AN EVALUATION OF THE THEORETICAL BASIS OF CORPORATE CRIMINAL RESPONSIBILITY FOR CORPORATE KILLINGS IN NIGERIA

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ABSTRACT

The laws in Nigeria recognise corporations as artificial persons, but fail to properly define the basis for holding corporations criminally responsible where its activities lead to the death of persons. The courts and in recent years, the legislation of countries like the United Kingdom, Australia, and United States of America have formulated corporate criminal responsibility theories in determining the mens rea of corporations. The theories discussed in this paper are the strict liability theory, vicarious liability theory, identification theory, aggregate theory and the corporate fault theory. The limitations of the different theories are highlighted and the paper further proffers a hybrid theory comprising of the corporate fault theory and the identification theory as the basis for which corporations in Nigeria can be held criminally responsible for offences requiring the proof of mens rea such as corporate killings. The paper adopts the doctrinal research approach making use of both primary and secondary data from statutes, relevant case laws, policy documents, books, journals and articles.

Keywords: Corporate Criminal Responsibility, Corporate Killings, Identification Theory, Corporate Fault Theory, Vicarious Liability Theory.

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1.0. Introduction

There is no doubt that most corporate goods and services are beneficial to the society. However, corporate activities may negatively impact society especially when grave consequences affecting lives and property, occur. Over the years, Nigeria has had a fair share of disasters emanating from corporate activities, resulting in loss of lives, and rendering communities inhabitable. These disasters cut across different sectors of the economy in Nigeria, which include: the aviation, construction, pharmaceutical, and manufacturing industries amongst others.[2] Although, there have been instances where corporations have been tried and convicted for criminal

[2]'Nigeria's plane crashes in last 20 years: timeline' *The Telegraph, June, 2012* < *https://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/9309700/Nigerias-plane-crashes-in-last-20-years-timeline.html*> *accessed 10th November, 2020;* 'Official: 153 on plane, at least 10 on ground dead after Nigeria crash' *CNN, June, 2015* < *https://edition.cnn.com/2012/06/03/world/africa/nigeria-plane-crash/index.html*> Accessed 10th November, 2020; Nicholas Ibekwe, 'T.B Joshua absent as trial over collapse building commences' *Premium Times, November 2015* <https://www.premiumtimesng.com/news/headlines/194133-t-b-joshua-absent-as-trial-over-collapse-building-commences.html> accessed 20th November, 2020; 'Lagos Arraigns Lekki Gardens MD, Others Over Involuntary Manslaughter' *Vanguard, July, 2017* <https://www.vanguardngr.com/2017/07/lagos-arraigns-lekki-gardens-md-others-involuntary-manslaughter/> accessed 20th November, 2020; 'Collapsed Building: Former MD of Lekki Gardens And Four Others In Court For Manslaughter' *Sahara Reporters, July, 2017* http://saharareporters.com/2017/07/04/collapsed-building-former-md-lekki-gardens-and-four-others-court-manslaughter accessed 20t November, 2020; Joseph Onyekwere, 'Lekki Gardens MD Faces Manslaughter Charges' *The Guardian ,February, 2017* <*https://guardian.ng/features/law/lekki-gardens-md-faces-manslaughter-charge/* > accessed 3rd March, 2019; Yetunde Oyebamiji Ojo, 'Defence Closes Case in Collapsed Synagogue Guest House' *The Guardian, December, 2019* < *https://guardian.ng/features/law/defence-closes-case-in-collapsed-synagogue-guest-house/*> accessed 2oth November, 2020; Bola Akingbade 'Synagogue Church's Trustees, Engineers Arraigned for Manslaughter' *Lagos Ministry of Justice'* <*http://lagosministryofjustice.org/2016/04/19/synagogue-churchs-trustees-engineers-arraigned-for-manslaughter/* > accessed -3rd March, 2019; Lydia Polgreen, '84 Children are Killed by Medicine in Nigeria' *The New York Times, February, 2009* *https://www.nytimes.com/2009/02/07/world/africa/07nigeria.html;* 'Nigeria Factory Fire, Kills' 37 *BBC News, September 2002* < *http://news.bbc.co.uk/2/hi/africa/2264527.stm*> *accessed 10th November, 2020;*

offences,[3] still, no recorded case of conviction for corporate killings in Nigeria.[4] In 2015, a religious corporation, Synagogue Church of All Nations was charged for hundreds of deaths resulting from the collapse of its guesthouse.[5] Also, in 2017, a construction and real estate company, Lekki Gardens Estate Limited was prosecuted for the deaths of persons caused by the collapse of one of its buildings.[6] The aforementioned cases occurred in Lagos, Nigeria and are before the High Court of Lagos State, where the corporations and its managers are being prosecuted for the deaths that occurred in the collapsed buildings.[7]

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[3] See R v Ziks Press [1947] 12 WACA 202; African Press Ltd v R [1952] 14 WACA 52; Service Press Ltd v A.G [1952] 14 WACA 173; R v Amalgamated Press Ltd [1961] 2 All NLR 199; Mandillas and Karaberis Ltd & Anor v Inspector General of Police [1958] I NSCC 70. In this case, the corporation was found guilty of theft, however, on appeal, the case was dismissed on other grounds; A.G Eastern Region v. Amalgamated Press of Nigeria Ltd [1956-1957] 1 ER 12.

[4] K.O Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) Vol.22 No.1, *IIUM Law journal 131 &*135< http://journals.iium.edu.my/iiumlj/index.php/iiumlj/article/view/118/119> accessed 28th November, 2018; Samson Erhaze & David Momodu, 'Corporate criminal responsibility' (2015) Vol.3 No.2, *Journal of Law and Criminal Justice* 69 <http://jlcjnet.com/journals/jlcj/Vol_3_No_2_December_2015/6.pdf> accessed 2nd January, 2019; David Folorunsho, ' Corporate Crimes and Liability Under Nigerian Laws' http://www.nigerianlawguru.com/articles/company%20law/CORPORATE%20CRIMES%20AND%20LIABILITY%20UNDER%20NIGERIAN%20LAWS.pdf accessed 2nd January, 2019

[5] Nicholas Ibekwe, 'T.B Joshua absent as trial over collapse building commences' *Premium Times, November 2015* < https://www.premiumtimesng.com/news/headlines/194133-t-b-joshua-absent-as-trial-over-collapse-building-commences.html> accessed 20th November, 2020.

[6] 'Lagos Arraigns Lekki Gardens MD, Others Over Involuntary Manslaughter' *Vanguard, July, 2017* <https://www.vanguardngr.com/2017/07/lagos-arraigns-lekki-gardens-md-others-involuntary-manslaughter/> accessed 20th November, 2020; 'Collapsed Building: Former MD of Lekki Gardens And Four Others In Court For Manslaughter' *Sahara Reporters, July, 2017* <http://saharareporters.com/2017/07/04/collapsed-building-former-md-lekki-gardens-and-four-others-court-manslaughter> accessed 20th November, 2020.

