International Journal of Innovative Legal & Political Studies 7(3):43-51, July-Sept., 2019

© SEAHI PUBLICATIONS, 2019 www.seahipaj.org ISSN: 2467-8503

An Appraisal of Corporate Criminal Liability in Nigeria

[1]Ikenga K.E.ORAEGBUNAM, PhD ; [2]MVC OZIOKO, PhD & [3]Adeola Elizabeth ADEYEMI

[1]Reader and Head, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria

[2]Senior Lecturer, Department of International Law and Jurisprudence, Nnamdi Azikiwe University, Awka, Nigeria

[3]LLM Candidate, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria

ABSTRACT
Despite the recognition of separate personality of a corporate entity, questions are still agog as to the parameters of determining the liability or responsibility of such an entity at the event of a commission of a crime that is directly connected to the activities of the company. The attendant difficulty with regard to straightforward response is hinged on the fact that such a corporate entity does not have a mind for the determination of *mens rea* for the purpose of conviction. The fiction theory that justifies separate personality of a company seems not to have an adequate explanation for criminal liability of that company. What really justifies the practice and the law of imputing criminal responsibility to a fictional person such as a company? Attempt at responding to this jurisprudential question is the gravamen of this inquiry.
Keywords: Corporation, Criminal Liability, *Mens Rea*, Nigeria

1. INTRODUCTION

With the provision of various incentives by the government of Nigeria for the promotion and participation of both foreign and local investors in the country's economy, there has been an upsurge of business participation in various sectors ranging from communication, food industry, energy, to housing and so on. This led to the incorporation of companies in order to effectively carry out businesses. Sometimes, however, criminal activities are associated with the corporate entities which, of course, are not natural persons. This development gives rise to a number of questions as to liability. Who should be prosecuted and who bears the punishment upon conviction. In other words, who would be liable for a company's offence? How should a company be punished for crimes requiring capital punishment? These and many more issues constitute the main thrust of this study.

2. The Principle of Corporate Personality

The incorporated company is the vehicle through which most modern businesses are conducted. The case of *Salomon v Salomon*[1] is generally seen as the cornerstone of company law and that which established

***Ikenga K.E.ORAEGBUNAM, PhD (Law), PhD (Phil.), PhD (Rel. & Soc.), MEd, BL,** Reader and Head, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. E-mail: ik.oraegbunam@unizik.edu.ng. Phone Number: +2348034711211.

***MVC OZIOKO, PhD, LLM, BL,** Senior Lecturer, Department of International Law and Jurisprudence, Nnamdi Azikiwe University, Awka, Nigeria. Phone Number: +2348039464374; and

*** Adeola Elizabeth ADEYEMI, LLM Candidate,** Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

[1] *Salomon v Salomon* & Co. Ltd [1897] AC 22

the now universally acknowledged principle that a company is different and distinct from its shareholders and would be treated as an independent entity with perpetual succession and the right to sue and be sued[2]. This case while establishing the independent status of companies, also buttressed the now recognized principle of company law that a company is responsible for its acts irrespective of the fact that those acts were done through human instrumentation. Indeed, the right to sue and be sued presupposes that a company may sue or be sued for both civil and criminal liabilities. Further, strengthening the principle of corporate legal personality in Nigeria is the provision of Section 65 Companies and Allied Matters Act[3] (CAMA) which specifically provides that 'Any act of the members in general meeting, the board of directors or of a Managing Director while carrying on in the usual way the business of the company shall be treated as the act of the Company itself and the company shall be criminally and civilly liable thereof to the same extent as if it were a natural person'.

3. Corporate Crime

Corporate crimes are defined as illegal acts, omissions or commissions by corporate organisations themselves as, social or legal entities or by officials or employees of the corporations acting in accordance with the operative goals or standard, operating procedures and cultural norms of the organisation, intended to benefit the corporations themselves.[4] Corporate crime, also referred to as white collar crime, is a crime committed by a corporation or business entity or by individuals who are acting on behalf of a corporation or business entity. In most cases, such crime benefits the organization. Kramer noted that 'By the concept of 'corporate crime', then, we wish to focus attention on criminal acts which are the result of deliberate decision making of those who occupy structural positions within the organization as corporate executives or managers. These decisions are organizationally based – made in accordance with the normative goals, standard operating procedure and cultural norms of the organization and are intended to benefit the corporation itself'.

