

# Criminal liability for economic criminal actions conducted by a corporation in the era of globalization.

Noor Aziz Said\*

Department of Criminal liability, Purwokerto State Islamic Institute, Jawa Tengah, Indonesia

## Abstract

During the era of globalization, the presence of corporation has provided an impactful role for the human kinds in the world, especially in increasing the national economic. On the other hand, corporations have given birth to a crime called Transnational Organized Crime (TOC) in the area of economic. For that, it needs a legal instrument among others legal liability and legal sanctions against corporations. The research method used in this study is juridical normative, namely research oriented literature study. Data sourced from statutory regulations, literature books containing legal principles and doctrines relating to the problem.

The results showed that the criminal law doctrine recognizes four forms of criminal responsibility, namely direct liability, vicarious liability, strict liability, and the company culture doctrine. Meanwhile, criminal sanctions against corporations are fines and if necessary are added with additional penalties on the condition that they must pay attention to the continuity of the existence of the corporation and the interests of workers if the corporation falls bankrupt due to criminal sanctions.

**Keywords:** Corporations, Transnational Organized Crime, Criminal liability, Criminal sanctions, Globalization.

*Accepted on May 21, 2021*

## Introduction

Globalization and modernization as a result of advances in technology, communication, transportation and information technology, especially in the fields of economy, trade and investment, world progress and development, have made national boundaries, sovereignty and sovereign rights become thinner and more unclear. This situation, of course, has a negative impact which is concerning. Humans or a corporation often take advantage of these advances to commit crimes that are often accompanied by violations that are contrary to human civilization [1]. The development of various types of crimes that are increasingly complex in the global era requires means of prevention and prosecution capable of solving problems in the development of crime as a result of advances in technology, communication, transportation and information technology, especially in the economic field.

In addition, international cooperation is needed in order to combat crimes on an international scale called international crime or Transnational Organized Crime (TOC). Several forms of international cooperation in an effort to catch fugitive criminals (fugitives) and return of assets that were taken abroad are the Interpol Mutual Legal Assistance (MLA) extradition treaty and diplomatic relations based on the principle of reciprocity [2].

Article 1 United Nations Convention against Transnational Organized Crime (TOC) tahun 2000 disebutkan dengan tegas bahwa the purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively. Then the report of the 5th and 6th UN Congress regarding the Prevention of Crime and Treatment of Offenders stated that crime as business is a crime in the economic or

business sector, especially those committed in an organized manner.

In the era of globalization, the existence of corporations has a very big share and role, both for the interests of humans, the interests of society, and the interests of the state. Corporations have a very important role in increasing state revenues in the form of tax revenues, job creation, technology experts, especially for a bank. This means that the corporation is one of the supporting pillars of the national economy. Corporate crime can be categorized as transnational organized crime. This is because corporate crime results in a systematized system and its elements that are very conducive. Corporate crime involves a systematic system because of the existence of a very solid criminal organization, whether due to ethnic ties, political interests, economic interests or other interests, with a clear code of ethics. Meanwhile, related to the most conducive elements, corporate crimes often involve groups (protectors), which, among others, consist of law enforcers and professionals and community groups who enjoy the proceeds of crimes committed systematically [3]. It should also be noted that corporate crimes generally contain the elements of cheating (squeaking), misrepresentation, concealment of facts, manipulation, breach of trust, subterfuge or circumvention of regulations (illegal. circumvention) therefore it is very detrimental to society at large.

## Literature Review

In Indonesia, the development of corporations cannot be inseparable from the development of corporations in the world in general. The development of the corporation is closely related to the development of the industrialization era that began in England. Since then, industries and society have

begun to develop into the era of industrialization and slowly leave the economic pattern that relies on the agrarian sector [4]. This industrialization requires the provision of funds and capital which is not small, therefore an entrepreneur cannot rely solely on his personal capital. The bigger the corporation, the wider its reach, the greater the capital requirement. This situation causes corporate ownership to shift no longer limited to individuals but to a group of people, even by the community. The development of corporations in Indonesia is getting bigger opportunities since Indonesia liberalized the trade sector. Liberalization is something unavoidable as an effect of globalization on the economy. Globalization by Muladi is defined as a process forced by global flows of people, information, trade and capital. In addition to liberalization, the development of corporate crime in the era of globalization is also caused by the aggressive impact of international corporations in developing their businesses and increasing their influence to enter the international market and dominate industry and trade in developing countries. The expansion of corporate organizations beyond the boundaries of morality recognized by civilized nations is not only carried out by accumulating capital and investment, but also by holding business mergers and the formation of cartels that are monopolistic in nature, in terms of financing cartels, price cartels, quality cartels, or a profit-sharing cartel and so on, whose purpose is to reduce and even eliminate competition. In addition, acquisitions can also be carried out, holding companies, whether intentionally formed or formed by themselves through fair means or by fraudulent business practices, conglomerates trying to control companies from upstream to downstream of a certain type of product.