[7] Joseph Onyekwere, 'Lekki Gardens MD Faces Manslaughter Charges' *The Guardian, February, 2017* <*https://guardian.ng/features/law/lekki-gardens-md-faces-manslaughter-charge/* > accessed 3rd March, 2019; Yetunde Oyebamiji Ojo, 'Defence Closes Case in Collapsed Synagogue Guest House' *The Guardian, December, 2019* < *https://guardian.ng/features/law/defence-closes-case-in-collapsed-synagogue-guest-house/*> accessed 20th November, 2020; Bola Akingbade 'Synagogue Church's Trustees, Engineers Arraigned for Manslaughter' *Lagos Ministry of Justice'*

In comparison with other common law jurisdictions such as, the United Kingdom (UK), Australia, and United States of America (USA) where policies on corporate criminal responsibility (CCR) have evolved, Nigeria seems to lag behind. Some of the aforementioned countries have progressed beyond the CCR common law formulated theories of identification and vicarious liability, which have limitations in its applications, and have developed innovative concepts for imposing criminal responsibility on corporations for serious offences such as murder or manslaughter.[8] In Nigeria, the law recognises a corporation as a natural person having its own rights and obligations.[9] However, the Criminal Code and the Penal Code (the Codes) in Nigeria provide for the offence of murder and manslaughter, but have failed to stipulate the procedure for proving the mental element of corporate crime. [10] The paper further discusses the Companies and Allied Matters Act (CAMA), 2020, which adopts the identification theory, and the Criminal Law of Lagos State (CLLS), 2011, having two theoretical approaches, the identification and the vicarious liability theory, embedded within its provisions.[11] There are also instances in which Nigerian courts recognised the identification theory as the most suitable approach in determining liability of corporations.[12] The paper discusses the limitations and dangers of adopting solely the common law theories, to the exclusion of embracing other innovative approaches to CCR.

<*http://lagosministryofjustice.org/2016/04/19/synagogue-churchs-trustees-engineers-arraigned-for-manslaughter/* > accessed -3rd March, 2019.

[8] See the U.K Corporate Manslaughter and Corporate Homicide Act, 2007; Part 2.5 of the Australian Criminal Code, 1995; and Section 22.2 of the Canadian Criminal Code.

[9] S 18, Interpretation Act, Cap 123 LFN, 2004; See Section 42 & 43 of the Companies and Allied Matters Act (CAMA), 2020; See also *CDBI v COBEC (Nigeria) Ltd* (2004) 13 NWLR (Pt. 948) at 376

[10] S 316 & 317, Criminal Code, Cap 38, LFN, 2004; S 220, 221 & 222 (7) Penal Code.

[11] See Section 89 of CAMA, 2020; Section 20 of the Criminal Law of Lagos State, 2011.

[12] *Aderemi v Lan and Baker Nigeria Ltd* [2000] 7 NWLR (Pt. 663) at 51; *Orji v Onyaso* [2000] 2 NWLR (Pt.643) at 19; *Kurubo v Zach-Motison (Nigeria) Ltd* [1992] 5 NWLR (Pt.239) at 115.

It becomes imperative to question the status quo on the present approach of CCR in Nigeria. The author, using the doctrinal research method,[13] interrogates the theoretical basis for imposing criminal responsibility on corporations. The limited applicability of the strict liability theory, common law theories of identification, and vicarious liability as well as aggregation theory are discussed. The paper concludes by proffering a hybrid theoretical approach of the corporate culture theory and the identification theory in addressing the gap in the law on CCR for corporate killings in Nigeria. The corporate culture theory addresses the present complexity faced in prosecuting large modern corporations, coupled with additional issues that limit the successful application of the other theories. Also, the identification theory, although has its shortcomings, may be suitable for prosecuting small corporations which are prevalent in Nigeria.[14]

2.0. Corporate criminal responsibility theories

It is established that corporations are capable of committing offences and can be punished for such. However, the problem encountered in the criminal justice process is adopting the most suitable approach in prosecuting these corporations for corporate killings within the tenets of criminal law.[15] CCR theories are the principles formulated and adopted over the years by the

[13] I.A. Ayua, "Legal Research and Development" in Ayua, I.A. & Guobadia, D.A. (eds.) *Law and Research Methodology* (Lagos: Nigerian Institute of Advanced Legal Studies, 2001) p. 5

[14] Luminous Jannamike, 'MSMEs, backbone of Nigeria's economy — UNIDO' *Vanguard, July 2* <*https://www.vanguardngr.com/2022/07/msmes-backbone-of-nigerias-economy-unido/* > accessed 17th November, 2022; PWC "Nigeria SME Survey: Assessing Current Market Conditions and Business Growth Conditions" <https://www.pwc.com/ng/en/events/nigeria-sme-survey.html> accessed 17th November, 2022.

[15] Simon P. Robert-Tissot 'A Fresh Insight into the Corporate Criminal Mind' Vol.3 No.4 *Journal of Financial Crime 362*; Linus Ali, *Corporate Criminal Liability in Nigeria* (Malthouse Press Limited, 2008) 44; Wilkson Meaghan, 'Corporate criminal responsibility. The Move Towards Recognising Genuine Corporate Fault' (2003) *Canter law review* 5; (2003) 9 *Canterbury Law Review 142*. *http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.html* accessed 25thNovember, 2018; Joanna Kyriakakis, *Corporate criminal responsibility and the ICC Statute: The Comparative Law Challenge* 336

courts and legislative bodies of different jurisdictions in determining the mens rea of corporate entities. Theories such as the strict liability and vicarious liability approaches originally applied to natural persons. Nevertheless, over the years, the courts have adopted the strict liability and the vicarious liability approaches in determining the mens rea of corporations. Other theories such as the identification, aggregation and corporate culture approaches have been applied in prosecuting corporations for crimes requiring mens rea. These theories shall be discussed extensively below.

2.1.1. Strict liability theory

The strict liability approach is one of the earliest theories formulated in determining the criminal blameworthiness of an accused person.[16] The strict liability theory emanated from civil law of tort. In applying this approach, the mental state of the accused at the time of the offence is inconsequential in ascertaining guilt because the offence is premised on commission of an act prohibited by the law.[17] Strict liability offences are also referred to as "statutory offences".[18] According to Lederman, the strict liability theory, was the first approach adopted by the courts in regulating corporate criminal activities.[19] It was not until the middle of the 19th century that corporations were brought within the ambit of criminal law.[20] Initially, the courts were not burdened with the responsibility of determining the mental element of offences, as corporations were either found liable for nonfeasance or malfeasance offences.[21] Nonfeasance offences were offences arising from the inadvertence to carry out statutory duty whilst malfeasance offences were

