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Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights

By DIANE MARIE AMANN*

I was asked to speak today, to respond to the concept of corporations' criminal liability for violations of human rights. I am delighted to do so. I am in the middle of research undoubtedly incubated during my term as an assistant federal public defender in that courthouse you see out the window. It asks whether, and in what circumstances, it is appropriate to launch international or transnational prosecutions against individual, human defendants—natural persons.¹ The issues with which I have been grappling seem even more acute when we speak of corporations—artificial persons or, in French, *personnes morales*.

Thus, I came to this conference armed with a set of questions. Would international criminal punishment of corporations serve the traditional purposes of criminal law in any way? Would it deter? Would it visit retribution on corporations? How large a fine would have to be levied to deter a corporation from repeating a crime? How can you punish an artificial person? You cannot throw a corporation in jail. There is, in U.S. law at least, the concept of the corporate death penalty, the termination of the license to do business.² But, it is very rarely, if ever, used. What about redressing

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1. For an initial consideration of these issues, see Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, in *THIRD WORLD LEGAL STUD.* (forthcoming 2001).

2. 12 U.S.C.A. § 93(d) (West Supp. 2000) (forfeiture of franchise of national banks convicted of money laundering offenses); *id.*, § 1464(w) (same for federal

victims? If that is really what you want to do, would not other means, like civil damages or a contribution fund, be much more useful?

And what about the emerging purposes of criminal punishment? Judges in the international criminal tribunals frequently echo the U.N. Security Council's contention that international criminal prosecutions will help to build peace.³ The link between corporate criminal responsibility and peace-building did not spring to mind. What about the expression of moral condemnation? Can a *personne morale* have morality that can be condemned?

Then I came to the conference. The first panel, entitled "Multinationals and the Unfinished Legacy of Nuremberg," provided more fodder for commentary. In his presentation on corporate criminal liability, Professor Andrew Clapham suggested embracing a doctrine advanced by the International Criminal Tribunal for Rwanda as a way to hold corporations responsible.⁴ The tribunal's 1998 judgment in *Akayesu* spoke in dicta of complicity, a concept analogous to what is called accomplice liability in the United States.⁵ Its articulation of the crime of complicity required proof that the accomplice knew that he or she was providing assistance to a principal criminal. The opinion proceeded to quote English, not U.S., law, to state that guilt would lie even if the accomplice did not wish the crime to be committed, and even if the accomplice regretted the crime that the principal committed.⁶ On hearing the passage, I

savings associations); *id.*, § 3105 (termination of foreign bank office in United States).

3. See, e.g., Prosecutor v. Tadic, No. IT-95-1, Sentencing Judgment, ¶ 7 (Int'l Crim. Trib. for the Former Yugo. Nov. 11, 1999), reprinted in 39 I.L.M. 117, 120, available at http://www.un.org/icty/tadic/trialc2/judgement/index_3.htm (stating that part of the "unique mandate" that the International Criminal Tribunal for the former Yugoslavia received from the U.N. Security Council is "contributing to the restoration and maintenance of the peace"); Prosecutor v. Akayesu, No. ICTR-96-4, Judgement, ¶ 2 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), available at <http://www.icttr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (writing that the Security Council established the International Criminal Tribunal for Rwanda to "contribute to the process of national reconciliation and the restoration and maintenance of peace").

4. Some of the ideas Professor Clapham advanced during the conference—though not this one—were discussed in Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

5. *Akayesu*, Judgement, ¶¶ 525-48, 698-743 (positing elements of complicity, yet not applying them, as it ruled that conviction of defendant for principal acts of genocide precluded finding of guilt for complicity to genocide).

6. In full, the passage reads:

scrawled on my legal pad, "Can that possibly be just?"

This will be easy, I thought.

But then I looked at the brochure for this conference. Three images—two distinct, one obscured. Children, with stern faces, and staring, even glaring, eyes. These faces, I realized, were not going to let me do this the easy way.

