CHAPTER 6

CORPORATE SENTENCING POLICY AND INTERNATIONAL CRIMINAL LAW

Sentencing of a juristic person poses one of the greatest challenge to a criminal law theorist. Sentencing policy along with *mens rea* has been the major obstacle in development of corporate criminal liability. However, with increase in the influence of multinational corporations, the ill effects of corporate power also surfaced which forced the gradual development of criminal prosecution of corporations. Consequently, various national legal systems adapted their laws i.e. civil as well a criminal to check corporate wrongdoing. As the experience in US and other common law countries has shown, the courts interpreted the scope of criminal law to include corporate criminal behaviour. In addition, law itself expanded to impute specific criminal liabilities to corporations.

6.1 WHY PROSECUTE CORPORATIONS - WHAT PURPOSE DOES IT SERVE?

Criminal Prosecution is an inherently moralistic process - it represents the collective disapproval of the ‘Society’ for the illegal act in question. That is the logic behind ‘state’ taking over the responsibility of prosecuting from private victims because a criminal offender is viewed as someone who is capable of harming not just the victim but the larger society. Civil Proceedings on the other hand are viewed as private disputes – something which the society as a whole is not concerned with. The only interest of the society is that private disputes must be adjudicated. Civil proceedings thus do not convey the gravity of the ‘Offence’ either to the Corporation or to the Society.
Criminal prosecution attracts wide social attention and is thus more effective from the view point of public discussion and informal social participation. Indictment and Punishment by a criminal court is an acknowledged forum for illegal acts which have widespread social and economic effects. Let us take a simple example. In case of a criminal prosecution of a legal person, the most prevalent form of punishment is ‘fines’. In civil action and/or administrative action against a corporation, again fines are the most common order. In USA, a corporation can be both subject to criminal indictment as well as simultaneous administrative action by the controlling authority or department. American agencies such as the Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), and the Federal Trade Commission (FTC) all have regulatory and enforcement powers. Such agencies often regulate virtually every aspect of American business, and more important, can use their enforcement power to investigate and “prosecute” alleged wrongdoing. American corporate criminal liability sits atop a pile of punitive and regulatory remedies, as just one very significant weapon in the government’s arsenal. Whereas, the very threat of criminal indictment is enough for the corporations to agree for any terms under the Deferred Prosecution Agreements (DPA) so as to avoid a trial, they are not too concerned when for the same action administrative or civil fines are imposed on them. The difference thus lies not in the sentencing but in the manner the particular ‘offence’ is dealt with by law i.e. by civil action or criminal prosecution. In the words of lord Denning, ‘the ultimate justification of punishment is not that it is deterrent but that it is the emphatic denunciation of the community of a crime’\textsuperscript{314}. It is also logical from Jurisprudential point of view - there

\textsuperscript{314} Peter Joyce, \textit{Criminal Justice An Introduction to crime and the criminal justice system}; Willian Publishing, 2006, p. 326,
can be no right without a corresponding duty. Thus if Corporations can claim rights under International Law, corollary is that they must also be subjects of international law for enforcement of duties against them.

The basic argument against corporate sentencing is that it is not capable of being physically imprisoned and hence criminal prosecution does not serve the same purpose as it does in the case of natural persons. There is an inherent fallacy in this argument against corporate sentencing. This fallacy springs from the notion that natural persons and legal person should be treated alike under criminal law. Once this basic fallacy is removed, it becomes much easier to analyse the issue of corporate sentencing objectively. Sentencing follows prosecution. There is no criminal law system in the world which first judges possibility of sentencing and then proceeds with the trial of the accused. This is logical since unless guilt is proved, a person cannot be sentenced. Taking this as the basis for criminal prosecution, it can be argued that it is the sentencing policy (for legal persons) which needs to be adapted or adjusted so as to make the prosecution more meaningful. It is not the sentencing of an accused which forms the basis for a criminal trial but the underlying ‘act’, one which causes the damage to society which results in the criminal trial. Then why should inadequate sentencing policy act as a deterrent for corporate prosecutions?

