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09-2792-cv; 09-2801-cv; 09-3037-cv

In The
United States Court of Appeals
For the Second Circuit

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF *AMICI* PROFESSOR JOHN DUGARD AND
ADVOCATE ANTON KATZ IN SUPPORT OF PLAINTIFFS-
APPELLEES SEEKING AFFIRMANCE OF
DISTRICT'S COURT DECISION**

SAKWE BALINTULO, as personal representative of SABA BALINTULO, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of MANDLA MADONDO, MPHONGO ALFRED MASEMOLA, MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, THOBILE SIKANI, LUNGISILE NTSEBEZA, MANTO DOROTHY MOLEFI, individually and on behalf of her deceased son, MNCEKELELI HENYN SIMANGENTLOKO, TOZAMILE BOTHA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, JAMES MICHAEL TAMBOER, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

Plaintiffs-Appellees,

(caption continued on inside cover)

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendants-Appellants.

GENERAL MOTORS CORPORATION, RHEINMETALL AG

Defendants.

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AMICI CURIAE

Professor John Dugard occupied the Chair in Public International Law at the University of Leiden in the Netherlands from 1998 to 2006. He is currently Extraordinary Professor of Law at the Centre for Human Rights at the University of Pretoria. He is a member of the Institut de Droit International. Since 1997 he has been a member of the UN International Law Commission and between 2000 and 2006 was Special Rapporteur on Diplomatic Protection to the Commission. He was a Judge ad hoc of the International Court of Justice from 2002-2008.

Advocate Anton Katz is a member of the New York and Cape Town bars; he has extensive experience litigating international law.

INTEREST OF AMICI CURIAE

The *amici* believe that this Court's deliberations in this important matter should have the benefit of a comprehensive and up-to-date understanding of international law, and that they are in a position to assist the Court in that regard.¹

¹ The *amici* are not being remunerated for their work on this submission. This submission is not the work of any person other than the *amici* and their assistants. It is to be noted that Professor Dugard has signed the *Brief of*

The subject matter of this submission is the second of the two issues as to which the Court requested additional briefings (by the parties and any interested *amici*), in its order dated December 4, 2009: What do sources of international law evince as to whether or not customary international law recognises corporate criminal liability?²

SUMMARY OF ARGUMENT

A norm of international law allows for the imposition of criminal liability upon corporations. It is evidenced by the recognition of one form or another of the criminal or quasi-criminal liability of corporations in treaties, and in the domestic law of virtually every state.³ The latter reflects a “general principle of law recognised by civilised nations” that contemplates the criminal liability of corporations in certain circumstances.

International Law Professors in Support of Plaintiffs-Appellees (Dec. 22, 2009), which brief is entirely consistent with this one.

² *Amici* express no view on the first of the two questions as to which submissions were solicited, viz, whether the violations of customary international law for which the ATS provides jurisdiction can encompass non-criminal conduct.

³ His submission does not address questions of substantive law or of jurisdiction. Regarding the latter, whether or not any international tribunal currently enjoys criminal jurisdiction with respect to corporations is a question entirely distinct from the subject matter of this submission, viz. whether corporations are in principle subject to international criminal liability.

Moreover, leading publicists have affirmed that corporations may, in principle, be held criminally liable at international law.

It may therefore be said that the main sources of international law recognise the criminal liability of corporations.⁴

I. GENERAL PRINCIPLES OF INTERNATIONAL LAW WEIGH IN FAVOUR OF THE IMPOSITION OF CRIMINAL LIABILITY UPON CORPORATIONS

The recognition of corporate criminal liability – in one form or another – in domestic jurisdictions spanning the globe manifestly qualifies as a “general principle of law” within the meaning of the Statute of the International Court of Justice.⁵

A 2006 survey of sixteen countries – including both common law and civil law countries – by the Fafo Institute for Applied Studies in Norway found that:

“[S]tate practice within domestic laws [of] many countries, across a variety of legal systems and traditions, has expanded criminal laws to include legal persons”.⁶

⁴ See Statute of the International Court of Justice (“ICJ Statute”), art. 38(1), June 6, 1945, 59 Stat. 1055.