4. Liability of a Company in Civil Matters

Notably, the Supreme Court has had the occasion to consider the liability of a corporation in the case of *Yesufu v Kupper International N.V*.[5] In that case, the Supreme Court held that where a director enters into a contract in the name of or purporting to bind the company, it is the Company, the principal, which is liable on it, not the director. Their Lordships further held that the director is not personally liable unless it appears that he undertook personal liability. Similarly, in *Kurubo v. Zach-Motison(Nigeria) Ltd*,[6] His Lordship, Tobi, JCA (as he then was) opined on the liability of a company as follows:

> 'In view of the fact that an artificial person or company vested with legal or juristic personality lacks the natural or physical capacity to function as a human being, those who work in it do all things for and on behalf of it...It is therefore the law and the tradition for the human beings authorized to negotiate agreement for and on behalf of the company. Where an agreement is so executed by a person in authority, the company is liable or deemed to be liable for the act or acts of the person'.

The point has also been made that a Director would not be personally held liable for a contract because a Director never enters into contract for himself, but he enters into contract for his principal, the company.[7] As a matter of fact, it has even been argued that a Director cannot sue on such contract or be sued on them unless he exceeds his authority but that in certain circumstances, a Director may become liable for breach

[2] A. Nkem & Ikenga K. E. Oraegbunam, 'Jurisprudence of Corporate Personality: Rethinking the Paradox of Separate Personhood in Fiction Theory', *African Journal of Law and Human Rights* 2(2018), 41-49.
[3] Cap C 20, Laws of the Federation of Nigeria 2004.
[4] C. Reasons, 'Crime Against The Environment: Some Theoretical And Practical Concerns'. *Crim. L.Q.* Vol. 34 Nov. 1 (1991) See also R. Kramer. 'Corporate Criminality: The Development of An Idea': In E. Hochstedler, ed. *Corporate as Criminals*. (Beverly Hills, Sage Publication 1984).
[5] *Yesufu v. Kupper International N.V* (1996) 5 Nwlr (Pt.446)17
[6] *Kurubo & Anor v. Zach-Motison (Nig) Ltd* (1992) 5 Nwlr (Pt. 239) 102
[7] *Okeowo V. Migliore* (1979) 11 Sc 138

of warranty.[8] Directors may also become liable for a contract if they contract in their own names.[9] By Section 70 of CAMA, a company would be liable to a third party for the acts of any officer or agent, except where there is collusion between the officer or agent and the third party. The provision of Section 70 CAMA is to the effect that notwithstanding that the officer or agent has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company, the company would be liable to a third party for the acts of such an officer or agent save where the company can prove by preponderance of evidence that there was collusion between officer or agent and the third party.

Notwithstanding, it is worth noting that the company is excluded from the civil liability of the Board of Directors (BOD) or Managing Director (MD) where such person had actual knowledge at the time of the transaction in question that such BOD or MD had no power to act in the matter it acted or that the BOD or MD had acted in an irregular manner or if, having regard to his position with or relationship with the company, he ought to have known of the absence of such power or of the irregularity.[10] Worth noting also is the provision of Section 66 CAMA which clearly provides that acts of any officer or agent of a company shall not be deemed to be acts of the company, unless the company, acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorised such officer or agent to act in the matter. Notably, by section 250 CAMA, where a person, not duly appointed as a Director, acts as such on behalf of the company, the position of the law is that such a Director's act will not bind the company and he will be personally liable for such action. However, where the company holds him out as Director, the company shall be bound by his acts.

4. Theories of Corporate Criminal Liability

In common law, corporate criminal liability is based on the identification theory and the *respondeat* superior theory. There is also the aggregation theory.