There are various advantages of introducing a system of corporate criminal liability. The problem is criminal law’s traditional focus on the individual and its corresponding inadequacy in counteracting corporate crime. Many of the crimes most dangerous to society originate from an organization’s activities and incentives. Corporate crime experts have thoroughly studied the rationales that justify
punishing organizations. It is the shift in approach towards a new corporate sentencing policy which will provide a solution to the problem. The emphasis on sentencing policy rather than the status of the offender (for judging whether legal persons should be prosecuted) is also supported by the various theories of punishment.

It is now an acknowledged legal position that goals of punishment are no longer limited to deterrence. The purpose of sentencing by the courts was to punish offenders, reduce crime (including deterrence) bringing about the reform and rehabilitation of offenders, protecting public and providing for offenders to make reparations to those affected by their actions. For deterrence, the most effective way is to physically imprison the offender/accused. This serves as a deterrent to future offenders and also protects the victim and society as such from the person who has already committed the offence. Deterrence may be individual or general. Individual deterrence seeks to influence the future behavior of a single convicted offender where as general deterrence seeks to influence the future actions of the public at large. Individual deterrence may be delivered in a variety of ways. These include indeterminate custodial sentences (where evidence of changed behavior is required before order of release is granted), or severe custodial conditions on an offender which are designed to encourage him or her to refrain from future offending behavior. General deterrence has a broad row, that of influencing the behavior of those who might be tempted to commit crime e.g. death penalty. The logic of

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this approach is that tougher sentences will reduce the level of crime in society\(^{317}\).

While analyzing US corporate sentencing practices in the light of sentencing theories, Cristina de Maglie observes that U.S. federal law has adopted the most modern preventive system to counteract corporate crime. In her paper\(^{318}\) she highlighted the Introductory Commentary of the U.S. Sentencing Guidelines for organizations - “the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanism\(^{319}\) for preventing, detecting, and reporting criminal conduct”. However, deterrent punishment itself is now no longer the most effective sanction in case of criminal prosecution. The term ‘punishment’ (which forms an integral part of sentencing) is capable of several definitions. Its meaning is often restricted to measures which are unpleasant and intended to inflict pain on an offender. It is also defined as the deliberate use of public power to inflict pain of offenders. However, the infliction of pain is not universally accepted as

\(\text{Supra Note 314 at p. 322}\)
\(\text{Supra Note 253}\)

\(\text{A corporation also must adopt internal mechanisms to prevent and detect criminal activity. In May 2004, the U.S. Sentencing Commission strengthened the criteria for effective compliance and ethics programs. An effective program requires that the organization has exercised due diligence to prevent the crime; and that it has otherwise promoted “an organizational culture that encourages ethical conduct and commitment to compliance with the law. . . .” It is an intermediate structure between the corporation and the criminal justice system. Under this mechanism, corporate managers perform the role of internal law enforcement agents. This monitoring system reduces the risk of behavior as a source of corporate crime. If a crime occurs and the corporation can show that it occurred despite the implementation of an effective compliance and ethics program, it enjoys a presumption against serious sanctions. Its fine can be reduced by as much as 95%, and probation can be avoided.48 However, if a crime occurs and the corporation had refused to adopt a compliance program, or had failed to implement an effective one, heavy penalties will be applied. This new approach to deterrence is called the carrot-stick model.}\)
a goal of punishment. Others prefer the use of the term ‘sanction’ as the general term for any measure which is imposed as a response to crime with adjectives distinguishing various kinds of sanctions – punitive sanctions, rehabilitative sanctions, reparative sanctions and the sanctions designed to protect the public through containment\(^\text{320}\). The goals of punishment now include retribution, reformation and compensation.

### 6.1.1 Retribution

Corporate criminal liability can successfully achieve its goal of retribution. Retributism insists that punishment is justified solely by the offender’s blameworthiness in committing the offence. Expressed simply, criminals are punished because they deserve it. This punishment is akin to vengeance since pain is inflicted on transgressors for pain’s sake rather than from a desire to bring about their rehabilitation\(^\text{321}\). A corporation’s economic resources allow for the payment of a fine that reflects the seriousness of an offense. Corporate offenses are normally extreme and damaging crimes, and thus better compensated by the corporation than by an individual agent. The U.S. Sentencing Guidelines insist on retribution. The fine directly correlates to the seriousness of the offense. Just punishment for corporate crime also ensures public confidence in, and respect for the law. The penalty for the corporate offender must be proportional to the harm committed so that it satisfies the public’s demand for vengeance\(^\text{322}\).