According to Muladi, this negative corporate culture is driven by organizational goals, namely:

- Priority of profit in the form of growth
- Control of the market
- The personal ambitions of the corporate leadership are limitless
- Weak law enforcement
- Lack of Surveillance
- The immoral sub-culture that engulfs society

All of which will increase the rise of corporate crime in modern society.

Studies on corporate crime have revealed that a large proportion of societies are either unfamiliar with corporate crime or are often less aware of the dangers it poses. The roots of public ignorance, among others, are caused by the invisibility of corporate crimes caused by the complexity, sophistication of planning and implementation, the absence or weakness of law enforcement and law enforcement and by the flexibility of legal sanctions and social sanctions, thus failing to strengthen and re-enforce collective sentiment towards moral ties [5]. In the field of the criminal justice system, corporate crimes have not been fully and clearly regulated in legislation but instead follow the types of crimes committed by the corporation concerned such as narcotics crimes, terrorism crimes, trafficking in persons and especially economic crimes.

On that basis, the corporation as a legal subject raises debate whether the corporation can be criminally liable or not. This debate rests on the presence or absence of an element of mens rea in the corporation in accordance with the adagium actus non facit reum nisi mens sit rea known as the principle of mens rea. Therefore, corporate crimes in the form of economic crimes will apply the provisions of criminal procedure law, both those contained in the Criminal Procedure Code and in particular those outside the Criminal Procedure Code as a consequence of economic crime as a special crime.

In terms of the country's finance and economy, the phenomenon of the development of criminal acts related to the existence of corporations in the era of globalization in Indonesia, the emergence of economic crimes committed by corporations, using various modes that deviate from legal provisions with the aim of obtaining large profits for corporations. Economic crimes committed by corporations have a detrimental impact on the economy and state finances, which results in disruption of growth and the continuity of national development which demands high efficiency. The phenomenon of economic crime that is developing in Indonesia is not accompanied by strict and harsh law enforcement against corporations, so what happens is that corporations often escape the trap of the law. Whereas the direction of law enforcement that is expected by the public so that criminal acts committed by corporations are not enough to only ensnare the board of directors or corporate management, but to place the corporation responsible for the criminal acts committed [6].

## Methodology

As a criminal act maker (as a legal subject), a corporation can be held accountable for a criminal act it commits either directed at the corporation concerned or directed at its management (corporate organs). The recognition of corporations as a criminal law subjects that are considered capable of committing criminal acts that can be held accountable (corporate criminal responsibility) is not a new thing that has caused many legal problems and a debate both among academics and among legal practitioners [7].

The problem regarding corporate criminal liability arises when corporate criminal liability is linked to the adage "Actus non facit reum nisi mens sit rea" (Asas mens rea). Apart from the problem of corporate criminal liability, corporations as legal subjects are mentioned in various laws, such as Article 15 of Law Number 7 Drt of 1955 concerning Economic Crime, Article 20 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Elimination of Corruption Crime, and Article 4 paragraph 1 of Law Number 15 of 2003 in conjunction with Law Number 25 of 2003 concerning the Crime of Money Laundering, legally the corporation is inseparable from criminal liability if the corporation commits a criminal act.

Previously, the importance of corporate criminal responsibility was that corporate crime as a form of crime that not only threatens economic stability and financial system integrity, but can also endanger the joints of life in society, nation and state.

The research method used is normative juridical. Normative juridical research is oriented towards literature study, namely the review of secondary data. Secondary data includes international conventions, laws and regulations, literature books that contain legal principles and legal doctrines, especially those related to corporate criminal liability and corporate criminal sanctions.