The Identification Theory (also called the alter ego theory) was developed by the English law by importing the concept from the civil law of tort.[11] The doctrine of identification theory had its origins in the civil case, *Lernards Carrying Company Limited v. Asiatic Petroleum Company Limited*[12] in which Viscount Haldane noted: 'corporation is an abstraction, its active mind and directing will must consequently be sought in the person who is really the very ego and centre of the personality of the corporation'. Under this theory, a sufficiently high ranking corporate member acts not as an agent of the corporation, but as the corporation itself.[13] In *Tesco Supermarkets Ltd. v. Nattrass,*[14]the court compared corporations to human bodies; the high ranking managers represent the nervous systems that control what the corporations do. Therefore, the *mens rea* and *actus reus* of the high ranking managers are automatically those of the corporation and no other method of proof is necessary.[15]

Whether an officer controls the corporation as the brains control the human body is a question of law; the determining factor of this test is whether the officer could act independently. The natural persons who can make the corporation criminally liable are those who can identify themselves with the corporation; this category includes the members of the board of directors, the managing directors, other persons

[8] *Smith v. Anderson* (1880)15 Ch. D. 247,275 CA ; *Firebanks Executors v. Humphreys* (1885)13 Qbd 54 Ca..

[9] *Trenco v. African Real Estate Ltd* (1978)4 Sc

[10] See Section 65(A) Cama.

[11] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective', 43 *Int'l & Comp. L.Q*. 493, 494 (1994).

[12] (1915) AC 705 at 75

[13] C. Harding, 'Criminal Liability of Corporations-United Kingdom' , in *La Criminalisation du Comportament Collectif: Criminal Liability of Corporations* 369, 382 (H. de Doelder & Klaus Tiedemann (eds.), Kluwer Law Int'l, 1996).

[14] *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153.

[15] Cristina De Maglie, 'Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law', 4 *Wash. U. Global Stud. L. Rev*. 547, 552 (2005).

responsible for the general management of the corporation, and delegates responsible with management functions who can act independently.[16] The crime must be committed within the person's scope of employment.[17] If these conditions are met, the corporation is criminally liable even when the corporation itself is defrauded.[18]

The corporations are liable under the *respondeat* superior theory for strict liability offences and for crimes for which the law expressly or impliedly provides for indirect liability,[19] that is, the doctrine of vicarious liability in which the acts of a subordinate were attributed to the corporation. The United States has adopted the respondeat superior model from the civil law. 'The principle of respondeat superior represents the implementation of the principles governing vicarious liability: the *actus reus* and the *mens rea* of the individuals who act on behalf of a corporation are automatically attributed to the corporation.'[20] The corporation is liable if the employee commits the crime while acting within the scope of his employment and on behalf of the corporation.

Aggregation theory imposes liability based on the act of one employee and the culpability of another who realized the significance of the act.[21] 'This theory also provides that, while no single employee had sufficient information necessary to have the required *mens rea* of the offence, if multiple individuals within the corporation possessed the elements of such knowledge collectively, their aggregate knowledge can be attributed to the corporation.[22] As a result, in some situations, corporations will be liable when no employee is.[23]

5. Determination of *Mens Rea* in Corporate Criminal Liability

The usual approach to criminal law and establishment of criminal liability is often by looking at natural persons and their criminal culpability with reference to *actus reus* and *mens rea*. The imputation of criminal liability to corporations raises numerous theoretical problems. Though reasonably satisfactory practical rules have been evolved, it is not easy to reconcile these rules with the criminal law requirement of *mens rea*.

The doctrine of men's rea in criminal justice system itself is fraught with difficulty in contextual meaning and application, without having to apply it to corporate crime. According to Oraegbunam and Onunkwo[24], 'the doctrine of *mens rea* is a central distinguishing feature of criminal justice system in old common law traditions. Yet it is one very controversial principle which suffers from an untold degree of confusion in its meaning. This problem of fluidity in denotation becomes all the more manifest when the courts are faced with the task of determining the guilt or criminal liability of a suspect. Under English criminal law, this hermeneutical problem had been a result of sundry causes. First and foremost, there are two distinct though interconnected levels of meaning attributable to the expression *mens rea*, namely, the narrow and the broad. While the former signifies the specific mental element that is required to be defined and proved in respect of a particular offence, the latter refers to a general principle of criminal responsibility which demands proof of a guilty mind against the accused.'

