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SOCIETAS DELINQUERE POTEST

The Criminal Responsibility of Corporations Under International Law Between Theoretical Hurdles and Practical Necessity

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ABSTRACT

The fact that international criminal law has so far not been applied to corporate complicity in international crimes creates the widest accountability gap in the field. Traditionally, corporations have been excluded on the basis of the contention that they are not subjects of international law and therefore not bound by it. Moreover, for centuries legal entities were considered to be incapable of committing the same crimes as individuals. In light of the increasing number of obligations that are imposed on companies by treaty and given the large number of cases of international crimes committed with the complicity of corporations, these theoretical objections become less and less relevant. Therefore, the main question now is: what is the best way to hold them accountable for such criminal behaviour? In this thesis, we will explore why criminal responsibility is to be preferred over civil liability, why collective responsibility of the legal entity is to be coupled with personal responsibility of the head executives, and which violations of international law should be encompassed. Then, the *actus reus* and *mens rea* of corporate complicity in international crimes will be explored, with a focus on how to hold accountable parent companies in the case of multinational corporations. Finally, it will be suggested that if any meaningful level of justice is to be attained, the mechanism of universal jurisdiction should be employed.

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INTRODUCTION

Contrary to the traditional legal saying *societas delinquere non potest* ('companies cannot commit crimes'), corporations can – and widely do – engage in criminal behaviour, even in the most heinous crimes known to humankind such as genocide, crimes against humanity, torture and the crime of aggression. A number of theoretical obstacles have so far impeded an effective judicial response to corporate complicity in international crimes, prominent among which is the contention that legal entities are not subjects of international law and therefore not bound by it. On a procedural level, corporations' conduct in the commission of international crimes is not covered by the jurisdiction of the International Criminal Court. Consequently, domestic courts are invested with the task of holding them accountable. Thanks to the mechanism of universal jurisdiction, the complicity of corporations in the commission of international crimes can be adjudicated by any court of any state, regardless of the identity of the perpetrator and the place of commission of the crime. Notwithstanding this kind of theoretical and procedural hurdles, the way the international community - both as a whole and as single states – has so far dealt with cases of corporate complicity in international crimes is so

unsatisfactory that it can be said to represent an accountability gap within the legal framework of international criminal law.

The present thesis has the aim to suggest a way through which the obstacles that have so far impeded complete and effective justice can be overcome, so that the accountability gap can finally be filled. The first chapter will deal with the longstanding debate on the legal personality of corporations in international law, the second will consider the specificities that characterise the material and mental elements of international crimes committed by corporations, the third will address the issue of how to hold multinational corporations – and especially their parent companies – liable for the international crimes committed by members of the corporate group and the fourth chapter will explore the procedural issue of jurisdiction, with a focus on the mechanism of universal jurisdiction.

The method that has been used is desk research.

CHAPTER 1

CORPORATIONS AS SUBJECTS OF INTERNATIONAL LAW AND THEIR INTERNATIONAL CRIMINAL LIABILITY

One of the major theoretical hurdles that impedes the widespread recognition of corporate criminal responsibility for the commission of international crimes concerns whether corporations can be considered to possess legal personality under international law. Traditionally, in fact, only States have been considered to be subjects of international law, while all the other persons – both natural[1] and legal – have always been thought of as objects of international law, that is, mere recipients of its effects.[2] It is therefore important to address such a question and consider which arguments can be

[1] This is no longer true after the Nuremberg Trials, where the concept of individual criminal responsibility was introduced in international law.
[2] Julian G. Ku, 'The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51 Va. J. Int'l L. 353, 377 citing *Oppenheim's International Law* (Robert Jennings and Arthur Watts, eds) (9th ed. 1992).

put forward in support of the contention that they have become, in effect, subjects of international law. This discussion, however, will also have to consider how relevant the categorisation into 'subject' or 'object' of international law still is today and therefore challenge this theoretical hurdle at its roots.

Further, even if the question of the legal personality of corporations is positively resolved, mainly two issues need to be considered. Should the legal entities be held accountable together with the specific individuals who engaged in the criminal activity? Is criminal law the best tool against them? The accountability gap that can be found in the field of international crimes committed by companies and the widely unsatisfactory way in which both the domestic and international legal systems have dealt with those issues suggest that both questions should be answered affirmatively. So far, in fact, corporate accountability has taken the form of civil remedies or has incriminated mainly individuals in positions of power within the corporation. Both approaches, however, have not tackled impunity in any meaningful way: if on the one hand companies would be sanctioned to pay large amounts of money and executives would be replaced, on the other hand the fact that those individuals were able to commit the crimes they did thanks to the corporation or in furtherance of its interests has not been part of the discussion before the courts.

This chapter will explore these three themes and will be divided into two Sections. Section I will consider whether corporations can be said to be subjects of international law. A historical perspective will be adopted, which will focus mainly on the Nuremberg Trials and on the negotiations that preceded the adoption of the Statute of the International Criminal Court (or 'Rome Statute') in 1998. Section I will also provide an account of the more recent developments in the field of corporate criminal responsibility for the commission of international crimes, both from a practical and a doctrinal point of view. Then Section II will analyse why criminal responsibility – as opposed to civil liability – of the corporation itself as an entity must be coupled with individual responsibility and will analyse what its scope should be.

Section I: Corporations As Subjects of International Law

The issue of the legal personality of corporations under international law has constituted the main obstacle for the recognition of corporate criminal accountability for the commission of international

crimes. Historically, there were two major events during which the international community could have – but did not – directly addressed this issue, thus contributing to decades of debates on how to interpret the lack of stance in such crucial moments: the Nuremberg Trials and the negotiations leading to the adoption of the Statute of the International Criminal Court. It is therefore necessary to analyse what the silence of the international community in those pivotal moments in the development of international criminal law really meant. As will be shown, the idea of corporate criminal responsibility in international law was never explicitly ruled out. But the contrary is also true: it was never explicitly recognised either. Much has changed since the negotiations that took place in Rome and perhaps it is now easier to assess whether companies can be considered to be subjects of international law. However, it has also been suggested that this discussion is now obsolete and that whether they do possess international legal personality is ultimately irrelevant: the reality is that they do take part in the commission of international crimes and should therefore be punished for it.

In what follows, we first discuss the legacy of the Nuremberg Trials. Next, we analyse the negotiations that took place before the adoption of the Rome Statute. Then we explore how the field of international corporate responsibility has evolved since the late 1990s, and finally we consider a number of different doctrinal positions on the concept of legal personality itself under international law.

i) The Nuremberg Trials

As outlined above, the main argument used by legal scholars and practitioners to exclude corporate criminal accountability for the commission of international crimes is that corporations are not subjects, but mere objects, of international law.[3] Accordingly, obligations and rights stemming from the international legal order cannot be placed upon them. Hence, they cannot be held accountable for the commission of international crimes.[4]

One of the justifications for such a contention can be traced back to what is widely believed to represent the origin of modern international criminal law: the Nuremberg Trials, which followed the International Military Tribunal for Nazi leaders. The subsequent Trials were conducted by the Allied

[3] ibid.
[4] Julian G. Ku, 'The Limits of Corporate Rights Under International Law' (2012) 12 Chi. J. Int'l L. 729.

Powers in the aftermath of the Second World War in order to hold accountable those responsible for the atrocities committed during the Nazi regime. There, the concept of individual criminal responsibility for international crimes was introduced: a major development in international law, given that up until that moment only States were thought to be subjects of international law and therefore bound by it. Prominent among the individuals who stood trial were some of the major German industrialists of the time, who had either directed or been employed by companies such as I.G. Farben[5], Flick[6] and Krupp[7] and who were accused of having assisted the Nazi regime in the commission of international crimes through a number of different means.

As the authors who contend that corporations possess no international legal personality rightly point out, during those trials (which have become known as the 'Industrialist Trials') no corporate entity was held liable.[8] Instead, only individual owners, directors and employees were ultimately sentenced. In the end, out of the 42 industrialists who were tried in Nuremberg, 'the tribunal found twenty-seven of them guilty of various international crimes, including war-crimes and crimes against humanity, crimes which also included the use of slave-labor and the plundering and spoliation of occupied territories'.[9] More specifically, in the Farben case, which constituted 'the world's largest business conglomerate'[10] at the time,

> "[a]ll of the defendants were indicted for the planning, preparation, initiation and waging of wars of aggression, and invasions of other countries (count one); plunder and spoliation (count two); slavery and mass murder (count three); and common plan of conspiracy (count five)." In addition, "[a]ll of the defendants, with one exception, were members of the German Labor Front, most of them belonged to the Nazi Party, and three were additionally indicted for membership in the SS (count four)".[11]

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[5] *The United States of America v. Carl Krauch et al.* [1948] US Military Tribunal Nuremberg.
[6] *The United States of America v. Flick et al.* [1947] US Military Tribunal Nuremberg.
[7] *The United States of America v. Alfried Krupp et al.* [1947-1948] US Military Tribunal Nuremberg.
[8] Ku (n. 2), 381.
[9] Jonathan Kolieb, 'Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law' (2015) 32(2) Am. Univ. Int. Law Rev. 569, 583.
[10] ibid.
[11] Michael J. Kelly, 'Atrocities by Corporate Actors: A Historical Perspective' (2018) 50(1) Case W. Res. J. Int'L. 49, 70.

For some of these counts, however, some of the accused were ultimately acquitted because it proved impossible to demonstrate their individual knowledge of the crimes committed.[12]

The outcome of the Nuremberg Trials, however, should not be overemphasised. As Bush explains, 'corporate and associational criminal liability was seriously explored [by prosecutors at Nuremberg] and was never rejected as legally unsound. These theories of liability were not adopted, but not because of any legal determination that it was impermissible under international law'.[13] Moreover, as Bush goes on to note, 'corporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal trial, liability for a head of state, or for crimes against peace, crimes against humanity, or genocide.'[14] In support of the contention that the decision not to prosecute corporations was based on political, rather than legal, considerations, it has also been noted that

> by the end of the 1940s, Allied preferences had shifted dramatically. There was no political support for the trials of German industrialists and proceedings against high-ranking professional soldiers were followed with some embarrassment. Fear of communism, Germanophilia, sometimes antisemitism, as well as administrative problems connected with further punishments, made the principal Allied powers wary of further purges in Germany and keen to establish normal relations with it.'[15]

The broader political and economic considerations that underlay the Nuremberg Trials emerge directly from some statements of the time. As reported by Kelly,

> German industrialist Hjalmer Schacht, while a defendant before the International Military Tribunal at Nuremberg, remarked to an American officer on the question of German rearmament in violation of the Treaty of Versailles, "If you want to indict industrialists who

[12] ibid.
[13] Jonathan A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109(5) Colum. L. Rev. 1094, 1239.
[14] ibid.
[15] Martti Koskenniemi, 'Between Impunity and Show Trials' in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2002) 9.

> helped to rearm Germany, you will have to indict your own too. The Opel Werke, for instance, who did nothing but war production, were owned by your General Motors".[16]

As might be expected, no prosecution of Opel Werke's executives – let alone General Motors' ones – ensued.

The conclusions that can be inferred from all of the above mentioned circumstances were explicitly voiced by Jackson, the Chief United States Prosecutor at Nuremberg, in a memo directed to U.S. President Truman in 1946: 'I also have some misgivings as to whether a long public attack concentrated on private industry would not tend to discourage industrial cooperation with our Government in maintaining its defences in the future while not at all weakening in the Soviet position, since they do not rely upon private enterprise.'[17] Given that this was the political atmosphere in which the Nuremberg Trials were being held, it is no surprise that no corporate entity was found liable. Therefore, they offer no legal backing for the contention that corporations are not subjects of international law. All they show is that companies were ultimately not tried, but the reasons behind that decision were anything but of a legal character. Rather, (geo)political considerations were determinative.

Right after the end of the Nuremberg Trials began the Cold War, which lasted until the late 1980s-early 1990s. During that period, 'the enforcement of international criminal law remained a rare exception',[18] even though many atrocities took place worldwide. As regards the involvement of corporations in the commission of those crimes, Kaleck and Saage-Maaß observe that 'the near absolute impunity of the direct perpetrators impeded any discussion about the legal responsibility of other actors who may have been indirectly involved in the crimes, such as business entities.'[19] When the tensions between the Western and Soviet blocs finally decreased, the international community was able to be more active in holding perpetrators accountable for the commission of international crimes. Consequently, in the early 1990s the Security Council passed two resolutions which created the International Criminal Tribunal for the former Yugoslavia ('ICTY')[20] and the International

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[16] Michael J. Kelly, 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 EILR 671, 673.
[17] Kolieb (n. 9), 581.
[18] Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes', (2010) 8 (3) JICJ 699, 702.
[19] ibid.
[20] UNSC Resolution 827(1993) of 25 May 1993.

