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Articles

Pages

Terrorism, Armed Conflict and the Nigerian Child: Legal Framework
for Child Rights Enforcement in Nigeria

~ *Damilola S. Olawuyi*

1

Clearing the Hurdles: A Therapeutic Examination of the Challenges to
the Protection and Enforcement of Economic, Social and Cultural Rights

~ *Damian U. Ajah & Ijeamaka Nnaji*

25

Inequitable Trade Rules in World Trade Organisation (WTO):
Impact on Developing Countries

~ *Emeka Adibe & Obinne Obiefuna*

57

Public Participation in Environmental Impact Assessment in Nigeria:
Prospects and Problems

~ *Hakeem Ijaiya*

83

Rethinking the Basis of Corporate Criminal Liability in Nigeria

~ *Calistus N. Iyidiobi*

103

Elevating Consumer Rights to Human Rights

~ *Festus O. Ukwueze*

131

When a Trademark Becomes a Victim of Its Own Success:
The Irony of the Concept of Genericide

~ *Nkem Itanyi*

157

Environmental Constitutionalism in Nigeria:
Are We There Yet?

~ *Theodore Okonkwo*

175

Requirements of Due Diligence on Capacity of Nigerian Government
Officials/Organs/Agents to Contract - *Godwin Azubuike v. Government
Of Enugu State* in Focus

~ *Rev. Fr. Prof. E.O. Ezike*

217



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CONTRIBUTIONS

The Journal welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

The General Editor,
Nigerian Juridical Review, Faculty of Law,
University of Nigeria, Enugu Campus, Enugu, Nigeria.
nigeriajuridical@unn.edu.ng, nigeriajuridical@yahoo.com

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+234-08063978826; +234-08181610325
onyekasyivanus@yahoo.com; sylvanusonyekachi@gmail.com

**RETHINKING THE BASIS OF CORPORATE CRIMINAL LIABILITY
IN NIGERIA*****Abstract**

The primary function and object of a company incorporated for the purposes of business is to make profit for the shareholders. In a bid to maximize profit, companies often commit all kinds of crime, murder inclusive. Unfortunately, although the company is an independent entity, it functions through the instrumentality of human beings. The usual question that arises when a crime is committed is, who takes the responsibility and how? The question that is even more crucial is, how and when can it be said that the company is criminally liable? The current approach in our jurisdiction is to hold the company vicariously liable. In other words, the company can only be liable if it can be shown that an alter ego or a principal officer who can bind the company committed the offence in the ordinary course of its business. It is the view in this paper that this approach is too narrow and creates an unnecessarily wide latitude for the company qua company to escape criminal liability. This paper thinks that it is high time we moved beyond the identification model/ vicarious criminal liability to embrace the corporate culture approach to corporate criminal liability so as to hold companies liable for the crimes they commit and met unto them the punishment which they deserve.

1. Introduction

Statutorily, companies are viewed as persons of full capacity capable of doing all things a natural person can do, albeit for the furtherance of its objects.¹ This fact is captured by *Von Gierke*, a German jurist who opines and rightly too, that a company is a real person and has

* **C. N. Iyidobi, LL.B (Hons.), LL.M (Nig.) B.L.**, Lecturer Faculty of Law, University of Nigeria, Enugu Campus, Enugu Nigeria. E-Mail: callistus.iyidobi@unn.edu.ng.

¹ S. 28(1) of the Company and Allied Matters Act (CAMA), Cap. C -20, *Laws of the Federation of Nigeria, 2004* (hereinafter referred to as LFN 2004); S. 17(1) United Kingdom Company Act 2006.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

a real life, a real will and thus has a personality. In his own words, “a company it is said, is a living organism and a real person with a body, members and a will of its own. It can will an act by the men who are its organs as a man wills and acts by his brain and body. The group is a person and has a group will.”² The interesting postulations of Lord Denning LJ also capture this position very vividly thus:

A company may in many ways be likened to a human body; it has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does.³

This undoubted legal position, which is that the law clothes a company with personality such that its rights and duties are distinct from that of its members, was judicially applied for the first time by the House of Lord in the case of *Salomon v Salomon and Co Ltd*.⁴ This principle of law has also been applied in the case of *Macaura v Northern Assurance Co. Ltd*,⁵ as well as the Nigerian case of *BanqueDe L’Afrique Occidentale v Habulliasu and Savage*.⁶ In this case, the defendant was a buying agent of a groundnut marketing board in the Northern Region of Nigeria until the business was sold to “Iliasu & Co. Ltd” which he formed for that very purpose. It however happened that the new company became indebted to the plaintiff and an action was brought against the incorporator, Iliasu and not the company. The trial court held that the company and the company owner were two different persons and as a result, the plaintiff’s action failed. In *George Will v. Grace Ekine*,⁷ Aloysius Katsina-Alu JCA as he then was stated that:

An incorporated company is a separate entity from its shareholders. Thus, when as in the instant case, company funds are used as

² L. B. Curzon, *Jurisprudence* (1979) p. 233.

³ *Bolton (Engineering) Co Ltd v Graham and Sons* (1957) 1 QB 159.

⁴ [1897] AC 22 at 51.

⁵ [1925] AC 619.

⁶ Cited in *Re Northern Nigerian Marketing Board* (Garnishee) (1964) NMLR 30.

⁷ [1998] 8 NWLR (Pt. 562) 456.

private funds in total disregard of the relevant company law, it is wrong and illegal.⁸

By implication, it is right to assert that the separate identity and personality of a company duly incorporated is now settled law both statutorily and judicially. It is therefore not a surprise that national and global economic life has come to be dominated by corporations, whose activities and operations are not just wide in scope but extensive in effect. It follows therefore, that just like natural persons, a company may in the furtherance of her objects, commit crimes. It can also be said that sequel to the wide and extensive nature of the operation of companies, they are very likely to be more dangerous criminals than individuals. For instance, many of the companies are multi-nationals operating in different countries at the same time. By implication, crimes committed by such companies will, without doubt, have international dimensions *cum* implications. It is therefore imperative that society should also have a measure of control on the activities of corporations and be able to punish and ultimately checkmate the criminal tendencies of corporations so as to protect citizens, the environment and the world at large from the likely monumental effects of corporate crime.