[16] Nicola Padfield, *Criminal Law* (Butterworths LexisNexis Butterworths, 2002) 39.
[17] See Padfield (n15) 58-63
[18] Padfield (n15) 58
[19] Eli Lederman, 'Criminal Law, Perpetrators and Corporations: Rethinking a complex Triangle' (1985) 76 J. Crim. L. & Criminology, 285, 288-89; Eli Lederman, 'Models for Imposing Corporate criminal responsibility: From Adaptation and Imitation Towards Aggregation and the Search for Self-Identity' (2001) Vol 4, *Buffalo Criminal Law Review* 651
[20] Ali (n14) 44 Meaghan (n14); Kyriakakis (n14) 336
[21] ibid; Thomas J. Bernard, 'The Historical Development of Corporate criminal responsibility' (1984) 22 C*riminology*.

offences emerging from non-performance of statutory obligations correctly.[22] Both nonfeasance and malfeasance offences were seen as strict liability violations as corporations were sued for non-compliance of statutory obligations, not because its activities contributed to grievous crimes or causing personal injuries to individuals.[23] In *R v Birmingham and Gloucester Rly Co*[24] the court held that a corporate body can be prosecuted for breaching an obligation prescribed by law, excluding offences relating to felonies, personal injury or violence.[25] These malfeasance and nonfeasance offences were strict liability offences in the 19th century, and therefore did not cover felony, personal injury or violence.[26] These offences arose from the failure of a corporation fulfilling legal obligations and did not require proof of criminal intentions to hold the corporation guilty.[27]

It is opined that the strict liability theory has its advantages which include shielding the public from unnecessary harm that could have been avoided or, criminals taking advantage of the complexity of the law to get off the hook.[28] In addition, rather than placing the burden on the prosecution to proof its case beyond reasonable doubt, the accused is mandated to exonerate himself. The application of the strict liability theory, serves as a deterrence to potential offenders to mend their ways before they fall breach and saves the time of the court from tireless and prolonged trials.[29] A counter argument however postulates that the strict liability approach is not suitable in determining most criminal law offences, because many offences require proof of mental blameworthiness.[30] The strict liability approach has been discredited because it fails to acknowledge effort by the accused in complying with the law and averting the occurrence of the criminal acts.[31] In light of the above argument, the use of the strict liability approach for criminal offences such as murder or

[22] (n19)
[23] ibid.
[24] [1842] Eng R 81; [1842] 3 QB 223.
[25] See also *R v Great North of England Rly Co* [1846] 9 QB 315.
[26] ibid; Ali (n14) 44 Meaghan (n14); Kyriakakis (n14).
[27] ibid; Jonathan Herring, *Criminal Law* (Palgrave Macmillian, Seventh Edition, 2011) 85
[28] Herring (n26).
[29] Padfield (n15) 62.
[30]Padfield (n15) 62; Herring (n26); *Sherra v De Rutzen* (1895) 1 QB 918.
[31] Herring (n26) 86.

manslaughter would not be suitable. It is important that the accused proves their innocence because of the weight of sanction and stigma accompanying such offences.[32] Consequently, because strict liability approach is used for mild offences, making corporate killing a strict liability offence may not yield the same effect that a conviction within the normal principles of proving murder should produce.[33] Corporations may also be exposed to unlimited liability from acts of its employees. The expansion of CCR to include offences requiring the proof of mens rea, necessitated the courts and subsequently legislators, devising other means of holding corporations criminally accountable, which will be discussed in the sections below.

2.1.2. Vicarious liability theory

Vicarious liability theory also known as respondeat superior, practised in the USA, is a common law approach which originated from the law of tort and may be categorised under strict liability offences, because of its focus on the physical element of crime in convicting the accused corporation.[34] The vicarious liability approach falls under the big umbrella of the agency theory.[35] According to the agency theory, a principal can be held liable for the act of its agent. Therefore, applying the agency theory to the vicarious liability approach, corporations may be held liable for a crime committed by its employees irrespective of the position of such employee within the

[32]Herring (n26) 86 ; *Sherra v De Rutzen* (n29).
[33] Ibid.
[34] Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate criminal responsibility Principles in Overview' (Chapter 1) in *'Corporate criminal responsibility. Emergence, Convergence, and Risk'* (Springer, 2011) 7; Herring (n26) 91; K.F Brickey 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) *Washington University Law Quarterly 60,393;* Patrick S. Atiyah, *'Vicarious Liability in the Law of Torts (1967).*
[35]Christiana de Maglie, 'Models of Corporate criminal responsibility in Comparative Law' (2005) Volume 4 Issue 3 *Centennial Universal Congress of Lawyers Conference—Lawyers & Jurists in the 21st Century* 553-554 https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1213&context=law_globalstudies accessed 12th February, 2019; Sowmya Suman, 'Corporate criminal responsibility - An Analysis' *Constitutional Lawyers in India* < http://www.legalserviceindia.com/article/l101-Corporate-Criminal-Liability---An-Analysis.html >accessed 12th February, 2019.

organisation.[36] Till the middle of the 19th century, the USA adopted the approach of the English courts, that corporations were not capable of committing criminal offences.[37] However the case of *NY Central & Hudson River RR Co. v United States*,[38] brought an overhaul of the principle that a corporation was incapable of committing criminal offences. In the aforementioned case, the corporation through its officials had contravened the provision of the Elkins Act.[39] The court, holding the corporation criminally accountable through its official, reasoned that corporations should not use the law as an instrument to perpetuate crime without sanction.[40] By middle of the 20th century, it was established that corporations could be held culpable for the acts of its officials, notwithstanding the fact that the law contravened was silent on transferring criminal responsibility on the corporation.[41] In applying the vicarious liability approach which is similar to the repsondeat superior approach, [42] the prosecution must proof that the offence was committed by an agent of the corporation, the offence was committed within the course of business[43] and the commission of the offence was carried out with the purpose of enriching the corporation.[44] In the case

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[36] ibid; Ved P. Nanda, 'Corporate Liability in the United States: Is a New Approach Warranted' (Chapter 2) in *'Corporate criminal responsibility. Emergence, Convergence, and Risk'* (Springer, 2011) 63-87; Herring (n26) 91; Ceila Wells, *Corporations and Criminal Responsibilities* (Oxford Publishers, 2001) 2nd Edition 118; Lederman, 2001 (n18) 654.

[37] See the case of *State v Great works miling & Mfg. Co*., 20 Me. 41, 43 (1841)

[38] 212 US 481 (1909)

[39] Pub.L. No57-103, ch.708,32 stat.847 (1903). The provision holds corporations responsible for the failure of any officer, agent or other person acting for or employed by any common carrier, as long as the official is acting within the scope of employment.

[40] *NY Central &Hudson River RR Co. v United States* 212 US 481 (1909) 495-496

[41] *US v Armour & Co*., 168 F. 2d 342, 343 (3rd Cir. 1948); *US V George F. Fish Inc*, 154 F. 2d 798, 801 (2d Cir.1946) (per curiam)

[42] Maglie (n34) 553-554; Nanda (n35) 68; see *United States V Richmond*, 700 F.2D 1183, 1195 n.7 (8th Cir.1983).