The faces reminded me of other research that I have been doing this year, regarding Sierra Leone.⁷ A state whose capital, Freetown, was known in colonial times as the Athens of West Africa,⁸ Sierra Leone has been wracked for the last ten years by civil war. One-third of a country about the size of South Carolina is under rebel control. A quarter of Sierra Leone's 4 million people are refugees or internally displaced persons. Two harrowing characteristics have marked the conflict. Children as young as seven or eight routinely have served in combat. And the civilian population has suffered incredibly horrific mutilations, rapes and other atrocities.⁹

The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

Moreover, as in all criminal Civil law systems, under Common law, notably English Law, generally, the accomplice need not even wish that the principal offence be committed. In the case of *National Coal Board v. Gamble*, Justice Devlin stated

"an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor."

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

Id. ¶¶ 538-39 (quoting *Nat'l Coal Board v. Gamble*, [1959] 1 QB 11) (citations omitted). For an analysis stating that complicity law differs in California and elsewhere in the United States, see Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. & CRIMINOLOGY 369, 375 (1997).

7. Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. (forthcoming 2001); Diane Marie Amann, *Medium As Message in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 249 (2001).

8. GEORGE PADMORE, *HOW BRITAIN RULES AFRICA* 271 (1936).

9. On these facts, see, e.g., U.S. DEPARTMENT OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SIERRA LEONE, Feb. 25, 2000, available at <http://www.state.gov/g/drl/rls/hrrpt/1999/index.cfm?docid=270> (last visited Apr. 21,

Why is this happening? It is an unusual war. There is not an ethnic conflict. There is not a religious conflict. There is no ideological conflict to speak of. There is no popular support for the rebels.

Well, then, why is all this happening? The answer, to a large extent, is diamonds.

In the words of one account, “[i]n Sierra Leone, a chaotic assemblage of rebel and pro-government forces has turned the nation into a patchwork of armed fiefs competing, essentially, for the country’s diamond riches.”¹⁰ The Revolutionary United Front, the chief rebel force in Sierra Leone, is allied with President Charles Taylor of Liberia not only in combat, but also in the illicit diamond trade. It is in the rebel-controlled areas that Sierra Leone’s diamond mines lie.

Diamond trafficking is incredibly lucrative. Diamonds cannot be traced. At this point no analysis reveals with certainty whether a diamond came from a legal mine, in, say, Botswana, or was extracted by slave laborers in Sierra Leone.¹¹

In exchange for these diamonds, Sierra Leonean rebels are getting arms and matériel with which to continue the war:¹² cheap arms, light enough for seven year olds to carry into combat, and drugs—crack, methamphetamine, other drugs—strong enough, and prevalent enough, to incite these children to brutality.¹³

How does this tragedy relate to the issue of corporate criminal

2001); AMNESTY INTERNATIONAL, COUNTRY REPORTS: SIERRA LEONE, at <http://www.web.amnesty.org/web/ar2000web.nsf/7ebe37766b402ffb380zs68f500614544/6ff8783fea50d6fc802568f200552966!OpenDocument> (last visited Apr. 21, 2001).

10. Alan Cowell, *Colonialism’s Legacy Becomes a Burden*, N.Y. TIMES, June 11, 2000, § 4, at 5.

11. Blaine Harden, *Africa’s Gems: Warfare’s Best Friend*, N.Y. TIMES, Apr. 6, 2000, at A1.

12. See generally Report of the Panel of Experts Appointed Pursuant to UN Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone, U.N. Doc. S/2000/1195 (2000), available at <http://www.sierra-leone.org/panelreport.html> (last visited Apr. 21, 2001) [hereinafter U.N. Experts’ Report].

13. On these facts, see, e.g., Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone*, in AFRICAN GUERRILLAS 172, 180, 190 (Christopher Clapham ed., 1998) (discussing the use of drugs to embolden Sierra Leone’s child soldiers); *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157*, U.N. GAOR, 51st Sess., Agenda Item 108 ¶¶ 27, 47, U.N. Doc. A/51/306 (1996) (discussing how administration of drugs and ready availability of lightweight arms promotes child soldiering).

liability?