Criminal Tribunal for Rwanda ('ICTR'),[21] which were mandated to adjudicate on the international crimes perpetrated in the Balkans in the 1990s and on the Tutsi genocide committed in Rwanda in 1994, respectively. Both tribunals contributed greatly to the development of international criminal law, but their jurisdiction was limited to natural persons.[22]

However, it was not long before the international community had another occasion to evaluate and analyse the possibility of expanding international criminal law so as to encompass also the conduct of corporations. In fact, in 1998 120 States met in Rome to discuss the establishment of an International Criminal Court, which would have a much wider territorial reach than the previously mentioned *ad hoc* international tribunals.

ii) The Negotiations of the International Criminal Court Statute

Another main argument employed by detractors of the international legal personality of corporations is that the Statute of the International Criminal Court does not include jurisdiction over legal persons.[23] Given that the Rome Statute codified for the first time international criminal law into a treaty, it is understandable that the decision not to extend the jurisdiction of the court to corporate entities could be interpreted as a confirmation of the fact that they are not to be bound by international criminal law. However, taken on its own, this purely positivist argument could be very misleading.

As then Chief U.S. negotiator for the ICC Statute David Scheffer has stated, the exclusion of corporations from the jurisdiction of the court is simply due to the fact that 'no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute.'[24] In the discussions that preceded the adoption of the ICC Statute the main concerns were of a procedural nature, and no argument was put forward against the concept of international criminal responsibility for corporations *per se*.[25]

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[21] UNSC Resolution 955(1994) of 8 November 1994.
[22] Article 6 of the Updated Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993 by Resolution 827, and subsequently amended); Article 5 of the Statute of the International Tribunal for Rwanda (adopted 8 November 1994 by Resolution 955).
[23] Ku (n. 2), 383.
[24] David Scheffer and Caroline Kaeb, 'The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory' (2011) 29 Berkeley J. Int'l L. 334, 360.
[25] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (UN Doc. A/CONF.183/2/Add.2).

The main reason why legal entities were ultimately excluded from the court's jurisdiction is tied to the principle of complementarity. The ICC was not created with the aim of substituting domestic proceedings. On the contrary, the court will declare that a case is inadmissible if it 'is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.[26] Given that at the time many States did not recognise the criminal liability of corporations in their domestic legislations, there was a concrete risk of the principle of complementarity being effectively unworkable for those States, thus making the jurisdiction of the ICC automatically applicable for them.[27] Some other concerns were related on the one hand to which legal entities should be encompassed, with some States wanting to include also criminal and terrorist organisations and others being wary of the risk of including those groups struggling for self-determination or against State entities, and on the other hand to who would represent the legal person in court and how to preserve the rights of third persons.[28] Most of these issues could have easily been resolved through further discussions and negotiations, were it not for the time constraints under which the delegations had to work. As underlined by Clapham, '[i]n the end it proved impossible to satisfy all delegations that the [French] proposal could be finalized in the remaining two weeks of the Conference in a form that would satisfy everyone's queries about this innovative use of international criminal law',[29] even though many States had effectively worked to support the various versions of the proposal.

It is apparent that even this second argument typically put forward by those who purport that corporations do not have international legal personality is not based on a discussion on the impropriety of the concept. Rather, the decision taken in Rome was mainly due to the contingent conditions of the time. But can it still be said that the main legal impediment present at the time, i.e., the issue of complementarity, still stands today? As will be discussed below, much has changed in the international arena since the negotiations in Rome and more and more States embrace the concept of corporate criminal liability in their domestic systems.

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[26] Article 17(1)(a) of the Statute of the International Criminal Court 1998.
[27] Jelena Aparac, 'Which International Jurisdiction for Corporate Crimes in Armed Conflicts?' (2016) 57 Harv.Int'l L.J. 40, 42.
[28] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (BRILL 2001).
[29] ibid.

iii) Recent Developments in the Realm of Corporate Criminal Responsibility

At the time of the Rome negotiations, there was a stark division between common law and civil law systems, in that the former tended to recognise corporate criminal liability while most of the latter did not. As pointed out by Weigend in 2008, '[w]hereas corporate criminal responsibility has had a long history in common law jurisdictions, it is a relatively new phenomenon in states that adhere to the continental legal tradition'.[30] Back then, however, the notion had already begun to spread very quickly.[31] Within a few years it could be said that 'the recognition of corporate criminal liability has cut across borders and legal systems'[32] and comparative studies were finding 'common lines of conceptualization, rather than stark differences, between common law and civil law systems in their acceptance of corporate criminal liability'.[33]

Naturally, the introduction of the concept of corporate criminal liability at the legislative level has caused a major increase in the number of cases brought before the courts. For present purposes, the most interesting aspect of this trend is that corporations have been accused not only of crimes under the relevant domestic criminal codes, but also of complicity in international crimes, including crimes against humanity, war crimes, the crime of genocide, the crime of aggression[34] and the crime of torture.[35] Having ratified the relevant treaties, and especially the ICC Statute, State Parties are under an obligation to investigate, prosecute and punish those responsible for the commission of international crimes, and it is only when the State Party is unable or unwilling to do so that the ICC will step in.

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[30] Thomas Weigend, 'Societas Delinquere Non Potest? A German Perspective (2008) 6 (5) JICJ 927, 928.
[31] ibid.
[32] Alexandra Garcia, 'Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg' (2015) 24 Tul J Int'l & Comp L 97, 106. See Appendix I for a map drawn by Clifford Chance in 2016 depicting the status of corporate criminal liability in different jurisdictions.
[33] Markus D. Dubber, 'The Comparative History and Theory of Corporate Criminal Liability' (2013) 16 (2) New Crim. L. Rev. 203, 204.
[34] Article 5 of the Statute of the International Criminal Court.
[35] Not covered by the jurisdiction of the ICC *per se* (but rather as a crime against humanity), it is nevertheless considered to be one of the so-called 'core' international crimes. Such a contention is supported by the fact that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) explicitly provides for the use of the mechanism of universal jurisdiction (Article 7), which application is commonly accepted only for the most heinous international crimes.

At the moment, there are several ongoing cases at the domestic level,[36] the most relevant being those concerning Lafarge in France[37] and Lundin Energy in Sweden.[38] As regards the former, the indictment of Lafarge in 2018 represents the first time that a corporation as a legal entity (and not merely its directors and owners) has been indicted for complicity in crimes against humanity committed abroad (precisely in Syria). Moreover, it is also the first time that a French parent company has been charged for the acts undertaken by one its subsidiaries abroad. The legal basis for this historic indictment is to be found in the French Criminal Code 1994. First, on a procedural level Article 121-2 provides that legal persons are criminally responsible for the violations committed on their behalf by their organs or representatives. Secondly, from a substantive point of view, the Code includes provisions regarding crimes against humanity (Article 212-1), war crimes (Article 461-1), the financing of a terrorist enterprise (421-2-2) and the endangerment of other people's lives (Article 223-1), which constitute the counts on which LaFarge was initially indicted.[39] Clearly, the French Criminal Code has gone further than international law by explicitly including legal persons as potential perpetrators of international crimes.

With regard to Lundin Energy (now Orrön Energy AB), while the corporation is not indicted as a legal entity, the case is nonetheless of fundamental importance, given that it represents an example of the application of universal jurisdiction in the realm of corporate international crimes, a mechanism which will be better explored in Chapter 4. For present purposes, suffice it to say that Swedish citizen Ian Lundin, former chairman of the company, and Swiss citizen Alexandre Schneiter, its former CEO, have been indicted for aiding and abetting war crimes in Sudan during the period 1999-2003. The legal basis for the indictment is the Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (2014),[40] which essentially

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[36] There is an ongoing investigation into BNP Paribas' role in the Darfur conflict (2020-, France); Sherpa, the Ethique sur l'etiquette, the European Uyghur Institute and an anonymous Uyghur survivor filed a complaint against Uniqlo France and Inditex (2023-, France), where French fashion groups are accused of complicity in crimes against humanity and genocide allegedly committed in China; ECCHR, Sherpa, Mwatana for Human Rights filed a complaint against Dassault Aviation, MBDA France, Thales, in which French arm companies are accused of being complicit in war crimes allegedly committed in Yemen.

[37] ECCHR and Sherpa filed a complaint against Lafarge in 2018.

[38] Ian Lundin and Alex Schneider, former executives of Swedish energy company Lundin Energy, are charged with aiding and abetting war crimes.

[39] In a decision rendered on the 16th of January 2024, the French Cour de Cassation has quashed the company's indictment for endangering the lives of others, while upholding the remaining charges of complicity in war crimes and crimes against humanity (Cass. Crim., 16 janvier 2024, n°22-83.681).

[40] SFS 2014:406.

incorporated core international crimes as offences in domestic law. This statute gives Swedish courts more legitimacy to adjudicate on cases involving the commission of international crimes, also having recourse to the principle of universal jurisdiction.

As these two cases and the legislation enabling them show, domestic legal systems are becoming more and more comfortable with the idea of corporate criminal responsibility, even when it comes to the commission of international crimes. Simultaneously, there has also been a shift in the way corporate responsibility is conceived both at the international and at the regional levels and this is evidenced by the adoption of a number of multilateral instruments, such as the Organisation for Economic Co-Operation and Development ('OECD') Guidelines for Multinational Enterprises or, more importantly, the United Nations Guiding Principles on Business and Human Rights ('UNGPs'). Their non-binding nature notwithstanding, these instruments show a new tendency to consider the impact that corporations have on the societies in which they operate and also to make explicit their responsibility to respect human rights. At the regional level, another very relevant example is the European Parliament 2016 Resolution on Corporate Liability for Serious Human Rights Abuses in Third Countries, which requires EU Member States to ensure that victims of human rights violations have access to an effective remedy 'when a corporation based in the given state holds, directs or controls companies that are responsible for human rights violations in other countries'.[41] Even though this Resolution places obligations directly only on Member States, it nevertheless shows an awareness about the impact that corporations have on human rights especially in Third Countries and attempts to address it.

Further, as pointed out by Clapham, 'international treaties in other areas have obliged states to prevent and punish transnational corporate crimes',[42] too. One such example is the Global Convention on the Control of Transboundary Movements of Hazardous Wastes (1989), which requires States to prosecute 'any natural or legal person' who is found liable for the transboundary illegal traffic of hazardous waste. At the regional level, another relevant instrument is the Council of Europe's Criminal Convention on Corruption (1999), wherein Article 18 stipulates that '[e]ach Party

[41] European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)).
[42] Clapham (n. 28), 173.

shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering'.

Just by looking at these few examples, it is clear that the contention that corporations bear no obligations under international law is only partially true. If on the one hand it is undeniable that all these obligations are primarily directed at States, on the other hand it is also true that there is increasing awareness regarding the role that corporations play in today's world and that more compliance with a number of human rights standards is required of them – even if not directly or through international enforceable means. The issue of the international legal personality of corporations being far from resolved, what can be said is that no convincing legal argument has been put forward – during the Nuremberg Trials, the Rome Conference or in the following years – that shows the unsoundness of such an idea. As will be explored below, some even speculate that we could dispense with the concept altogether.

iv) The Concept of Corporate Legal Personality from a Doctrinal Standpoint

From a historical point of view, it has been shown above that neither the Nuremberg Trials nor the negotiations of the ICC Statute represent convincing legal arguments that can support the contention that corporations are not subjects of international law. Even on the conceptual level, however, the inferences drawn from these events by those[43] who affirm that corporations are not subjects of international law is based on a flawed assumption. In fact, there seems to be a conflation of the substantive and the procedural aspects of international law. In other words, from the fact that there is not an international *forum* where corporations could be tried for the commission of international crimes (i.e. a procedural aspect), it has been deduced that corporations are not subjects of international law (i.e. a substantive aspect). Taking into consideration the array of legal instruments that have been adopted both at the international and at regional levels criminalising corporate corruption,[44] Clapham observes that

[43] Ku (nn. 2 and 4).
[44] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 23 May 1997; Criminal Convention on Corruption, Council of Europe (1999); Joint Action of 22 December 1998 on corruption in the private sector (E.U., L. 358/2); Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (E.U., C. 195/2, 1997); Convention on the protection of

> [t]he absence of jurisdiction for the ICC over the crime of corruption does not prevent the international law of corruption entering into force for corporations. Similarly, lack of ICC jurisdiction over legal persons for war crimes should not mislead us into thinking that the laws of war and international human rights law do not apply to companies.[45]

In other words, the absence of such a *forum* notwithstanding, the substantive norm would still 'lie dormant, but it could be activated, without breach of the *nullum crimen* principle, through the establishment of a court or tribunal vested with jurisdiction over transnational business corporations'.[46]

Thus, at this point of the discussion, it can be said with a certain degree of confidence that neither the trials held in Nuremberg nor the discussions in Rome can be used as convincing legal arguments against the inclusion of corporations in the category of subjects of international law. However, it is equally true that they do not provide a decisive legal argument in favour of such an extension, either. On that note, some scholars believe that the passage of legislation by many States providing for corporate criminal responsibility as well as the adoption of international instruments especially in the realm of business and human rights[47] is 'paving the way for the consolidation of a customary rule eventually recognizing corporate criminal liability'.[48] More recently, Guizzardi Righetti has affirmed that:

> [t]here is very little doubt that a customary principle, albeit and at least an emerging one, can be identified in the *opinio juris* and practice. First, there is a growing body of international treaties embedding criminal corporate liability clauses, and secondly, as recalled by Ambos,

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the European Communities financial interests' (E.U., C 316/49, 1995); OAS Inter-American Convention against Corruption of 29 March 1996.

