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International Monsanto Tribunal In The Hague - October 2016

TERMS OF REFERENCE 5

La firme Monsanto s'est-elle rendue complice d'un crime de guerre, au sens de l'article 8 para. 2 du Statut de la Cour pénale internationale, par la fourniture de matériaux à l'armée des Etats-Unis dans le cadre de l'opération "Ranch Hand" déclenchée au Viet Nam à partir de 1962?

Is the firm Monsanto complicit in the commission of a war crime, as defined in Article 8(2) of the International Criminal Court, by providing materials to the United States Army in the context of operation "Ranch Hand" launched in Viet Nam in 1962?

INTERNATIONAL MONSANTO TRIBUNAL, HAGUE - OCTOBER 2016

COMPLICITY IN WAR CRIMES AS DEFINED IN ARTICLE 8(2) OF THE INTERNATIONAL CRIMINAL COURT

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COMPLICITY IN WAR CRIMES AS DEFINED IN ARTICLE 8(2) OF THE INTERNATIONAL CRIMINAL COURT

PART I FACTUAL BACKGROUND

Defoliation in military terms entails the extermination of plant life that might conceal enemy armed forces, command centres, supply depots or fields of crops that may provide sustenance—indiscriminate—since not even a person holding a holding a Nobel Laureate in Agricultural Science can distinguish and then separate a civilian farm from a military farm one (a field of crops is just that a field of crops). In the 20th Century defoliation destruction is usually accomplished by three principal courses of action: setting fires; dropping napalm or phosphorus bombs; and spraying chemical agents from trucks, helicopters, or fixed-wing aircraft. During World War II and the Korean War the United States employed the former two methods, whereas during the Vietnam War chemical agents—chiefly Agent Orange (which had and continues to have devastating consequences on the Vietnamese ecosystem that extends beyond laying waste to the environment in the 1960s which ensured adverse health effects to those exposed to the chemicals then, now and into the future).

1.1 The Facts

1. In November 1961, then United States (U.S.) President John Kennedy approved the use of herbicides in the Vietnam War. Operation Ranch Hand was the formal designation for the program. With mounting casualties amongst American soldiers and the imperative to reduce the death toll. It was considered politically and economically expedient in two ways: lowering the death toll of American soldiers and accelerating the end of the war. The Operation commenced in 1962 concluding in 1971. During the operation, the U.S. Air Force used specially modified C-47s and C-123s aeroplanes¹ equipped to spray herbicides of which the dominant one was being Agent Orange. The non-scientific names for the herbicides—Agent Orange, Agent White—were derived from the colour codes on the drums that contained the defoliants (these chemicals tagged 2, 4-D and 2, 4, 5-T are scientifically: 2,4-D (2,4-dichlorophenoxyacetic acid); 2,4,5-T (2,4,5-trichlorophenoxyacetic acid) and its contaminant TCDD (2,3,7,8-tetrachlorodibenzo-*p*-dioxin); cacodylic acid; and picloram.
2. From 1965 to 1969, Monsanto was the dominant supplier out of nine other wartime government contractors who manufactured Agent Orange. The U.S. Government had set the specifications for defoliation chemicals and determined when, where and how it was used. *Agent Orange was manufactured by Monsanto then solely Agent Orange for the U.S. military as a wartime government contractor.*
3. Operation Ranch Hand ended in 1971 after some 19 million gallons of chemicals had been sprayed on an estimated 20 percent of Vietnam's jungles and 36 percent of its mangrove forests covering nearly 10,000 square miles. Of the roughly 19 million gallons of herbicide, about 11 million was Agent Orange manufactured, and supplied by Monsanto.
4. Monsanto keen to capture the bulk of the market share and hence 'pocket' the bulk of the money that the U.S. Department of Defence (DoD) was dishing out was in a rush ensuring its Agent Orange was had 1000 times greater potency than any of the other six competing companies. Due to rushing the manufacturing process, dioxin became an industrial by-product in Agent Orange. *Dioxin is second only to radioactive waste in its ability to destroy.*
5. In 1970, commissioned study begun in 1970 by the United States National Academy of Sciences. In its 1974 Report it asserted that no long-term

¹ The normal payload was for the C-47 was 2,300 kg equivalent to 2,700 litres. The C-123 had a payload of 10,800 kilograms equivalent to 10,800 litres. Payload is the carrying capacity of an aircraft measured in terms of weight. Depending on the nature of the flight or mission, the payload of may include cargo, passengers, flight crew, munitions, scientific instruments or experiments, or other equipment.

damage, including birth defects or environmental degradation, could be attributed to the various herbicidal agents sprayed in Vietnam. In the 1990s the same organisation found connections between herbicides containing dioxin and several ailments, including sarcomas, non-Hodgkin's lymphoma, Hodgkin's disease, and chloracne. *[It is of note that the U.S. Department of Veterans Affairs in the past and present compensates its soldiers who served in Vietnam veterans for the following cancers/medical conditions: non-Hodgkin's lymphoma, soft tissue sarcoma, and chloracne but no such scheme exists for the Vietnamese victims—predominately civilians.]*

6. In 2001 Arnold Schechter a Professor of Environmental and Occupational Health Sciences produced a public health report based on a case study of Bien Hoa (a region of Vietnam) where seven thousand gallons of Agent Orange had been discharged in 1970. His study revealed high levels of dioxin in children born after the war and in adults who moved to the city from locations where no herbicides containing dioxin were sprayed. Schechter concluded that the toxic substance migrated from soil to the groundwater to waterways which infected marine creatures such as fish which when eaten transmitted the dioxin to humans.
7. In 2014, a Committee of the United States Institute of Medicine (IOM) concluded that there was sufficient evidence of an association of several cancers and other medical conditions linked to exposure to Agent Orange during the Vietnam War. This was after examining overtime more than 230 epidemiological studies in detail on a range of health problems and their possible association with herbicides. It found sufficient evidence of a statistical association between exposures to herbicides or dioxin among which included soft tissue sarcoma, non-Hodgkin's lymphoma, and Hodgkin's disease. The committee also found sufficient evidence of an association between herbicides or dioxin and chloracne and Porphyria Cutanea Tarda (PCT)
8. It is recognised that birth defects in Children associated with individuals exposed to Agent Orange (American and Vietnamese) include: Spina bifida—a defect in the developing foetus that results in incomplete closing of the spine, is associated with Veterans' exposure to Agent Orange or other herbicides during qualifying service in Vietnam or Korea.
9. There a direct relationship exists between exposure and numerous health problems. If not the U.S Department of Veteran Affairs would not have decided to provide compensation to nearly two thousand veterans who served in Vietnam suffering from ailments/medical conditions associated to exposure to Agent Orange. Equally it should be noted that the various chemical companies that manufactured the agents settled a class-action lawsuit out of court that provided almost \$200 million in damages to U.S. veterans who served in Vietnam during the period. *No similar scheme exists for those most affected by permanent exposure—the Vietnamese.*

PART II

RESTRICTIONS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS IN WARTIME

The use of poison was well-understood in the middle of the 19th century. The listed modes of application included the poisoning of water sources and food provisions, the sending to the enemy armed forces of people, animals or objects infected by diseases, and the use of poisoned weapons. A ban on the use of poison was not controversial and its scope was easily extended to other domains of international law.²

2.1 Restrictions on use of biological and chemical weapons

10. There is a long record of prohibitions on the use of poisons and chemical and biological (CBW) based toxins in armed conflict; the requirement to punish the individual who violates the prohibition was first stipulated in the 1675 *Strasbourg Agreement*.³ Some two hundred years later, Article 70 of the first *US Army Field Manual* (1863) stated that 'the use of poison in any manner be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war'.⁴ The *Brussels Declaration* of 1874 stated that belligerents do not have unlimited power in the adoption of means to injure an enemy. Though this declaration never took effect as a binding convention, together with the 1880 Oxford Manual⁵ it laid the foundation of later agreements concluded at The Hague Peace Conferences in 1899 and 1907.