## Discussion

### *Definition of corporation*

Based on several definitions about the corporation, it can be concluded that there are five elements to be called a corporation, namely:

- Artificial legal subjects who have a special legal position.
- Can be a group of people and/or organized wealth.
- Has a specific structure and purpose.
- Has an unlimited life span.
- Obtaining the power (from the state) to carry out certain business activities.

### *Characteristics of corporate criminal acts*

Steven Box stated that the scope of corporate crime covers:

- Crime for corporations, namely crimes or law violations committed by corporations in achieving certain business and goals in order to gain profit.
- Criminal Corporation, namely a corporation that aims solely to commit crimes. (in this case the corporation is only a cover for a criminal organization).
- Crimes against corporation, namely crimes against corporations such as theft or embezzlement of corporate property, in this case the corporation as a victim.

In terms of victims of corporate crime, Muladi distinguishes between victims of conventional crimes and victims of corporate crimes as follows:

In conventional crimes, the victims can be identified easily, whereas in corporate crimes the victims are often abstract, such as the government, other companies or consumers who are large in number, while individually the losses are small.

Meanwhile Clinard and Yeager stated 6 (six) types of victims:

- Consumer (product safety or quality).
- Credit violation, which is providing false information in advertising with the aim of influencing consumers.
- Most economic systems have been directly affected by dishonest trading practices (violations of antitrust regulations and violations of other regulations) and most financial violations except those relating to consumer purchases.
- Environmental violations (air and water pollution) that become victims, namely the physical environment.
- Workers are victims of violations of wage provisions

- The government is the victim, because of administrative violations or court orders and tax fraud cases.

### *Types of corporate criminal acts*

According to Article 4 paragraph (2) of Perma Number 13 of 2016, there are four types of actions which constitute corporate criminal acts:

- The corporation gains or benefits from a criminal act.
- Criminal acts are committed for the benefit of the corporation.
- Corporations allow criminal acts to occur.

The corporation does not take the necessary steps to take precautions, Preventing a bigger impact, Ensuring compliance with applicable legal provisions in order to prevent criminal acts.

### *Corporate criminal liability issues*

Placement of a corporation as a subject of criminal law and therefore can be held accountable for the crime for its actions is still a matter/debate [8]. These problems or debates give rise to attitudes of agreeing and disagreeing with corporations as subjects of criminal law.

British courts do not recognize criminal liability against corporations on grounds:

- The existence of the superior respondeat doctrine (namely the principle that a person is held accountable for actions committed by an agent/subordinate) in the tort law in the 19th century which lacks a conceptual basis for being accountable for individual actions to corporation
- It is difficult to find elements of mens rea in corporations.
- The existence of the ultra vires doctrine which contained conceptual obstacles, because until the 19th century, this doctrine limited the power of the corporation to actions justified according to the AD (Articles of Association). Since AD only formally authorizes corporations to commit acts in accordance with the law, logically the corporation does not have the power to commit crimes
- Corporate prosecutions cannot be reconciled with rigid procedural requirements, including that the defendant must be personally presented to court. British law dislikes a trial in absentia.

The opinion that legal entities/corporations cannot be convicted is reinforced by the adage *societas delinquere non potest*, namely that legal entities cannot commit criminal acts and *adagium delinquere universitas non potest*, meaning that legal entities (corporations) cannot be convicted.

Meanwhile, those who agree to place corporations as subjects of criminal law state the following reasons:

- It turns out that being convicted of the management alone is not enough to carry out repression against offenses committed by or with a corporation. Therefore it is also necessary to be possible to punish corporations, corporations and managers or managers only.

**Citation:** Said NA. Criminal liability for economic criminal actions conducted by a corporation in the era of globalization. *Addict Criminol.* 2021;4(3):1-6.

- In view of the fact that in social and economic life, corporations are increasingly playing an important role as well besides the dangerous nature of crimes on an international scale and even transformed into Transnational Organized Crime.
- Criminal law must have a function in society, namely protecting society and enforcing norms and provisions that exist in society. If the criminal law only emphasizes the individual aspect which only applies to humans, then that goal is ineffective, therefore there is no reason to always press and oppose the criminalization of corporations.
- A corporation which is convicted with a criminal threat is one of the efforts to avoid criminal action against the corporate employees themselves.
- Apart from agreeing and disagreeing about the liability of crimes against corporations, Indonesia's criminal law recognizes corporations as legal subjects and therefore corporations can be held liable for criminals.