---

[16] [1972] A.C. 153, 178.

[17] *Director of Public Prosecutions v. Kent & Sussex Contractors, Ltd.,* [1944] K.B. 146 (K.B. Div'l Ct. 1943);

[18] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective', 43 *Int'l & Comp. L.Q*. 493, 494 (1994).

[19] *Allen v. Whitehead* [1930] 1 K.B. 211; Streteanu & Chirita, supra note 5, at 147.

[20] Cristina De Maglie, 'Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law', *4 Wash. U. Global Stud. L. Rev.* 547, 552 (2005).

[21] E.M. Wise, 'Criminal Liability of Corporations- US', *in La Criminalisation du Comportament Collectif: Criminal Liability of Corporations* 383, 384 (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).

[22] Bank of New England, N.A., 821 F.2d 844.

[23] E.M. Wise, Op. cit.

[24] I.K.E. Oraegbunam & R. O. Onunkwo, 'Mens Rea Principle And Criminal Jurisprudence In Nigeria' *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 2, 2011, pp.249-272. 'https://www.ajol.info/index.php/naujilj/article/viewFile/8247/72562

The core argument against corporate criminal liability has been the belief that a corporation cannot have *mens rea* and therefore, cannot be blameworthy or guilty of a criminal offense.[25] Critics show that the corporate will and power of decision are exercised through the will of the collectivity of people managing the corporation. Therefore, it is said that the mens rea element of a criminal offense does not belong to the corporation, but to the members who made the decision to take a specific course of action.[26] The corporation would be punished without being blameworthy and this would be against the criminal law principles.

In the Nigeria scene, the central thrust of the problem is that *mens rea* is a relevant and very important element of most offences provided for in the Criminal Code. 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 or omission, which occurs independently of the exercise of his will or for an event which occurs by accident. 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 pieces of principal criminal law legislation in Nigeria, there is the need for the establishment of the guilty mind of the accused company.

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 (statutory liabilities), *mens rea* need not be attributed to the company while in the later class of offences, *mens rea* has to be established. The process of establishing *mens rea* of corporate crime remains inconsistent and evasive.

6. Corporate Criminal Liability in Nigeria

Although corporate criminal liability has been accepted in many jurisdictions, the legal basis for its application varies from jurisdiction to jurisdiction. In Nigeria, laws that regulate the activities and duties of corporations specify various penalties for infraction and impose strict liability on such companies. Thus, companies may be fined or penalized for failing to render a return, perform an activity or for participating in a prohibited activity. In inputting criminal liability to companies registered in Nigeria, Section 70 of the Companies and Allied Matters Act 2004 stipulates that 'were in accordance with section 65 to 69 of this Act, a company would be liable to a third party for the acts of any officer or agent, the company shall, except where there is collusion between the officer or agent and the third party, be liable notwithstanding that the officer or agent has acted fraudulently or forged a document purporting to be seal or signed on behalf of the company'.

Recent legislative enactments in Nigeria have come to recognize a variety of crimes which may be committed by the corporations and have proffered different penalties. The first statutory intervention for corporate criminal liability for the conducts of corporate organs, officers and agents in Nigeria was in 1990. The Companies and Allied Matters Act was promulgated and section 65 provides thus:

> …Any act of the members in a general meeting of the board of directors or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person…

[25] H.J. Hirsch, La Criminalisation du Comportament Collectif – Allemange, in La Criminalisation du Comportament Collectif: Criminal Liability of Corporations 31, 31.

[26] Florin Streteanu & Radu Chirita, *Raspunderea penala a persoanei juridice 7* (Rosetti ed., 2002

Section 66 (2) of the same Act made provision for vicarious liability of the company for the acts of its servants while acting within the scope of their legitimate employment. By section 69, persons dealing with a company shall be entitled to make an assumption that the memorandum and articles of association of the company have been duly complied with. They are equally entitled to assume that the person described as a Director, Managing Director or Secretary has been duly appointed and can exercise powers customarily exercised by holders of such offices. This is so in all cases except where the person dealing with such a company had actual knowledge to the contrary. Section 70 of the Act provides that:

where in accordance with sections 65 to 69 of this Act a company would be liable to a third party for the acts of any officer or agents, the company shall, except where there is collusion between the officer or agent and the third party, be liable notwithstanding that the officer or agent has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company.