[43] *United States v Route* 2, Box 772, 607. 3d 1523, 1527 (11th Cir. 1995); *United States v Twentieth Century Fox Film Corp*, 882F. 2d 656, 660 (2d Cir.1989); *United States v Automated Med. Labs. Inc.*, 770 F.2d 399,406-07 (4th Cir. 1985); *United States v Gold*, 743 F.2d 800.822-24 (11th Cir. 1984); *United States v Richmond*, 700 F 2d 1183, 1194-95 (8th Cir.1983); *United States v Ingredient Tech.corp.*, 698 F.2d 88,99 (2d Cir. 1983); *Hilton Hotels Corp v United States*, 467 F 2d 1000, 1004-07 (9th Cir. 1972); *Steere Tank Lines, Inc v United States*, 330 F. 2d 719, 723 (5th Cir. 1963).

[44] *United States v 7326 Highway 45 North*, 965 F.2d 311, 316 (7th Cir. 1992); *United States v Cincotta*, 689 F.2d 238 241-42 (1st Cir.1982).

of *United States v Cincotta*,[45] the court elaborated that, for an employee to have acted in line of duty, such a person must have acted within the job description and the criminal act must have placed the corporation in an advantageous position of financial gain. Notwithstanding the third criteria above, the court held in the case of *United States v Automated Medical Laboratories Inc.*,[46] that although a corporation did not gain from the criminal act, it could still be culpable for the offence committed by its employee.

Initially, it did not matter whether the corporations took steps in averting the liability, however over the years, a corporation may now be given a lighter sentence if it is proven that steps were taken or policies were put in place to prevent the offence occurring.[47] In this author's opinion, there is no fairness if a corporation is made criminally responsible for an act of its employee, where it is proven that the organisation put measures in place to avert such occurrence and that the employee acted out of order.[48] The adoption of the vicarious liability approach, exposes corporations to enormous risk, and the purpose of defining the basis of CCR is not to stifle the operation of businesses but to ensure that corporations are operating within the ambit of the law and that erring corporations are properly convicted.[49] In Lagos state, Nigeria, the provision for CCR can be found in Section 20 of Criminal Code Law of Lagos State (CLLS) 2011. Section 20 (4) of CLLS adopts the vicarious liability approach which makes it possible for a corporation to be charged for the offence committed by its officers on any level, if it is proven that it failed to avert the occurrence of the crime. Indeed, on the face of it, section 20 (4) appears to adopt the vicarious liability approach, however the provision further provides that CCR may arise from corporate mismanagement. In addition, section 20 (4) stipulates that corporate crime can only originate from natural persons.

[45] 689 F.2d 238,241 (1st Cir. 1982).
[46] 770 F 2d 399, 407 (4th Cir. 1980).
[47] Herring (n26) 91; Kyriakakis (n14) 134-136.
[48]See *Salomon v Salomon & Co* [1896] UKHL 1: [1897] A.C. 22; Lederman, 2001 (n19) 682.
[49]ibid.

A limitation of the vicarious liability approach which is common with the identification and aggregation approaches discussed below, is the attribution of an individual's criminal responsibility to the corporation. Following the cardinal principles of criminal law, mens rea is personal or direct and cannot be derived from another individual.[50] Therefore, responsibility cannot shift from a person who committed the offence, to an innocent person who had no idea of the wrong being executed.[51] This author aligns with the argument of the UK Law Commission Committee who rejected the idea of holding corporations responsible for the deaths caused by just any level of staff, because they are of the opinion that such would expose corporations to enormous liability even where it has not been found wanton.[52] Close monitoring is possible for small corporations. However, large corporations with diversified operations may be exposed to potential criminal litigation. In the U.K, the common law identification theory was formulated to determine corporate criminal offences that required mens rea.[53] The identification approach is discussed in the next section.

2.1.3. The Identification Theory

The identification theory also known as the "alter ego", "normalist" or "directing mind and will" theory was developed by the courts to solve the dilemma of ascertaining the mens rea of corporations.[54] This theory postulates that, the act of superior officers, those in high level of authority, who make decision on behalf of the organisation, is taken as the act of the

[50] Guy Stessens, 'Corporate criminal responsibility: A comparative Perspective' (July, 1994) Vol. 43, No.3, The international and Comparative Law Quarterly p 508` <https:/about.Jstor.org/terms> accessed 2 October, 2019.

[51]Herring (n26) 91; Kyriakakis (n14) 134-136; See Oluyemisi Bamgbose and Sonia Akinbiyi, *Criminal Law in Nigeria* (Evans Brothers Nigeria Publishers, 2015) 28-29; See Anni Geraghty, 'Corporate criminal responsibility' (2002) 39 *American Criminal Law Review* 327.

[52] Law Comission Reort 1996. Par.7.29 – 7.31; Luke Price, 'Finding Fault in Organisation-Reconceptualising the Role of Senior Managers in Corporate Manslaughter' (2015) Vol. 35, No.3 *Legal Studies*, 390; See also Paul Almond *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillian, 2013)26.

[53] Pieth and Ivory (n33) 8; Wells (n35) 95.

[54] Pieth and Ivory (n33) 6; Price (n51) 370-390.

corporation.[55] The prosecution must prove that the superior officer is associated with the offence committed, in order to convict the corporation of the crime.[56] Hence, in case of corporate killings, the prosecution must first proof the guilt of the superior officer for such offence, before the affected corporation can be found criminally liable.[57] The locus classicus of the identification theory is the case of *Lennard's Carrying Co v Asiatic Petroleum Co Ltd*,[58] where the court attributed the error of the directors to the corporation. It is argued that a corporation is a creation of law and therefore can only function through individuals.[59] A corporation has a legal personality and is seen in law as an artificial person, nevertheless, it is made up of individuals who are the "direct minds" and therefore act on its behalf.[60] Unlike the vicarious liability theory which advocates that the employee or agent is authorised by the corporation to act on its behalf, but, are viewed as two separate legal entities, the identification approach propounds that the corporation and its superior officers are one and the same, therefore, any action made by the superior officer is seen as the action of the corporation.[61]

In the case of *Tesco Supermarket Ltd v Nattrass*,[62] the court did not expressly define who the directing mind of the corporation is, it however gave examples of persons who may fall into that category. Lord Reid held that the directing minds of the corporation could include the directors, managing directors, or any other senior officer who has power of control.[63] Lord

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[55]Stessens (n49) 507.

[56] Almond (n51) 25; CPS 'Corporate Manslaughter' updated 16th July, 2018/ Legal Guidance, Violent Crime https://www.cps.gov.uk/legalguidance/corporate-manslaugter#_Toc519506201 accessed 1st December, 2019.

[57] ibid.

[58] [1915] AC. 705 HL.

[59] Pieth and Ivory (n33) 120

[60] ibid.