It is a historic and undisputed fact that the most predominant means by which the society controls crime is the criminal law. It seems however, that the application of criminal procedure to an artificial person (the company) has not been easy and the reasons are not far-fetched. To start with, criminal law was developed to deter natural persons from committing crimes. Unfortunately, the nature and attributes of a natural person are diametrically opposed to that of a fictional person. It is also true that the major tool of deterrence is punishment. The problem that arises however is how and when to punish a corporate person. This is compounded by the fact that it is trite law that before one can be punished for an offence, two important elements must be established; that is *mens rea* (guilty mind) and *actus reus* (unlawful act). This basic principle of law is classically epitomized in the Latin maxim, *actus non fact nisi mens sit rea*, meaning that a person cannot be convicted and punished for a

⁸ *Ibid* p. 456.

crime unless it can be proved that the person did a wrong act with a guilty mind.⁹

The doctrine of 'Corporate Criminal Liability' has however evolved and today, companies can be held criminally liable for some or all offences depending on the jurisdiction. The truth however remains that it is not well with the system in many jurisdictions, Nigeria inclusive. It is therefore not surprising that the level of development of corporate criminal liability differs a great deal as one moves from one jurisdiction to another. As such, the basis of corporate criminal liability which is at the center of this paper differs from one jurisdiction to another. In Nigeria for instance, the approach is to identify a natural person who can bind the company that has committed the said offence in the ordinary course of the company's business so as to impute his guilty mind and wrongful act to the company, and in turn, hold the company vicariously liable for his criminal conduct.

Sequel to the above situation, this paper is dedicated to appraising the current basis of corporate criminal liability in Nigeria with a view to drawing inferences from what obtains particularly in Australia in order to expand the frontiers of such grounds for liability by embracing the corporate culture approach to corporate criminal liability as obtainable in Australia.

2. Meaning of and Justification for Corporate Criminal Liability

It has to be noted from the outset that, an established, acceptable and unanimous definition of corporate criminal liability is illusive and there is no intention to dwell on the diversity of opinion on the issue. On the contrary, a simple working definition of the concept that will help one understand and appreciate further discussions on the concept is that corporate criminal liability or responsibility means the act of holding a corporate person accountable for a criminal act, committed by the corporation. It involves the punishment of a corporation for an established crime committed by such a company and the process of doing so. This implies that corporate criminal liability is self-explanatory in that it simply deals with the liability of a company or corporate entity for crime. As

⁹ *Timbu Kolian v. Queen* (1968) 42 A.L.J.R. 295.

recursive, as this may sound, it captures the essence of the concept at least for the purposes of this work. Having said this, it becomes pertinent to deal with the issue of the justification for holding a corporate entity liable for its criminal conduct even when it has no physical body with which for instance to commit the crime.

This issue should ordinarily not arise because the basis or reasons for criminal liability should ordinarily apply to corporate criminal liability. However, there has always been and there still is a strong view or school of thought that opposes the imposition of criminal liability on corporations. For them, the imposition of criminal liability on corporations is a mistake.¹⁰ It has also been argued that corporate criminal liability is inefficient and should be shelved for civil liability and it is enough to punish the individuals who commit the crime while in the employment of the company rather than the company who is claimed to be a fiction that exist only in our notion.¹¹ There is also the notion that corporate criminal liability goes to punish innocent third parties like employees and shareholders.¹² The criticisms are many and varied and it is against this backdrop that it becomes important to clarify and justify the imposition of corporate criminal liability and the reasons thereof.

Imposition of corporate criminal liability is reasonable and very proper because contrary to the views of the critiques of corporate criminal liability, corporations are not fictional entities; they are rather legal, economic and social realities. The greater percentage of our lives today depend on corporations. To be more precise, there is no aspect of our lives that corporations are not involved in one way or another, ranging from the food we eat, the houses we inhabit, the water we drink, the electricity we use, as well as the environment we live in. It follows without doubt that our safety is affected more and depends largely on how corporations, large and small, conduct themselves than it depends on the conduct of our next door neighbour. In light of the above, there is no plausible reason why the

¹⁰ Albert W. Alschuler, "Two Ways to Think About the Punishment of Corporations," 46 *AM. CRIM.L. Rev.* 1359 (2009) p 37.

¹¹ Jennifer Arlen and Reaier Kraaknan, "Controlling Corporate Misconduct, an Analysis of Corporate Liability Regimes". 72 *N.Y.U.L Rev.* 682 (1997).

¹² *Ibid.*

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

criminal law/procedure should not be applied to check the possible and regular excesses of these very powerful entities especially when such excesses amount to crime. This is very important because the powers wielded by these corporations are very high. Again, CNN. Money.Com. Fortune 1000 captures it thus:

The wealth of the top fortune 500 corporations is a measure of corporate power. In 2008, annual revenue from the top revenue producing corporations in the U.S were more than \$2.1 trillion, the profits from the ten most profitable U.S corporations were more than \$176 billion. Exxon Mobil topped both lists recording almost \$445 billion in revenue and \$45 billion in profit.¹³

What seems to be more important is that modern corporations are inclined to using the powerful resources available to them in manners that very often cause serious harm to individuals, communities and the environment in general. The Niger Delta region of Nigeria is a good case in point. In this region of Nigeria, the recklessness of the multinationals in the extraction of oil has almost destroyed the environment. Oil spillages destroy the aquatic life which is a major source of the people's livelihood, not to talk of the fact that the few available lands have been rendered useless for agricultural purposes. The consequence is that while the indigenes languish in poverty, anguish and disease, the oil explorers and their workers live like kings in special areas which they have carved out for themselves in the same environment. Some other recent examples include the destabilization of the stock market by corporate misconduct and malfeasance. This has led to the loss of billions in shareholders' equities and the loss of hundreds of thousands of jobs. This unfortunate result of corporate criminality has been renamed "*economic meltdown*." But the big question remains, what is the source of the heat that melted down the global economy? The very simple answer will be corporate crime, misconduct and malfeasance. For instance, Enron was the seventh most valuable company in the U.S until the revelation that it was using deceitful accounting devices to shift debts off its books and hide corporate losses which led to losses of more than \$100 billion in

¹³ <http://Moneycan.com/magazines/fortune/fortune500/2009/full-list> (last visited Oct. 5, 2010) last accessed on 24th of April 2014.

shareholders' equity before it filed for bankruptcy.¹⁴ There has also been many instances of companies' involvement in this kind of behaviour even in Nigeria. The AP scandal is still fresh in our minds. Similarly, the Central Bank reforms have shown that banks previously believed to be very stable from what they have presented to the public, were actually very sick and in need of urgent help. This is just one of the many dimensions of Corporate Crime.