⁵ *Id.*

⁶ Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability, A Survey of Sixteen*

Countries as diverse as India, Argentina, Indonesia, Japan, and South Africa have embraced corporate criminal liability.⁷

The history of corporate criminal liability at international law has reflected the political and jurisprudential divide between common law and civil law countries. We deal in this submission first with common law countries, then with civil law countries, and finally by assessing State practice at an international level. In this final section, therefore, the implications of the Nuremberg Tribunal and the International Criminal Court (“the ICC”) regarding the liability of legal persons at international law will be canvassed.

A. COMMON LAW JURISDICTIONS IMPOSE CRIMINAL LIABILITY UPON CORPORATIONS

Common law countries, such as the United States of America, the United Kingdom, and South Africa, have long recognised the criminal liability of

Countries, Executive Summary, at 13 (Fafo, Sept 2006) available at <http://www.fafo.no/pub/rapp/536/536.pdf>.

⁷ *Id.*

corporations. It is trite that common principles of law recognised by States are a source of international law.⁸

Concepts of corporate criminal liability were developed in the nineteenth century as a means of dealing with the growing economic role of corporations in the era.⁹ Although the principle was originally quite restricted in ambit, it may now be said as a general rule that corporations may be held liable in common law countries for any crime save one which, by its nature, can only be committed by a natural person.¹⁰

Federal courts in the United States have employed the model of vicarious liability to attribute *mens rea* to corporations.¹¹ In the United Kingdom and Australia a qualified vicarious liability applies; corporations are only liable if the conduct is committed by an individual of sufficient seniority within the

⁸ ICJ Statute Art. 38(1). *See e.g.* Barcelona Traction Light and Power Company Ltd (Belgium v. Spain) 1970 I.C.J. 3, 33-35 (drawing upon common consensus of States that corporations enjoyed the benefits of limited liability.)

⁹ *See e.g.* L.H. Leigh, *The Criminal Liability of Corporations in English Law* 15-42 (Weidenfeld & Nicolson 1969); H de Doelder and K Tiedemann, *Criminal Liability of Corporations - XIV International Congress of Comparative Law* (1996).

¹⁰ *For example*, bigamy and perjury: Henry John Stephen, *Stephen's Commentaries on the laws of England* 22 (Butterworth 1950).

¹¹ *See e.g.*, *N.Y. Cent. & Hudson River R. R. Co. v. United States*, 212 U.S. 481, 494-5 (1909); Kathleen F. Brickey, *Corporate and White Collar Crime* 18-32 (Aspen Publishers 2006); and Wayne R. LaFave, *Substantive Criminal Law*, 2d, 382-399 (West 2003).

corporation.¹² South Africa and Canada are examples of countries where forms of vicarious liability for legal persons have been imposed by statute.¹³

The general willingness and ability of common law countries to impose criminal liability on corporations has been said to flow from the utilitarian theories of social regulation that underpin criminal justice in those countries.¹⁴

Contemporary common law jurisprudence thus unambiguously embraces corporate criminal liability, albeit in a number of different manners and pursuant to distinct theories. This has constituted a significant building block in the development of a corresponding principle at international law.

B. CIVIL LAW JURISDICTIONS IMPOSE VARIOUS FORMS OF PUNITIVE SANCTIONS UPON CORPORATIONS

Civil law jurisdictions have in the past been unwilling to allow criminal liability to be imposed upon legal persons.¹⁵ Criminal law expressed and enforced the

¹² See generally Celia Wells, *Corporations and Criminal Responsibility* (OUP 2001); *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) at 171; *Hamilton v Whitehead* (1988) 155 CLR 121 at 127.

¹³ Criminal Procedure Act 51 of 1977 at section 332 (South Africa); *North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape* 2000 (2) SA 78 (C) (South Africa); Criminal Code of Canada R.S.C. 1985, c. C-46 at 22.1-22.2.

¹⁴ See *Discussion*, 6(5) *Journal of International Criminal Justice* 947 (2008).