² Jean Pascal Zanders, *International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy*, *J Conflict Security Law* (2003) 8 (2): 391.

³ The Strasbourg Agreement of 27 August 1675 is the first international agreement banning the use of chemical weapons. The treaty was signed between France and the Holy Roman Empire. It should be noted at that time, the Holy Roman Empire was in some ways a mini-United Nations of the age—encompassing several kingdoms and vast swathes of Europe meaning that the Treaty has catchet. The Holy Roman Empire covered numerous territories in Europe—which are present day are some of the main sovereign states in Europe including Germany, Italy and the other 'territories' it disgorged upon its collapse that now number about half a dozen countries

⁴ F. Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders no. 100 by President Abraham Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973) 3-23.

⁵ The Laws of War on Land, Manual adopted by the Institute of International Law at Oxford, 9 September 1880, reproduced in Schindler and Toman, *op. cit.*, 35-48. The Institute of International Law was founded in 1873 and was composed of individual members and associations from different countries. F. Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders no. 100 by President Abraham Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973) 3-23

11. The Regulations Respecting the Laws and Customs of War on Land annexed to both the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land explicitly forbade the employment of poison and poisonous weapons.⁶ Contracting powers agreed with the 1899 Hague Declaration (IV, 2) Concerning Asphyxiating Gases 'to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases'.⁷
12. The 1919 Versailles Treaty which formally ended the First World War imposed strict conditions on Germany.⁸ Articles 170 and 171 forbade Germany chemical weapons (CW) use in war as well as the importation and exportation of arms, munitions and war material of every kind, and of chemical weaponry in particular.

2.2 Indiscriminate Weapons

13. The ICRC's Customary International Humanitarian Law Study (ICRC Study)⁹ in Rule 71, states that the 'use of weapons which are by nature indiscriminate is prohibited'.⁸⁴ Lineage of this rule is conceded by many commentators to be part of the corpus of customary international law. Rule 76 states that the use of herbicides as a method of warfare is prohibited in certain circumstances, namely if they:
 - a. are of a nature to be chemical weapons;
 - b. are of a nature to be biological weapons;
 - c. are aimed at vegetation that is not a military objective;
 - d. would cause incidental loss of civilian life, injury to civilians,
 - e. damage to civilian objects, etc. which may be expected to be excessive; or
 - f. would cause widespread, long-term and severe damage to

⁶ Schindler and Toman, *op. cit.*, 76-77. The Laws of War on Land, Manual adopted by the Institute of International Law at Oxford, 9 September 1880, reproduced in Schindler and Toman, *op. cit.*, 35-48. The Institute of International Law was founded in 1873 and was composed of individual members and associations from different countries. Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders no. 100 by President Abraham Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973) 3-23.

⁷ Schindler and Toman, *op. cit.*, 99-101. The other two declarations prohibited the launching of projectiles and explosives from balloons and the use of so-called dum-dum bullets. Schindler and Toman, *op. cit.*, 76-77. The Laws of War on Land, Manual adopted by the Institute of International Law at Oxford, 9 September 1880, reproduced in Schindler and Toman, *op. cit.*, 35-48. The Institute of International Law was founded in 1873 and was composed of individual members and associations from different countries. Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders no. 100 by President Abraham Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973) 3-23.

⁸ The Peace Treaty of Versailles, signed at Versailles on 28 June 1919, available from the World War 1 Document Archive, at <<http://www.lib.byu.edu/~rdh/wwi/versailles.html>>. Treaties with similar provisions were negotiated with each of Germany's wartime allies.

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross and Cambridge University Press, Cambridge, 2005, Vol. I.

the natural environment.

The ICRC Study concluded that

...the use of herbicides in armed conflict as a method of warfare would violate the general prohibition of the use of chemical weapons ... [i]n addition, the use of herbicides consisting of, or containing, biological agents would violate the [BWC] ... attacks on vegetation by herbicides would violate the general rule on the conduct of military hostilities if the vegetation is not a military objective, ... if the attack causes excessive incidental civilian losses or damage to civilian objects...or if the attack may be expected to cause widespread, long-term and severe damage to the natural environment... ¹⁴³

2.3 Armed Conflict and Environment: A Brief History of Law-Making

14. In the early 1970s, two developments occurred. “[T]he international community began addressing environmental protection generally, and it also made a serious attempt to remedy the deficiencies of legal protection for victims of armed conflict. Both developments were prompted by a scandalization of public opinion triggered by environmental disasters associated to armed conflict and resultant environmental and public health effects.
15. The 1998 Rome Statute,¹⁰ establishing the International Criminal Court in its definition of war crimes contains an explicit provision protecting the environment in times of international armed conflict. Article 8(2)(b)(iv) of the Rome Statute postulates:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹¹⁵

16. This provision is related, but not identical to the provisions of Additional Protocol I. These include Article 51(5) (b), prohibiting attacks that cause 'excessive' collateral damage to civilians or civilian objects, and the two provisions concerning the environment quoted above (Articles 35(3) and 55).

¹⁰ Rome Statute of the International Criminal Court (ICC) of 17 July 1998, A/CONF.138/9.

¹¹ Ibid., Art. 8(2)(b)(iv). Rome Statute of the International Criminal Court (ICC) of 17 July 1998, A/CONF.138/9.

17. 'To assess the significance of the Rome Statute provision, one has to bear in mind that criminal law contains secondary norms. They constitute means to enforce a primary obligation. As such, they need not be identical to those primary obligations. While a provision of international criminal law presupposes a primary norm prohibiting the behaviour that constitutes a crime ...'¹²

2.4 Additional Protocol I and the Threshold Question

18. The crucial problem raised by Additional Protocol I is the meaning of the three conditions attached to the prohibition on 'long-term, widespread and severe' damage to the environment.²⁵ The narrow scope of the prohibition is due both to the cumulative character of the three conditions and to their interpretation, which effectively sets the threshold very high, but also with some ambiguity.

2.5 Environmental Damage as Collateral Damage: The Question of Proportionality

19. The environment may be damaged indirectly by attacks against military objectives. This is the case with oil spills (if the direct target is a military objective) or pollution caused by attacks against industrial installations. In this case, the elements of the environment that are affected constitute civilian objects. Damage to these environmental objects would then be 'collateral damage', which is permissible only to the extent that it is not excessive in relation to the concrete and direct military advantage anticipated as a result of the attack.