The point remains that considering the resources available to corporations, there is no kind of criminal venture that they cannot engage in comfortably. In Nigeria, most fraudulent acts committed by government officials are perpetrated by means of either existing corporate entities or corporations formed for that purpose.

Corporations in Nigeria are not alone in the game of massive bribery. For instance, Siemens, the German engineering giant, paid more than \$1.4 billion in bribe to government officials in Asia, Africa, Europe, the middle East and Latin America, using its robust financial resources to secure public works contracts around the globe.¹⁵ The argument of the opponents of corporate criminal liability is that "Siemens" should not be seen as the committer of this crime but the individuals therein so as not to punish innocent third parties like shareholders, etc. However, there is absolutely nothing wrong in viewing Siemens as a corporate body, as the criminal. The reasons, which are also some of the reasons behind corporate criminal liability, is that U.S investigators actually found out that the use of bribes and kickbacks were not anomalies, but the corporation's standard operating procedure and also an integral part of her business strategy.¹⁶ Quoting Joseph PersuhiniJr, the head of the Washington Office of FBI; "It will amount to overstating the obvious

¹⁴ Sara Sun Beale and Adam G. Suficat; "What Development in Western Europe Tell Us about American Critiques of Corporate Criminal Liability", 8 *Buff.CRIM.L.Rev.* 89-10 (2004).

¹⁵ Press Release, U.S Department of Justice; *Siemens, AG And Three Subsidiaries Plead Guilty To Foreign Corrupt Practices Act Violations And Agree To Pay \$450 Million In Combined Criminal Fines* (Dec15,2008) Available at <http://www.usdoj.gov/opa/pr/2008/December/08-crim-1125html> Eric Lechtbalm and Carter Daugherly, "Bribery Cases Will Cost Siemens \$1.5 Billion", N.Y Times Dec 16, 2008 at BS.

¹⁶ Lichtblan and Daugherly, *Ibid* p 8.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

to say that payment of kickback by contractors in U.S to government agencies is a very normal practice". It is not in doubt that most of the contractors as mentioned here were corporate entities. It must quickly be added that the argument that because the corporation is a fiction, it cannot be punished, and as a result, each time a corporation is purported to be punished, it is innocent third parties that are wrongly forced to bear the liability directly, is porous, baseless and most unfounded. To start with, the whole idea of corporate entity is to create a legal entity that has a separate and independent subsistence from shareholders and employees as well as creditors, etc. One major incident of this separate subsistence as clearly observed previously is independent liability. One is thus amazed that the opponents of corporate criminal liability will not mind shareholders bearing no liability when the company meets a hard time because the company is liable independently for its debts, but will not want the company to be liable for its crimes. Put more clearly, they accept the separate legal personality of the company for purposes of civil liability and reject it in cases of criminal liability. This is a clearly unacceptable position. The fact remains that whether it is criminal liability, liability for torts or civil liability, the separate personality of the corporation stands and the effect of the liability on the so called third parties is limited to their equity in the company.

An analogy may also be drawn between corporate criminal liability and the criminal liability of natural persons *viz a viz* the contention of the opponents of corporate criminal liability. When an individual commits a crime, he may be fined, jailed or sentenced to death as the case may be. Any of these punishments would definitely affect the dependent relatives of the convicted person in so many ways, be it financially, socially, emotionally, psychologically or otherwise. The innocent third party argument when applied in this situation will mean that punishing him will amount to punishing those innocent dependent relatives. If this argument were to stand, then most, if not all criminals will be free because it would be hard to find any person whose punishment will not adversely affect another person totally innocent of his crime. It is therefore submitted that because a corporation is a real, legal, and powerful entity, whose capacity and tendency to commit crime is not in doubt, the Criminal

Law which is the primary machinery for controlling criminal behavior should be applicable to it in the same way as it applies to individuals in the same society under the same laws.

3. Nigeria's Approach to Corporate Criminal Liability.

In Nigeria, for an act to be a crime, it must be stipulated under a written Law. There are thus no such things as Common Law crimes under Nigerian law. This position finds credence in the 1999 Constitution of the Federal Republic of Nigeria which provides that:

Subject to the provisions of this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined in a written Law, and the penalty therefore is prescribed in the written Law; and in this subsection, a written Law refers to an Act of the National Assembly or the Law of a State, or any subsidiary Legislation, or instrument under the provision of a law¹⁷.

It follows that the issue of corporate crime and liability in Nigeria must be looked at from the perspective of statutes. To this end, we wish to note that the principal criminal law legislation, *viz*, the Criminal and Penal Codes define 'person' in words that make corporations also liable for the offences provided therein. The Criminal Code Act,¹⁸ as well as the Penal Code, has no definition for person but the Interpretation Act¹⁹ defines it to include any body of persons corporate or unincorporated. It can conveniently be said that corporations, like natural persons, are generally capable of liability for all the offences contained in these criminal law legislation. Unfortunately, these legislation do not make any provisions on how corporations are to be held liable for these offences. It is here that the problem of corporate criminal liability in Nigeria actually lies. The center thrust of the problem is that *mens rea* is a relevant and very important element of most offences provided for in the said legislation. The Criminal Code for instance provides that:

Subject to the express provision of this code relating to negligent acts and omissions, a person is not criminally responsible for an act

¹⁷ Section 36(12) Constitution of Federal Republic of Nigeria, 1999 Cap C.23 LFN, 2004.

¹⁸ Criminal Code Act Cap. C38, LFN, 2004

¹⁹ Section 18 Interpretation Act, Cap I 23 LFN 2004

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

or omission, which occurs independently of the exercise of his will or for an event which occurs by accident²⁰.