In *Attorney-General (Eastern Nigeria) v. Amalgamated Press* the court (per Ainley, CJ.) stated that a company cannot be charged with an offence for which imprisonment is the only punishment. However, very few punishments are rigidly fixed by the law and the courts have indicated a willingness to impose a fine where such fine is a fitting substitute for imprisonment. Thus in *R. v. Service Press Ltd,* the court did not hesitate to fine the defendants for contempt of court. In imposing the fine, de Comarond S. P. J. stated: 'the contemnor being a limited company cannot have recourse to imprisonment which…would have been a salutary lesson'.

There has been a list of other statutes recognizing a variety of crimes which may be committed by corporations and which proffer different penalties. Such statutes include: The Federal Environmental Protection Act, (FEPA), The National Drug Law Enforcement Agency Act, Harmful Waste (Special Criminal Provisions) Act, Food, Drugs and Related Products (Registration) Act, Trade Malpractices (miscellaneous offences) Act, the Companies Income Tax Act, and Money Laundering Act. Others are the Investment and Securities Act, Corrupt Practices and Other Related Offences Act, the Economic and Financial Crimes Commission Act, the Failed Banks (Recovery of Debt) and Financial Malpractice in Banks Act, the Environmental Protection and Waste Management Agency, and the Consumer Protection Council Act. These statutes were enacted to promote the social, economic and well-being of the Nigerians.

Like CAMA and the Penal Code, most of these statutes fail to make provisions for how the companies may be held liable for the offences they may commit. Furthermore, some of these offences are cast in the context of being committed by a 'natural person' and provide for punishments that make it impossible for corporate entities to be prosecuted for such. For instance, section 18 of the EFCC Act dealing with offences in relation to economic and financial crimes provides for imprisonment only for a term not less than two years and not exceeding three years. Section 15 of the same Act provides only imprisonment for life for offences in relation to terrorism, and section 32 (1) provides only for imprisonment for a term of five years without the option of a fine for offences in relation to forfeiture orders. This provision is inappropriate in the context of the penalties provided for the offences as corporations are not amenable to imprisonment.

Criminal Liability of Directors

The Nigerian Legal system, which is fashioned along the English Legal system, accommodates the position at Common Law to the effect that corporations could be criminally liable but not for all offences. The foregoing notwithstanding, it appears to be settled that the veil of incorporation does not protect a company director (or any company officer) from criminal liability. It should be noted, however, that such a director (or company officer) would not ordinarily be criminally liable unless he himself has behaved culpably. In driving home this point, Pinto and Evans write[27]: 'In criminal law, there is no parasitic liability of directors, so a director is not guilty of an offence simply because the corporation itself is guilty; a condition precedent to conviction of a director is some act (or omission) on his or her part. Where a director has acted criminally, it is no defence that he did so within the scope of his employment and was committing the crime on behalf of his employer.' Under Nigerian law, situations abound where a

[27] Pinto &Evans, *Corporate Criminal Liability*, Sweet & Maxwell, London, Second Edition (2008), p. 71

Director can be personally liable for certain offences allegedly committed by a company through one of its organ. For instance, Section 369 CAMA criminalises false information forwarded by an officer of a company to the company‟s auditors and provides for the personal liability of an officer with the penalty being a fine of N500 or one-year imprisonment or even both, if found guilty of the offence. A look at some provisions of tax law in Nigeria also reveals that a director can be criminally liable for crimes committed in the discharge of his or her office as a director. For instance, Section 94(1) Companies Income Tax Act (CITA) provides inter alia that where any person other than a company who for the purpose of obtaining any deduction, set-off, or repayment in respect of tax for any company, or who in return, account or particulars made or furnished with reference to tax, knowingly makes any false statement or false representation is guilty of an offence and liable on conviction to a fine of N1,000 or to imprisonment for five years, or to both such fine and imprisonment. This provision is quite consistent with the elementary principle of criminal law that the two elements that make a crime – *actus rea* and *mens rea* must be present before any conviction must be secured, the only exception being strict liability offences.