2.6 Customary International Environmental Law and Soft Law Instruments

20. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 1972 articulated an overarching principle that bears on IEL applicability during armed conflict. Principle 21 provides that 'States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.⁶⁰ Two decades later, the Declaration on Environment and Development (Rio Declaration) of 1992 stated in Principle 24 that: 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary'.⁶¹ The Rio Conference adopted similar language in the Programme of Action for Sustainable Development (Agenda 21) in Article 39(6), detailing the means of implementation. It states that '[m]easures in accordance with international law should be considered to address, in times of armed

¹² Michael Bothe et al., International law protecting the environment during armed conflict: gaps and opportunities, *International Review of the Red Cross*, Volume 92 Number 879 September 2010, pp. 569-592: 574

conflict, large-scale destruction of the environment that cannot be justified under international law'.

21. Principle 5 of the World Charter for Nature mandates that '[n]ature shall be secured against degradation caused by warfare or other hostile activities'.⁶⁴ This principle appears intended to prohibit environmental harm during armed conflict. UN General Assembly resolution 47/37, adopted in 1993, urges states to take measures for complying with international law protecting the environment during armed conflict.¹³

2.7 Applicability of Customary International Environmental Law (IEL) in Times of Conflict

22. Commentators posit that customary IEL applies during armed conflict in a similar manner to MEAs (Multilateral Environmental Agreements). Rymn Parsons emphasises that environmental norms are equally relevant and applicable during armed conflict.¹⁴ Support for this argument is derived from the venerated Martens Clause¹⁵, which addresses the role of norms, custom, and practice as the law of war develops.¹⁶ The clause appears in dozens of 20th Century treaties in one form or another.
23. In cases not covered by the present Protocol and other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁸⁶
24. The deployment of chemical herbicide to clear large parts of jungle forest, plus systematic area bombardment (so-called cratering), and other like measures left an estimated 10 per cent of Vietnamese territory destroyed. This mode of warfare was part of States reacting through the establishment of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).³ Subsequently Additional Protocol I (1979 to Geneva treaties) in, Articles 35(3) and 55 of Additional Protocol I directly addressed damage to the environment in the course of wartime operations.^{4,5}

¹³ UN General Assembly resolution 47/37, 9 February 1993, Protection of the Environment in Times of Armed Conflict, UN Doc. A/RES/47/37.

¹⁴ Rymn James Parsons, 'The fight to save the planet: U.S. armed forces, 'greenkeeping', and enforcement of the law pertaining to environmental protection during armed conflict', in Georgetown International Environmental Law Review, Vol. 10, No. 2, 1998, p.

¹⁶ The Martens Clause was introduced into the preamble to the 1899 Hague Convention II—Laws and Customs of War on Land. It states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

25. The Statute of the International Criminal Court (ICC)⁶ added criminal liability for those who violate the prohibition. Article 8(2)(b)(iv) of the Rome Statute, lists as a war crime in international armed conflict the intentional launching of an attack in the knowledge that such attack will cause widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and overall military damage anticipated. The inclusion of this activity as a war crime is evidence of international legal protection for the deliberate degradation of the environment in the course of military operations. The natural environment finally seems to have been accepted into the category of goods that generally need preservation in times of war, an injury to which amounts to one of the most serious crimes of international concern.⁷

PART III

ARTICLE 8(2) (B) (IV) OF THE ROME STATUTE

3.1 The Rome Statute

26. The wording of Article 8(2) (b) (iv) in the Rome Statute largely derives from Articles 35(3) and 55(1) of Additional Protocol I.⁹ Thus the understanding and interpretation Article 8(2) (b) (iv) is linked to the provisions of Articles 35(3) and 55 of Additional Protocol I. Recourse to them is admissible under Article 21(1) (b) of the Rome Statute, which allows the ICC to apply, in addition to the Statute and the Elements of Crimes, where appropriate, other international treaties. It is further advised by the general rules of interpretation under the Vienna Convention on the Law of Treaties,¹² in particular Article 31(3)(c) thereof, which stipulates that the interpretation of an international treaty has to take into account any relevant rules of international law applicable in the relations between the treaty parties.¹³

3.2 The 'Natural Environment' as Reference Point

27. Article 8(2)(b)(iv) of the Rome Statute does not require actual damage to the natural environment; the mere action of launching a potentially devastating attack suffices.¹⁴ It is also not necessary that the natural environment be the direct target of attack causing detrimental side effects to the natural environment. The natural environment must therefore be spared from excessive harm even if it does not present a military objective.¹⁷ It deserves mention that Articles 35(3) and 55 of Additional Protocol I are not limited to the enemy environment, but likewise cover damage in the

¹⁷ Bothe, supra note 16, at 57; A. Bouvier, 'Protection of the Natural Environment in Time of Armed Conflict', (1991) 31 *International Review of the Red Cross* 567, at 575-6; Dinstein, supra note 3, at 541-2; Kiss, supra note 19, at 189; de Preux, supra note 25, at para. 1454; Witteler, supra note 20, at 253. M. Bothe, 'The Protection of the Environment in Times of Armed Conflict. Legal Rules, Uncertainty, Deficiencies and Possible Developments', (1991) 34 *German Yearbook of International Law* 54, at 56; Koppe, supra note 10, at 151. But see W. D. Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective', (1995) 8 *LJIL* 7, at 13, with regard to Art. 55 of Additional Protocol I.

territory of the party to whom the perpetrator belongs.¹⁹ The same should be assumed with regard to Article 8(2)(b)(iv).

3.3 The Threshold of 'Widespread, Long-term and Severe Damage'

28. The essential element of Article 8(2) (b) (iv) of the Rome Statute is the damage threshold, which is worded in the same way as Articles 35(3) and 55(1) of Additional Protocol I. Since negative effects on the natural environment by the conduct of warfare cannot be completely avoided, only exceptionally grave consequences are prohibited, namely widespread, long-term, and severe damage. The conjunctive 'and' signifies that these three conditions must be met cumulatively. In this respect, Additional Protocol I and the Rome Statute differ from Article I of the ENMOD, the latter of which encompasses damage having widespread, long-lasting, or severe effects on the natural environment, alternatively.
29. In the ENMOD, an Understanding to the treaty defines 'widespread' to encompass damage in an area on the scale of several hundred square kilometres; 'long-lasting' to mean the lasting of damage for a period of months, or approximately a season; and 'severe' to apply to damage involving serious or significant disruption or harm to human life, natural and economic resources, or other assets.²⁷

3.4 Severe Damage

30. The criterion 'severe' describes an intensity independent of the local and durational aspect of the damage.⁵⁶ This element refers to harm that jeopardizes or destroys the viability of an ecosystem.⁵⁷ According to the drafters of Additional Protocol I, severe damage to the natural environment 'would be likely to prejudice, over long-term, the continued survival of the civilian population or would risk causing it major health problems'.⁵⁸ The population might be that of today or future generations. As the employment of both 'survival' and 'health' indicates, actions are also prohibited which leave a population alive but lead to serious health problems passing from one generation to another. Damage covered could include congenital, mutagenic, teratogenic, or carcinogenic defects induced in humans by environmental factors resulting from the repeat spraying of the herbicide Agent Orange during the Vietnam War.¹⁸

3.5 The Cumulative Standard and the Notion of 'Damage'

31. The notion of 'damage' implies a lasting negative effect. This establishes a relatively clear standard since environmental law prohibits harmful activities.