[61][1915] AC. 705 HL ; *H.L Boulton (Engineering) Co. Ltd v T.J Graham & Sons Ltd* [1951] 1 OB 159, 172; Wong Jonathan, 'Corporate Manslaughter: A Proposed Corporate Killing Offence for New Zealand' (2006) 12 *Canterbury Law Review* 157; Meaghan (n14); See *Nigeria Bank for commerce and Industry v Integrated Gas (Nig.) Ltd* [1991] 8 NWLR, (Pt 613), P.119 at P.129, Paras C-E; *Delta Steel (Nig) Ltd v American Computer Technology Incorporated* [1999] 4 NWLR, (Pt 597), P.53 at 66 Paras C-D.

[62] [1971] UKHL 1; [1972] AC. 153 ER 127.

[63] [1971] UKHL 1; [1972] AC 153 ER 171.

Diplock, further suggested that the constitution of the corporation could reveal who had control and authority to take decisions on its behalf whilst Viscount Dilhourne held that the directing mind and will of the corporation is usually someone not answerable to anyone.[64] Nevertheless, it has been argued that having the privilege of making decisions without taking instructions from anyone may only be open to few persons, who may not be involved in the daily activities of the corporation.[65] In some circumstances, the veil of the corporation may be lifted to know the brains behind its operation. But it has been argued that the act of lifting the veil is a shift from the principle laid down in the case of *Salomon v Salomon*,[66] that a corporation has a separate personality from those who run it. It is further argued that by the courts' lifting the veil and going after the officers of the corporation, there is the tendency of a deviation from corporate liability to personal liability, as there should be a balance between the two, to avoid the corporation benefiting from its illegality to the detriment of the individuals that run it.[67] The principle of lifting the corporation veil is not a process that should be discarded where necessary, to ensure that individuals who have committed crime within the organisation are exposed and rightfully punished. However, the principle of lifting corporate veil does not best serve the purpose of this paper as it borders on individual criminal liability rather than CCR.

In Nigeria, the Codes do not expressly provide the process by which the guilty mind of corporations may be determined. From some Nigerian decided cases, it can be argued that the courts have adopted the identification approach.[68] In addition, the Companies and Allied Matters Act (CAMA)

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[64] [1971] UKHL 1; [1972] AC 153 ER 187.
[65] Meaghan (n14)
[66] Salomon v A. Salomon & Co (n47)
[67] C.N Iyidiobi, ' Rethinking the Basis of Corporate criminal responsibility in Nigeria' (2015) 13 *Nig.J.R* 115-116 < http://law.unn.edu.ng/wp-content/uploads/sites/12/2016/08/5.Rethinking-the-Basis-of-Corporate-Criminal-Responsibility-.pdf> accessed 1st February, 2019.
[68] *Aderemi v Lan and Baker Nigeria Ltd* [2000] 7 NWLR (Pt.663) at 51; *Orji v Onyaso* [2000] 2 NWLR (Pt.643) at 19; *Kurubo v Zach-Motison (Nigeria) Ltd* [1992] 5 NWLR (Pt.239) at 115; Erhaze & Momodu (n3) 65-67, Meaghan (n14); Samuel Idhiarhi, 'An Examination of the Scope of Corporate criminal responsibility in Nigeria' (2016) 12 *NJI Law Journal* 7-9

2020, clearly adopts the identification approach. According to CAMA 2020, corporations may only be held criminally responsible through the act of its directors or decisions taken by members of the corporation during a general meeting.[69] Members of a corporation are referred to as titleholders, because of the shares or the stake they have in the organisation.[70] Also, from a perusal of the provisions of the CLL, Section 20 (3), adopts the identification approach, which provides that the act of a person who has "*apparent or real authority to bind the company*" will be imputed to the act of the corporation itself. From the provisions of the CLL on CCR, it is evident that the law makers adopted a hybrid approach of vicarious liability theory and identification theory. Nevertheless, it has been argued that due to the peculiarities in the operations of corporations, attempts at identifying and sanctioning key responsible officers in a corporation have proven to be a difficult task.[71] This opinion may be true only to the extent that it works perfectly well for small corporations compared to the larger corporations.[72] In *R v Kite and OLL Ltd*[73], the court in its judgment found a corporation liable for the death of four pupils who drowned in a canoe trip. The corporation failed to take the necessary steps to ensure the safety of the pupils. It was easy to link the corporate executive officer to the deaths because it was a small corporation, and he managed all operations within the business entity.

Herring argued, without categorically disqualifying the identification approach, that it is not in all cases of corporate killings that this approach can

<https://www.researchgate.net/publication/315212072_AN_EXAMINATION_OF_THE_SCOPE_OF_CORPORATE_CRIMINAL_LIABILITY_IN_NIGERIA> accessed 2nd January, 2019; Akanbi (n3) 122-124; Jonathan (n60); It was a difficult task linking the direct minds of the corporation to the deaths caused by its acts or omissions. It was also difficult getting a conviction in the instance where the death caused was not due to the negligence of the worker, but because of bad work culture of the corporation.

[69] Section 89 of the Companies and Allied Matters Act (CAMA), 2020.

[70] Olakunle Orojo, 'Company Law and Practice in Nigeria' (5th Edition Lexis Nexis Butterworths, 2008) 189.

[71] Erhaze & Momodu (n3) 65-66; Idhiarhi (n67) 8.

[72] Price (n51) 390; Almond (n51) 27

[73] WinchesterCrown Court, 8 December, 1994, unreported; Simon Midgley, 'Boss is Jailed Over Canoe deaths' (Friday, 9th December, 1994, *Indepenent, December, 1994* < https://www.independent.co.uk/news/boss-is-jailed-over-canoe-deaths-1386979.html > accessed 25th November, 2022.

be used because, there are instances where killings resulting from corporate activities cannot be linked to senior management or junior employees in the corporation.[74] For example, in the Zeebruggee case, it was challenging linking the negligent act leading to the death of many persons to senior management. This was because, the roles and duties of the employees were not clearly spelt out. Rather, Herring proposes that mismanagement, ineffective policies and bad culture within a corporation, may be responsible for criminal act or omission, resulting in corporate killing.[75]

The approach of linking senior management to corporate criminal responsibility works effectively for smaller corporations, but for large corporations with many compartmentalised levels of operations, tracing a criminal act to the senior management may be a herculean task. The law on corporate killings should be broad enough to cater for both small and large corporations. The identification approach places a huge burden on the prosecution in not only proving the guilt of the corporation, but first proving that the crime was committed by a superior officer who is regarded as the directing mind of the corporation.[76] In some cases, this might be impossible to establish. The identification theory may enable corporations to circumvent the law and avoid liability, using the loopholes in the law. The theory also allows the corporation to rearrange responsibilities in a way that the so-called brains behind the corporation do not handle risky business transactions.[77] Stessens, argues that another disadvantage of the identification approach is that, an act of a superior officer may not be sufficient to prove beyond reasonable doubt that he or she is guilty of the offence, and the court does not allow the summing up of different actions or inactions of superior officials to

[74] Herring (n26) 91; See also, R. May, 'Thecriminal responsibility of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence' (2000) Edinburgh Law Review 4, 46

[75] Herring (n26) 91.