[45] Clapham (n. 28), 178.

[46] Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 (3) JICJ 695, 898.

[47] The most recent development being the Corporate Sustainability Due Diligence Directive ('CSDDD') adopted by the European Parliament on the 24th of April 2024.

[48] Garcia (n. 32), 106.

> there is a "clear trend towards the recognition of companies' human rights obligations since the acceptance of the UN 'Guiding Principles on Business and Human Rights'".[49]

Were such a contention to be true – and the growing number of States extending criminal responsibility to corporations for the commission of international crimes, the increasing number of cases brought before the courts alleging the commission of international crimes by companies, the extensive literature that has been written in the past decades in support of the concept of corporate criminal responsibility under international law and the numerous international treaties that impose obligations on corporations especially in the field of human rights (albeit indirectly) all seem to point to an affirmative answer – it will soon be possible to affirm with confidence that corporations must be considered to be subjects of international law. Much will depend on the outcome of trials such as *Lafarge*, on the willingness of prosecutors to bring charges against corporations for the commission of international crimes, on the introduction of legislation providing for corporate criminal responsibility in other States, as well as how instruments such as the CSDDD are received.

Some other authors, however, suggest that the discussion on the international legal personality of corporations is now obsolete and should be discarded altogether. In a contribution, the title of which alludes to the scholar's opinion ('*The Shifting Sands of Corporate Liability Under International Criminal Law'*), Kaeb contends that

> [i]n light of the recent developments in state practice and judicial development, no longer seems to be a matter of whether corporations are liable under international law, but rather how such liability would be implemented—in other words, what the material elements for liability are and what an effective penalty structure would look like.[50]

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[49] Giampaolo Guizzardi Righetti, 'Finding Hope for International Corporate Liability in a Post-Kiobel and Jesner World' (2020) 3 (1/2) JILPAC 53, 58.
[50] Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 The Geo. Wash. Int'l L. Rev. 351, 402.

Going even further, Higgins noted as early as 1995 that by standing by the subjects/objects of international law dichotomy we have 'erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint'.[51] In her opinion, "the whole notion of 'subjects' and 'objects' has no credible reality, and […] no functional purpose'[52] and she suggested that it be replaced by the concept of 'participants' in the international legal process.[53] As observed by Alvarez,

> the subject-object dichotomy implies that these are hermetically sealed categories such that mere "objects" are passive recipients of international rights and duties that are created by international law's "subjects." The realities of contemporary international law-making processes are a great deal more complex. The designation of "participant" recognizes that today, thanks to increasing participation rights in a number of international fora for many non-state actors, corporations (alongside a number of non-state actors) are now involved in the making of international law.[54]

Even if Higgins' theory is compelling because it is 'more sensitive to real world practice'[55] and less abstract, her position has not received a lot of support in the literature. Therefore, the argument that a rule of customary law is emerging seems more convincing. More broadly, it can be argued that discussion on the international legal personality of companies is quickly losing its relevance. As Kaeb suggests, the time has now come to focus on *how* to hold corporations liable for the commission of international crimes.[56]

Section II: (Collective) Corporate Criminal Accountability and Its Scope.

Having dealt with the long-standing debate on the subjectivity of corporations in international law, it is now necessary to identify the best ways to hold them accountable for the commission of the most

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[51] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) 49.
[52] ibid.
[53] ibid.
[54] Jose E. Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 (1) Santa Clara J. Int'l L. 1, 9.
[55] ibid.
[56] Kaeb (n. 50).

heinous crimes in a way that is effective, does not pose excessive burdens on the victims and ultimately addresses the actual role that corporations as a whole – rather than single individuals within them – play in the commission of such violations. As will be better explored below, criminal law, with its reliance on the work of prosecutors rather than on victims, especially in evidentiary matters, as well as with the range of sanctions that it can issue, is certainly the best way to deal with those criminal acts. The criminal net, however, should not catch only those individuals in positions of power who carried out the criminal activities. Rather, it should encompass the legal entity in its entirety – provided that the necessary requirements are met, of course. This would avoid the evidentiary problems that arise when having to establish the responsibility of specific individuals within structures as complex as companies.

The discussion is structured as follows. First, the issue of collective *versus* individual responsibility for corporate crimes is examined and the conclusion drawn is that the two should coexist. Next, the focus shifts to the reasons why criminal accountability and criminal proceedings in general should be preferred over civil law mechanisms. Finally, the scope of corporate criminal liability will be discussed, in particular the question of which crimes should be included. In certain parts of the discussion procedural aspects will be mentioned, however this issue will be dealt with in depth in Chapter 4.

i) Collective vs Individual Responsibility for International Corporate Crimes

The idea of holding directors and owners directly liable for the commission of crimes that have been materially carried out by their employees or by the corporation more generally (i.e., in cases where responsibility is more diffused and not attributable to specific individuals) is not a new concept in international law: as we saw above, it formed part of Nuremberg. However, placing responsibility solely on individuals has four main shortcomings, especially in structures as complex as multinational corporations ('MNCs').

First, it has been pointed out that 'it is often difficult to pinpoint the specific contributions of each individual within the larger enterprise, and the sole actions of individual corporate officers may be insufficient to establish liability, particularly if they act with the intent to further the interests of

the corporation'.[57] These difficulties were already patent during the Nuremberg Trials and concerned mainly the showing of the required *mens rea* for each individual defendant. This resulted in acquittals on most counts.[58] As Kelly points out, 'the prosecution could more easily have shown collective knowledge by prosecuting the corporation and then constructive knowledge for the individual officers afterward'.[59] Placing the responsibility on the corporation could also be very helpful in addressing what Kremitzer terms "'fatherless' omissions, i.e., when a legal duty in imposed on the corporation, [but] it is not clear who was personally obliged to fulfil the duty and it can be proven that the non-fulfilment of the duty was conscious (on the level of its management)'.[60]

Apart from the evidentiary problems that emerge when the focus is on individual offenders within intricate structures such as companies, Lambridis also notes that '[b]y prosecuting only corporate officers and employees as individuals, the law fails to account for the collective dynamics, culture, and structure of a corporation that often enables it to commit crimes that officers and employees would otherwise be incapable of committing individually'.[61] In this regard, it has been pointed out that '[c]riminological research into the causes of corporate crime attaches much weight to the pathology of corporations.'[62]

A further argument that has been advanced in favour of an extension of liability covering also the corporate entity has to do with the relationship between the corporation itself and its organs. Kremnitzer, in fact, observes that,

> it is just to make the corporation 'pay' for misdeeds of its organs: the corporation benefits from their positive and successful activities. It is only fair that it will suffer from their wrongdoing. The corporation earns a good name for its own when the acts of its organs create the basis for such good name (for instance, through contribution to society). Why should the corporation's

[57] Photeine Lambridis, 'Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity' 2021 53 NYU JILP 144, 151.
[58] Kelly (n. 11).
[59] ibid.
[60] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', 8 (3) JICJ 909, 914.
[61] Lambridis (n. 57).
[62] Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 JICJ 803, 826.

> reputation remain immune when it deserves a blemish on its name due to crimes committed by it through its organs? She who enjoys the honey should not be protected from the sting.[63]

The advantages of holding the corporate entity liable together with the individuals responsible are also clear from the victims' point of view, given that 'in some cases the individual criminal might not have the assets to pay the reparation ordered by the Court'.[64] Therefore, 'fixing responsibility on a legal person could mean that victims were assured compensation where otherwise they would get nothing'.[65]

Collective responsibility, however, is not free from drawbacks. As has been pointed out, '[a] recurrent concern is that holding companies criminally accountable unjustly punishes the shareholders because their ability to influence corporate conduct is tempered by the difficulty of monitoring the activities of the corporation's managers and employees'.[66] This would impinge on one of the tenets of criminal law: *nullum crimen, nulla poena sine culpa*. The adverse impact that holding a corporation criminally liable could have on those individuals who were not even aware of the commission of crimes by the corporation itself is undeniable. However, a valid counterargument could be that they *should have known*. In other words, given the shift in international law requiring businesses to respect an increasing number of regulations in disparate areas, from the environment to human rights, shareholders should employ all means at their disposal to inquire about the activities of the company on a regular basis and keep directors and board members under constant scrutiny by requesting reports or by setting up independent monitoring mechanisms, for instance. The means are there to avoid being implicated in the commission of international crimes. As for the shareholders' will to use them, that is a completely different matter. In any case, their indirect punishment through the company's prosecution is ultimately justified by the fact that 'they are engaging in conduct that in itself arouses censure: profiting from crime'.[67]

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[63] Kremnitzer (n. 60), 913.
[64] Clapham (n. 28), 147.
[65] ibid.
[66] Garcia (n. 32), 101.
[67] ibid., 127.

This argument, however, can be sustained only insofar as collective responsibility is coupled with individual responsibility. Otherwise, 'innocent' shareholders and board members will endure the same punishment as those individuals within the corporation who materially engaged in the criminal activities. Even though the present thesis is mainly concerned with the concept of collective criminal liability, it is not suggested that it should be considered as an alternative to individual criminal responsibility. On the contrary, it should complement the latter and make up for its shortcomings. This represents another counterargument to the contention that collective corporate accountability would adversely affect 'innocent' third parties: they would only be affected indirectly (which, put bluntly, translates into no risk of incarceration), while the main perpetrators will be directly and more heavily punished for the specific role they had in the commission of the international crimes.

In conclusion, there seems to be no convincing argument against the concept of collective criminal liability for corporations as long as it is accompanied with the prosecution of the individuals directly responsible for the commission of the crimes.

ii) Criminal vs Civil Liability for the Commission of International Crimes.

Given the extensive and often irreparable consequences that it can cause to a person's life, criminal law occupies a very specific place in the legal order: it is the *extrema ratio* (the 'last resort'). Therefore, one should always be very cautious in invoking recourse to criminal tools even when dealing with very serious social issues. In particular, Alston warns that an excessive reliance on international criminal law in addressing core international crimes could be counterproductive for the broader human rights cause.[68] In his opinion, 'the preoccupation with atrocity crimes […] diminishes the attention given to significant violations that do not reach the threshold of an atrocity [and] it also facilitates the neglect of structural issues such as extreme inequality, entrenched racism and sexism, and extreme poverty'.[69] It is undeniable that the focus of criminal law is intrinsically and necessarily narrow: a crime has been committed and the person who committed it should be punished, irrespective of the broader socio-economic conditions in which that crime took place. Criminal law

[68] Philip Alston, 'Criminalizing Human Rights' (2023) 15 JHRP 660.
[69] ibid.

is not a panacea for all the human rights violations that occur world-wide and rightly so. Other mechanisms that address systematic inequalities more broadly should be in place and criminal law should always be seen as the last resort. Moreover, on a more procedural level, it can be observed that criminal processes require a higher burden of proof and represent a cost to the public purse.[70]

That being said, in the case of genocide, crimes against humanity, torture, war crimes and the crime of aggression committed by corporations, criminal mechanisms, as opposed to civil ones, are to be preferred for at least four reasons. First, there is a logical argument: such actions are proscribed by international *criminal* law. Even though it is true that the harm that ensues from those conducts could be framed in tortious terms, genocide, torture, crimes against humanity, war crimes and aggression are first and foremost *crimes*. Therefore, criminal tools are surely the most coherent response to their commission.