¹⁸ Hulme, *supra* note 1, at 96, 98. On the development of international environmental protection law see K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (2004), 6-10.

32. “The ICC Statute was established as a mostly self-contained legal regime. In this spirit, Article 21 of the ICC Statute spells out a hierarchy of law to be applied before the ICC, putting the Statute in first position. Other international treaties as well as customary international law can be applied. Furthermore, according to Article 12(1) of the ICC Statute, any state party automatically accepts the jurisdiction of the Court with respect to the crimes contained in the Statute.”¹⁹
33. Article 120 of the ICC Statute prohibits outright reservations to the Statute. All this provides a powerful argument for disregarding any restriction imposed on the prohibition in Article 8(2) (b) (iv), of the ICC Statute under Additional Protocol I or customary international law, at least in relation to states that have ratified the Statute.⁹⁶ The provision was adopted without any sign of limitation; the state parties were also fully aware that reservations to the ICC Statute are impermissible. “The requirement to interpret the ICC Statute in conformity with general international law is explicitly incorporated into Article 8(2)(b) of the ICC Statute, the opening clause of which stipulates that all crimes in this section are serious violations of the laws and customs of war ‘*within the established framework of international law*’.”²⁰

PART IV

THE CASE FOR CORPORATE AND INDIVIDUAL LIABILITY

4.1 Corporate and individual liability

34. The conflation of individual complicity and corporate responsibility represent a legal pivot regarding the case for international criminal liability for corporations. Thus it does “not necessarily follow, *per argumentum e contrario* that no corporate responsibility for international crimes can exist without a prior finding of individual guilt.”²¹ Steven Ratner notes that “... theories of corporate responsibility point to the futility of targeting norms only at individual employees who commit wrongs ... the business enterprise as such must assume its own responsibilities.” This means that a corporation can be an autonomous agent who can be held responsible for the consequences of its policy, irrespective of any determination of the blameworthiness of the individual employees.”²² Herman van der Wilt notes that “it would be better to put the blame squarely on the shoulders of the collective, not only because it can accomplish what separate individuals

¹⁹ Ines Peterson, *The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?*, *Leiden Journal of International Law*, 22 (2009), pp. 325-343: 340.

²⁰ Ines Peterson, *The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?*, *Leiden Journal of International Law*, 22 (2009), pp. 325-343

²¹ Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 72.

²² *Ibid* at 73.

are unable to do, but also because employees can easily escape conviction and punishment by hiding behind the corporate veil.”²³

35. During the Diplomatic Conference at Rome preceding the adoption of the *Rome Statute* for an International Criminal Court Statute protracted negotiations revolved regarding criminal liability for ‘legal persons’ which encompasses corporations. These negotiations culminated in an elaborate French proposal.²⁴ The proposal read as follows:

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

- a. The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
- b. The natural person charged was in a position of *control* within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
- c. The crime was committed by the natural person acting *on behalf of* and *with the explicit consent* of that juridical person and in the course of its activities; and
- d. The natural person has been convicted of the crime charged.
- e. For the purpose of this Statute, “juridical person” means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organisation registered, and acting under the national law of a State as a non-profit organisation.⁹

- 36 The proposal to add legal entities to the jurisdiction of the ICC was eventually declined for inclusion. Among the reasons (mainly diplomatic and political rather than legal) cited for its rejection was, it would shift the focus of the ICC away from individual criminal liability given that no common international standard for corporate liability existed.³³ Thus, Article 25(1) of the *Rome Statute* of the International Criminal Court (ICC) declares that the ICC shall (only) have jurisdiction over natural persons.

²³ Ibid at 73.

²⁴ S Andrew Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in: Menno Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (2000), 139.

37 Those wedded to the idea of personal culpability aver that legal corporations have “no body to kick and no soul to damn”.²⁵ These commentators argue, that corporate criminal responsibility as collective liability is indiscriminate as encompasses all those having an interest in the corporation who may be entirely innocent of the crimes charged.²⁶

4.2 A corporation is a legal person and be treated as rational agent and actor

38 The requirement that a natural person acted on behalf of the corporation forges a link between the agent and the legal person. Celia Wells notes that a corporation can be held “criminally liable for the acts of any of its agents if an agent commits a crime within the scope of his employment and with intent to benefit the corporation”.²⁷ Thus, it is reasonable and fair to hold corporations criminally responsible for complicity in international crimes, if the assistance in those crimes is connected with its *raison d’être*—engagement in commercial activities and profit generation.²⁸

39 In assessing of complicity in international crimes, the pertinent question is not whether the core crimes themselves display an economic aspect, but whether the supporting activities bear relation to the core business of the corporation. “The fact that the acts have been performed in the course of the corporation’s activities will normally imply that the company wields power over those acts, in the sense that it can decide whether they occur or not.”²⁹ The distinction is relevant as companies will usually be aware of its acts and conduct.³⁰ Interest, power of control and awareness/acceptance are the crucial components for considering a legal person as a rational agent that can be held responsible for decisions, acts and omissions.³¹

4.3 Corporate agents have been prosecuted for complicity in international crimes; International Military Tribunal for Nuremberg

40 The Nuremberg Tribunal implicitly accepted the criminal responsibility of organizations on the basis that the *Nuremberg Charter* contained provisions (Articles 9 to 11) relating to criminal organizations.¹⁹ According to Article 9, “the Tribunal could declare, at the trial of any individual member of any group or organization and in connection with any act of which the individual may be convicted, that the group or organization of

²⁵ C. Coffee, Jr, “No Soul to Damn, No Body to Kick”; An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Michigan LR (1981), 386.

²⁶ Kai Ambos, Article 25; Individual criminal responsibility, in: Otto Rome Triffterer, Commentary on the Rome Statute of the International Criminal Court--Observers’ Notes, Article by Article (2008), 743, 746.

²⁷ Celia Wells, Corporations and Criminal Responsibility (1993), 118.

²⁸ Harmen van der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, Chinese Journal of International Law (2013) 12(1): 43-77 at 48.

²⁹ Ibid at 48-49.

³⁰ Ibid at 49.

³¹ Ibid at 49.

which the individual was a member was a criminal organization.” Article 10 encapsulated the basic legal fulcrum thus:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

- 41 The Tribunal employed Article 10 as a vehicle to hold individuals criminally responsible for membership of certain organizations.³² The declarations made by the Tribunal established the legal basis that subsequently enabled prosecution of corporate leaders and entities by national courts within the ambit of *Allied Control Council Law No. 10*.³³ Corporate agents were indicted for providing
- a. weapons, raw materials and instrumentalities which sustained the Germany’s aggressive war (*Farben, Krupp*)
 - b. benefiting on a large scale from the illegal confiscations of plants and other private and public property in the occupied countries (*Farben, Flick*),
 - c. delivering gas to the concentration camps (*Zyklon B*) and
 - d. employing concentration camp inmates and other forced labourers as slaves in their factories (*Krupp, Farben, Roehling*).