Joint Liability for Criminal Actions

In certain instances, the company and its directors would be jointly liable for criminal conduct. For example, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act29 (Failed Banks Act) in Section 18 provides that where an offence under the Failed Banks Act is committed by a body corporate is proved to have been committed with the connivance of, or is attributable to negligence on the part of a company director, the company as well as the director shall be held liable. It goes without saying that the Failed Banks Act contains relevant provisions, where the veil of incorporation will be lifted, to melt out the appropriate punishment on erring directors.

7. A Look at Some Other Jurisdictions

UK Position

Corporate criminal liability has grown into an important segment of criminal law in the United Kingdom and the courts have made clear decisions on the applicability of the concept. Over the years, the English courts followed the doctrine of vicarious liability in which the acts of a subordinate were attributed to the corporation. This doctrine was only used for a small number of offences that required no *mens rea* such as public nuisance, criminal libel and contempt of court, and, later on they were replaced with the identification theory. The doctrine of identification theory had its origins in the civil case, *Lernards Carrying Company Limited v. Asiatic Petroleum Company Limited*[28]*, which laid* down a general principle for attributing fault to a corporation. - the court noted that 'A corporation is an abstraction … its active mind and directing will must consequently be sought in the person … who is really … the very ego and centre of the personality of the corporation.' Under this concept, the acts and state of mind of certain senior officers of the corporation - the directing minds - are deemed to be the acts and state of mind of the corporation. That means that the directing minds are identified as the corporation. However, due to the strict limitations of the identification theory, it has been almost impossible to have convictions of corporations for mens rea crimes. As a result, the English law has started to slowly change; the courts decided that a corporation can be convicted for negligently omitting to take some preventive measures even though no person within the company had this specific duty.[29] Following Home Secretary Office reports and Government proposals, the Government released a draft Bill and sought comments on the Bill by June 2005. The Bill essentially enacts and expands the identification doctrine. Subsequently, the new Corporate Manslaughter and Corporate Homicide Act (*CMCHA*) were passed into law in England, Wales and Northern Ireland, with effect from 6th April 2008, replacing the common law offence of manslaughter by gross negligence.

The CMCHA provides that organizations owe duties of care to the following:

[28] Supra

[29] *Seaboard Offshore, Ltd. v. Secretary of State for Transp*., [1994] 2 All E.R. 99, 104 (H.L.)

(a) all employees or other persons working for the organization or performing services for it;
(b) the public as the occupier of a premises (workplace);
(c) the public in connection with the supply of goods and services;
(d) in constructing or maintaining buildings;
(e) for infrastructure or vehicles etc, or when using plant or vehicles, et cetera; and
(f) when carrying out other activities on commercial basis.

The United States Position

The US has criminal law at both the State and Federal levels. The majority of prosecutions are brought under State criminal laws. State criminal laws vary in their approach to corporate criminal liability. The liability of corporations under federal criminal law is based on the doctrine of *respondeat superior* or *vicarious liability* and *aggregation doctrine*. 'The principle of *respondeat* superior represents the implementation of the principles governing vicarious liability: the *actus reus* and the *mens rea* of the individuals who act on behalf of a corporation are automatically attributed to the corporation.'[30] The corporation is liable if the employee commits the crime while acting within the scope of his employment and on behalf of the corporation.