Moreover, as will be explored in Chapter 3, a criminal court might issue other kinds of sanctions that could be more impactful on the corporation than just ordering the payment of a lump sum, which is the inevitable outcome of a successful tort lawsuit.

Furthermore, it should not be forgotten that criminal prosecution will involve the state apparatus in the investigatory process and therefore relieve the victims of the huge burden involved in bringing a civil case against a large corporation.

Finally, the stigma that attaches to the criminal process should not be underestimated, especially because a corporation's reputation represents one of its most valuable 'assets'.

Given all the advantages associated with criminal law and the criminal system more generally, it can be concluded that '[c]riminal law may be the only mechanism in reality to be able to confront big and strong corporations'.[71]

iii) The Scope of Corporate Criminal Responsibility: Should All Human Rights Violations Be Encompassed?

[70] Clapham (n. 28), 195.
[71] Kremnitzer (n. 60), 916.

As a final point on the framing of the kind of accountability for which this thesis is advocating, it is necessary to establish what kind of corporate crimes should be covered by it. As is well-known, corporations have been accused of having either directly perpetrated or assisted in the commission of many different crimes: from modern slavery practices[72] to unethical exploitation of natural resources which causes damage to health, the environment, and people's livelihoods.[73] Countless violations of human rights have been carried out by companies directly or thanks to their assistance.

When it comes to corporate criminal responsibility, however, it is important to circumscribe the ambit of its application. As mentioned above, the fields of international criminal law and international human rights law, even if overlapping for the most part, should be kept distinct. In line with this, Van Den Herik suggests that international criminal law cannot and should not be seen as the solution for all human rights violations.[74] Among the various differences between the two fields, she highlights that while under international human rights law the primary duty-holder is the State, in the domain of international criminal law the main duty-holder is a non-state actor, the individual.[75] Therefore, '[a]dding another non-state actor as subject of international criminal law does not require a paradigm shift. In addition, all of the fundamental norms at stake — the prohibition of genocide, crimes against humanity and war crimes — are *jus cogens* norms, which leave no or extremely little room for any discretion.'[76] On the contrary, 'the implementation of many human rights requires policy decisions and balancing acts — which leave ample room for discretion that should preferably not be exercised by undemocratic private corporations.'[77]

In addition to these theoretical hurdles in extending international criminal responsibility on corporations for every human rights violation, there are also procedural and strategic considerations that call for caution. The first concern is purely procedural and has to do with the way international criminal law should be applied. As will be explored in Chapter 4, currently the most efficient way of holding corporations accountable for the commission of crimes is through domestic prosecution, in

[72] Florian Jeßberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' (2016) 14 (2) JICJ 327.
[73] See Amnesty International's report on the 'Ogoniland case' concerning Shell Petroleum Development Corporation's criminal activities in Nigeria, <https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> accessed 12 March 2024.
[74] Larissa Van Den Herik, 'Regulating Corporations Under International Law' 8 (3) JICJ 725.
[75] ibid., 742.
[76] ibid.
[77] ibid.

particular thanks to the principle of universal jurisdiction. However, given that the principle of universal jurisdiction represents an exception to the traditional rules of jurisdiction, it can only be invoked in very exceptional circumstances, that is, only when 'core' international crimes have been allegedly committed, and not every human right violation consists in the commission of a 'core' international crime. Consequently, the substantive scope of corporate international criminal responsibility should be informed by its procedural aspects: since at the moment the most efficient way of holding corporations responsible for the commission of international crimes is through the application of the principle of universal jurisdiction, the confines of corporate criminal responsibility should only encompass those crimes that can be prosecuted under that doctrine, i.e., 'core' international crimes.

Finally, given the major disagreement around the concept of corporate international criminal responsibility as accounted for in the previous pages, such a circumscription appears to be the most strategic and pragmatic approach to reach at least a minimum level of justice.

Conclusion

In conclusion, thanks to the developments that took place in the past decades, corporations are now to be considered as subjects of international law and should therefore be held criminally responsible for their role in the commission of international crimes.

The first part of this Chapter discussed the international legal personality of corporations. It was argued that no proper legal argument put was forward against the concept of corporate criminal responsibility in international law during either the Nuremberg Trials or the negotiations that preceded the adoption of the ICC Statute. In any case, it was argued that the international legal landscape has changed significantly since the late 1990s when the Rome Statute was discussed, with numerous soft law instruments having been adopted which indirectly impose obligations on corporations in the field of international human rights. Moreover, an increasing number of States have recognised corporate criminal responsibility. Given these changes, it was argued that a customary rule of international law is emerging to the effect that corporations can and should be held responsible for their involvement in the commission of international crimes.

The Chapter then suggested that it is highly desirable that individual responsibility be coupled with collective liability and that criminal law should be preferred over civil law mechanisms. These conclusions were reached taking into consideration the point of view of victims, in an effort to identify the most effective route to proper justice. Finally, it has been specified that criminal responsibility should concern only core international crimes and not all human rights violations.

Having set the above parameters, the next Chapter will analyse the conduct necessary to establish corporate criminal responsibility for the commission of international crimes, focusing on the main aspects of such conduct – namely, the *actus reus*, the issue of causation and the *mens rea*.

CHAPTER 2

THE ELEMENTS OF INTERNATIONAL CRIMES COMMITTED BY CORPORATIONS

The extension of international criminal responsibility in a way that includes also corporations calls for an analysis of how the classic elements that make up all crimes (*actus reus*, *mens rea* and causation) could be said to be satisfied in the specific context of 'core' international crimes committed by them. While each of those crimes has its own specificities when it comes to their components,[78] the present Chapter will not delve into them. Rather, it will explore more generally when the said elements can be considered to be there when a corporation, rather than an individual, is the perpetrator. Chapter 2 will be divided into two Sections. Section I will deal with the *actus reus* and the intimately tied issue of causation, while Section II will be dedicated to the required *mens rea*.

Section I: The *Actus Reus* of International Crimes Committed by Corporations

[78] By way of example, the crime of genocide requires a special intent ('*dolus specialis*') 'to destroy, in whole or in part, a national, ethnical, racial or religious group' (Article 6 ICC Statute), while the commission of other 'core' crimes can be found even when there is generic intent ('*dolus generalis*').

The first main component of any crime is the material or objective element (*actus reus*). When a crime has been committed by an individual, establishing whether they have participated in the commission of the objective criminal act is usually very straightforward. In the case of companies, however, the attribution of responsibility to the legal entity necessarily follows a two-step approach: i) the *actus reus* is carried out by a natural person who is acting on behalf or in the interest of the corporation and ii) that act is ultimately attributed to the corporation because it can be demonstrated that the legal entity as a whole had the requisite *mens rea* regarding that criminal activity (see *infra*). The attribution of responsibility is further complicated by the fact that in the field of international criminal law companies usually are not the principal perpetrator of atrocity crimes, but rather assume a role of complicity.

Section I will focus on the material element of core international crimes and will be divided into two subsections. Subsection i) will deal with the mode of liability for international crimes committed by corporations, which usually takes the form of complicity (or aiding and abetting) rather than direct commission. As a mode of liability in international criminal law, aiding and abetting 'generally refers to acts or omissions that assist, encourage or lend moral support to a crime.'[79] Moreover, issue of causation will be addressed, which becomes particularly thorny when the actors complicit in the commission of international crimes are complex structures like corporations. Subsection ii) will explore whose actions should be attributable to the corporate entity.

i) Complicity in, or Aiding and Abetting, the Commission of International Crimes

At the outset it should be mentioned that for many centuries until the Nuremberg Trials the maxim *societas delinquere non potest* ('a company cannot commit a crime') has effectively barred any kind of reflection over corporate criminal conduct.[80] Interestingly, such a maxim was coined 'in the thirteenth century's conflict with Emperor Frederick II, [when] the Roman church famously stated: "*societas delinquere non potest*"—arguing against the postglossators' opinion and arguing with the

[79] Manuel J. Ventura, 'Aiding and Abetting' in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), Modes of Liability in International Criminal Law (CUP, 2019) 1.
[80] Aparac (n. 27), 41.

aim of avoiding the Papal excommunication of corporations.'[81] However imbued with the political and economic interests of the time, such a conception of the corporation as being incapable of committing the same crimes as individuals has survived for many centuries – as evidenced by the fact that some jurisdictions have introduced criminal legislation targeting corporations only in the past decade. Even conceptually, however, such a contention is easily rebuttable. As put by Nerlich,

> [c]learly, an abstract entity cannot physically carry out an act of murder, rape or torture. But neither can it sign a fraudulent tax declaration. The responsibility of corporations, therefore, is always derived from conduct of natural persons and is, as such, imputed liability. If this is accepted, it appears possible to attribute any conduct of a natural person to a legal person, including conduct amounting to rape, etc.[82]

Having clarified that companies can – and widely do – commit crimes other than just tax evasion, it is now necessary to look at the so-called modes of liability, that is, the ways in which a legal entity can be implicated in the commission of a crime, focusing here on international crimes.

Generally, the most evident case of criminal responsibility is when the criminal conduct is directly carried out by the perpetrator. When it comes to 'core' international crimes, however, the scale of the impact required is of such a magnitude that it is difficult – even if not impossible[83] – to imagine their commission without the involvement of the state machinery. This kind of crimes usually require effective control over large territories and substantial parts of the population as well as over the army. Therefore, corporate participation in the commission of international crimes usually takes the form of complicity or aiding and abetting.[84] Even though much of the literature on the subject that will be cited throughout this subsection has revolved around criminal liability of

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[81] Klaus Tiedemann, 'Corporate Criminal Liability as a Third Track' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds.), *Regulating Corporate Criminal Liability* (Springer 2014) 15.
[82] Nerlich (n. 46), 900.
[83] The growing popularity of Private Military Companies ('PMC'), which, as such, are and could be employed by corporations, might change this scenario in the following years. See 'The Business of War – Growing risks from Private Military Companies' (Council of Europe, 31 August 2023) < https://www.consilium.europa.eu/media/66700/private-military-companies-final-31-august.pdf > accessed 13 March 2024.
[84] Article 25 (3) (c) ICC Statute 1998.

individuals within the corporation, the considerations that have emerged out of these discussions can easily be applied to corporate actors as well. First, as pointed out by the International Commission of Jurists, 'whether an act constitutes aiding and abetting is a question of fact to be decided in the circumstances of each case'.[85] However its report lists specific examples of aiding and abetting:

> the provision of goods or services used in the commission of crimes; the provision of information which leads to the commission of crimes; the provision of personnel to commit crimes; the provision of logistical assistance to commit crimes; the procurement and use of products or resources (including labour) in the knowledge that the supply of these resources involves the commission of crimes; and the provision of banking facilities so that the proceeds of crimes can be deposited.[86]

In an effort to categorise these examples, Kaleck and Saage-Maaß contend that there are typically two scenarios in which business actors can participate in international crimes: '(1) the cooperation of corporations with military regimes and dictatorships and (2) the involvement of corporations in (civil) war and other conflict zones.'[87] The authors then proceed to divide these two categories in a few subcategories. As for the first category, the cooperation of corporations with military regimes can be classified into: '(a) cases in which corporations profit from state violence, (b) cases in which the regime's human rights abuses are facilitated by providing the necessary means and (c) cases in which corporations directly support repression without direct economic benefit.'[88] With regard to the second category, the involvement of corporations in conflict zones can either mean that they actively support one of the parties to the conflict or that they economically profit from the conflict.[89] This categorisation encompasses all of the ways in which a corporation can be somewhat linked to the

[85] International Commission of Jurists Expert Legal Panel, *Report on Corporate Complicity in International Crimes* (Corporate Complicity & Legal Accountability; Volume 2: Criminal Law and International Crimes, 2008) 19.
[86] ibid.
[87] Kaleck and Saage-Maaß (n. 18), 703.
[88] ibid.
[89] ibid., 707.

commission of international crimes. However, not all these scenarios can be considered to be criminally relevant for the purposes of complicity.