4.4 Powers of representation: “on behalf of” and “in control of” the corporation

- 42 In the *IG Farben Case* charges were brought against the top management and members of the advisory board. They stood trial on account of a number of international crimes, including the planning, preparation, initiation and waging of wars of aggression. The charge of participation in crimes against peace was predicated on the fact that IG Farben had supplied essential materials of great importance in the waging of the war. While the high level officials of IG Farben were acquitted of complicity and conspiracy in crimes against peace, they

³² In the words of Nina Jørgensen: “The Tribunal could not impose a sentence on the group or organization as such and a judgment as to the criminality of an organization was to be declaratory only.” Nina H.B. Jørgensen, *Criminality of Organizations*, in: André Nollkaemper & Harmen van der Wilt, *System Criminality in International Law* (2009), 201, 204.

³³ *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, *Amtsblatt of the Control Council in Germany*, No. 3, 31 January 1946, 50.

did not escape punishment for their involvement in acts of plunder and spoliation that had enabled the corporation to benefit from land and factory seizures enabling it to expand and consolidate its chemical division empire.³²

- 43 In the *Flick Case*, the owner of the Flick concern was arraigned along with his top five chief assistants who among other duties superintended various plants. In the line-up was Terberger, deputy chair of the three-man managing board of the Maxhuetten plant.³⁴ In *United States v. Krupp*, Alfred Krupp, eight members of senior members of management and three top level executives of the Krupp firm were indicted for Crimes against Peace, spoliation and plunder and the deployment of slave labour.³⁵

4.5 Corporations have been successfully prosecuted domestically

- 44 International criminal law is widely incorporated into United States and European national legislation.³⁶ Thus, the legal basis for criminal proceedings concerning corporate involvement in international crimes generally exists. Mordechai Kremnitzer notes

...[w]eight should be given to the legal endorsement of criminal liability for corporations in many states -- not only from the Anglo-American jurisprudence -- but also states in Western Europe, such as France, The Netherlands, Switzerland and Denmark. This legal reality creates a prima facie indication of its utility. The burden of disproving it shifts to those who argue against it. If the concept of criminal accountability of corporations is so anomalous, how can we explain the trend towards endorsing criminal liability on corporations?"³⁷

- 45 In UK domestic law, courts have embedded the doctrine of a joint criminal enterprise that makes an accessory to one offence liable to all other foreseen offences committed in the course of that offence or in its furtherance.³⁸ The "doctrine applies even where the accessory does not share the perpetrator's purpose in committing the initial offence

³⁴ Compare Matthew Lippman, above n.17, 186. Matthew Lippman, War Crimes Trials of German Industrialists: The "Other Schindlers", 9 Temp. ICLJ (1995), 173.

³⁵ Matthew Lippman, War Crimes Trials of German Industrialists: The "Other Schindlers", 9 Temp. ICLJ (1995), 186.

³⁶ Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art (2006), available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>.

³⁷ Mordechai Kremnitzer, A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law, J Int Criminal Justice (2010) 8 (3): 909: 914.

³⁸ Schachar Eldar, Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility, J Int Criminal Justice (2013) 11 (2): 331: Footnote 10.

meaning joint enterprise liability is not necessarily predicated on a common purpose or design.”³⁹

4.6 *Doe v Unocal*⁴⁰: Profiting from State violence

46 In this case, Burmese citizens filed a claim against the Burmese government and its joint venture partner (Unocal—an American corporation) before the United States District Court for the Central District of California.⁴⁵ The plaintiffs accused the defendants of human rights violations which included forced labour and the loss of homes and property, as the result of their forced relocation for the purpose of the construction of an oil pipeline. Unocal was sued under the *Alien Tort Statute* (ATS), which requires a violation of international law.

47 Unocal and its business partner Total had constructed a pipeline from Burma to neighbouring Thailand. Burmese troops from the infamous military junta of the State Peace and Development Council were engaged by Unocal to provide security and build infrastructure for the project. These troops were accused of committing egregious human rights abuses including forced labour, rape, torture and summary execution in the course of their security and building activities under the project.

48 The legal question arose whether Unocal as a private corporation could infringe international law. Unocal sought the dismissal of the case on the basis of lack of subject matter jurisdiction as well as the lack of sufficient evidence to prove its complicity of the alleged human rights violations.⁴¹ The court in rejecting the argument held that:

The US Court of Appeals for the Ninth Circuit, the court ruled that Unocal could be held responsible under the *Alien Torts Claims Act* (ATCA) for aiding and abetting the Burmese government on the basis of its knowledge of the violations was sufficient for it to be complicit in the government’s actions.⁸⁹

49 In 2004, Unocal agreed to settle the claim for an unspecified sum, which included payment of compensation to the plaintiffs as well as funds to enable them and their representatives to develop programmes to improve living conditions in the area of the pipeline.⁴² The plaintiffs argued that the corporate defendants aided and abetted the government of Myanmar in committing human rights abuses.

³⁹ Schachar Eldar, *Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility*, *J Int Criminal Justice* (2013) 11 (2): 331: Footnote 10.

⁴⁰ *Doe I v. Unocal*, 395 F.3d 932, 947 (9th Cir. 2002), at 939.

⁴¹ Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 58.

⁴² Kinley and Tadaki, *‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’*, (2004) 44 *Virginia Journal of International Law* 931 at 980.

Harmen van der Wilt notes that in “the assessment of the corporation’s accomplice liability it was apparently important that

- a. Unocal and its representatives “knew or should have known about SLORC’s practices of forced labour and relocation when they agreed to invest in the Yadana gas pipeline project”;
- b. that the corporation benefitted from the use of forced labour; and
- c. that it provided practical assistance by giving financial support.”⁴³

4.7 *Frans van Anraat Case*⁴⁴: Knowledge and Awareness

50 Dutch businessman Frans van Anraat stood trial on charges of complicity in genocide and war crimes before a Dutch criminal court.⁴⁵ According to the charges, Van Anraat had delivered at least 1100 tons of Thiodiglycol (TDG) (a basic ingredient in the production of lethal mustard gas) to the Iraqi regime of Saddam Hussein over a three year period (1985 to 1988). This commodity served as the main ingredient for the production of chemical weapons. These chemical weapons were subsequently used by the Iraqi regime during the war with Iran and on parts of the Kurdish population in the northern Iraqi territory.

51 The District Court and the Appeals Court acquitted van Anraat on the charges of complicity in genocide on the basis that Van Anraat as an accomplice did not share the specific intent of the main perpetrator. However, Van Anraat was convicted for complicity in war crimes on the basis of aiding and abetting war crimes for supplying the Iraqi government with chemicals needed for the production of mustard gas. The Court found that van Anraat’s sale of the chemicals contributed to the deaths of the Kurds and thus he was criminally liable for providing essential assistance to the despotic Saddam Hussein regime and possessed the knowledge that his product would be used to commit human rights abuses.⁴⁶

52 The *Van Anraat* case stands out because of two conspicuous--and inter-related--features.

⁴³ Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 58.

⁴⁴ District Court of The Hague, 23 December 2005, LJN: AU8685; Court of Appeal The Hague, 9 May 2007, LJN: BA4676, ILDC 753 (NL 2007).