### 6.1.2 Reform and Rehabilitation

Punishment may be inflicted on those who are convicted of crime with a view to changing their personal values and habits so that future

\(^{320}\) Supra Note 314 at p. 320  
\(^{321}\) Supra Note 314 at p. 324  
\(^{322}\) Supra Note 251
behavior conforms to mainstream social standards. Penal reformers in the late 18\textsuperscript{th} and early 19\textsuperscript{th} century viewed prison as an arena in which bad people could be transformed into good and useful member of the society\textsuperscript{323}. Corporate criminal liability also ensures the goal of rehabilitation. While criminal sanctions have limited ability to reform individuals, imposing sanctions on a corporation can correct the corporate culture of the organization. Where there is no human psyche to reorient, a criminal sanction can involve an invasive and extreme reconstruction. This can result in a complete reform of a corporation’s practices after the offense\textsuperscript{324}. Deferred Prosecution Agreements perform this function as a part of criminal sentencing policy under US law. The indicted corporations are directed to make major organisational changes so as to pre-empt the repeat of offence.

6.1.3 Utilitarian, Incapacitation and Restorative Theories

In addition, there are other theories of punishment. Utilitarian theory of punishment views punishment as ‘a prima facie evil that has to be justified by its compensating good effects in terms of human happiness or satisfaction’\textsuperscript{325}. ‘Incapacitation’\textsuperscript{326} places potential victims of crime at the forefront. It seeks to protect society from the action of criminals by a range of strategies that include physically removing them from society. Incapacitation may involve various forms of preventive action. Punishment may further be used as a mechanism to take away from criminals the unfair advantages that they have derived over other members of the society as a consequence of their illicit activity. Punishment thus seeks to restore the ‘balance of advantage and disadvantage distributed by crime’\textsuperscript{327}. E.g. in the

\begin{itemize}
\item \textsuperscript{323} \textit{Supra} Note 314 at p. 323
\item \textsuperscript{324} \textit{Supra} Note 251
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\item \textsuperscript{327} \textit{Supra} Note 314 at p.324
\end{itemize}
United Kingdom, the 2002 Proceeds Of Crime Act established the Asset Recovery Agency to investigate and recover criminal assets and also provided for recovery scheme to facilitate the recovery of proceeds of unlawful conduct if a criminal prosecution was not initiated. Restorative justice\textsuperscript{328} has been defined as consisting of values, aims and processes that have as their common factor attempts to repair the harm caused by criminal behavior. This approach entails a wide range of activities. Initially it was virally synonymous with specific model of practice called Victim-Offender Reconciliation Program or Victim – Offender Mediation (VOM). VOM entailed a one to one mediation meeting facilitated by a neutral mediator. Restorative process views humans as fundamentally cooperative beings as opposed to individualistic beings in need of coercive forms of social control. Restorative justice intimately involves the victim of crime in the post-crime process, thereby elevating the victim to the position of being a stakeholder in criminal justice process rather than being confined to the sidelines. In this way, the needs of the victim are placed at the very heart of the criminal justice process.

Specifically in reference to sentencing under international criminal law, Dr. Barbora Hola while dealing with Purposes of International Sentencing\textsuperscript{329} with respect to international criminal tribunals, tries to answer the philosophical question of the reason behind punishing perpetrators of international crimes. She observes that the answer to the question of why we punish perpetrators of international crimes is provided neither in the positive law nor in the Tribunals’ case law. The Statutes of the ICTY and ICTR do not mention any objectives of punishment that should guide judges in meting out penalties in