Although the Penal Code does not have a similar provision, a look at Part II of the Code which deals generally with criminal responsibility makes it clear that the Code does not generally allow criminal responsibility without the mind being at fault. This is achieved by the use of such words like, "intention", "knowledge", "accident", "dishonestly", "fraudulently" *et cetera*. It follows that for a company to be held liable for most of the offences contained in the two principal criminal law legislation in Nigeria, there is the need for the establishment of the guilty mind of the accused company. As stated before, both Codes failed to state or give an idea of how this very crucial task is to be done. Hence, establishing the basis for the liability of companies for offences requiring the establishment of *mens rea* in Nigeria has been very chaotic. It seems that it has been more convenient or easier to hold companies liable for violation of statutory liabilities as created by varied legislation in Nigeria than holding them liable for basic offences as contained in the Code like stealing, manslaughter, and many others. In the first class of offences above, *mens rea* need not be attributed to the company while in the later class of offences, *mens rea* has to be established. It is submitted that the process of doing so remains inconsistent and evasive. It is for this reason that Vukor-Quarshi observed that; "...the law governing the criminal liability of corporations for crime is a veritable jungle for conjecture, uncertainty and conflict."²¹ Okonkwo and Naish are of the view that "the limit of corporate criminal liability under Nigerian Law awaits clear definition."²² It is not surprising that not minding the existence of the Criminal Code as far back as 1916 and which applied all over Nigeria until 1960 when the Penal Code came on board, Nigerian courts placed heavy reliance on the common law and not the Code for the development of corporate

²⁰ Section 24 Criminal Code Act, Cap. C38, LFN, 2004.

²¹ G.N Vukor-Quarshi: "Corporate Criminal Liability: An Additional Chapter to the Criminal and Penal Code of Nigeria" *The Calabar Law Journal* (TCL), Vol. 5, pp. 72, 73 (1988).

²² Okonkwo & Naish; *Criminal Law in Nigeria*, 2nd ed (Ibadan: Spectrum Books Limited, 1983), p. 127.

criminal liability at the earliest stage. Little wonder why Berkeley J. in a case stated by a Station Magistrate in Jos in 1930 in relation to whether corporate criminal liability could be imposed by statute had this to say:

It is obvious that it is the firm which is charged with having committed an offence against the Mining Law... At Common Law this is impossible. There must be some person who can be brought before the Court and if necessary placed in the dock. But in modern times there have been certain offences created which render corporate bodies liable²³

It is therefore safe to assert that the legal regime for corporate criminal liability in Nigeria simply followed the developments in United Kingdom though very sluggishly. For as long as corporations in the United Kingdom remained criminally not liable for *mens rea* offences, the position remained the same in Nigeria. However, following the change of this trend consequent upon some landmark decisions of English Courts in the year 1944,²⁴ Nigerian Courts gradually shifted their position. Thus, the English cases which revolutionized the law on corporate liability for offences of *mens rea* in United Kingdom were also the catalyst for the changes that occurred in Nigerian. For instance, in the cases of *R .v. Ziks Press*,²⁵ *African Press Ltd .v. R*,²⁶ *Service Press Ltd .v. AG*²⁷ and *R.v. Amalgamated Press Ltd.*,²⁸ Nigerian courts found companies guilty of the offence of seditious publication as contained in section 51 (1) of the Criminal Code. The most outstanding case in this regard is the case of *AG (Eastern Nig) .v. Amalgamated Press*²⁹ wherein the court in its totality and in very clear terms rejected the argument of the defendant company that a corporation cannot be attributed with

²³ *R v Anglo Nigerian Tin Mines Ltd* (1930) 10 NLR 69.

²⁴ *DPP.v. Kent and Sussex Contractors Ltd.*[1914] KB 46, *R. v. I.C.R Road Haulage Ltd* [1944] KB 551 and *More v. Brester* [1944] 2 All ER 515.

²⁵ (1947) 12 WACA 202.

²⁶ (1952) 14 WACA 52.

²⁷ (1952) 14 WACA 173.

²⁸ (1961) 2 All N.L.R. 199.

²⁹ (1956-57) 1ERR 12, 9.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

mens rea. In that case, the company was charged under the Eastern Nigerian Newspaper Law 1955³⁰ which provides that:

Any person who publishes or reproduces or circulates in a Newspaper, any statement, rumor, or report knowing or having reasons to believe that such statement, rumor or report is false shall be guilty of an offence.

While convicting the company under this section and for the offence therein, the court stated that;

...it is said... that there is an element of *mens rea* in the offences with which corporations cannot be charged; offences of personal violence, or with offences for which the only punishment is imprisonment. In an old case, perjury was held to be beyond the capacity of a corporation. But I have no doubt that a company can have knowledge of the falsity or otherwise of that which it published in a newspaper and a corporation, through its agents is clearly capable of making inquiry as to the falsity or otherwise of what it there publishes. A corporation is also capable of publishing a Newspaper. I cannot therefore see why a corporation is incapable of publishing in a newspaper that which the corporation knows or has reason to believe is false.

One can thus assert with a high degree of certainty that what the court did in this case was to ascribe the knowledge of the company's agents to the company so as to find it guilty of the offence. In addition, the court also provided an insight into such offences for which a company cannot be held liable. Such offences as could be seen from the case include offences of personal violence and offences for which the only punishment is imprisonment. It is however unfortunate that the court still failed to prescribe or elucidate the conceptual basis of corporate criminal liability. The court also left one completely in the dark as to which classes of persons or agents of a company whose knowledge can be attributed to the company for purposes of criminal liability of the company.