⁴⁵ *Ibid.*

⁴⁶ *Public Prosecutor v. Van Anraat*, LJN AU8685, The Hague District Court, 23 December 2005 at 13; BA6734, *Gerechtshof's-Gravenhage*, 2200050906-2, judgment of 5 September 2007, available online at http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&u_ljn=BA6734 (visited 25 June 2016); *Gerechtshof's-Gravenhage*, 2200050906-2, judgment of 5 September 2007, at 14, available online at: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&u_ljn=BA6734.

- a. a strong *functional* connection between the war crimes and the nature of the assistance. Not only were the deliveries of TDG indispensable for the manufacture and subsequent use of chemical weapons, they reflected in a sense the atrocities themselves.”⁴⁷
- b. Van Anraat had a strong position *vis à vis* his commercial partners. Due to his cognitive and commercial skills, he could to a large degree control the process ... It would have been unimaginable that certain business transactions would have escaped Van Anraat’s attention.⁴⁸

4.8 Royal Dutch Shell Case⁴⁹

53 In 1998, under the ambit of the *United States Alien Tort Claims Act* (ATCA) the plaintiffs brought a case alleging that Royal Dutch Shell (a petroleum company) had supported the Nigerian government in torturing and killing activists who protested against the environmental damage that Shell’s oil extraction operations were causing in the Niger Delta.⁵⁰ The defendants were charged with complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. Royal Dutch Shell Company had allegedly worked for decades in cohorts with various Nigerian military regimes to suppress any and all demonstrations that were carried out in opposition to the oil company’s activities. In 2009, the parties settled for US \$15.5 million in compensation to the plaintiffs.

4.9 Transnational corporations possess functional legal personality under international law

54 States have applied international rules prohibiting genocide, slavery and torture to bar such conduct by individuals, including companies, as well as by governments.”⁵¹ Beth Stephens points to international treaties that specifically refer to corporate crimes, including the Apartheid Convention, and treaties governing corruption and bribery, hazardous wastes and other environmental violations as examples of duties borne by companies under international law.¹⁴³

⁴⁷ Harmen van der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 63.

⁴⁸ *Ibid* at 63.

⁴⁹ *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson and Wiwa v. Shell Petroleum Development Company*.

⁵⁰ Documents and decisions are available online at: Center for Constitutional Rights, *Wiwa et al. v. Royal Dutch Petroleum et al.*, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (visited 14 December 2009).

⁵¹ David Kinley & Rachel Chambers, The UN Human Rights Norms for Corporations: The Private Implications of Public International Law, *Human Rights Law Review* (2006) 6(3): 447-497, 479

55 'A corporation is a bearer of human rights and enjoys the protection of the law.⁵² In this sense, it is not at all artificial, but real in the legal world, and has a normative being.⁵³ Corporations are real players in the world.'⁵⁴ "One of the characteristics of corporations is that they operate through human beings and some of these human beings have the legal power to reflect the actions and will of the corporation."⁵⁵

56 In *Tesco Supermarkets Ltd v. Natrass*, the UK House of Lords, Lord Reid averred

...the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company [...] He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company...⁵⁶

57 Whether "non-state actors are natural or legal persons is conceptually only of secondary relevance. This is confirmed by the fact that certain human rights -- such as the protection of property -- may also be invoked by legal persons."⁵⁷ "Several international legal instruments provide for the protection of rights of private-law legal persons.⁵⁸ Prohibitions underlying core crimes bind natural and legal persons equally: legal persons are but a man-made legal construction to facilitate social interaction thus the basic rules apply to them as to natural persons.⁵⁹

58 'A corporation benefits from its positive and successful activities. It is only fair that it will suffer from their wrongdoing. The corporation earns a good name for its own when the acts of its organs create the basis for such good name. Why should the corporation's reputation remain immune when it deserves a blemish on its name due to crimes committed by it through its organs? She who enjoys the honey should not be protected from the sting.'⁶⁰

⁵² Slye, supra note 3, at 959. R. Slye, 'Corporations, Veils and International Criminal Liability', 33 *Brooklyn Journal of International Law* (2008) 955-974, at 959.

⁵³ CrimA 3027/90, *Modi'im Construction and Development Ltd. v. State of Israel*, supra note 1, at 380.

⁵⁴ Mordechai Kremnitzer, A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law, *J Int Criminal Justice* (2010) 8 (3): 909: 911.

⁵⁵ *Ibid* at 911.

⁵⁶ *Tesco Supermarkets v. Natrass*, [1972] AC 153 (emphasis added).

⁵⁷ Volker Nerlich, Core Crimes and Transnational Business Corporations, *J Int Criminal Justice* (2010) 8 (3): 895: 889.

⁵⁸ See A. Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon', 20 *Berkeley Journal of International Law* (2002) 91 et seq., at note 3.

⁵⁹ Volker Nerlich, Core Crimes and Transnational Business Corporations, *J Int Criminal Justice* (2010) 8 (3): 895: 889.

⁶⁰ M. Kremnitzer and H. Genaim, 'The Criminal Liability of a Corporation', in A. Barak (ed.) *Shamgar Book*, Vol B (Tel Aviv: Israel Bar Association, 2003) 33-113, at 67-68.

4.10 No reason why corporations should be immune from liability under international criminal law

59 The International Military Tribunal for Nuremberg—the first international criminal tribunal labelled some groups— namely the Nazi leadership corps, the SS and the Gestapo—as ‘criminal’. The Tribunal recognized that legal persons can engage in criminal conduct.⁶¹ In the *I.G. Farben Case*, the Nuremberg tribunal remarked that:

*[w]hile the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crimes enumerated in the indictment.*⁶²

4.11 The Special Tribunal for Lebanon: *The TV S.A.L. and Akhbar Beirut S.A.L. Cases*

60 In the *New TV S.A.L. and Akhbar Beirut S.A.L. Cases*, the Special Tribunal for Lebanon (STL) ruled that it had jurisdiction over corporations for the offence of contempt. They decided so despite the absence of a clear provision explicitly granting such jurisdiction noting that the fact that the International Criminal Court does not have jurisdiction over legal persons cannot be interpreted as an absolute bar to such jurisdiction.”⁶³ In the *New TV S.A.L Case Appeal Decision* the STL “noted that the absence of precedent before international tribunals cannot be interpreted as a bar to jurisdiction over legal persons for that offence, but simply illustrates the fact that the issue was never adjudicated”⁶⁴ The court averred that:

While it remains true that no post-World War II International criminal court or tribunal has previously found that it had the authority to try legal persons, this singular fact does not convince the Appeals Panel that the term ‘person’... excludes legal persons when seen through

⁶¹ International Military Tribunal (Nuremberg), Judgement and Sentences (1 October 1946), reprinted in 41 American Journal of International Law (1947) 172.

⁶² ‘The I.G. Farben Case’, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VIII (United States Government Printing Office, 1952), at 1108.

⁶³ Nadia Bernaz, Corporate Criminal Liability under International Law: Cases before International Courts and Tribunals: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon, J Int Criminal Justice (2015) 13 (2): 313.

⁶⁴ Nadia Bernaz, Corporate Criminal Liability under International Law: Cases before International Courts and Tribunals: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon, J Int Criminal Justice (2015) 13 (2): 325.