In *United States v. Hilton Hotels Corporation*[31], the Court relied on a broad interpretation of the Respondeat Superior doctrine in arriving at its decision. The purchasing agent at Hilton Hotel in Portland, Oregon, threatened a supplier of goods with the loss of the hotel's business if the supplier did not contribute to an association formed to attract conventions to Portland. The corporate president testified that such action was contrary to corporate policy. Both the manager and assistant manager of the hotel testified that they specifically told the purchasing agent not to threaten suppliers. Nevertheless, the court convicted Hilton Hotel Corporation of antitrust violations under the *respondeat* superior standard because to outsiders, the assistant manager appeared to be acting on behalf of the corporation. Although the *respondeat* superior test was applied in Hilton Hotels, the issue of a wayward employee arises and whether his singular action defines the corporate culture. In another case , United States v. Sun-Diamond Growers of California[32], the court explained its holding by noting the policy justification for holding corporations criminally liable for acts of their agents: 'to increase incentives for corporations to monitor and prevent illegal employee conduct'

The Australian Position

Initially, Courts in Australia relied on the principles of vicarious liability, but have largely followed the identification approach since it was developed in the UK in the 1940s as the basis for corporate criminal responsibility. In July 1990, a Review of Commonwealth Criminal Law recommended that the statutory framework of Commonwealth offences be completely overhauled. A Model Criminal Code Officers Committee (MCCOC) was set up under the Standing Committee of Attorneys-General to undertake a broad consultation and draft a model statutory criminal framework for Australia. In its Final Report, the MCCOC concluded that the identification approach was no longer appropriate as a basis for corporate criminal liability, given the 'flatter structures' and greater delegation to relatively junior officers in modern corporations'. Their findings and recommendations were enacted into law hereinafter referred to as Criminal Code Act 1995 (*Commonwealth of Australia*) Provisions. The organizational liability provisions in the Australian Criminal Code Act are found at Part 2.5, Division 12 of this legislation in a section entitled 'Corporate Criminal Responsibility.' This section provides that; 'if an employee, agent or officer of the body corporate commits an offence within the scope of his or her employment, the physical

[30] Cristina De Maglie, 'Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law', 4 *Wash. U. Global Stud. L. Rev*. 547, 552 (2005).
[31] (1976) 467 F.2d 1000
[32] (1999) 526 U S 398

elements of the offence are attributed to the body corporate. It also provides that intent, knowledge or recklessness, becomes a fault element of an offence if the body corporate expressly, tacitly or impliedly authorized or permitted the commission of the offence'. Australian Criminal Code attributes liability to the corporate entity. Section 12 (2) of the same Act states that a body corporate may be found guilty of any offence, including one punishable by imprisonment, the section went further to state that: If a physical element of an offence is committed by an employee, agent, or officer or body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate. Section 12.3(4) states that the relevant factors 'include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorized or permitted the commission of the offence.

Another major legal reform that took place in Australia is to be found in the specific offence of Industrial Manslaughter Amendment Act, 2003 which came into force in March 2004. Section 49(c) of the Act defines the offence for 'industrial manslaughter' by an employer. Section 49(d) defines a similar offence for 'senior officer' by replacing the word 'employer' in Section 49(c) with 'a senior officer [of an employer].'Section 7(a) of the Crimes Act 1900 (ACT) allows section 49(c) and 49(d) to be integrated with the Criminal Code 2002 (ACT), which is modeled on the Commonwealth Criminal Code 1995. This allows for the fault element of recklessness to be proven from a corporate culture or negligence can be proven by showing that the corporation's conduct as a whole was negligence. Section 49(b) provides that in terms of the 'conduct' that caused the industrial fatality, an employer or senior officer's omission to act can be 'conduct' if:

it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from –

(a) an act of the employer or senior officer; or

(b) anything in the employer or senior officer's possession or control; or

(c) any undertaking of the employer or senior officer.

8. CONCLUSION

Although, the common law doctrines of vicarious liability and identification theory are applicable in Nigeria, it is difficult to say with certainty whether the principal criminal law legislation to wit: the Criminal Code and the Penal Code actually provide a basis for holding corporations liable. Both these codes fail to state or give an idea of how the very crucial task of determining *mens rea* and *actus reus* 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 problematic. 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 codes like stealing, murder, fraud, manslaughter, and many others, that is, the legal basis for corporate criminal liability in Nigeria. Nigeria should introduce an offence of corporate manslaughter's following a series of prominent disasters, including plane crashes, petroleum oil pipe and gas explosions, sea disasters and collapsed buildings killing thousands of innocent Nigerians.