In fact, an overarching issue in all these conducts concerns the idea of business as a neutral action. It is important to draw a line "between the morally condemnable behaviour of 'doing business with a bad actor' and criminally relevant contributions to another entity's international crimes."[90] According to the International Commission of Jurists, a corporation can be held legally accountable for complicity in gross human rights abuses in essentially three cases: a) when it enables human rights abuses (i.e., without the company's conduct the abuses would not have occurred; b) when it exacerbates human rights abuses (i.e., the company's conduct makes the abuses and the harm worse); c) when it facilitates human rights abuses (i.e., the company's conduct changes the way the abuses are carried out).[91] In order to single out cases of non-neutral business activity, however, these actions must be coupled with the required *mens rea* (discussed in depth *infra* in Section II) and, according to the International Commission of Jurists, there must be proximity between the company's activities and the commission of international crimes.[92] With regard to this last requirement, evidence of proximity include: geographical proximity, economic, political and legal relationships with the main perpetrator; as well as the intensity, duration and texture of these relationships.[93] It has been suggested, however, that not too much weight should be attached to proximity, given that it 'can indicate corporate liability but […] more is needed to establish liability.'[94] By taking into consideration the case of Kouwenhoven,[95] who had been accused of having aided and abetted war crimes in Liberia by financing the government's army and smuggling weapons in their favour, it can be observed that even though the defendant 'admitted that he was in close contact with Charles Taylor [then President of Liberia] [and that] he even went on diplomatic and foreign missions with him … this did not prove that he had knowledge of, and contributed to, war crimes by way of arms deliveries to Taylor's regime.'[96]

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[90] ibid., 720.
[91] International Commission of Jurists Expert Legal Panel, *Report on Corporate Complicity in International Crimes* (Corporate Complicity & Legal Accountability; Volume 1: Facing the Facts and Charting a Legal Path, 2008).
[92] ibid.
[93] ibid., 25.
[94] Huisman and van Sliedregt (n. 62), 824.
[95] *The Public Prosecutor v. Guus Kuowenhoven* (Supreme Court of the Netherlands; Case no. 17/02109; 18 December 2018).
[96] Huisman and van Sliedregt (n. 62), 823.

Furthermore, it has been observed that the kind of activity carried out by the corporation can in itself be an indication of its neutrality or lack thereof. As pointed out by Kaleck and Saage-Maaß,

> it is necessary to make the distinction between the supply of goods that are *per se* dangerous such as weapons and the supply of goods with a specific make-up that may only contribute, in a certain scenario, to the commission of international crimes, such as computer programs or certain chemicals. […] Businessmen trading *per se* dangerous goods will need to have less knowledge of the actual criminal purpose for which the main perpetrator acquired the goods, to be criminally liable; whereas in the case of other goods, the trader will have to know more details about the circumstances in which his goods will be used to commit international crimes to be liable for aiding and abetting.[97]

Alternatively, according to some authors, 'the fundamental criterion to employ should be the foreseeable use of the commodity, rather than its inherent quality',[98] especially when assessing financial complicity. These scholars found that 'the success and failure of Latin American dictatorships […] strongly depended on the financial support they received'[99] and observed how the decision of the U.S. Government to refuse to financially help the Chilean military regime was due to the recognition that 'massive contributions of funds can indeed facilitate crimes against humanity.'[100] While it is undeniable that financial support can play a determinative role in the commission of international crimes by States, it becomes particularly difficult to assign responsibility given that 'there is an inherent difficulty in tracing money and then assessing its impact on a given human rights context',[101] as the authors themselves concede. Given the lack of effective means for tracing and measuring the impact of fungible assets such as money, Kaleck and Saage-Maaß' suggestion to focus on the inherent quality of goods seems more helpful when it comes to assessing their role in the commission of international crimes.

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[97] Kaleck and Saage-Maaß (n. 18), 721.
[98] Juan Pablo Bohoslavsky and Mariana Rulli, "Corporate Complicity and Finance as a 'Killing Agent'" (2010) 8 (3) JICJ 829.
[99] ibid, 848.
[100] ibid.
[101] ibid., 849.

Another fundamental issue concerns causality, which generally raises very thorny questions and even more so in the context of corporate complicity in international crimes, due to the complex structures that characterise companies as well as to the geographical distance between their headquarters and the *locus criminis*. One specific complexity that arises in international crimes is overdetermination. As explained by Stewart, '[a]n event is overdetermined if there are multiple sufficient causes for its occurrence'.[102] How to determine responsibility in such cases?

According to the jurisprudence of the ICTY, the ICTR and the Special Court for Sierra Leone ('SCSL') the conduct of aiding and abetting must have constituted a 'substantial contribution' in the commission of the international crime.[103] This approach has been heavily criticised as being 'at best unhelpful and at worst fundamentally incoherent'[104] and as causing 'modern trials [to] depend upon faith rather than justifiable principle'.[105] Moreover, even the ICC has recently rejected the 'substantial effect' requirement.[106] In fact, while in the 2014 *Katanga* case it stated that 'a significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt'[107] and that 'the contribution will be considered significant where it had a bearing on the occurrence of the crime and/or the manner of its commission',[108] in *Bemba*, the Trial Chamber explained that 'Article 25(3)(c) of the Statute does not require the meeting of any specific threshold',[109] thus overruling its 2014 precedent. Similarly, in *Al Madhi*, the Pre-Trial Chamber expressly reaffirmed that the act of assistance need not be "'substantial' or anyhow qualified other than by the required [*mens rea*] to facilitate the commission of the crime".[110] According to Ventura, the judgments in *Bemba* and *Al Madhi* are inconsistent with both the ICC Statute and the jurisprudence of the Court regarding Article 25(3)(a), which deals with co-perpetration.[111] In fact, Article 17(1)(d) of the ICC Statute states that a case should be declared inadmissible where it 'is not of sufficient gravity to justify further action by the Court'. According to the author, any consideration on the seriousness of the crime 'would be

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[102] James G. Stewart, 'Overdetermined Atrocities' (2012) 10 (5) JICJ 1189.
[103] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8 (3) JICJ 873, 891.
[104] Stewart (n. 102), 1216.
[105] ibid.
[106] Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy, and Alyssa T. Yamamoto, 'Aiding and Abetting in International Criminal Law', (2020) 104 Cornell L. Rev. 1593, 1612.
[107] *The Prosecutor v. Germain Katanga*, (ICC-01/04-01/07), Judgment of 7 March 2014, para. 1632.
[108] ibid., para. 1633.
[109] *The Prosecutor v. Jean-Pierre Bemba Gombo et. al.*, (ICC-01/05-01/13), Judgment of 19 October 2016, para. 93.
[110] *The Prosecutor v. Al Madhi* (ICC-01/12-01/15), Decision on the Confirmation of Charges (2016) para. 26.
[111] Ventura (n. 79), 48.

rendered irrelevant if any contribution to the crime were sufficient'.[112] Moreover, it has been observed that in cases concerning co-perpetration as provided for in Article 25(3)(a),[113] the court "had no problem 'reading in' an essential contribution requirement, which stands to this day", regardless of the absence of any threshold language in that article as well.[114]

In assessing the desirability of the introduction of the requirement of a substantial contribution in the jurisprudence of the ICC regarding Article 25(3)(c), on the one hand it could be argued that it is undeniable that such a requirement is rather vague and fact dependent. On the other hand, however, it is also called for by the otherwise infinite causation chain that would lead us to hold consumers criminally accountable for having bought computers containing cobalt obtained through the commission of crimes against humanity, for instance. Even though the wrongful acts of many natural and legal persons are morally reproachable, it is evident that casting the *criminal* net so widely would effectively mean that almost every natural and legal person would be held accountable for having somehow contributed to the commission of innumerable international crimes: in the case of consumers, for having created a huge demand for computers and other electronic devices. However, '[a] lower causation standard might be appropriate for more detached forms of involvement that do not necessarily warrant a criminal justice response.'[115] Furthermore, from a strictly strategic point of view, focusing only on the more substantial contributions caused by corporations in international crimes seems to be more efficient, especially from an evidentiary point of view. Having said that, if the ICC were to introduce the substantive contribution/effect in the future, it would be advisable that it also specified what constitutes a 'substantial contribution' so that the concept can be applied with more consistency and coherence and not be arbitrarily construed by judges on a case-by-case basis. Even though this change of direction in the ICC jurisprudence would not extend the court's jurisdiction so as to encompass also legal persons, it would nevertheless provide some indication of what actions should be considered to be criminal for the purposes of international criminal law, thus supporting other *fora*, such as domestic ones, in finding a common understanding of the standards for complicity in international crimes. After having considered the main aspects of the *actus reus* and the major issues with which legal practitioners have to deal with when it comes to corporate

[112] ibid. 49.
[113] e.g., ICC, *Lubanga*, Confirmation of Charges Decision, (ICC-01/04-01/06-803-tEN), 29 January 2007, paras 346-348.
[114] Ventura (n. 79), 50.
[115] Huisman and van Sliedregt (n. 62), 827.

complicity in international crimes, subsection II will now consider whose actions should ultimately be attributed to the corporate entity.

ii) Whose Acts Bring About the Corporate Entity's Criminal Responsibility?

Given that the corporation's implication in the commission of international crimes derives ultimately from the conduct of a (multitude of) natural person(s), it should now be explored whose and which actions should be criminally relevant for the responsibility of the corporation. As summarised by Nerlich, while various jurisdictions require the activities to have been undertaken 'on account' or 'for the benefit' of the corporation, others require the agents to have acted in their functions within the company.[116] Between the two approaches, the former should be preferred, because it is clearly wider and avoids the evidentiary hurdles of proving a person's role within a corporation – which becomes particularly difficult for *de facto* or shadow positions.

The fact that an action has been undertaken 'on account' or 'for the benefit' of the corporation necessarily entails that mainly the acts carried out by people in certain positions of power within the company will be relevant. By way of example, the Criminal Convention on Corruption adopted in 1999 by the Council of Europe requires Member States to introduce legislation holding legal persons criminally liable,

> for the criminal offences of active bribery, trading in influence and money laundering […] committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: *a power of representation of the legal person; or an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person*[117] (emphasis added).

Such a limitation on whose actions can ultimately be attributed to the corporation is tied to the *mens rea* requirement: there must be at least corporate knowledge of the commission of an international

[116] Nerlich (n. 46), 902.
[117] n. 44.

crime. This does not necessarily mean that the actions of a 'low-ranking' employee are automatically excluded. If their criminal actions were carried out for the benefit of the corporation and with the knowledge or even acquiescence of at least some directors or board members, then it could still be attributed to the corporation. If, on the other hand, the employee carried out criminal activities with the intent of benefitting the corporation, but no corporate executive had any knowledge thereof, then it seems quite unfair to hold the corporation criminally accountable. Normally, therefore, the relevant criminal activities will be those carried out by those people whose *mens rea* is determinative in implicating the legal entity, i.e. people with decision-making and representative powers.

When it comes to the legal theories that can be utilised for the attribution of responsibility (also) to the corporation, mainly four have been considered by scholars:[118] a) command responsibility, b) *respondeat superior* ('let the master answer'), c) the identification or *alter ego* theory, and d) other holistic theories, such as the systems one. The first two are examples of vicarious liability: a person in a superior position is held liable for the crimes committed by one or more of its subordinates. On the one hand, according to *respondeat superior*, which is adopted mainly in the American common law system, 'a company director can be criminally responsible for the crime of an employee under a strict liability/'should have known' regime, due to the duties of supervision the law attaches to the former in furtherance to the employer-employee relationship between them."[119] On the other hand, command responsibility emerged during the post-World War II trials, where 'commanders of armed forces were held accountable for the conduct of their troops and any atrocities carried out by those troops either in the gas chambers or the battlefields'[120] and has since been applied mainly in the military context. Contrary to the first one, this theory does not apply on a strict liability basis, but rather on 'knowledge – either actual or constructive'.[121] These vicarious liability theories have the potential of encompassing even the actions committed by low-ranking employees. On the contrary, the identification theory is more concerned with the conduct of high-ranking officers, who are 'deemed to act as an embodiment of the corporation'.[122] Finally, there are other theories that attempt

[118] For the most part these theories have been explored in the context of individual responsibility of superior officers. Nonetheless, the same reasonings can be transposed in the context of attributing responsibility to the legal entity.
[119] Panagiota Kotzamani, 'Towards a unified approach to superior responsibility in international criminal law: Establishing the links between participation to the crime and the superior responsibility doctrine' (2022) 35 LJIL 679, 690.
[120] Kelly (n. 16), 674.
[121] ibid.
[122] Garcia (n. 32), 106.

"to escape from company liability derivative on the wrongdoing of one individual, [but rather] aim to capture the 'corporateness' of corporate conduct."[123] One such theory is the 'systems theory', according to which responsibility will be attributed to the corporation if the actions carried out by one of its members – be it a person in a position of power or an employee – can be traced back to a 'corporate culture' that effectively enabled such conducts. This latter route has been embraced by the Australian Criminal Code Act 1995, which in Part 2.5, Division 12.3(6) defines corporate culture as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place'.