*the prism and nature of the Tribunal's inherent power to protect the integrity of its proceedings. Indeed, corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law.*⁶⁵

- 61 In *Akhbar Beirut S.A.L.* the STL Appeal Panel rejected the argument that prosecuting natural persons is enough to fully prevent an impunity gap. The Appeals Panel contended that 'many corporations today wield far more power, influence and reach than any one person'⁶⁶ thus excluding them from the reach of the Tribunal and thus shield them from prosecution.⁶⁷ In essence, the Appeal Panel adopted a wide view of the Tribunal's inherent jurisdiction even though neither the Statute of the Tribunal nor its Rules, explicitly give the Tribunal jurisdiction over corporations in its proceedings or in any other proceedings.⁶⁸

4.12 Individual responsibility and group liability form a continuum rather than a dichotomy

- 62 'Holding one accountable only for one's own doing is placed at one end of the continuum, while state criminal responsibility and criminal liability based on membership in a criminal organization is located at the other. In the middle, ascending based on the degree of individual participation in the crime, fall criminal law doctrines such as conspirators liability'.⁶⁹ An organization of the social whole largely determines the character and conduct of its parts, exclusive attention to these constituent components risks missing everything of significance to moral judgment and social understanding'.⁷⁰ In this regard is to be noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) borrowed from domestic law the joint criminal enterprise doctrine, a mode of group liability which was not expressly mentioned in its Statute.⁷¹

⁶⁵ Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and AI Khayat (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015 (hereafter, 'New TV S.A.L. Appeal Decision'), § 67.

⁶⁶ *Ibid.*, § 82. Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and AI Khayat (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015 (hereafter, 'New TV S.A.L. Appeal Decision'), § 82.

⁶⁷ Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and AI Khayat (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015 (hereafter, 'New TV S.A.L. Appeal Decision'), § 41.

⁶⁸ Nadia Bernaz, Corporate Criminal Liability under International Law: Cases before International Courts and Tribunals: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon, *J Int Criminal Justice* (2015) 13 (2): 313: 328-329.

⁶⁹ Schachar Eldar, Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility, *J Int Criminal Justice* (2013) 11 (2): 331: 332.

⁷⁰ *Ibid* at 332.

⁷¹ Adopted in Judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999.

63 The *UN Human Rights Norms for Corporations* use the duty-bearer (i.e. corporations) as their central organising theme. Drawing on the premise that corporations can and do violate international human rights standards. The Norms first identify corporations as duty-bearers and then ask what rights might, could or should corporations be expected to respect and protect. The primary obligations in the Norms are that transnational corporations (TNCs) and other business enterprises should promote, secure the fulfilment of, respect, ensure respect of and protect human rights. Paragraph 3 of the Norms prohibit TNCs from engaging in or benefiting from certain serious human rights abuses.²⁶

4.13 Business activity is not always a neutral action

64 Business actors can be involved in international crimes in a variety of ways that might meet the legal standards of either *direct or secondary liability*. In cases that concern neutral business actions a line must be drawn between the morally condemnable behaviour of ‘doing business with a bad actor’⁷² and criminally relevant contributions to another entity’s international crimes. This distinction is relevant when companies facilitate states to breach international law by providing the means to commit such activities.

65 Some helpful criteria to distinguish corporate complicity in international crimes from neutral business activity were developed by the International Commission of Jurists (ICJ) in its 1998 report on the involvement of corporations in international crimes. According to the ICJ Report, a company runs the risk of being complicit in international crimes if by such conduct, the company or its employees:

- (1) enables the specific abuses to occur, meaning that the abuses would not occur without the contribution of the company, or
- (2) exacerbates the specific abuses, meaning that the company makes the situation worse, including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency, or
- (3) facilitates the specific abuses, meaning that the company’s conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.’⁷³

⁷² In *Re South African Apartheid Litigation*, 02- md-1499, U.S. District Court, Southern District of New York (Manhattan), 8 April 2009, at 87.

⁷³ ICJ, *Corporate Complicity & Legal Accountability*, Report of the International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, Vol. 1: Facing the Facts

4.14 Transnational businesses have obligations under international criminal law

- 66 The international sphere criminal liability of corporations seemingly is an issue *de lege ferenda*, not *de lege lata*. “A norm of criminal law describing a crime may be understood as comprising two sub-norms: the first consists of a prohibition of certain conduct, such as the prohibition to kill another person. To make it a norm of criminal law, however, a second sub-norm is required, which provides that the consequence of any contravention of the first sub-norm is criminal punishment.”⁷⁴ “In international criminal law, this structure can best be observed in respect of war crimes, where the prohibition of certain conduct is generally contained in a rule of international humanitarian law—be it customary or conventional in nature; the second sub-norm is often grounded in international custom.”⁷⁵
- 67 “The question of whether any international court or tribunal has jurisdiction may be distinguished from the question of whether there is a rule of substantive international law providing for the punishment of legal persons for core crimes. It is conceivable that a norm exists even though there may not exist a forum where it can be enforced. The norm thus would lie dormant, but it could be activated, without breach of the *nullum crimen* principle, through the establishment of a court or tribunal vested with jurisdiction over transnational business corporations.”⁷⁶
- 68 In the absence of any international treaty providing for substantive norms, the source of any such norm can be found in international custom. Some commentators have and do contemplate that customary law provides for criminal punishment of transnational businesses for core international crimes.⁷⁷ Some post-World War II decisions (*Flick*, *Krupp* and *IG Farben*) asserted that corporations were capable of aiding and abetting/accessories to war crimes and crimes against humanity.

and Charting the Legal Path (2008), available online at http://www.icj.org/IMG/Volume_1.pdf (visited 15 December 2009), at 25.

⁷⁴ Volker Nerlich, Core Crimes and Transnational Business Corporations, *J Int Criminal Justice* (2010) 8 (3): 898.

⁷⁵ *Ibid* 898.

⁷⁶ *Ibid* 898.

⁷⁷ See A. Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’, 6 *JICJ* (2008) 899; Ramasastry, *supra* note 3. A. Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, 20 *Berkeley Journal of International Law* (2002) 91 et seq., at note 3.

4.15 Obligations of Transnational Businesses are not limited to Core Crimes with an Economical Dimension

4.15.1 *The Flick Case*⁷⁸

69 In the *Flick Case*, the US Military Tribunal sitting at Nuremberg considered whether private individuals could be held responsible under international law. The Tribunal explained:

It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty. There is no justification for a limitation of responsibility to public officials.⁷⁹

4.15.2 *Tesch and Two Others (Zyklon-B)*⁸⁰

70 The three accused were agents of the Tesch and Stabenow Company, which had supplied Zyklon B gas to the *Schutzstaffel* (SS) one of whose component--the SS-Totenkopfverbände (SS-TV), ran Nazi Germany's concentration and extermination camps. The chemicals supplied were used to murder concentration camp prisoners. The British Military Court sitting at Hamburg found two of the accused guilty of war crimes for the violation of article 46 of the 1907 Hague Regulations.⁸¹ Apparently, the court considered that this provision bound not only states and their officials, but also private individuals. By supplying gas to the SS, the defendants breached the provision. The *Zyklon B* case demonstrates that the involvement of business corporations in international core crimes may go beyond crimes that have an obvious economical dimension. Thus, it cannot be said that business corporations can only be involved in certain economic core crimes. Rather, depending on the circumstances of each case, their

⁷⁸ 'Opinion and Judgment', U.S. v. Friedrich Flick et al., U.S. Military Tribunal IV, 22 December 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (TWC)*, Vol. VI (Washington, DC: U.S. Government Printing Office, 1952) 1187, at 1192.

