which accentuates that a perpetrator who conducted criminal conspiracy, plotting, or aiding and abetting shall be attributed to penal provisions that are enshrined in Article 36, Article 37, Article 38, Article 39, and Article 40 of Law No. 26 of 2000. Consequently, Article 612 of Law No. 1 of 2023 does not impede corporate criminal responsibility for gross human rights violations. However, provisions regarding gross human rights violations in Law No. 1 of 2023 lack guidance on the appropriate sanctions that could be imposed on corporations as they limit themselves to imprisonment. Another possible conundrum surrounding the applicability of Law No. 1 of 2023 to corporations arises, as such law does not amend the *ratio personae* of Law No. 26 of 2000 but primarily adjusts Articles 8 and 9. Nonetheless, by upholding the legal maxim of *lex posterior*

derogat legi priori – 'a later law repeals an earlier law'⁷⁴ – provisions concerning genocide and crimes against humanity (i.e. *ratione materiae*) in Law No. 1 of 2023, which can be used towards corporations, prevail over Law No. 26 of 2000. This is further supported by the fact that Articles 598 and 599 have become integrated into Law No. 1 of 2023, requiring the element of 'Every Person' to be read and interpreted to include corporations under Article 145. Fundamentally, this thus renders Law No. 1 of 2023 capable of addressing the complicity of corporations in gross human rights violations.

Possibility of Corporate Criminal Liability Outside of Aiding and Abetting

While the provision of funds by a corporation towards perpetrators conducting crimes against humanity or genocide unequivocally reflects the act of aiding and abetting, it is consequential to explore the direct liability of corporations, not as aiders and abettors. Essentially, establishing corporations as direct perpetrators imposes a challenge. The most apparent obstacle correlates with the difficulty of corporations' proving the commission of particular crimes. For instance, Article 599 includes 'rape' as one of the crimes classified as crimes against humanity. Imagining corporations as direct perpetrators of such a crime is inherently impossible.

Article 48 of Law No. 1 of 2023 provides at least 2 (two) alternative circumstances that shall be considered during the proceeding to establish a corporation's fault. First, corporations allow the commission of a crime; second, the corporation did not take concrete steps to prevent, mitigate a much more severe impact, and ensure compliance with relevant legal provisions to avoid the commission of a crime. The first alternative is often linked with 'vicarious liability', requiring the existence of an employer-employee relationship.⁷⁵ Suppose this is to be implemented in the case of a corporation's involvement in gross human rights violations. In that case, liability can be attributed to the corporation as a subject with a duty to ensure employee compliance. The corporation was aware of and allowed its employees to decide to facilitate an act falling within the ambit of crimes against humanity or genocide. Such a provision depicts the core idea of omission, prescribing a legal duty to the corporation as a party responsible for the acts of its employees.

On the other hand, the second alternative encapsulates the theory of corporate culture. In regard to corporate criminal liability for gross human rights violations, the theory of corporate culture may be utilized to hold a corporation liable for allowing funds to be given to the principal perpetrator. Due to the grave nature of the crimes concerned, they are often documented and publicized by the media at a global scale, leaving corporations no choice but to avoid or, at best, halt any relations maintained with the group or government perpetrating the crime. To further illustrate this, in endorsing a corporate culture that ensures compliance with the law, a State-owned company producing weapons should not allow the maintenance of business relations with the military junta in Myanmar, knowing well that it is the root cause of

⁷⁴ Aaron X. Fellmeth and Maurice Horwitz, "Guide to Latin in International Law," Oxford Reference, accessed March 1, 2024, <https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1282>.

⁷⁵ Nur Aripkah, "Persoalan Kriteria Batasan Pertanggungjawaban Pidana Korporasi: Tinjauan Terhadap Peraturan Mahkamah Agung Nomor 13 Tahun 2016," *Jurnal Hukum Ius Quia Iustum* 27, no. 2 (2020): 374, <https://doi.org/10.20885/iustum.vol27.iss2.art8>.

the ongoing genocide therein. Suppose the corporation was initially unaware that such a crime was being conducted. In that case, it should take all the necessary steps to stop the transaction once it realises the impacts of the provision of funds. As such, Indonesian Criminal Law opens the possibility for corporations to be held criminally responsible based on the theory of corporate culture.

CONCLUSION

In conclusion, Law No. 1 of 2023 reflects its ability to respond to corporate complicity in gross human rights violations under the basis of aiding and abetting the corporate culture theory. Although the standards of aiding and abetting somewhat differ from those envisaged under international criminal law, they are nevertheless not far from what has been sustained by international criminal tribunals. Standards reflected under the Indonesian Criminal Law would remain sufficient to address the aiding and abetting of a gross human rights violation by a corporation. While the element of ‘Every Person’, which encompasses corporations, makes it seem safe to deem that Indonesia’s new criminal legal framework has sufficiently provided room for the prosecution of corporations for gross human rights violations, greater clarity is ultimately needed to prevent ambiguity on its applicability and sanctions that could be imposed to corporations for their violation. This may include the consideration to amend Law No. 26 of 2000 to accommodate the prosecution of corporations for gross human rights violations that have been unlatched by Law No. 1 of 2023. Nonetheless, the effective implementation of such provisions rests on the Prosecution and the judgement of the Judges, who shall ultimately remember the international nature of both genocide and crimes against humanity.

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