It can be reasonably concluded that there is no clear direction in Nigeria as regards the actual legal framework for corporate criminal liability. This is so especially as it relates to offences with mental

³⁰Section 14(1).

elements. At best, all that can be said is that the doctrine of identification has been arbitrarily applied in the few available cases to hold companies criminally liable. In other words, the common law position on corporate criminal liability remains operative in Nigeria. This position finds support in the work of Asogwa who in his discussion on the basis of corporate criminal liability, observed that, conceptually, primary responsibility revolves around the notion that the corporation itself has been guilty of the crime in the sense that the human agent who performed the act or made the omission constituting the offence is one whose status and authority within the organization are such that the individual can be said to have acted as the organization.³¹ He then described this as the doctrine of the *alter ego* in line with the case of the *Lady Gendolen*³² wherein the court felt that in cases where the law requires personal fault as a condition for liability in tort, the fault of the manager will be the personal fault of the company. So also in the realm of criminal law. In cases where the law requires a guilty mind as a condition for a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.³³

In support of this view, he again cited the case of *Lenard's Carrying Co. Ltd. v Ascetic Petroleum Co. Ltd* and concluded that the two cases represent the true position of the common law on corporate criminal liability. What this writer finds very interesting in Asogwa's analysis is his observation that it is inherently difficult to prove that an offence deserving criminal sanction has been committed in the cause of the company's business by some unidentified senior employee, and even if it were possible to identify some guilty individual within a company, a utilitarian sense of justice may point towards corporate rather than individual liability. He further argued that:

It may be harsh to impose individual criminal liability as where a company attempts to escape goat employees who have been pressured into complying with an unwritten code of illegality or

³¹ Frank I. Asogwa, "Corporate Criminal Responsibility," *The Nigerian Juridical Review*, Vol. (1994-1997) pp.158-179.

³² [1965] 3 WLR 91, [1965] 2 All E. R. 283.

³³ Asogwa, above note 31.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

where an individual may be exposed to oppressive rule of criminal liability or exemplary punishment...³⁴

Aside from the above, another major difficulty with this approach to corporate criminal liability is that it raises the challenge of punishing companies for some specific offences. A clear example is seen in the above case of *AG (Eastern Nig) .v. Amalgamated Press*. Speaking specifically on this, Okonkwo and Naish observed that a major difficulty in corporate criminal liability is the physical impossibility of imposing certain punishments on corporations. According to them:

The punishment for murder for instance is fixed by law as death and a corporation cannot be hanged. In *A. G. (Eastern Region) v. Amalgamated Press*, Ainley C. J. declared that a corporation cannot be charged with an offence the only punishment for which is imprisonment. But in fact very few punishments are fixed by law and the courts can usually impose a fine.³⁵

The above position raises more questions than answers. For instance, where the law has fixed imprisonment as the only punishment, (even if such offences are few) can the court impose a fine as an alternative punishment? It has however been opined that where death is the only available punishment, a company can be killed by means of winding- up.³⁶ We completely agree with this view. However, the big question remains, whether a court can make an order for “corporate killing” by means of winding up where the Criminal Code has provided for death by hanging? In the face of all these confusing issues, one is not surprised when it is opined that the limits of corporate criminal liability under the Nigerian law awaits clear definition.³⁷

While noting that a company can be liable for an offence for which death is the punishment, it is also clearly recognized that the common law vicarious approach to corporate criminal liability is fraught with difficulties. For instance, the problems associated with vicarious criminal liability in Nigeria especially in the States where

³⁴ *Ibid.*

³⁵ Okonkwo and Naish; *Criminal law in Nigeria*, 2nd ed. (Ibadan: Spectrum Books Ltd, 1983) p .

³⁶ Asogwa, above note 31.

³⁷ *Ibid.*

the Criminal Code operates lies in the provision of section 24 of the Criminal Code. The said section provides thus:

Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or for an event which occurs by accident.

The above general and sweeping provision of the Code makes it preposterous to convict a person (including a company) of an offence involving *mens rea* if the offence is committed by an employee unless it can be shown that, that person participated in the crime directly or indirectly. Vicarious criminal liability for *mens rea* offences, except within the accepted limits of the principle of “alter ego” is difficult in the light of section 24 of the Criminal Code. Section 24 also operates to make strict liability offences difficult. As has been stated:

Because of the importance of section 24 of the criminal code, it may be difficult now to say that an offence is one of strict liability since that section by virtue of section 2(4) of the Code Act applies to all offences whether in the code or outside the code unless expressly excluded. Therefore it will be open to the accused person (not excluding a corporation) to show that he exercised reasonable precautions and due diligence in the circumstances such as proving that he gave necessary instructions or provided the right environment that would not conduce the commission of the alleged crime.³⁸

The implication is that the position of the law in Nigeria as it relates to corporate criminal liability remains undesirable. This is true as the issue of holding a company liable for offences with mental elements including murder and manslaughter remains neither here nor there. This is unacceptable considering that the United Kingdom from where we borrowed the vicarious criminal liability approach has since moved on to a point where companies can be held liable for corporate manslaughter. This is the case Under the UK Corporate Manslaughter and Corporate Homicide Act 2007 the effect of which in summary is that an organization is guilty of the offence of “corporate manslaughter” (corporate homicide’ in Scotland) where the way in which its activities are managed or organized causes the

³⁸ *Ibid*, pp. 167-168.

death of a person; and amounts to a gross breach of a relevant duty of care owed to the deceased and where the way in which the organization's activities are managed or organized by its "senior management" is a "substantial element" of the gross breach of the relevant duty of care. The important thing here is that the emphasis is not necessarily on a manager or any individual but on the organization's activity. By implication, what matters is that looking at what the organization has done, it can be inferred that there has been a breach of a relevant duty of care owed to the deceased person and that this breach emanated from the senior management of the organization and is the cause of the deceased's death. This is very commendable. Since it is the activity of the company that is in question, the senior management principle is uncalled for.

For the fact that the Act hinges on the existence of "relevant duty of care," the law interestingly gave a succinct definition of what amounts to a relevant duty of care in section 2 (1)³⁹ to be any one of a circumscribed list of duties owed under the law of negligence (regardless of any statutory schemes displacing liability in negligence, or any common law rules that prevent a duty of care to persons engaged in joint unlawful conduct, or who have accepted a risk of harm).

It is interesting to note that the beauty of the definition lies more in the *caveat* which its absence would have created unnecessary hurdles for prospective beneficiaries of the Act bearing in mind that at common law, the proof of negligence is a herculean task. The definition also leaves no one in doubt as to those to whom the duty is actually owed. This again is commendable. The Act further makes provisions as regards the circumstances under which a gross breach of duty of care will or may arise to the effect that it will arise where the conduct alleged *falls far below what can reasonably be expected of the organization in the circumstances*. The Act is also very clear on what the phrase "senior management" means by defining it as the persons who play significant roles in: (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organized; or (ii) the actual managing or organizing of

³⁹ Section 2(1) U K Corporate Manslaughter and Corporate Homicide Act 2007.

the whole or a substantial part of those activities. Our take on this is that the definition is very clear.