There is a 1999 report circulating on the Internet from David Pratt, a Member of the Canadian Parliament and Special Envoy to Sierra Leone, to Lloyd Axworthy, then foreign minister of Canada.¹⁴ Pratt described the multimillion-dollar diamond trade and arms sales from Liberia as “vital pillars of support for rebel forces in Sierra Leone.”¹⁵ The Sierra Leone mines are run by what Pratt called “shadowy companies” believed to employ private security firms that thwart government efforts at control.¹⁶ Pratt’s account and others outline components of this commercial enterprise; they include diamond markets in Beirut, Antwerp and New York, and arms dealers in Eastern Europe, Libya and Liberia.¹⁷ A shadowy industry with the means to create havoc in Sierra Leone. In Liberia and Congo too, the story is not much different.¹⁸

Thinking about diamonds made me think seriously about trying to call corporations to account, by means of transnational or international criminal law, for behavior that can only be characterized as criminal.

There is precedent for it. As Professor Clapham explained, the first Judgment of the International Military Tribunal at Nuremberg included declarations that certain organizations were criminal. These included the Leadership Corps of the Nazi Party, as well as various Nazi security forces.¹⁹ Though no corporations were convicted in that

14. David Pratt, *Sierra Leone: The Forgotten Crisis, Report to the Minister of Foreign Affairs, the Honorable Lloyd Axworthy, P.C., M.P. from David Pratt, M.P. Nepean-Carlton, Special Envoy to Sierra Leone*, available at <http://www.sierra-leone.org/pratt042399.html> (Apr. 23, 1999).

15. *Id.* pt. 2. A 2000 U.N. report estimates the RUF diamond traffic to be between \$25 million and \$125 million a year, “more than enough to sustain its military effort.” U.N. Experts’ Report, *supra* note 12, ¶ 80.

16. Pratt, *supra* note 14, pt. 2.

17. *Id.* (mentioning links with West Africans of Lebanese descent and to diamond markets in Beirut, as well as arms dealing through regions described in text); Harden, *supra* note 11 (stating that “[e]ight out of 10 of the world’s rough diamonds . . . pass through Antwerp’s Diamond Center,” and that “[m]any diamond traders in Antwerp do not particularly want to know where the stones came from”).

18. See, e.g., Norimitsu Onishi, *In Ruined Liberia, Its Despoiler Sits Pretty*, N.Y. TIMES, Dec. 7, 2000, at A1 (describing how President Taylor has used diamonds to fuel war in Sierra Leone and elsewhere in Africa and, at the same time, has “plundered his country’s natural resources”); Donald G. McNeil Jr., *A War Turned Free-for-All Tears at Africa’s Center*, N.Y. TIMES, Dec. 6, 1998, § 4, at 5 (describing how greed for diamonds and other natural resources prolongs war in Congo).

19. See *United States v. Goering*, Judgment (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 135-36, 139, 143 (1946) (declaring criminal the Leadership

or in subsequent judgments, these declarations nonetheless established that artificial persons could be guilty of international crime.²⁰

In the United States, holding corporations criminally liable is unremarkable. Particularly in the area of money laundering, it is not at all unusual for a corporation to endure criminal process.²¹

As Professor Ugo Mattei mentioned in the course of this conference, even in civil law states there is movement in this direction. A recent French law, for example, allows corporate criminal responsibility.²² Within Europe as a whole, though hesitation remains, there is agitation in this area.²³ Out of last December's

Corps; the *Geheime Staatspolizei*, or Gestapo; the *Sicherheitsdienst des Reichsführer SS*, or SD; and the *Schutzstaffeln*, or SS).

20. See Clapham, *supra* note 4, at 165. Industrialists were, of course, convicted in postwar trials. *Id.* at 166-67 (discussing conviction of directors of I.G. Farben company for international crimes including use of slave labor and production of poisonous gas). Prosecution of human beings engaged in illegal commercial activity well may serve deterrence, incapacitation, and other justifications for criminal punishment. That question is beyond the scope of this paper, which considers only prosecution of corporations, artificial persons.