[76] Lederman, 2001 (n18) 660

[77] Stessens (n49) 509; S Field and N. Jorg, 'Corporate Liability and Manslaughter: Should we be going Dutch?' (1991) Crim L.R p158; C Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1988) Crim. L.R. 788.

proof a crime was committed.[78] Where the prosecution cannot prove its case against the superior officer, it therefore means that the case against the corporation will fail.

2.1.4. Aggregation Theory

The aggregation theory recognises that a corporation is a legal entity that has rights and obligations distinct from its managers, but, sums up the collective acts and omissions of different employees to determine the guilt of the corporation.[79] The aggregation of knowledge approach evaluates the combined actions and knowledge of different individuals, whose acts if tried alone would not amount to a crime. For example, the action of one employee may be linked to the knowledge of another employee in establishing that a crime occurred.[80] The aggregation theory also known as the "collective intent theory" [81] does not specify the position of employees who have jointly committed the act, which makes it similar to the vicarious liability theory.[82] This approach came to light with its usage by some Federal Courts in the USA.[83] The danger which the aggregation approach tends to correct is, where business transactions within the corporation are handled across several departments, it becomes easy for seemingly innocent transactions to result in a crime, but difficult for the prosecution to prove individual guilt beyond reasonable doubt.[84] Common law does not recognise this approach.[85] In the

[78] Stessens (n49) 510; Read the case of *R v HM Coroner for East Kent* (1989) C.R. App. R. 16; C wells, 'Corporations: Culture, Risk and criminal responsibility' [1993] Crim. L.R. 562.
[79]May, (n73) 46; wells, 2001 (n35) 156; Pieth and Ivory (n33) 7.
[80] Lederman (n18 663.
[81]Maglie (n34) 557.
[82] Lederman, 2001 (n18) 662-66.
[83] Lederman, 2001 (n18) 662; See the case of *United States V Bank of New England* 821 F.2d 844 (1st Cir. 1987) wherein the court held the Bank of New England culpable for contravening the provisions of the Currency Transaction Act, (Currency Transaction Reporting Act, 31 U.S.C. §§ 5311–5322 (1982). The court held that even though the transaction was carried out by different bank officials on different occasions, each act of the officials could not amount to a breach, but summing up all the transactions of the client, the bank had failed to file a currency transaction report on behalf of the client; See also, *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996).
[84] Maglie (n34) 557; Lederman (n14) 663-64; See *United States v Bank of New England* 821 F 2d 844,856 (1st Cir.1987).
[85] Idhiarhi (n67) 10; Meaghan (n14); Price (n51) 392-393.

case of *R v P & O European Ferries (Dover) Ltd*,[86] the Court rejected the aggregation approach in reaching a decision on the guilt of the cabin men who failed to ensure that the door of the ship was closed, thereby resulting in the sinking of the ship with over 180 passengers on board. The case was dismissed because the prosecution was unable to prove that the controlling minds of the business caused the death of the passengers. The latest law in the UK on corporate killings, the Corporate Manslaughter and Homicide Act, 2007 (CMAHA), allows for aggregation of faults of different individuals across the organisation, nevertheless, senior management must play a substantial role in the commission of the crime.[87] The problem with the aggregation approach under the CMAHA, is that it does not define who should be categorised as a senior management of a corporation; this is because, a person categorised as a part of the senior management in one corporation, may not be part of the senior management of another.[88]

The aggregation theory approach has been queried to be unreasonable by attributing the knowledge of a few staff to mean corporate awareness.[89] The American legal system focuses on summing up knowledge rather than intention,[90] the common law courts have the perspective that it might be easy to link "knowledge" of a group of employees to aggregation, but hard to prove beyond reasonable doubt, the individual criminal state of mind of each person.[91] The author of this paper opines that, the aggregation theory is too narrow for a serious offence such as corporate killings and may be unfair to larger corporations. The supposed knowledge of a few unassuming employees, regardless of their level can render a corporation criminally responsible, because it is believed that the separate pieces of information

[86] [1991] 93 Cr. APP Rep 72.

[87] Section 3 and 4 of the Corporate Manslaughter and Corporate Homicide Act, 2007

[88] Price (n51) 394; James Gobert, The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen Years in the Making but Was It Worth the Wait? The Modern Law Review, May, 2008, Vol. 71, No. 3 (May, 2008), pp. 426-429).

[89] In the case of *Standard Oil Co v United States*, 307 F.2d 120, 127 (5th Cir. 1962) and *United States v Basic Construction Co*, 711 F 2d 570,573 (4th Cir.1983), the court did not distinguish the act of the junior officials from that of the senior officials. The criminal acts of the junior officials were taken as the act of the corporation.

[90] Wells (n35)119-120; Lederman (n18) 669-670.

[91] Idhiarhi (n67) 10; Meaghan (n14); *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr. APP Rep 72.

within the comprehension of each employee is sufficient to earn a conviction.[92] The court in the case of *United States v Bank of New England,*[93] made a positive comment about the aggregation approach. In the case, the court held that:

> *Corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know of the specific activities of employees administering another aspect of the operation.*

Notwithstanding the submission of the court in the above case, the author of this paper rather agrees with the argument of Lederman who argues that the aggregation approach is usually synonymous to 'aggregation of knowledge', yet it does not justify the employees and invariably, the corporation being found guilty. The aggregation theory, just like any of the theories mentioned above is problematic and may be a bit more complex, because, for CCR to arise, a natural person(s) must first be convicted or blamed for the act to be attributed to the corporation.[94] According to the aggregation approach, a scenario may play out where the prosecution has to prove that the knowledge of employee A is linked to the unaware innocent action of employee B and proved beyond reasonable doubt that both employees connived to commit the crime in question. This would be difficult to achieve because each employees' actions standing on its own is void of criminal motive. The long standing criminal law Latin maxim of *Actus non facit reum nisi mens sit rea,* makes it very clear that the act of the accused must be synonymous with his or her guilty intentions, except such crime is in the category of strict liability offences. The above Latin maxim is the bedrock on which criminal litigation in Nigeria is established. In the Nigerian supreme court case of *State v*

[92] Lederman (n18) 662-664.
[93] 821 F 2d at 856 (1st Cir.1987).
[94] Lederman (n18) 663.

Masiga,[95]the court made it clear that the two essential elements of an offence, the *actus reus* and the *mens rea,* must be established to prove the guilt of the accused. In another Supreme Court case, *Njoku & Ors v State,*[96] the apex court reiterated the importance of proving both the criminal act and criminal intentions of the accused in establishing that an offence was committed. Applying the aggregation approach to the above criminal law Latin maxim, there is an obvious deviation on how criminal proceeding are supposed to be conducted. Aggregating the acts of some employees to the knowledge of others is definitely against the tenets of criminal law. For crimes like corporate killings, requiring criminal intentions to be proven, the aggregation theory will be very challenging proving. It is either the criminal intent and action is present in each employee or not.