It is further interesting to note that the Act has been judicially applied as some companies have been convicted under the Act. The first among these cases was the case of *R. v Cotswold Geotechnical Holdings Limited*.⁴⁰ The facts of the case is that a Cotswold employee who had been obtaining soil samples from the bottom of a 3.5m trial pit died following the collapse of the pit. It was not disputed that it had been dangerous for the employee to enter the pit. The jury heard that the walls of the trial pit were unsupported and that soil had collapsed into the pit killing the employee. The issue was whether there had been a breach of duty by Cotswold so gross so as to amount to an offence under the Act. The prosecution's case was that Cotswold had failed to take all reasonably practicable steps to protect the employee from an unsafe system of work in digging trial pits which were unnecessarily dangerous, and that they had ignored well recognised industry guidance that prohibited entry into excavations more than 1.2m deep. The employee had also been left unsupervised on site at the time of the accident. To secure conviction the prosecution needed to demonstrate that:

1. Cotswold's conduct had caused the employee's death and amounted to a gross breach of its duty of care to an employee (section 1(1) of the Act); A substantial element of the
2. A breach was in the way in which the organization's senior management had managed or organized its activities (section 1(3) of the Act).

The Court in the end held that Cotswold was guilty of Corporate Manslaughter and was sentenced to a fine of £385,000 payable over ten years at a rate of £38,500 per year. The fine was wholly beyond the means of the company and Cotswold appealed contending that the fine was excessive and would force the company into liquidation. The appeal was however dismissed on the basis that it was plainly foreseeable that the way in which Cotswold conducted its operations could cause serious injury or death. There have also been other

⁴⁰ [2012] 1 Cr. App. R. (S.) 26.

convictions including that of JMW Farm.⁴¹ This is very much different from the position in Nigeria where there is a dearth of cases of corporate convictions for manslaughter or related offences.

It is in the light of all these that there is a need to rethink the basis of corporate criminal liability with a view to avoiding the difficulties associated with the vicarious liability approach and also to overcome the dilemma still associated with liability for corporate killing or corporate manslaughter in Nigeria. In this regard, a corporate culture based approach for corporate criminal liability modeled after the Australian approach as well as the US United States of American corporate culture approach to sentencing is recommended as considered below.

4. The Application of Corporate Culture as the Basis for Corporate Criminal Liability: The Australian Example.

Australia has a unique approach to corporate criminal liability that is strikingly different from the general approach adopted by many other jurisdictions. This unique approach does not impute the liability of individuals in the company to the corporation but rather places corporate criminality on the organizational structure of the company. It is this striking and interesting difference in approach that is the focus of the consideration at this point in this paper.

We shall start by stating that Australia operates a federal system of government wherein the Commonwealth (the federal legislature) has legislative powers to legislate only on some specific matters in the exclusive list. It is also noted that just like Nigeria, general criminal law in Australia is not on the exclusive legislative list. Accordingly, most criminal law provisions belong to the State. Consequently, different States adopt different approaches to the criminal law. For instance, in some States, the criminal law is totally codified while in others, it is a combination of statutes and common law. This position, without doubt, applies to corporate criminal liability in Australia. However our major interest is the statutory provision for corporate criminal liability for federal offences which is

⁴¹R v JMW Farm Limited [2012] NICC 17

largely based on the corporate culture and appears to be the most sophisticated model of corporate criminal liability world over.

4(a) The Evolution of the Regime

The current statutory provision for corporate criminal liability in Australia is a product of the general systematization of Australian federal criminal law. It was precisely in 1990 that a total review of the Commonwealth Criminal offences was considered very crucial. Consequently, a Model Criminal Code Officer's Committee (MCCOC) was established under the Standing Committee of the Attorneys General to undertake wide consultation and draft a Model Law. The said Model Law eventually became the basis of the Australian Criminal Code Act 1995 (CCA). From its beginning, the Model Law contained provisions on corporate criminal liability. Interestingly, the current statutory provision on corporate criminal liability in Australia is the same as was contained in the final draft of the Model Law.⁴² MCCOC had in its final report stated that the identification approach which was the previous operational bases for corporate criminal liability in Australia was no longer suitable for corporate criminal liability due to the "flatter structure" and greater delegation of duties to relatively junior officers in modern corporations.⁴³ One option or alternative considered by the MCCOC was a total reversal of the onus of proof, such that where a director, servant or agent engaged in a conduct, both the conduct and the state of mind of the relevant individual would be deemed to be the conduct of the body corporate, and the body corporate would only have a defense if it could prove, on the balance of probabilities, that it exercised due diligence to avoid the conduct.⁴⁴ This option was however not adopted by the MCCOC which observed that:

⁴²See Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Discussion Draft: Chapter 2 – General Principles of Criminal Responsibility* (July 1992) 94-98; Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2 – General Principles of Criminal Responsibility* (December 1992) 104–108 (**Final Report**).

⁴³*Final Report*, above 18, 105.

⁴⁴*Ibid*, 107.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

...its objective was to develop a scheme of corporate criminal responsibility which as nearly as possible adapted personal criminal responsibility to fit the modern corporation. The Committee believes that the concept of 'corporate culture' ... supplies the key analogy. Although the term 'corporate culture' will strike some as too diffuse, it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. There is a close analogy here to the key concept in personal responsibility – intent. Furthermore, the concept of 'corporate culture' casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.

In justifying the corporate culture approach to corporate criminal liability the MCCOCC argued that:

The rationale for holding corporations liable on [a corporate culture] basis is that '... the policies, standing orders, regulations and institutionalized practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognized as authoritative within the corporation.⁴⁵

The Criminal Code Bill that emanated from the MCCOCC report was later considered by the House Standing Committee on Legal and Consultation Affairs. In the course of the consultation, the corporate culture approach to corporate criminal liability was expectedly criticized. Chief Justice Gleeson of New South Wales (as he then was) observed that it was wrong to hold corporations liable for “permitting conduct” which according to him does not imply more than failing to prevent the conduct, especially as the criminal law will generally not hold individuals liable in the same circumstance.⁴⁶ He also noted that the corporate culture as a foundation for corporate criminal liability was vague. In the end the, the Senate Committee

⁴⁵ See Field and Jorg, 'Corporate Manslaughter and Liability: Should we be Going Dutch?' [1991] *Crim. LR*, 156 at 159.