21. United States v. Banque Leu, S.A., No. CR-93-0607 (N.D. Cal. Dec. 13, 1993) (plea of guilty to money laundering), discussed in Kirk W. Munroe, *Surviving the Solution: The Extraterritorial Reach of the United States*, 14 DICK. J. INT'L L. 505, 520-21 (1996). See also Don Van Natta Jr., *U.S. Indicts 26 Mexican Bankers in Laundering of Drug Funds*, N.Y. TIMES, May 19, 1998, at A6 (reporting on sting operation in which three Mexican banks were charged with money laundering). Just days after these remarks were delivered, a Chinese company that made binder clips sold in the United States was convicted of violating a 1932 federal law proscribing importation of products made with prison or forced labor. William K. Rashbaum, *Chinese Firm Pleads Guilty in Labor Case*, N.Y. TIMES, Mar. 1, 2001, at B1. Cf. Leonard Orland & Charles Cachera, *Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) under the New French Criminal Code (Nouveau Code Pénal)*, 11 CONN. J. INT'L L. 111, 117-20 (1995) (discussing development of "American model of corporate criminal responsibility").

22. C. PÉN. art. 121-22 (extending criminal liability to corporations in the 1990s revision of French Penal Code). Permissible punishment includes measures such as closing of business and limitations on activities, to fines of up to five times that allowed for natural persons. *Id.*, arts. 132-12, 132-38, 131-39; see generally Orland & Cachera, *supra* note 21 (discussing these laws).

23. Clapham, *supra* note 4, at 175-78 (discussing European measures); Roland Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, 4 BUFF. CRIM. L. REV. 283, 284 (2000) (writing of "widespread reluctance to accept this idea in continental Europe," yet noting that France, Denmark, and Sweden had already established corporate criminal liability, and that some commentators had called for similar innovation in Germany). In Japan, two weeks after this presentation, a subsidiary of Credit Suisse was found guilty of securities violations, "the first criminal conviction of a bank in memory." Miki Tanikawa, *Japanese Court Convicts a Bank*, N.Y. TIMES, Mar. 9,

Palermo conference on organized crime came a multilateral convention that calls upon states parties to adopt measures to hold corporations criminally liable.²⁴

Criminal prosecution of industries engaged in the business of war thus deserves serious and full consideration.

What would be the advantage? Authorizing corporate criminal liability would bring the repressive power of a state, or perhaps a collection of states, to the table. Thus, investigation and prosecution would be pursued by an organized body—a governmental entity—with power that may equal or exceed that of the suspect corporation. Governmental entities, moreover, may make use of otherwise unavailable intelligence and classified information.

The benefit itself raises concerns. Government criminal prosecution well may become a test case for civil litigation seeking damages. Think about the Lockerbie trial that just ended. After more than a decade of international litigation and negotiation over how to adjudicate the bombing of a Pan Am airliner, two Libyans stood trial at an abandoned military base in the Netherlands, before a panel of Scottish judges applying Scottish law. One was convicted, the other acquitted. How did the relatives of Lockerbie victims react? “Well,” some said in essence, “we’re not delighted with the verdict. But the criminal case gave us access to lots of new information. Now we’ve made our case for the civil litigation, to recover damages.”²⁵ Should a government act as a stalking horse for civil litigation?

Will individual states have the courage to take on corporations in this way? Think about what is happening here in the United States. Neither the U.S. government nor the State of California has pursued Chevron or Unocal for alleged overseas human rights abuses.

2001, at W1.

24. *U.N. Convention against Transnational Organized Crime*, U.N. GAOR, 55th Sess., Agenda Item 105, art. 10, at 30, U.N. Doc. A/55/383 (2000) (setting forth obligations regarding “[l]iability of legal persons”), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (last visited Apr. 21, 2001); Gunther Kern, *More Than 100 Nations Back Cross-Border Anti-Crime Treaty*, AGENCE FRANCE-PRESSE, Dec. 15, 2000, available at 2000 WL 24782064 (stating that 121 states signed the treaty during Palermo conference).

25. Donald G. McNeil Jr., *Libyan Convicted by Scottish Court in ‘88 Pan Am Blast*, N.Y. TIMES, Feb. 1, 2001, at A1 (stating that victims’ relatives seemed “satisfied,” noting that the verdict “would help their civil case against Libya”); Donald G. McNeil Jr., *Verdict’s Reasoning*, N.Y. TIMES, Feb. 2, 2001, at A1 (quoting attorney for plaintiffs on how Scottish criminal court’s findings would aid civil case).