Prosecution may also struggle in summing up bits and pieces of knowledge of different employees in proving beyond reasonable doubt that an offence had occurred. An offence as grievous as manslaughter or murder should not have a complex approach such as the aggregate theory in determining guilt of a corporation.

2.1.5. Corporate Culture theory

The corporate culture theory was developed for today's corporation. According to Van Erp, corporate culture can be defined as:[97]

> *Shared values and beliefs, myths, interpretation and meanings within an organisation and actions and behaviours, including customs, practices, norms, rituals and implementations of control systems.*

The corporate culture approach holds that corporations are capable of committing crime without attributing blame to any individual working for it.[98] The operations of large corporations or multinationals are dissimilar to

[95] (2018) 8 NWLR (Pt. 1622) 383 at p 41, paras B-C.
[96] (2013) 2 NWLR (Pt.1339) 548 at Pp. 571, paras E-H.
[97] Judith Van Erp, 'The Organisation of Corporate Crime: Introduction to Special Issue of Administrative Sciences (July,2018) 5.
[98] Peith and Ivory (n35) 6-7; Herring (n26) 91

how businesses were managed in the past, having simple and less complex structures of management, it was easier to identify the directing minds.[99] In the 21st century, not only are corporate operations compartmentalised, the powers of shareholders have been drastically diluted by the mode by which shares are apportioned within the organisation, this is to show how much ownership and control have been decentralised.[100] Different departments are assigned specific duties, and in carrying out these specific duties, decisions are made, independent of other departments within the corporation.[101] What makes up the culture within the corporation are the policies, strategies, attitude to risks, compliance and decisions being made in the different departments. Corporate policies are potent to compel certain kinds of behavior from its employees. The employees are mandated to conform to these policies, rules, regulations and strategies, regardless of its legal implications.[102] The corporate culture approach may be applied regardless of whether criminal fault can be linked to any individual within the corporation. Perusing the provisions of the CLLS, 2011, Section 20 (4), recognises the corporate fault approach in determining CCR, to the extent that it mandates the proof of corporate complicity in the commission of the crime, but, it further states that liability may only be committed by natural persons, thereby limiting the application of the corporate fault approach.

By identifying the best theoretical approach in determining CCR for corporate killings, it is easier to enact an effective and potent law which will

[99] J. Morton, Horwitz, Santa Clara Revisited: The Development of Corporate Theory [1985] Va. L. Rev. 173 in Eli Lederman, 'Models for imposing corporate criminal responsibility: From Adaptation and Imitation towards Aggregation and the Search for Self-Identity' Vol.4 Buffalo Criminal Law Review 687.

[100]Harvey M. Silet & Susan W. Brenner, 'The Demise of Rehabilitation: Sentencing, Reform and the Sanctioning of Organisational Criminality' (1986) 13 *Am.J. Crim.L* 353; Lederman (n18) 683; Benson, Maakestad, Collens and Geis, 'District Attorneys and Corporate Crime: Surveying the Prosecutorial Gate Keepers (1988) 26 *Criminology* 507

[101] Ann Foerschlert 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct, California Law Review (Oct. 1990) Vol 78, No. 5, 1300 https://www.jstor.org/stable/3480748 accessed 2nd October, 2019.

[102] Price (n51) 386; Van Erp (96) 4.

deter and punish corporate killings, without favouring either small corporations or large corporations.

3.0. The Way Forward:

In discussing the most suitable approach to be adopted in determining CCR for corporate killings in Nigeria, this paper puts forwards a hybrid theory which is the corporate culture theory, and in peculiar instances, the identification theory.

A case for the adoption of the corporate culture theory approach argues that corporate crimes may arise from a break down or lapse in the organisation system.[103] According to May, in holding a corporation liable, the corporation's operational structure and patterns, strategies, measures put in place to detect and prevent risky activities amongst others, should be considered.[104] Just as natural persons have values and principles that define their personalities, so also, a corporation has values, systems and policies that gives it a distinct identity, and by which corporate culpability can be determined.[105] It is the culture in a corporation that guides daily activities and defines roles of employees.[106] Reputation of a corporation is formed by what it engages in, whether good or bad.[107] It is not enough to link a corporate crime to an act of a natural person, the corporate culture in itself is sufficient to deduce blameworthiness of a corporation.[108] The corporate culture theory provides that a corporation may only be held criminally liable if it can be

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[103] Susanna Menis, 'The Fiction of the Criminalisation of corporate killings' (2017), Vol.81 (6) *The Journal of Criminal Law p467-477. <sagepub.co.uk/journalpermission.nav>*.

[104] May (n73)72

[105]OMP. Kharbanda and Ernest A, Stallworthy, 'Company Culture: Its role in an industrial Society' (1991) Vol. 91 No.2 Industrial Management & Data Systems pp2&3; See Iyidiobi (n66) 120-130; Frank I Asogwa, 'Corporate Criminal Responsibility' (1994-1997) *Nigerian Juridical Review, 158-179;* Idhiarhi (n67) 10; Maglie (n34) 558-560; Brent Fisse & John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collection and Accountability, [1988] 11 Sydney L. Rev. 468, 479; Brent Fisse, 'Retributive, Fault and Sanctions' [1983] 56 S Cal. L. Rev. 1141, 1154-58; Jennifer A. Quaid, 'The Assessment of Corporate criminal responsibility on the Basis of Corporate Identity: An analysis' [1998] 43 McGill L. J 67,78; Gobert (n87); Lederman (n18) 690.

[106] Lederman (n18) 691; Fisse and John Braithwaite, 'Corporations, Crime and Accountability' [1993] at 25

[107] Lederman (n18)687-690.

[108] Foerschlert (n100) 1289.

proven that its system of operation is dysfunctional.[109] Bunt, argues that where a corporation fails to take into recognition its social obligation, it is almost inevitable, it would handle its operations negligently.[110]

The culture of the corporation can be determined by looking into the established processes put in place to ensure the corporation is legally compliant and employees are educated on the values of the corporation and the mechanisms to discipline erring employees.[111] The court in determining the guilt of the corporation using the corporate culture approach, would have to consider the effort of the corporation in ensuring effective monitoring systems and control.[112] For example, the attitude adopted by the corporation in dealing with deviant employees or how they are penalised for wrong decisions or sloppy work, tells a lot about the corporation. Judith Van Erp postulates that just as natural persons have criminogenic features which criminologist believe to affect a person's tendencies to commit crime, so also corporate criminologist believe corporations also have features that expose a corporation to criminal responsibility.[113] Another feature mentioned by Judith Van Erp that exposes corporations to the risk of criminal responsibility is in how communication is being managed.[114] When information is not passed across to the corporation timeously or correctly, it is inevitable that negligent, reckless and unlawful acts and decisions will be made.[115] In addition, the business environment in which a corporation has found itself and the pressure faced from shareholders, competitors, regulators, consumers and government may pressurise the corporation into making decisions which may lead to corporate crimes.