⁴⁶ Evidence of Hon Chief Justice Gleeson, excerpted in Senate Legal and Constitutional Committee, *Criminal Code Bill 1994 and Crimes Amendment Bill 1994* (December 1994) 31 (*Senate Committee Report*).

concluded that the Criminal Code Bill was a thorough, workable, logical and balanced compromise, and as such recommended it to be passed. Accordingly, the bill was passed into law and its provisions on corporate criminal liability are the extant law in that respect in Australia as regards federal offences. We shall now proceed to consider the corporate culture foundation for corporate criminal liability under the Australian Federal Criminal Code Act.

4 (b) Overview of the Provisions of Section 12 of the Australian Criminal Code Act

The general import of the provisions of the Australian Criminal Code Act is vividly captured by the Explanatory Memorandum thus:

The corporate culture provisions extend the *Tesco Supermarkets v Natrass* [1972] AC 153 at 173 rule which recognizes that corporations can be held primarily responsible for the conduct of very senior officers. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company.

It extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's written rules tacitly authorized non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees know that if they do not break the law to meet production schedules (for example, by removing safety guards or equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorize reckless offending (for example, recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.⁴⁷

This is further amplified by the Senate Second reading speech on the bill to the effect that;

⁴⁷ Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44; see also Alice Belcher, "Imagining How a Company Thinks: What is Corporate Culture?" (2006) 11 *Deakin Law Review* 1, 7-8.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

The Code introduces the concept that criminal responsibility should attach to bodies corporate where the corporate culture encourages situations which lead to the commission of offences. The provisions make companies accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.

In speaking about this part I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.

At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. For example, the government is not planning to water down the requirements of **Section 65 of the Ozone Protection Act 1989** in regard to the matters covered by that act. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.

The vivid import of the provisions of the section as captured by the above two comments is that it places criminal liability on the culture of the company which has either encouraged or facilitated the commission of the crime as opposed to imputing the fault of individuals on the company as is the case under all versions of the identification approach.

5. Corporate Culture as a Factor in Sentencing Corporate Entities: The Example of United States of America.

Granted that corporate culture is not the basis for corporate criminal liability in USA, both at the federal and state levels, it has to be acknowledged that America has the most organized and well-articulated sentencing procedure for corporate offenders at the federal level. This sentencing guideline or procedure is based on corporate culture. The procedure for sentencing corporate offenders for federal offences is laid down in the *Federal Sentencing Guidelines Manual*. Chapter 8 of the said manual sets out extremely detailed

guidelines for the sentencing of organizations⁴⁸ convicted of federal felonies and Class A misdemeanors. It is important to note that the provisions are also intended to enhance reform in corporate behavior especially as it provides for implementation of “compliance and ethics programs” by corporations. Chapter 8 was first introduced in 1991 after several years of research and debate about the best approach to sentencing corporate defendants.⁴⁹ Corporate culture considerations are particularly prominent in two aspects of Chapter 8, namely the assessment of appropriate fines, and as an aspect of corporate probation. For the purposes of calculating a fine range, Chapter 8 provides that Courts should determine a “culpability score” on the basis of certain aggravating and mitigating factors. One aggravating factor being “involvement or tolerance of criminal activity” is said to arise where:

- (A) the organization had 5,000 or more employees and
 - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the offense was committed had 5,000 or more employees and
 - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) Tolerance of the offense by substantial authority personnel was pervasive throughout such unit.⁵⁰

⁴⁸ “Organization” in this context means a person other than an individual, and includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

⁴⁹ Diana E Murphy, “The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics” (2002) 87 *Iowa Law Review* 697, 701-2; Richard S Gruner, “Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform” (1994) 36 *Arizona Law Review* 407, 411-14.

⁵⁰ United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (2006) §8C2.5(b)(1) *Sentencing Guidelines*; available at <http://www.ussc.gov> at 14 March 2011.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

It is noted that this was implemented from the moment it came into existence. For instance, in 2006, involvement in or tolerance of wrongdoing was taken into account as an aggravating factor in the determination of a “culpability score” in over 60% of sentences under Chapter 8.⁵¹ Another aggravating factor is the absence of an “effective compliance and ethics program”. In 2006, such absence of a compliance programme was an aggravating factor in the determination of a ‘culpability score’ in 100% of sentences under Chapter 8.⁵² Just as there are aggravating factors, there are also mitigating factors which include the existence of an “effective compliance and ethics program” (defined in some detail below). This mitigating factor does not however apply in all cases. For instance, it does not apply where:

- (a) the organization unreasonably delayed reporting the offence to the authorities;⁵³ or
- (b) an individual within high-level personnel of the organization, a person within high level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual with either overall responsibility or day-to-day operational responsibility for the compliance and ethics program itself, participated in, condoned, or was willfully ignorant of the offence.⁵⁴

In addition to this, there is a rebuttable presumption that the organization did not have an effective compliance and ethics program if an individual-

- (i) within high-level personnel of an organization having fewer than 200 employees; or
- (j) within substantial authority personnel, but not within high-level personnel, of any organization; participated in, condoned, or was willfully ignorant of, the offence.

⁵¹ United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (11th ed., 2006), Table 54 (*Sentencing Sourcebook*) available at <http://www.ussc.gov> at 14 March 2011.

⁵² *Ibid*

⁵³ *Ibid*, section 8C2.5(f)(2).

⁵⁴ *Ibid*, section 8C2.5(b)(3)(A)

This goes to show that under the sentencing guideline, a corporation is expected to exhibit a high level of ethical behavior otherwise the company will receive a stiffer punishment upon conviction. On the contrary, a company that can be seen to or that can prove that it has an effective compliance and ethics program will definitely be subjected to a lower or less stiff sentence.