Instead, that is being done by individual plaintiffs via suits invoking the Alien Tort Claims Act.²⁶ States rejected a proposal to include corporate criminal liability in the Rome Statute of the International Criminal Court.²⁷ In Sierra Leone, there is movement toward establishment of a mixed national-international tribunal, a Special Court. But the draft statute provides only for punishment of natural persons,²⁸ and then only to those few persons suspected of bearing “the greatest responsibility” for atrocities.²⁹ Can we expect aggressive pursuit of corporations by states or international organizations?

Think too about how international criminal prosecution of corporations would affect litigation. Making corporations litigants would make criminal trials longer and more expensive. Corporate defendants in international criminal cases, no less than corporate defendants in U.S. Alien Tort cases, will push for rulings leading to more pro-defense doctrines.³⁰ From the perspective of one who believes there should be more attention to the rights of the accused in

26. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997) (describing suit seeking redress under this act, codified at 28 U.S.C. § 1350, based on plaintiff villagers’ allegations that California-based corporate defendant, through government security forces, engaged in relocation of villages, enslavement, and property theft in Burma); Jason Hoppin, *Chevron Hit with Human Rights Claim*, NAT’L L.J., Apr. 24, 2000, at B1 (reporting on lawsuit filed in San Francisco by Nigerian citizens, complaining of human rights violations at defendant’s Nigerian operation).

27. Clapham, *supra* note 4, at 143-60 (detailing negotiation process that led to this rejection and suggesting that statute could eventually be amended to include such liability).

28. See Statute of the Special Court for Sierra Leone, art. 19 (requiring conviction be punished by “imprisonment”) [hereinafter Special Court Statute], in *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 52d Sess., Enclosure, at 28, U.N. Doc. S/2000/915 (2000), available at <http://www.un.org/Depts/dhl/docs/s2000915.pdf> (Oct. 4, 2000) [hereinafter Secretary-General’s Report].

29. Amendment to Statute of the Special Court for Sierra Leone, in *Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary General*, U.N. SCOR, 52d sess., Annex, art. 1(1), at 3, U.N. Doc. S/2000/1234 (2000), available at <http://www.un.org/Docs/sc/letters/2000/1234e.pdf> [hereinafter Security Council Letter]. U.N. Secretary-General Kofi Annan had proposed that the Special Court be permitted to adjudicate a broader group—not just leaders, but anyone suspected of being “most responsible” for serious violations. See Secretary-General’s Report, *supra* note 28, ¶¶ 29-30, at 6-7; Special Court Statute, *supra* note 28, art. 1, at 15. The U.N. Security Council insisted on the narrower formulation. See Security Council Letter, *supra*, ¶ 1, at 1.

30. See, e.g., *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 169 (5th Cir. 1999) (affirming dismissal of suit in which Indonesian citizen had alleged that a Louisiana mining corporation was liable for international human rights violations and genocide).

the international arena, this may be a good thing. Yet some rulings, like the holding in *Unocal* setting a high threshold for liability of private actors, might constrain the scope of the law unduly.³¹ Thus blameworthy defendants, human beings as well as corporations, could escape criminal punishment.

There remains, always, the question of punishment. What, short of closing the business, would give a corporation its just deserts? Today, human defendants convicted of war crimes, crimes against humanity and genocide routinely receive sentences ranging from twenty years to life in prison.³² Can a money-based penalty, such as a fine or disgorgement of assets, approximate prolonged incarceration? Indeed, monetary penalties levied against corporations in criminal cases in the United States often seem trifling.³³

There is also the matter of moral condemnation. From

31. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1312 (C.D. Cal. 2000) (granting motion for summary judgment on ground that plaintiffs had not demonstrated that corporate defendant's actions met this threshold).