Several provisions place corporations as legal subjects and can be justified in criminal law:

- Law No. 7 Drt of 1953 regarding Economic Crimes (Article 15)
- Law No. 6 of 1984, regarding the Post (Article 19 paragraph (3))
- Law No. 5 of 1997 regarding Psychotropics
- Law No. 31 of 1999 jo. Law No. 20 of 2001 regarding the Eradication of Corruption (Article 20)
- Law No. 15 of 2003 jo. Law No. 25 of 2003 regarding the Crime of Money Laundering (Article 4 paragraph (1)).

### ***Corporate criminal liability doctrines***

Basic criminal liability against corporations:

- Corporate criminal liability is contained in Article 4 paragraph (1) of Perma No. 13 of 2016:
- Corporations can be criminally liable in accordance with the criminal provisions of the Corporation in the law governing Corporations.
- Doctrines of Corporate Criminal Liability.

Direct liability doctrine or Identification Theory. According to this doctrine:

- Starting from the doctrine of respondeat superior.
- The meaning of the adage/maxim is A master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.
- Based on employment principle.

An employer is primarily responsible for the actions of workers/employees; so the servant act is the master's act in law. This principle is also known as the agency principle (the company is liable for the wrongful acts of all its employees).

Vicarious liability doctrine is often defined as substitute responsibility (legal responsibility where someone is held accountable for wrongdoing by another). The legal responsibility of one person for the wrongful acts of another).

Basically, this theory or doctrine or teaching is taken from civil law which is applied to criminal law. Vicarious liability usually applies in civil law regarding acts against the law (the law of torts) based on the doctrine of respondeat superior. According to the principle of superior respondeat where there is a relationship between master and servant or between principal and agent, Maxim's opinion is valid, which reads *qui facit per alium facit perse* [9]. According to Maxim, a person who does something through another person is considered to be himself the one who did the act. Therefore, the teaching of vicarious liability is also called the teaching of respondeat superior

The doctrine of strict liability according to the law (strict liability)

Corporate criminal liability can also be solely based on law, apart from the doctrine number 1 and 2 above (identification and vicarious liability doctrine), that is, in the event that the corporation violates or does not fulfill certain obligations/conditions/situations determined by Constitution. Violations of certain obligations/conditions/situations by corporations are known as companies' offenses, situational offenses, or strict liability offenses [10].

For example, the law determines as an offense for:

- Corporations running their business without a permit
- Corporation holding a permit that violates the terms (conditions / situations) specified in the permit
- Corporations operating uninsured vehicles on public roads.
- According to Curzon, the doctrine of strict liability is based on the following reasons:
- It is essential to ensure that certain important rules are needed for the welfare of society
- Proving the existence of mens rea will be very difficult for violations related to the welfare of the community (in this case one of which is an economic crime)The high level of "social danger" caused by the action in question.

Strict liability according to Russell Heaton is defined as a criminal act by not requiring the perpetrator to be guilty of one or more of the actus reus. So in this case, strict liability is a liability without fault. Romli Atmasasmita stated that in addition to the British criminal law adhering to the principle of "actus non facit reum nisi mens sit rea" (a harmful act without a blame worthy mental state is not punishable), it also adheres to the principle of absolute responsibility without having to prove the existence or absence of an element of error to the perpetrator of the criminal act. The principle of responsibility is known as strict liability crimes [11].

company culture doctrine

According to this doctrine/theory, a corporation can be held accountable from its procedures, working system, or culture (the procedures, operating systems, or culture of a company). Therefore, this cultural theory is often called a systems theory/ model or an organizational model (organizational or system model) [12]. Corporate error is based on internal decision-making structures).

According to Lord Morris, a senior official is a person whose responsibility is to represent or symbolize the implementation of the directing mind and will of the company.

Meanwhile, Lord Diplock argued that senior officials are those who, based on the memorandum and provisions of the foundation or the decisions of the directors or decisions of the general meeting of the company, have been entrusted with exercising company power.

Judging from the application, the doctrine of the corporate culture model can be applied if An attitude policy, rule, course of conduct of practice within the corporate body generally or in the part of the body corporate where the offences occurred. Evidence may be led that the company's written rules tacitly authorized non compliance or failed to create a culture of compliance.

In practice, the application of corporate criminal liability doctrines is difficult to implement due to the following obstacles:

The perpetrator of a corporate crime has a white-collar crime character. Sutherland interpreted white collar crime: as a crime committed by a person of respectability and high social status in the course of his occupation.