\textsuperscript{328} Supra Note 314 at p.327
\textsuperscript{329} Dr. Barbora Hola, “Sentencing of International Crimes at the ICTY and ICTR Consistency of Sentencing Case Law”; Amsterdam Law Forum Vol. 4:4; Fall Issue 2012
individual cases. Therefore, the ICTY and ICTR judges are generally free to switch from one self-chosen rationale to another as they see fit. The general aims, in a sense of restoration and maintenance of international peace and security, are provided in the resolutions establishing the Tribunals. However, this rhetoric was employed primarily to justify the creation of the Tribunals under Chapter VII of the UN Charter. It is unclear whether and how these relate to the meting out of penalties to individuals standing trial before the Tribunals. Some principles specific to sentencing have emerged in ICTY and ICTR case law. In this respect, judges clearly found inspiration in classic ‘domestic’ penal theories. Over the years, the following purposes have been listed by judges as relevant for international sentencing: retribution, justice, deterrence (general and specific), rehabilitation, reprobation, stigmatisation, affirmative prevention, incapacitation, protection of society, social defense and finally restoration/maintenance of peace and reconciliation. In general, deterrence and retribution are emphasised in the majority of cases. Aside from retribution and deterrence, the third most frequently cited sentencing objective by the ICTY and ICTR judges is rehabilitation. Closely related to sentencing theories are the principles followed in actual sentencing which are discussed below.

6.2 GENERAL PRINCIPLES OF SENTENCE DETERMINATION

The general principles of sentence determination are broad principles judges claim to pursue in individual cases. Two most important principles in regard to sentence determination are -Principle of Primacy of Gravity and Principle of Totality. The gravity of the crime is one of the sentencing factors explicitly dictated by the positive law. The gravity of the offence has been labeled as “the starting point for
consideration of an appropriate sentence”, “by far the most important 
consideration, which may be regarded as the litmus test for the
appropriate sentence”, or “a factor of paramount importance in the
determination of sentence”. The overriding obligation in determining
sentence is that of fitting the penalty to the gravity of the criminal
conduct.

The principle of totality stipulates that a final sentence should reflect
the totality of criminal conduct a defendant is convicted of. The origins
of the totality principle can be traced back to the RoPE’s Rule 87(C)
that regulates sentencing in cases of multiple convictions and offers
Trial Chambers two options: (i) impose a sentence in respect of each
finding of guilt and indicate whether such sentences shall be concurrent
or consecutive or (ii) impose a single sentence reflecting the totality of
the criminal conduct of the accused.

Principle of Proportionality forms another sentencing principle
closely related to the assessment of the gravity of crime. The principle
of proportionality is apparently uncomplicated – the sentence should
be proportional to the gravity of the crime. However, in case of
international crimes, the question is not easily answered. For
example, what would be the proportional sentence in case of genocide
or say money laundering resulting in terrorist financing is not a
question which can have a straightjacket formulae. Principle of
Gradation is another principle related to the gravity of crimes and its
main purpose is to differentiate between crimes of different degrees of
seriousness. It is closely related to the position a defendant occupied

331 Rules of Procedure and Evidence of ICTR
332 Both ICTY and ICTR judges have been handing out single sentences.
Therefore, the principle of totality has gained importance.
333 Supra Note 329
and the role he/she played in the overall conflict situation\(^{334}\). In this sense, the principle of gradation resembles the defendant-relative proportionality whereby judges compare the criminal conduct of a defendant to that of other defendants, taking into account in particular his significance in the overall conflict and the heinousness of his crimes\(^ {335}\). In addition to the above principles, *Principle of Uniformity*\(^ {336}\) has gained some ground under international criminal law especially in view of the sentencing disparities found in ICTY and ICTR. Principle of Uniformity refers to treating like defendants alike and reflecting differences among defendants through proportional differences in sentences.

Keeping the foregoing discussion in mind, it can be argued that if ICC jurisdiction is extended to include the corporate entity as a legal subject, different modes of penalty must also be devised keeping in mind the various theories and principles of punishment highlighted above. Currently, under the Rome Statute the penalty options are imprisonment or fines. Both of these options are clearly inadequate for the corporate criminal. Imprisonment is impossible, and monetary fines, as discussed previously, may be a negligible penalty for wealthy corporate actors who can simply pay the fine and continue their relatively unimpeded business. Therefore, current punishment and

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334 In Tadić the Appeals Chamber reduced the trial sentence because “the Trial Chamber failed to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia”.\(^3\) The Appeals Chamber emphasised that “although the criminal conduct ... was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low”

335 *Supra* Note 329

deterrent methods provided by international criminal law do not cater for the corporate actor. Nevertheless, success in this realm is possible\textsuperscript{337}.