Another interesting thing about the Federal Sentencing Guidelines Manual is that apart from basing the sentence to be imposed on a corporation on the nature of the company's organizational structure/character, it also contains provisions that are aimed at encouraging or even enforcing good corporate culture. Little wonder why under the said manual, the court is required to order a term of probation for corporations (for a period not exceeding five years⁵⁵) where this is necessary, *inter alia*, to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.⁵⁶ The terms of such probation may include requirements to develop and submit to the court an effective compliance and ethics program, make periodic reports as to compliance with the program, and submit to audits and interviews of employees, conducted at the corporation's expense by the probation officer or court appointed experts.⁵⁷

According to the US Sentencing Commission records, in 2006, a period of probation was ordered in 197 cases out of the 217 cases (90.8%) decided pursuant to the organizational sentencing chapter of the *Federal Sentencing Guidelines Manual*.⁵⁸ The record also has it that in 41 out of the 217 cases (19.8%), the defendant was ordered by the Court to develop a compliance and ethics program. This goes to show that the manual is being put to very effective use and this is highly commendable. In all, the *Federal Sentencing Guidelines Manual* sets out in very clear detail the parameters of the effective compliance and ethics program that may be relevant to a corporate defendant's culpability score and / or its probation terms. As a

⁵⁵ *Ibid*, section 8D1.2.

⁵⁶ *Ibid*, section 8D1.1(a)(6).

⁵⁷ *Ibid*, Section 8D1.4(c).

⁵⁸ *Sentencing Sourcebook*, Table 53, above note 51.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

matter of fact it remains the most developed and the best approach to corporate sentencing and is therefore worthy of emulation.

There is yet another interesting aspect of corporate criminal liability in USA that must be considered because of its relationship with corporate culture. This aspect involves the discretion of Federal prosecutors as regards whether or not to charge a company to court. This is important because, although USA may have a very high number of corporations that have been charged to court when compared with other countries, the truth remains that corporations have constituted only a tiny percentage of defendants sentenced for federal offences in USA. As a matter of fact, fewer than one per cent of federal sentences imposed between 1996 and 2000 were imposed on organizations as against individuals. The reason for this is that there is an increasing reliance by federal prosecutors on “*deferred or non-prosecution agreements*” wherein corporations avoid indictment in exchange for undertaking certain obligations, which very often include payment of a monetary penalty and/or reforms of their corporate governance regime. The more interesting thing is that the exercise of the discretion of federal prosecutors on whether to indict and prosecute a corporation or to apply “*deferred or non-prosecution agreements*” is not applied arbitrarily but is rather guided by specific regulations. To be specific, it is the “*Principles of Federal Prosecution of Business Organizations*” issued by the US Deputy Attorney-General that guide the federal prosecutors in deciding whether to bring charges against corporate defendants or to resolve it via plea agreements.⁵⁹

The McNulty Memorandum provides that, in deciding whether to bring charges against corporations, prosecutors generally apply the same factors as they would for an individual defendant, but that, as a result of the special position of corporate defendants, some additional considerations may be relevant. The specified additional considerations include:

⁵⁹ The current version of the Principles is that issued by Deputy Attorney-General Paul McNulty in December 2006 (**McNulty Memorandum**). The McNulty Memorandum supersedes the previous version of the Principles issued by Deputy Attorney-General Larry D Thompson in 2003 available at <<http://www.usdoj.gov>> at 14 October 2010.

The pervasiveness of wrongdoing within a corporation, including the complicity in, or condonation of, the wrongdoing by corporate management. And the existence and adequacy of the corporation's pre-existing compliance program.⁶⁰

It is therefore safe to conclude that the corporate culture is the major determinant in the issue of whether or not a company is to be charged to Court. The McNulty Memorandum stipulates that with regards to issues bordering on “pervasiveness of wrongdoing,” the most important is the role of management. This is because the management is responsible for a corporate culture wherein criminal conduct is either discouraged or tacitly encouraged.⁶¹ Coming to those relating to “*compliance program*” the Memorandum emphasizes the importance of determining whether the compliance program is merely a *paper program* or is actually being implemented and enforced.⁶²

Finally, the Memorandum stipulates that where a *plea agreement* is reached, it is necessary that the corporate wrongdoers should be required to comply with an adequate compliance program.⁶³ This approach is wonderful even though its suitability in jurisdictions like Nigeria where corruption is endemic is very doubtful owing to its susceptibility to abuse. However, as Nigeria strives to deal with the challenges of endemic corruption, it remains an option most worthy of exploration in the future.

6. Recommendations and Conclusion

As it stands today, the basis for corporate criminal liability in Nigeria remains the identification of an adequate officer or organ of the company that can bind the company so as to impute his action on the company and hold the company liable. This is wholly a development of case law since there are no statutory provisions on the criteria for holding a company criminally liable. It is submitted with humility and a sense of responsibility that this approach is clumsy, complex and imprecise. We must therefore, seek alternatives.

⁶⁰ *Ibid*, 4

⁶¹ *Ibid*, 6.

⁶² *Ibid*, 14.

⁶³ *Ibid*, 19.

**Rethinking the Basis of Corporate Criminal Liability in Nigeria ~
C. N. Iyidobi**

It is submitted that our Criminal and Penal Codes are too archaic and obsolete to serve any meaningful purpose as far as corporate criminal liability is concerned today. Thus, we submit that they should be amended as a matter of urgency. In doing this, there is the need for the amended version of the law to state clearly the basis for corporate criminal liability. There is also a serious need for the Codes to state in very precise terms how the mental elements of the offences contained therein are to be established against a corporate person. Having said this, it is conceded that it may not be enough to advocate that the clear basis for corporate criminal liability be provided for in the code. It is also important to make recommendations on what should be the basis of corporate criminal liability. It is recommended that the corporate culture approach as applicable in Australia should be adopted by our legislators as basis of corporate criminal liability. In other words, there should be a clear shift from the complex and ineffectual identification approach. This recommendation is made bearing in mind that today's companies have grown both in size and complexity to a point where it has become impossible to identify a single individual who can be said to have committed the offence so as to impute his criminal act and intent on the company. Again, this will put to an end to the question of when and how to hold a company liable for the killing of any person or persons. It is also noted that baring the dangers of abuse due to endemic corruption, the application of corporate culture in sentencing and in deciding whether or not to charge a company for a criminal offence is not a bad idea. There is still the question of the proper and most efficient form of punishment to be meted on the company but that remains an issue for future research.