[109]Lederman (n18) 695.
[110] H.G Van de Bunt, 'Corporate crime' (Emerald Backfiles 2007) Vol.2 No.1 '*The Journal of Asset Protection and Financial Crime'*17; see also J Braithwaite, *Corporate crime in the Pharmaceutical Industry* (Routledge and Kegn Paul, London) 110-158.
[111] Pamela H. Bucy, 'Corporate Ethos: A Standard for Imposing the Corporate criminal responsibility, 75 Minn. L. rev. 10954, 1124 [1991] at 1121.
[112] Lederman (n18) 690-98.
[113] Van Erp (n96) 4.
[114] ibid.
[115] ibid.

It is important to note at this juncture that corporate culture is not created in a day but formed over years of consistency and routine.[116] Unlike other theories discussed above, which are contingent on the acts or omissions of an individual, the corporate culture theory expounds that although natural persons are important in running the operations of the corporation, they are not indispensable. Laying off an employee does not impede the smooth running of the business, especially within a well-structured organisation.[117] Foerschlet, therefore argues that the mind of the corporation should not be limited to the persons running it, rather, the internal and daily activities, "decisions", "structure" and "policies" should be investigated to discover the true mind of the corporation.[118] Often times, values and beliefs of the employee do not interfere in corporations with defined system of operations or policies.[119] Decisions are also made collectively within an organisation's setting not only at the apex level.[120] Consequently, the prosecution may also be unable to link the act of one individual or senior management to the committed crime.[121] It is the duty of a corporation to ensure that risk mitigating policies are put in place to monitor possible risk occurrences. Therefore, the corporation should be held criminally liable for its acts and omissions. According to Colvin:

> *Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault…the responsibility of the corporation is primary. It is not dependent on the responsibility of any individual. Responsibility is anaylsed within a realist framework by examining directly questions about what the corporation did or did not do as an organisation, what it knew or ought to*

[116] Kharbanda and Stallworthy (n104) 4.
[117] Lederman (n18) 687-688.
[118] Foerschlert (n100) 1302-1303.
[119] Lederman (n18) 678,688-89.
[120] Foerschlert (n100) 1301-1302.
[121] ibid.

> *have known about its conduct; and what it did or ought to have done to prevent harm from being caused.*[122]

Menis argues that the idea of holding a corporation liable through its top officials is not a bad idea, but modern-day large corporations, have been decentralised in such a manner that instructions are given at lower-level cadre.[123] Modern corporations are more complex than the initial small corporations of the 19th century. Due to the complexity of corporate structure, it is more difficult to control from the apex. Responsibilities are distributed at different levels within the corporation, leading to proliferation of instructions and authorisations within the organisation. It is common to see subunits or departments controlling complex tasks within the corporation. Subsidiary corporations are given the liberty to act independently from laid down policies of Parent Corporation. In addition, analysing the mode of operation in modern day corporations and its global expansion of transactions extending beyond home countries to other nations of the world, it may be difficult to link the criminal activity to a senior officer of the organisation. This is because the organisational structure of such corporation may be operating on a regionalised level.[124]

Furthermore, in examining the best approach of corporate criminal responsibility to be adopted in Nigeria, it is important to take into account the demography of businesses operating in the country. We have both large and small scale corporations operating in Nigeria, especially a lot of small scale businesses. The identification approach is the commonly adopted approach in the Nigerian courts, and this may be due to the small to medium scale size of the corporations before the court. In this author's opinion, the identification approach should not be totally discarded where small size corporations are involved, this is because of its convenience in prosecuting small businesses. In the ongoing cases of corporate killings prosecuted in Lagos state, the prosecution adopted the approach of the identification

[122] Eric Colvin, 'Corporate Personality andcriminal responsibility, [1996] 6 *Crim. L.F*. 1-2
[123] Menis (102) *467-477.*
[124] Maglie (n34) 560.

theory, whereby the directors alongside the corporation were sued.[125] The identification approach was easily adopted because the corporation in question were small sized corporation and the activities that led to the crimes committed could be directly traced to the controllers of the corporations. However, limiting the approach to individual based guilt will be very detrimental. The identification theory cannot be the major or sole approach in determining criminal responsibility for corporate manslaughter in Nigeria because of it numerous shortcomings.

4.0. Conclusion

The different theories that underlie the imposition of criminal responsibility on corporations have been analysed above. This paper submits that a corporation can be held criminally liable without necessarily linking it to any individual within the corporation. The uniqueness of the corporate culture approach is that, it is not limited by the setbacks in other theories. Applying the principles of the vicarious theory, will raise the bar too high for the prosecution to hold a corporation liable, whilst applying the aggregation approach solely, unduly exposes the corporations to crimes that it had no control over. Regarding the identification theory, this paper acknowledges that corporate mismanagement can be exposed through act and omissions of the directing minds, but it is not in all instances corporate criminal responsibility can be traced to these individuals. This paper therefore proffers a hybrid theoretical basis for determining corporate criminal responsibility for corporate killings in Nigeria. It is possible for our laws to adopt a hybrid approach whereby the law provides the different modes by which a corporation may be held liable. A hybrid approach can be identified in the provision of the CLLS, 2011, whereby the prosecution can choose to adopt the most suitable method of prosecuting a corporation for alleged criminal

[125] Akingbade (n1); Onyekwere (n1); Ibekwe (n1); 'Lagos Arraigns Lekki Gardens MD, Others Over Involuntary Manslaughter' *Vanguard, July, 2017* <https://www.vanguardngr.com/2017/07/lagos-arraigns-lekki-gardens-md-others-involuntary-manslaughter/> accessed 20th November, 2020; 'Collapsed Building: Former MD of Lekki Gardens And Four Others In Court For Manslaughter' *Sahara Reporters, July, 2017* http://saharareporters.com/2017/07/04/collapsed-building-former-md-lekki-gardens-and-four-others-court-manslaughter accessed 20t November, 2020;

activities. But as discussed above, the provisions of the CLLS, 2011 on corporate criminal responsibility is very restricting and may pose a great challenge in prosecuting and convicting guilty corporations. Another law that has adopted the hybrid approach on corporate criminal responsibility is the Australian Criminal code. The Australian law provides the different avenues by which corporate criminal responsibility can be proven and places emphasis on bad corporate culture.[126] The Australian Criminal Code also recognises the role a director or senior employee may play in defining the criminal responsibility of corporations. Determining corporate criminal responsibility through acts of the board of directors is an easier option where the business is small and acts of the directing mind can be linked easily to the commission of crime. It is logical where criminal acts of the board of directors may bind the corporation due to the powers vested in them by the law to act on behalf of the corporation, however, as argued in this paper, obtaining a conviction on this basis may prove difficult due to the complexity or size of the business involved. Yet, the provisions of the Australian law on corporate criminal responsibility are not limiting. The law to be drafted on corporate killings in Nigeria, should be flexible to reflect the various business sizes operating within the country.

[126] Part 2.5 of the Australian Criminal Code, 1995.