32. *Prosecutor v. Kunarac*, Nos. IT-96-23 & IT-96-23/1, Judgement, ¶¶ 3-11, 862-82 (Int'l Crim. Trib. for the Former Yugo. Feb. 22, 2001), available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm> (sentencing three Bosnian Serb military and paramilitary officials, in case involving rape, slavery, and torture of civilians, to twenty-eight, twenty, and twelve years respectively); *Prosecutor v. Musema*, No. ICTR-96-13, Judgement and Sentence (Int'l Crim. Trib. for Rwanda Jan. 27, 2000), available at <http://www.ictor.org/ENGLISH/cases/Musema/judgement/index.htm> (setting penalty of life in prison for former state-owned factory director guilty of three counts of genocide and crimes against humanity); *Prosecutor v. Tadic*, No. IT-94-1, Sentencing Judgement (Int'l Crim. Trib. for the former Yugo. Nov. 11, 1999), reprinted in 39 I.L.M. 117, 120, available at http://www.un.org/icty/tadic/trialc2/judgement/index_3.htm (sentencing defendant for various amounts of time for multiple counts, to be served concurrently, so that imprisonment will span twenty-five years); *Prosecutor v. Akayesu*, No. ICTR-96-4, Sentence (Int'l Crim. Trib. for Rwanda Oct. 2, 1998), available at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/ak81002e.html> (sentencing former mayor convicted of genocide and other crimes to three life sentences plus eighty years incarceration).

33. The amounts in money laundering cases seem high, but pale in comparison to overall criminal activity. For example, two Mexican banks forfeited \$13 million after pleading guilty to money laundering. *Asset Forfeiture: Hearing before the Senate Subcomm. on Criminal Justice Oversight, Comm. on the Judiciary*, 106th Cong. (1999) (statement of James E. Johnson, Treasury Undersecretary (Enforcement)), available at 1999 WL 20010422. The illegal funds processed, however, were estimated at much more. David Rosenzweig & Mary Beth Sheridan, *Mexican Banks Indicted in Drug Money Probe*, L.A. TIMES, May 19, 1998, at A1 (referring to \$115 million in illegal money). In another case, a company that pleaded guilty to forcing Chinese prisoners to assemble thousands of binder clips a day, though their fingers were bleeding, agreed to pay a \$50,000 fine as its sentence. Rashbaum, *supra* note 21.

Nuremberg to today, international criminal tribunals have placed great weight on their power to denounce and to express the outrage of the international community. The International Military Tribunal consciously established a record of atrocities and made declarations of culpability.³⁴ Likewise, in 1996, the International Criminal Tribunal for the former Yugoslavia wrote that it “sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence”³⁵ This expressive component of international adjudication can only be effective if the judgment is solemn and the sentence weighty. Conviction of a corporation for a heinous crime, coupled with a monetary penalty, may not suffice. Despite the moniker *personne morale*, a corporation has no morality. I fear that attachment of the label “criminal” to such an entity will dilute the expressive force of international criminal law.

So where does that leave me?

Greed is at the heart of some of the world’s worst tragedies. Corporations are being used as instrumentalities for great and unimaginable suffering. In such cases, I believe it is appropriate to impose criminal liability on corporations. To do so, under the right conditions, could indeed assist in bringing peace to war-torn regions.

It is essential that the standards of knowledge and intent to which corporate defendants are held satisfy strict penal standards. Criminal conviction for what approaches a crime of association ought to be avoided. The *Akayesu* complicity standard may have value in civil litigation against corporations, but in the criminal context that standard invites doubt about the fairness of conviction even of an individual, sentient human being. These concerns increase in the context of a collective, artificially intelligent being.

Furthermore, corporate criminal culpability should be pursued

34. See, e.g., *United States v. Goering*, Judgment (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 82 (1946) (stating that an event, later held to fall outside the Tribunal’s jurisdiction, “must not be forgotten”); *id.* at 126 (writing that evidence of Nazi persecution of Jews comprises “record of consistent and systematic inhumanity on the greatest scale”); *id.* at 132 (noting consequences of its power to “declare” certain groups criminal); *id.* at 147 (stating that it “must” describe the “shocking” behavior of members of the Nazi General Staff and High Command, even as it declares the group not to be criminal).

35. *Prosecutor v. Erdemovic*, No. IT-96-22, Sentencing Judgement, ¶ 65 (Int’l Crim. Trib. for the Former Yugo. Nov. 29, 1996), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm>.

only in the worst cases. For the grossest, most systematic violations of human rights. For the business of war, for the Sierra Leones. Perhaps not for many of the Alien Tort cases we have heard about in the course of this conference.

And what about punishment? I never thought I would hear myself advocate the death penalty. But the offenses I have outlined cause unforgivable suffering. Only total dissolution of the corporation—capital punishment—is appropriate.