All these theories have their positive and negative aspects when it comes to attributing responsibility to the corporate entity. *Respondeat superior* works on a strict liability standard, which seems inappropriate and excessively punitive, especially given that one of the tenets of criminal law is the maxim '*nullum crimen, nulla poena, sine culpa*': no crime, no penal sanction without fault. Therefore, there must be at least an element of knowledge that could be attributed to the corporation. Regarding the *alter ego* theory, its scope is clearly too narrow, since it only targets the actions carried out by high-ranking officers. As concerns the systems theory, even though very appealing, it appears to be rather vague and may potentially end up being just another version of strict liability. Moreover, from an evidentiary point of view, it seems quite difficult to reconstruct and demonstrate the existence of such a culture. It can therefore be concluded that the command responsibility theory seems to be the most appropriate, even though it is true that there are differences between the military and corporate contexts – the most evident being the strict hierarchy that characterises the former. However, 'an imputed knowledge theory might be more acceptable in a less rigidly structured corporate context because an individual might not be tried and sentenced to life imprisonment; instead, only corporate financial assets would be at risk.'[124]

Discussions on the *actus reus* alone can only go so far. It is now necessary to deal more directly with the *mens rea* element.

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[123] Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed.) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing Limited, 2005) 153.
[124] Kelly (n. 16), 681.

Section II: The *Mens Rea* of International Crimes Committed by Corporations

While the commission of the *actus reus* is relatively simple to assess, the main problems arise when it comes to demonstrating that the corporation had the requisite mental or subjective element (*mens rea*) in carrying out that criminal action. While the action of a single person could be attributed to the legal entity as a whole, the same cannot be said of the mental element.

After having established the most appropriate *mens rea* standard for aiding and abetting the commission of an international crime, in fact, it must be proved that that standard is met by the corporation itself, not only by the natural person who took part in the criminal activity. This is clearly an operation which raises a number of questions, the main one being: how can a legal entity hold an intention or knowledge and how can it be demonstrated?

Section II will discuss these thorny issues. In particular, subsection i) will consider the various *mens rea* standards and will examine the relationship between customary international law, according to which knowledge is sufficient, and the ICC Statute and jurisprudence, which call for the application of a purposive standard. Through the lens of functional pluralism, it will be ultimately argued that the two standards should coexist and efforts to reconcile these two sources of international criminal law should be abandoned. Subsection ii) will deal with how the presence of the required mental state can be established in a corporate context.

i) The Required *Mens Rea* Standard in Corporate International Criminal Law.

With regard to the subjective element standards, it has already been suggested that strict liability (i.e., the absence of any *mens rea* requirement) should be excluded when it comes to corporate *criminal* liability. This does not mean, however, that such a low standard could not be employed in tort cases, where sanctions have a much smaller impact on the losing party and *mens rea* is not a necessary element of civil liability.[125] Huisman and Van Sliedregt argue that, '[i]n domestic law, there are different *mens rea* standards for aiding and abetting/complicity in criminal law'.[126] On a spectrum from the stricter to the broader, the following standards can be found: sharing the intent of

[125] Huisman and van Sliedregt (n. 62), 824.
[126] ibid., 821.

the principal, purpose, knowledge of the principal's intent and *dolus eventualis*/foresight test.[127] As the authors observe, most legal systems adopt either the knowledge or the *dolus eventualis* standards.[128] At the international level, the International Commission of Jurists has explicitly stated that 'the requisite mental element (*mens rea*) of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator'.[129] The report then specifies that 'the aider and abettor need not share the *mens rea* of the principal but must be aware of the essential elements of the crime which was ultimately committed by the principal.[130] However,

> it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[131]

Given the consistent application of the standard of knowledge by international tribunals in the past decades, and especially in the jurisprudence of the ICTY and ICTR, 'one could persuasively argue that it constitutes customary international law'.[132] As highlighted by the authors, 'it accords with empirical reality [given that g]enerally, commercial interests lie behind business involvement in international crimes, not the intent to commit international crimes.'[133] Moreover, international tribunals have stated that 'knowledge may be actual or constructive, and may be inferred from the perpetrator's broader awareness, as well as "the relevant circumstances"'.[134]

The discussion on the required *mens rea* for complicity in international crimes was revived following the adoption of the Rome Statute. Article 25(3)(c), in fact, provides that 'a person should be criminally responsible and liable […] if that person: *for the purpose of facilitating the commission*

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[127] ibid.
[128] ibid.
[129] n. 85, 21.
[130] ibid.
[131] ICTY, *Blaskic,* (Appeals Chamber) 29 July 2004, para. 50
[132] Huisman and van Sliedregt (n. 62), 824.
[133] ibid., 822.
[134] Hathaway et al. (n. 106), 1614.

of such crime, aids, abets, or otherwise assists in its commission or its attempted commission […]' (emphasis added). Even though there is limited jurisprudence on the matter, the ICC has specified that,

> ['purpose'] introduces a higher subjective mental element and means that the accessory must have lent his or her assistance with the aim of facilitating the offence. It is not sufficient that the accessory merely knows that his or her conduct will assist the principal perpetrator in the commission of the offence.[135]

It is important, however, to highlight that 'the ICC's purposive standard does not concern the *mens rea* vis-à-vis the crime committed by the principal (where knowledge is sufficient), but only affects the *mens rea* vis-à-vis the aider and abettor's own actions (where mere intentional action is insufficient).'[136] It has been observed that the inclusion of such a standard in the ICC Statute does not comply with customary international law. However,

> scholars contend that the ICC Statute does not alter, supersede or restrict established customary international law: first, because the ICC Statute was drafted for a specific and unique Court and resulted from a series of political compromises and second, because not every provision was intended to reflect customary international law. Finally, the Court itself expressly states that its provisions should not limit international law. To abandon knowledge as the mens rea standard would, in the amici view, contradict the history and aims of international criminal law.'[137]

[135] *Prosecutor v. Bemba*, Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 74 of the Statute, para 97 (Oct. 19, 2016).
[136] Ventura (n. 79), 173.
[137] Huisman and van Sliedregt (n. 62), 822.

Notwithstanding the confusion that expectedly ensued after the entry into force of the ICC Statute, it has been suggested that there may be very little practical difference. As the International Commission of Jurists noted in its 2008 report, in fact,

> if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the official knowingly aided a crime in order to make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime "on purpose".[138]

What was merely theoretical speculation back in 2008 can be observed in practice in the 2016 *Bemba*[139] case itself, where

> the mere fact that the accused Babala was a financier who made payments to witnesses was insufficient, in and of itself, to infer that he made the payments for the purpose of corruptly influencing them. Rather, that inference was based on his knowledge of the circumstances surrounding the scheme to alter and contaminate witness testimony, and his personal participation in the said scheme.[140]

Once again, it is important not to conflate the ICC jurisprudence with international criminal law as a whole. While it is undeniable that the court represents the most important actor in the field, it should not be forgotten that its Statute shall not 'be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.[141] Nevertheless at first glance it would seem to be completely incoherent to apply the purpose standard in cases before the

[138] n. 85, 22.
[139] n. 135.
[140] Ventura (n. 79), 57.
[141] Article 10 of the ICC Statute.

ICC and the knowledge standard before other tribunals, either international or domestic. On the contrary, some authors contend that 'the search for a single unified aiding and abetting standard is neither likely to succeed nor advisable'.[142] In particular, the case is made for so-called 'functional pluralism': different international courts apply different *mens rea* standards because they have different functions and different mandates and for this reason 'the search for consistency and uniformity […] is misguided.[143] In fact, while the *ad hoc* and hybrid tribunals[144] were created in the aftermath of specific atrocities and their mandates were limited both territorially and temporally, the ICC has been introduced as a court of last resort, which is complementary to domestic proceedings and can adjudicate on virtually any case of commission of core international crimes involving a State Party, with the only limitation being that that case be of sufficient gravity.[145] In other words, the choice as to which *mens rea* standard has been applied by the different tribunals is indirectly linked to the issue of state sovereignty: while the *ad hoc* and hybrid tribunals did not raise particular worries around state sovereignty – given that the former were created by UN Resolution and did not require state consent and the latter were instituted together with the affected States – the same is not true for the ICC, hence the introduction of the principle of complementarity. Moreover, as has already been seen in the previous Chapter, the negotiations that led to the adoption of the Rome Statute were characterised by discussions between representatives of very different legal traditions. Consequently, it can be said that 'the addition of "purpose" was meant to represent a compromise between knowledge- and interest-based standards'.[146]

Functional pluralism relieves the interpreter of the nearly impossible task of reconciling different standards and of trying to establish which one should prevail. However, one must be careful not to confuse different functional purposes with 'bad coordination or negotiating exigencies that produced poorly considered differences'.[147] Given the aforementioned divergent rationales behind the creation of different international *fora* and the limited practical impact the adoption of a seemingly more stringent standard by the ICC has brought about, it is suggested here that this

[142] Hathaway et al. (n. 106), 1619.
[143] ibid.
[144] E.g., the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Special Court and the Residual Special Court for Sierra Leone.
[145] Hathaway et al (n. 106), 1620.
[146] ibid. 1629.
[147] ibid., 1630.

pluralism be accepted and not countered. For the purposes of the present thesis, it will be interesting to see how the application of functional pluralism will morph the *mens rea* standard when criminal proceedings are conducted by domestic courts following the principle of universal jurisdiction (Chapter 4).

ii) The *Mens Rea* Element in the Corporate Context.

As already alluded to in the previous Section, the glue that sticks together the actions carried out by an individual within a corporate structure and the criminal responsibility of the corporate entity is the presence of the required *mens rea* – be it knowledge or purpose – within the corporation itself. In other words, while the acts will necessarily be materially executed by a natural person, the relevant mental element will be that of the corporation, rather than that of the specific individual, with regard to those acts.

In the case of individual criminal responsibility, the International Commission of Jurists has highlighted that the assessment of a person's mental state 'is conducted on the basis of all relevant circumstances, established through direct and indirect or circumstantial evidence, [which means that] objective facts can be used to infer the subjective mental state of the defendant'.[148] In particular, the kind of evidence relevant to the state of mind could include information readily available within the company at the time the company representative provided the assistance, or widespread knowledge that crimes are being committed thanks to the corporation's assistance,[149] where the latter would amount to so-called constructive knowledge. Such knowledge could also be imputed from the position and experience of the representatives who possessed the relevant information:

> A competent business person in a leadership position will know the context behind the major efforts of his business. Indeed, it is only logical that a person selling a product will try to assess the needs of his or her customer in order to increase sales. Thus, tribunals will impute

[148] n. 85, 23.
[149] ibid.

> knowledge to certain corporate officials if the officials ordinarily must have knowledge of that type to effectively carry out his or her duties.[150]

But how can it be established that the corporation as a whole knew the relevant information? Depending on which theory of responsibility attribution is adopted (discussed *supra* in Chapter 2, Section I, subsection ii) different paths can be undertaken to demonstrate the requite *mens rea*. If one opts for either *respondeat superior* or the *alter ego* theories, it has been contended that the identification be extended 'so that the corporation is liable for the crimes of those with responsibility for particular spheres'.[151] This route seems rather problematic because it automatically transposes the requisite *actus reus* and *mens rea* of a single corporate executive to the legal entity itself. In other words, it constitutes a form of strict liability, which does not sit comfortably in the realm of criminal law, which is based on 'personal' responsibility, rather than presumptions of culpability. If responsibility is sought to be attributed through more holistic theories, that is those which take into consideration the corporation's culture and internal mechanisms, then it has been proposed that one should focus on the corporation's internal decision structures to determine whether they have contributed to the commission of the crime.[152] As already expressed above, holistic theories, while very appealing because less formalistic and probably more reflective of corporate reality, lack in preciseness – starting from the concept of 'corporate culture' – and risk becoming either an implementation of strict liability or a route that ultimately never leads to prosecution, depending on how much value judges place on the presumption of innocence.