⁷⁹ 'Opinion and Judgment', U.S. v. Friedrich Flick et al., U.S. Military Tribunal IV, 22 December 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (TWC)*, Vol. VI (Washington, DC: U.S. Government Printing Office, 1952) 1187, at 1192.

⁸⁰ See *The Zyklon B Case, the Trial of Bruno Tesch and Two Others*, British Military Court at Hamburg, 1-8 March 1946, in *Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission*, Vol. I (London: H.M.S.O, 1947) 92.

⁸¹ *Ibid* at 92.

involvement may extend potentially to all crimes under international law.

4.16 Drawing conclusions; Criminal liability of corporations

- 71 A corporation as a bearer of rights and duties and is expected to act according to rules, is it not an inescapable consequence that the corporation has the capacity of understanding the rules and of acting in accordance to them? If it fails consciously to comply, why should it not be blamed? With all due respect to the unique nature of criminal law, if the corporation has enough mind and free will to commit itself to a contract, where do the mind and the will disappear then one turns to penal law.⁸²
- 72 “The requirement that the corporation must have consented to, or at least accepted, the actions of their representatives, involving complicity in international crimes, in order to incur liability connotes the *mens rea* dimension. Under general doctrine of corporate liability, knowledge and intent of persons acting on behalf of the corporation are attributed to the corporation itself.”⁸³ A legal spectrum that emerges in the assessment of complicity of corporate agents in international crimes is whether they themselves or their corporation benefited from transactions which facilitated those crimes.⁸⁴ In the *IG Farben Case*, the IMT noted that the corporation had benefited tremendously from the unlawful seizures of plants in occupied territory, enabling the corporation to establish its chemical empire. “In *Unocal*, the court considered the question whether Unocal had gained from the use of forced labour as one of the criteria to assess whether courts would have prima facie subject matter jurisdiction under ATS in the first place.”⁸⁵
- 73 Imposing criminal liability on the corporation is the only way to stand up to the fundamental principle according to which crimes of the worst nature must not remain unpunished. Imposition of criminal liability on the corporation enables accountability in cases where the culpable organ disappeared, died or is unavailable to appear before the court. It also enables accountability where individual accountability is impossible. This is the case, e.g. when a collective body of the corporation acts criminally but not unanimously, and the majority cannot be identified, or when it can be proven that the corporation executed a criminal policy but there is no sufficient evidence against any individual who was responsible for this policy.⁸⁶

⁸² M. Kremnitzer and H. Genaim, ‘The Criminal Liability of a Corporation’, in A. Barak (ed.) Shamgar Book, Vol B (Tel Aviv: Israel Bar Association, 2003) 33-113, at 67-68.

⁸³ Harmen van der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 70.

⁸⁴ Harmen van der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, *Chinese Journal of International Law* (2013) 12(1): 43-77 at 70.

⁸⁵ *Ibid* at 71-72.

⁸⁶ Slye, *supra* note 3, at 961. R. Slye, ‘Corporations, Veils and International Criminal Liability’, 33 *Brooklyn Journal of International Law* (2008) 955-974, at 961.

74 'Conceptually, it is arguable that transnational business corporations are bound by the prohibitions underlying the core crime of international law, despite the fact that currently no international criminal court or tribunal has jurisdiction to hold them accountable. As far as genocide, crimes against humanity and war crimes are concerned, the liability of transnational business corporations is not limited to crimes with an economical dimension; depending on the circumstances of the case, corporations can be held accountable for any crime. Thus, international criminal law appears to be prepared to address core crimes attributable to transnational business corporations.'⁸⁷

PART V CONCLUSION

That same death sentence that those were given decades ago has been passed from generation to generation. Agent Orange is a generational serial killer. Agent Orange stores itself in the fatty tissue of the primary person exposed and then is thought to mutate the DNA of the conceived child causing many of the same birth defects, diseases, illnesses and ultimately deaths, as are seen in generations of Vietnamese. Hundreds of thousands globally have died and will continue to die drastically before the average human lifespan.

For the last 50 years, Monsanto has gotten away with this crime. The company trying that dominates global food supply is a very successful commercially entity but also a successful murderer deserving to be tried and convicted. Monsanto will tell you that they were contracted by the United States Government and therefore should have no accountability for the travesties created by Agent Orange. In fact, as the largest producer of Agent Orange, Monsanto themselves knew that the chemical was deadly. Besides, even in the worst case scenario. It doesn't take a genius to figure out that there might be serious danger to humans if they are coming into contact with a chemical that turned lush green jungles into barren wastelands in a matter of hours.

⁸⁷ Volker Nerlich, Core Crimes and Transnational Business Corporations, *J Int Criminal Justice* (2010) 8 (3): 895: 908.

PART VI

PRAYERS TO THE TRIBUNAL

- 1.** *The Plaintiffs seek* a declaration that when a legal duty is imposed on a corporation, in circumstances where it is not clear who was personally obliged to fulfil the duty non-fulfilment does not exonerate a corporation from the harm it has occasioned by its complicity in acts that facilitate breaches of international law by a third party.
- 2.** *The Plaintiffs seek* a declaration that corporations may commit crimes which can be prosecuted at the international level on the basis that corporate criminal liability under international law is not conceptually impossible.
- 3.** *The Plaintiffs seek* a declaration that despite Article 25 of the ICC confining itself to 'natural' persons, its inherent jurisdiction does grant leeway to prosecute other juridical persons considering that the essence of inherent powers is that they can and do exist outside of written text.
- 4.** *The Plaintiffs seek* a statement that it is reasonable and fair to hold corporations criminally responsible for complicity in international crimes when their engagement in commercial activities and profit generation aid and abet third party breaches of international law.
- 5.** *The Plaintiffs seek* a statement that a corporation benefits from its positive and successful activities. The corporation earns a good name for its own when the acts of its organs create the basis for such good name. In tandem a corporation's reputation cannot remain immune when it deserves a blemish on its name when it is a primary or secondary accessory to breaches of international law.
- 6.** *The Plaintiffs seek* a declaration that jurisdiction by an international court/tribunal is linked to rules of substantive international law that provide for the punishment of legal persons. In the absence of any international treaty providing for substantive norms, the source of the norm can be located within the in international normative system.
- 7.** *The Plaintiffs seek* a declaration given Monsanto's active development and supply of Agent Orange to the US military and the supply of millions of gallons of the chemical, the corporation establish an environmental and health trust fund of US \$50 million—5% of its annual profits. This is not a punitive sum given that its profits regularly hover above US \$1 billion per annum.
- 8.** *The Plaintiffs seek* a declaration that Monsanto establish an endowment fund of US \$5 million to fund a research institute on use of chemical and biological substances and the environmental effects in armed conflict under the joint auspices of the International Committee of the Red Cross (ICRC) and The United Nations Environment Programme (UNEP).