When dealing with corporation as a convicted person, focus of the sentencing has to change from inflicting pain (as a means of punishment) on the wrongdoer to proportionality. A corporation being incapable of corporeal punishment nevertheless can be subjected to such kinds of punishment which will essentially serve the same goals which are sought to be achieved in case of sentencing of natural persons. It’s a commonly held belief that the only available punishment for convicted ‘legal person’ is fine. Reality is that there are other modes of punishing a legal person but which are not applied often. Following is a list of proposed punishments for corporations based on study of different criminal law systems:

\textit{Forfeiture}: In addition to ‘Fines’, ‘Forfeiture’ as a punishment for a Corporation has immense deterrence value. Depending upon the gravity of offence proved, all or a substantial value of the assets of the Corporation can be forfeited. Forfeiture is a significant blow to the economic power of a corporation. If all the assets are forfeited, it is almost like a death sentence for a corporation as its value in the market will crash beyond redemption.

\textit{Breaking up of the Corporation}: There is precedent in support of this mode of punishment. In the Nuremberg Trials (which is universally recognised as the marking the birth of international criminal law), \textit{IG

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Farben\textsuperscript{338} (a German Chemical conglomerate which had been formed by amalgamation of 7 leading chemical industries of Germany) was broken up into 3 different companies to break its industrial power i.e. Bayer, Hoechst and BASF.

In addition to Forfeiture and Breaking up, following modes of punishment are efficacious depending upon the gravity of offence –

- Deferred Prosecution Agreements provide a very good example of where the corporation is to be let off under probation and yet retain control over it for ensuring that the organisational set up is rectified to prevent the reoccurrence of the crime by the organization.

- Restriction of doing business in certain areas or regions (akin to simple imprisonment – commercial movement is circumscribed or limited).

- Revocation of permits/ authorizations to do business in certain commercial fields. Under Italian law, Article 2 paragraph 20 of Law No. 481/1995\textsuperscript{339} imposes fines on the companies and in case of reiteration of the violations, suspension of the activity and the suspension or loss of the authorization. Similarly, with respect to management companies in the financial sector,

\begin{footnotesize}
\textsuperscript{338} Prosecution case was that ‘. . . the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crime enumerated in the indictment’. In its decision the Tribunal stated: ‘When private persons, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.’ Trials of War Criminals before the Nuremberg Military Tribunals, Vol. VIII, at 1153

\textsuperscript{339} concerning regulations for the public utilities sector
\end{footnotesize}
Article 75 of Legislative Decree No. 58/1998\textsuperscript{340} provides for the revocation of the market’s authorization if the irregularities are exceptionally serious;

- Nationalization of business (temporary or permanent). Under Italian law, Article 33 paragraph 4 of Law No. 223/1990\textsuperscript{341} provides that, as a consequence of the infringement of the rules provided by Article 15 and concerning the abuse of dominant position, the company may incur the following sanctions: disconnection of the plants; forced divestment of the company or capital shares, unbundling or forced sale of activities.

- Winding up or Dissolution (in case of organisations which are set up only for a criminal purpose)

- Debarment\textsuperscript{342} is governed by the Code of Federal Regulations and authorizes agency officials to debar any corporation convicted of certain felonies, including “embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property” or any felony “in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract”. Any corporation convicted of a felony may be permanently barred from doing business with government agencies or participating in government programs, a deprivation that can singlehandedly destroy producers in sectors from aeronautics (no defense contracts) to pharmaceuticals (no federal funding for drug research, no reimbursement for welfare recipients receiving medication).

\textsuperscript{340} consolidated Law on Financial Intermediation, the “Decree No. 58”

\textsuperscript{341} concerning regulations for the radio and television system

- the mandatory seizure ("confisca") of the price or profit deriving from the violation;

- the interdiction of the company’s activities (for a period ranging from three months to two years or permanently in case of significant and repetitive violation);

Thus in addition to fines, there are efficacious modes of imposing a meaningful sentence on corporations which is based on gravity, proportionality and also takes into account the fact that legal person cannot be subjected to corporal punishment. The requirement is change in the focus from inflicting pain (in case of natural person) to proportionality and gravity (in case of corporations).