Given that command responsibility is the broadest, most aligned with criminal law tenets and less vague theory, it is to be preferred. Wells suggests that in such a case the *mens rea* be proved through aggregation, the adoption of which indicates the recognition 'that individuals within a company contribute to the whole machine; it is the whole which is judged, not the parts'.[153] As the author herself mentions, this notion 'is problematic it if is taken to mean that the fragmented

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[150] Kyle Rex Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes against Humanity' (2005) 56 AFLR 167, 195.
[151] Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP, 2001) 155.
[152] ibid. 156.
[153] ibid.

knowledge of a number of individuals is fitted together to make one culpable whole'.[154] On the contrary, 'the question would not be whether employee X's knowledge plus employee Y's knowledge *added up* to recklessness or whatever, but whether, given the information held amongst a number of 'responsible officers', it can be said that the corporation itself was reckless'.[155]

The aggregation theory has the very evident advantage of assisting prosecutors and judges in demonstrating the presence of the required mental state without falling into the pitfalls of proving individual knowledge or purpose of people who acted within very intricate structures like corporations. It has been observed, for example, that individual criminal responsibility in *Farben*[156] could have been more easily demonstrated 'using a complicity standard of knowledge to impute parts of what each individual defendant knew to a unified whole on the part of the company […] through corporate minutes, transactional records, and aggressive cross-examination'.[157]

Moreover, it seems to mirror corporate reality as one in which different organs or sectors have specific functions, competences, and areas of specialty, which could mean that the high-ranking officers in each particular part of the company have access to different pieces of information. In other words, 'several individuals in a corporation may jointly contribute to a collective decision-making process without having full consciousness over the entire process'.[158]

Aggregating the pieces of information held by different executives – evidenced through documents, communications between officers, general knowledge, among other means – can therefore lead to a finding of the relevant *mens rea* within the corporation.

Conclusion

In the present Chapter it has been seen that the most frequent mode of liability for corporations in international crimes is aiding and abetting (or complicity) and that such involvement may take many forms – from direct collaboration with oppressive regimes to an active role in providing arms to war

[154] ibid.
[155] ibid.
[156] n. 5.
[157] Kelly (n. 11), 76.
[158] Kaja Blumtritt, 'No Soul to Condemn, No Justice to Achieve? Corporate Impunity Under the Rome Statute and its Implications for the ICC's Legitimacy' (2020) 3(3/4) JILPAC 311, 315.

criminals. Moreover, it has been observed that mainly two *mens rea* standards have been applied in international *fora* – that is, purpose and knowledge – and it has been argued that these different standards be accepted in the name of functional pluralism. Furthermore, it has been noticed that one of the major difficulties in the realm of corporate criminal responsibility lies in the attribution of acts committed by natural persons to the corporation itself. As regards the *actus reus*, it has been argued that the theory of command responsibility be adopted, according to which the legal entity will be held accountable for the criminal acts of one of its executives or employees when they have acted for the benefit or in the interests of the company itself. With regard to the *mens rea*, it has been suggested that an aggregation model of all the information held by different high-ranking officers within the corporation regarding those criminal acts be followed, and that the knowledge of such information be ultimately attributed to the legal entity.

After having analysed the different elements of international crimes in the specific case of their commission by corporations, it is now necessary to address some of the issues that arise when assessing the responsibility of those corporations that are characterised by long supply chains and by being part of much larger groups often dislocated in different parts of the world, that is MNCs. Moreover, it is important to have a discussion around which kind of effective sanctions can be issued against corporations, given that, unlike natural persons, they cannot be incarcerated.

CHAPTER 3

THE INTERNATIONAL CRIMINAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS AND HOW TO HOLD THEM ACCOUNTABLE IN AN EFFECTIVE WAY

As seen in previous chapters, holding a single corporation accountable for the commission of international crimes is already a very complex endeavour, both theoretically and practically. However, the difficulties exponentially increase when multinational corporations ('MNCs') are involved. Given that their activities are conducted in various countries, often through subsidiaries and very long supply chains, the allocation of responsibility becomes much harder, especially

because of the doctrine of separate legal personality, according to which each subsidiary and each member of the corporate group is a distinct legal entity. As a consequence, the parent company cannot be held accountable for violations committed by its subsidiaries, except for very specific cases that will be dealt with below. Given that international crimes are mainly committed by these very intertwined webs of distinct corporations that can ultimately be reconducted to a parent one – rather than by a single individual corporation – it is fundamental to explore these dynamics and understand how to allocate criminal responsibility within them. This requires engaging with some principles of company law. Moreover, it is necessary to discuss what effective sanctions would look like in these intricate mechanisms. Section I will be dedicated to an analysis of how company law effectively favours a culture of impunity, due to the concepts of separate legal personality and of limited liability. Various routes to accountability will be explored – from 'piercing the corporate veil' to circumventing this doctrine altogether by placing due diligence and oversight obligations directly onto parent companies. Section II will then deal with different sanctions that could be issued against MNCs. It will be argued that in order for these penalties to be effective, they must address the realities of the business world, have a deterrent effect and be more victim focused.

Section I: MNCs and International Criminal Law

Any meaningful discussion on corporate complicity in the commission of international crimes must necessarily address a particular type of legal entity: the multinational corporation, which 'is an enterprise producing goods or delivering services in more than one country.'[159] More specifically, it 'has its management headquarters in one (or rarely more than one) country, the home country, while also operating in other countries, the host countries.'[160] In the latter, MNCs carry out their commercial operations through subsidiaries and long supply chains. Moreover, they often operate 'through sub-contracting many activities to completely distinct corporations.'[161] The complex structure that characterises MNCs further complicates the allocation of responsibility since each member of the corporate group can hide behind the doctrine of separate legal personality, which

[159] Eurostat, Statistics Explained, Glossary: Multinational Enterprise (MNE), European Commission, (4 April 2019) https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Multinational_enterprise_(MNE) (accessed 11 May 2024).
[160] ibid.
[161] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1(2) BHRJ 203, 217.

makes it harder to hold the parent company liable. While 'an MNC […] consists of multiple corporations formed in different jurisdictions […] often there is a complex web of interconnections and profit-sharing.'[162] In this section, we first address the intricacies of MNCs and then we explore some ways through which the parent company can be held criminally responsible for international crimes committed by other members of the corporate group.

i) The Complex Structure of MNCs

Multinational corporations carry out operations in different countries through subsidiaries, subcontractors, and complex supply chains. It has been observed that certain transnational sectors, such as the extractive, arms supplying, chemical and financial ones are particularly prone to be the site of commission of international crimes.[163] More specifically, '[i]t is too often the case that crimes in these sectors are committed by subsidiary companies in third-world countries that are either unable or unwilling to prosecute'.[164]According to Garcia, '[i]nability usually stems from dysfunctional legal systems, undercriminalization, and lack of material means, especially in conflict zones [whereas u]nwillingness […] has more to do with the choice many countries are confronted with between protecting the human rights of their citizens and increased economic activity through foreign investment.'[165] Therefore, directly targeting the local actor by invoking the host country's legislation rarely, if ever, leads to any meaningful level of justice being achieved. Hence the practical necessity to hold the parent company – which is usually established in a Western country – responsible for the criminal activities carried out throughout its supply chains. Moreover, it has been observed that 'it may be difficult for victims to ascertain which company of a corporate group actually took a decision, or the subsidiary in question might lack the economic capacity to provide adequate compensation'.[166] All of these valid arguments in favour notwithstanding, holding a parent company liable for the crimes committed in another country by one of its subsidiaries is not as straightforward as one might

[162] ibid.
[163] Garcia (n. 32), 114.
[164] ibid.
[165] ibid.
[166] International Commission of Jurists, 'Access to Justice: Human Rights Abuses Involving Corporations. India' (2011) 62.

think. As noted by Kaleck and Saage-Maß, in fact, 'attributing the crime to a transnational corporation operating in the background raise[s] evidentiary as well as legal problems.'[167]

With regards to evidentiary matters, it is clear that conducting legal proceedings in a different country to that in which the crime was committed makes the access to evidence, especially witness testimonies,[168] particularly difficult. Moreover,

> [e]ven assuming that one can identify the particular entity [involved in an alleged violation], the use of intermediary holding companies, joint ventures, agency arrangements and the like, often protected by confidentiality arrangements, makes it difficult or impossible to establish a connection between the entity and its parent ownership.[169]

However, the major hurdles are of a purely legal character. Bilchitz identifies three issues of this kind.[170] The first one concerns jurisdiction and the fact that 'each state is generally regarded as sovereign with jurisdiction over its own internal affairs'.[171] On this point, Muchlinski has noted that,

> [i]n economic terms this allows for a further method of externalising risk away from the group, using not only corporate separation but the separation of the global legal order into discrete national and sub-national jurisdictions. In effect the 'corporate veil' is being supplemented by a 'jurisdictional veil' that can be used to limit risk by reason of corporate separation.[172]

The second legal issue highlighted by Muchlinski has to do with the fact that MNCs carry out their operations in 'parts of the world in which laws are not properly enforced, human rights standards are weak and courts lack independence'[173] and they often exploit these weaknesses to their economic

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[167] Kaleck and Saage-Maaß (n. 18), 722.
[168] ibid., 714.
[169] Mark B. Taylor, Robert C. Thompson and Anita Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (Fafo, 2010).
[170] Bilchitz (n. 161), 216.
[171] ibid.
[172] Peter Muchlinski, 'Limited liability and multinational enterprises: a case for reform?' (2010) 34(5) Camb. J. Econ. 915, 920.
[173] Bilchitz (n. 161), 217.

advantage 'without any fear of legal consequences'.[174] Given these conditions, prosecuting the local subsidiary by applying the host state's legislation would most likely be a useless effort. Moreover, it would not take into account the fact that it is the (usually Western-based) parent company that ultimately benefits the most out of criminal activities carried out in developing countries with the aim of maximising profits. The jurisdictional issues arising out of the inadequacy of the legislation and judicial systems in host countries, which make it appropriate to initiate proceedings in the parent company's home state, will be dealt with in Chapter 4.

The focus of this section is on the third legal impediment singled out by Bilchitz, that is the doctrine of separate legal personality between parent and subsidiary firms (also known as 'corporate veil'). This doctrine is coupled with limited shareholder liability, according to which 'the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment.'[175] This principle is applied also in the relationship between parent and subsidiary companies. These mechanisms 'make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent before the national jurisdiction of the home state of that company.'[176] These doctrines have been criticised for at least two reasons. First, taking into consideration the genesis of the principle of limited liability, it has been observed that it 'arose in the nineteenth century as a result of a political and economic struggle designed to stimulate economic activity by encouraging widespread investment in corporate shares.'[177] Moreover, '[t]he classical model of the limited liability joint stock company assumes that the owners are actual persons who require the corporate form to engage in the risks of business. It does not contemplate the situation where one company owns and controls another.'[178] Therefore, the main problem for accountability nowadays is the fact that,

> courts, then and since, have automatically applied concepts and policies designed to separate investors from liability for the risks of the business to protect as well each of the upper-tier

[174] ibid.
[175] Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 BHRJ 41, 48.
[176] ibid.
[177] Muchlinski (n. 172), 916.
[178] ibid., 918.

companies of the enterprise from liability for the debts incurred by their lower-tier subsidiaries in conducting the common business of the group.[179]

Second, Tully contends that these legal principles pay 'scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over the subsidiary'.[180]

These doctrines are considered to be basic principles of company law, but the accountability gap left by their application has led many scholars to come up with ways in which to mitigate, circumvent or even abolish them, as we shall now see.

ii) Different Ways to Hold Parent Companies Criminally Responsible for the Actions of Other Members of the Corporate Group.