Corporate crime has the characteristics of crimes in the economic field, namely:

- Disguise of purpose or intent: For example: a bribe which can take the form of various facilities and opportunities for the recipient and for the giver who can also be a legal entity, the bribe can be disguised in the form of advertising fees, promotions and so on.
- Reliance upon the ignorance or carelessness. In this case, the lack of expertise, lack of knowledge and negligence of the victim will be exploited by the perpetrator.
- Concealment of the violation. In socio-economic crimes, the victim often feels that he is a victim of victimization after a while. An example is embezzlement which is a continuing act.

### ***Criminal sanctions against the corporation***

Regulated in Article 25 Perma No. 13 of 2016:

- The punishments imposed against the corporation are in the form of principal and/or additional crimes
- The main punishment that can be imposed against a corporation is a fine

Additional penalties are imposed in accordance with the provisions of the applicable laws and regulations.

In the Netherlands, additional fines and penalties must pay attention to the following matters:

- Additional fines and/or penalties must not cause the corporation to collapse/go bankrupt.
- Additional fines and/or penalties must not cause corporate workers to suffer losses. For this reason, additional fines and/or penalties must be considered:

- Continuity of the existence of the corporation.
- It is in the interests of workers if the corporation cannot operate due to criminal sanctions.

Thus, the imposition of additional fines and/or penalties must be oriented towards the continuity of corporate operations and the interests of workers for the future [13].

What is responsible for the crime against the corporation is if the crime is committed by a functional official of the corporation whose actions are committed for the benefit of the corporation. If a functional official commits an act of enriching himself or someone other than the corporation so that the corporation suffers a loss, the corporation cannot be held responsible for the crime.

### **Conclusion**

There are four types of criminal responsibility towards corporations, namely direct liability, vicarious liability, strict liability, and company culture doctrine. Additional criminal sanctions and/or penalties against the corporation must pay attention to the continuity of the existence of the corporation and the interests of workers if the corporation falls bankrupt due to criminal sanctions.

### **References**

1. Alexander CR, Cohen MA. Why do corporations become criminals? Ownership, hidden actions, and crime as an agency cost. *J Corp Fin.* 1999;5:1-34.
2. Sinaga HD, Wirawan A, Pramugar RN. Reconstruction of Corporate Criminal Liability in Indonesia. *Int J Adv Sci Technol.* 2020;29:1231-40.
3. Simpson SS, Koper CS. Detering corporate crime. *Criminol.* 1992;30:347-76.
4. Orland L. Reflections on corporate crime: Law in search of theory and scholarship. *Ame Crim Law Rev.* 1979;17:501.
5. Kramer RC, Michalowski RJ, Kauzlarich D. The origins and development of the concept and theory of state-corporate crime. *Crim Delinq.* 2002;48:263-82.
6. Alexander CR. On the nature of the reputational penalty for corporate crime: Evidence. *J Law Eco.* 1999;42:489-526.
7. Benson ML, Cullen FT. Combating corporate crime: Local prosecutors at work. *UPNE;* 1998.
8. Kadish SH. Some observations on the use of criminal sanctions in enforcing economic regulations. *Univ Chi Law Rev.* 1962;30:423.
9. Benson ML, Cullen FT, Maakestad WJ. Local prosecutors and corporate crime. *Crim Delinq.* 1990;36:356-72.
10. Paternoster R, Simpson S. A rational choice theory of corporate crime. *J Res Crim Delinq.* 2017; 54:847-68.
11. Passas N. Lawful but awful: 'Legal corporate crimes'. *J Soc Eco.* 2005;34:771-86.
12. Coffee JC. Corporate crime and punishment: A non-Chicago view of the economics of criminal sanctions. *Ame Crim Law Rev.* 1979;17:419-476.

**Citation:** Said NA. Criminal liability for economic criminal actions conducted by a corporation in the era of globalization. *Addict Criminol.* 2021;4(2):1-6.

13. Braithwaite J. Corporate crime in the pharmaceutical industry (Routledge Revivals). Routledge. 2014.

**\*Correspondence to**

Dr. Noor Aziz Said

Department of Criminal liability

Purwokerto State Islamic Institute

Jawa Tengah

Indonesia

E-mail: noorazizsaid09@gmail.com