Over time, mainly five routes to holding parent companies criminally accountable have emerged both in the literature and in court. The first one is known as 'piercing (or lifting) the corporate veil', a mechanism according to which a court will disregard the formal separate personality of a company and allocate responsibility directly to its shareholders (or, in the case of a corporate group, its parent or holding company). Generally speaking, courts are very reluctant to disregard the separate legal entity and therefore this mechanism will be employed only in very exceptional circumstances, especially in cases where it is necessary to 'prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations'.[181] Three requirements have been identified for the corporate veil to be pierced by courts. With regard to the relationship between parent company and its subsidiary, it will be necessary to prove that the former has '*de facto* control over the operations of the foreign subsidiary for it to be liable'.[182] More specifically, the lack of separate legal identity 'may arise from an excessive exercise by the parent of its control over the

[179] Phillip Blumberg, 'Accountability of Multinational Corporations: the Barriers Presented by Concepts of the Corporate Juridical Entity' (2001) 24 HICLR 297, 303.
[180] Stephen Tully, ''Never say never jurisprudence': comparative approaches to corporate responsibility under the law of torts' in Stephen Tully (ed.) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing Limited, 2005) 128.
[181] *Case Concerning the Barcelona Traction, Light and Power Co.* (Belgium v. Spain), 1970 ICJ, para. 56.
[182] Gwinne L. Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World (2014) 46 Colum. HRLR 158, 218.

management, operation and decision-making of the subsidiary eliminating any independent role for the officers and directors of the subsidiary.'[183] However, 'many courts applying "piercing" jurisprudence insist that the parent's participation in the management of the subsidiary must extend to day-to-day decisions before "piercing" is appropriate'.[184] The other two requirements are evidence of the facts that 'the subsidiary has been used as a shield to accomplish some fraudulent or unjust or inequitable conduct for the benefit of the parent or controlling shareholder'[185] and that the plaintiff has suffered an injury because of the defendant's conduct. Therefore, 'some courts require a showing that the subsidiary is insolvent or otherwise unable to satisfy a judgment'.[186] Alternatively, the corporate veil could be pierced if it was demonstrated that the subsidiary is in reality an agent of the parent, so that legally speaking the acts of the former are the acts of the latter, which will be ultimately held liable. Yet, '[f]or an agency relationship, the law requires not merely "control" but also a consensual transaction'.[187] Having said that, 'with subsidiaries typically utilized to shield the parent company from liability, it should be no surprise that very few parent/subsidiary relationships satisfy the common law requirements for an "agency" relationship.'[188] Overall, very few attempts to pierce the corporate veil have been successful.[189]

In light of the origins of limited liability and its original purpose, it has been suggested that the doctrine of limited liability in the case of corporate groups should be abolished.[190] Blumberg contends that '[i]n view of [the] fundamental changes in the nature of the shareholder and its relation to the subsidiary corporation, it should be immediately apparent that many of the presumed theoretical advantages of limited liability simply become irrelevant in the case of the corporate group.'[191] On the contrary, Muchlinski argues that 'the complete abolition of limited liability is fraught with too many pitfalls to be viable.'[192] In particular, it would damage the protection currently afforded to voluntary creditors and would increase the risks of entrepreneurship.'[193] Regardless of the arguments in favour or against Blumberg's suggestion, eliminating the doctrine of limited liability

[183] Blumberg (n. 179), 305.
[184] ibid.
[185] ibid. 306.
[186] ibid.
[187] ibid. 307.
[188] ibid.
[189] De Schutter (n. 175), 49.
[190] Muchlinski (n. 172), 925.
[191] Phillip Blumberg, 'Limited Liability and Corporate Groups' (1986) J. Corp. Law 573, 624.
[192] Muchlinski (n. 172), 927.
[193] ibid., 925.

would be a very radical departure from traditional company law, and it is highly unlikely that parliaments and courts will be willing to take such a step any time soon.

The third theory that has been suggested to circumvent the issues that arise out of the doctrines of separate legal personality and limited liability is known as the 'enterprise theory'. It 'essentially argues that members of integrated corporate groups should be jointly and severally liable for injury and damage arising from the activities of the members of the group, on the basis that they are, in reality, a "single economic enterprise", under common management.'[194] In *Union Carbide Corporation v. Union of India*,[195] the Indian government did rely on this principle. This case originates from the death of hundreds of thousands of people in Madya Pradesh because of a leak of chemical fumes in a pesticide factory run by Union Carbide India Ltd., a subsidiary of US-based Union Carbide Corporation. In that case, the government pleaded the following:

> [t]he complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality there is but one entity, the monolithic multinational. [...] Persons harmed by the acts of multinational corporation are not in a position to isolate which unit of the enterprise caused the harm.[196]

In the end, an out-of-court settlement was reached in 1989 and '[a] valuable opportunity was thus lost for firmly grounding the principle in contemporary Indian law.'[197] Generally speaking, attempts to hold parent companies liable under the enterprise theory have been largely unsuccessful.[198] In particular, [d]omestic courts have tended to reject these arguments on the basis that they undermine basic tenets of company law'.[199]

The fourth way through which parent companies could be held criminally liable is through the introduction of a 'legal presumption of parent responsibility for the acts of the subsidiary based

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[194] Jennifer Zerk, 'Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights' (2014) 46.
[195] *Union Carbide Corporation v. Union of India*, (1988) MPLJ 540.
[196] n. 166, 62.
[197] ibid., 64.
[198] Zerk (n. 194), 46.
[199] ibid.

on the actual or potential control exercised by the former over the latter.'[200] According to Muchlinski, this mechanism 'places the onus on the parent to rebut the presumption with conclusive proof of the independence of the subsidiary'[201] and could be introduced either by judicial development or, more realistically, under statute.[202] On the one hand, the introduction of this principle would be desirable in that it would ease the victims' burden of proof and place it on the corporation. On the other hand, it could become an incentive for parent companies to exercise any kind of control in a disguised manner and would most likely lead to a reluctance to get involved in the subsidiary's activities, even in terms of oversight and prevention.

The necessity for the parent company to exercise meaningful oversight over the activities of the other members of the corporate group is one of the arguments that has made de Schutter suggest a completely different approach to parent company criminal liability.[203] In his opinion, in fact, any attempt to circumvent or mitigate the principles of separate legal personality and limited liability are ultimately very unsatisfactory and only in very rare occasions have parent companies been held criminally responsible. Therefore, he suggests the focus be shifted onto those obligations that are placed directly on the holding corporation. In particular, this approach should focus 'on the direct liability of the parent company arising from the failure to exercise due diligence in controlling the acts of the subsidiaries it may exercise control upon.'[204] According to the author, placing obligations directly on the parent company has the advantage of avoiding 'the temptation for the company concerned to abstain from seeking to influence the behavior of the entities to which it is linked'.[205] In fact, the burden of proof lies with the parent company to demonstrate that 'it was unable to effectively avoid the contested behaviour of the subsidiary company from occurring, despite having exercised due diligence and despite its best efforts to seek information about such behaviour and to react accordingly.'[206] This route to accountability aligns with the current trend in the business and human rights field, where human rights obligations are framed in terms of due diligence requirements.[207] Interestingly, this approach has been recently incorporated in the Corporate

[200] Muchlinski (n. 172), 923.
[201] ibid., 924.
[202] ibid.
[203] De Schutter (n. 175).
[204] ibid., 50.
[205] ibid., 54.
[206] ibid., 53.
[207] See for instance the French Corporate Duty of Vigilance Law (LOI n° 2017-399 of 27 March 2017)

Sustainability Due Diligence Directive ('CSDDD') adopted by the European Parliament on the 24th of April 2024, which sets 'obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in companies' chains of activities.'[208] Out of all the theories explored above, this seems the most realistic and effective route to criminal accountability of parent companies for the commission of international crimes by any member of the corporate group. Given that currently the most stringent obligations imposed on corporations in the field of human rights concern due diligence duties, it seems rather appropriate to ground their criminal responsibility on the violation of those obligations. This solution presents two main advantages. First, it encourages the parent company to exercise meaningful control and oversight over the activities of the other members of the corporate group. In fact, 'the more it does seek to influence such behavior, the easier it will be for that company to prove that it has acted with due diligence to ensure that human rights are not negatively impacted by its activities or those of its affiliates or partners.'[209] Second, 'this solution contributes to legal certainty: rather than aligning the degree of responsibility of the company with the measure of the de facto influence it exercises, a measure that is always elusive and bound to be contested, such responsibility is to take all measures it can reasonably take in order to avoid negative human rights impacts.'[210] Further, this approach would also be beneficial from the victims' point of view. In fact, 'the imposition of a direct duty of care dispenses the victim from the burden of having to pierce the separation between the two legal entities'.[211]

Having established how to directly incriminate parent corporations, we will now analyse what a finding of criminal liability has looked like for them so far and then we will explore more effective and victim-focused measures to hold them accountable.

Section II: Sanctions and Other Remedies for Complicity in International Crimes by MNCs

Corporate responsibility for the commission of international crimes has traditionally taken the form of individual criminal responsibility of the corporation's executives. But even in the rare occasions

[208] Article 1 CSDDD.
[209] De Schutter (n. 175), 54.
[210] ibid.
[211] ibid., 51.

when it has been possible to allocate criminal responsibility within a corporate group – usually under tort law principles and statutes – the ways in which MNCs were ultimately sanctioned are far from satisfactory. The dissatisfaction comes mainly from the fact that penalties have often consisted in the payment of a sum of money – usually a very trifling amount if compared with the corporation's turnover. By way of example, the case brought against Shell for the crimes committed during the 1990s in Nigeria against members of the Ogoni community was settled in 2009 for $15.5 million, which 'represents exactly the 0.003% of Shell's total revenue from continuing operations only in the previous year.'[212] Further, these sums are sometimes not even paid directly to the victims, but to the government. This is what happened in 2007, when Chiquita 'pled guilty to the federal crime of funding a designated terrorist organization and paid a fine'[213] of $25 million to the Department of Justice, 'but the victims of their conduct have received nothing.'[214] Similarly, in 2022 Lafarge pleaded guilty to the count of 'conspiring to provide material support and resources in Northern Syria from 2013 to 2014 to the Islamic State of Iraq and al-Sham (ISIS) and the al-Nusrah Front (ANF)'[215] and paid $777.78 million in criminal fines and forfeitures directly to the US Government. After examining the penalty structure resulting from an allocation of criminal responsibility within MNCs, some ways through which the sanctioning system should be improved to be more effective will be explored.

i) The *Status Quo* of Sanctions against Corporations for the Commission of Grave Human Rights Violations

So far, successful cases against MNCs for complicity in the commission of international crimes or, more generally, human rights violations, have ended with the payment of a certain amount of money – usually, as a result of out-of-court settlements.[216] This kind of outcome can be criticised for at least two reasons. First, from a public interest perspective, the rationales behind the mechanism of out-of-

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[212] Garcia (n. 32), 103.
[213] EarthRightsInternational, 'Human Rights Claims Against Chiquita for Funding Colombian Paramilitaries will Proceed in U.S. Court' < https://earthrights.org/media_release/human-rights-claims-against-chiquita-for-funding-colombian-paramilitaries-will-proceed-in-u-s-court/ > accessed 21 May 2024.
[214] ibid.
[215] Office of Public Affairs, U.S. Department of Justice 'Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations' (2022) https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations accessed 29 June 2024.
[216] See, for instance, *Wiwa v. Royal Dutch Petroleum Co.* [2009] SDNY 96 Civ. 8386 (KMW) (HBP); *Union Carbide Corporation v. Union of India* (1988) MPLJ 540.

court settlements – that is, relieving the court system of some of the backlog and facilitating a quicker resolution of disputes – do not seem to justify the recourse to this alternative to trials in cases involving the most atrocious violations of human rights. In fact, it takes away the official public acknowledgment of wrongdoing deriving from a criminal prosecution or a finding of liability and does not necessarily mean that the MNC admits its culpability. This is evident in the *Wiwa* case, where the corporation emphasised that "the payment of the $15.5 million is not an admission of guilt, but a 'humanitarian gesture'."[217] Further, extrajudicial settlements are often not an entirely free decision on the part of victims, who often do not have the necessary resources to carry on legal proceedings that might last for years and might therefore be obliged to accept a settlement proposal even if it is less than satisfactory.

Second, the payment of an amount of money by the corporation can in itself be problematic. On this point, Kaeb contends that '[j]udged against a behavioral psychology standard, monetary fines risk putting a price tag on moral values, including the most egregious violations of human rights'[218] thus changing 'the underlying social norms into a mere market exchange.'[219] Moreover, it has been observed that 'financial sanctions can be passed on to customers, thus attenuating though not obliterating their punitive effects'.[220] To have any kind of meaningful impact on the corporation, financial sanctions must be related to the company's turnover. In fact, it must be kept in mind that, generally speaking MNCs take the majority of their commercial decisions after a cost-benefit analysis. Therefore, the threat of a monetary sanction must be greater than the profits that may come from the participation in the commission of international crimes and other human rights violations.

The current situation being far from satisfactory, it is necessary to explore other ways through which corporate groups and the parent companies in particular can be sanctioned for complicity in international crimes.

ii) Holding MNCs Responsible in a More Effective Way: Alternatives to Monetary Sanctions

Before considering which consequences a parent company should face after a finding of criminal responsibility, it is necessary to specify what it means for a sanction to be 'effective'. In other words,

[217] Garcia (n. 32), 103.
[218] Kaeb (n. 50), 388.
[219] ibid.
[220] n. 85, 58.

one must first identify the objectives of imposing a penalty on an MNC. One such goal could be deterrence, both specific (i.e., disincentivizing the company itself from engaging in similar criminal behaviour in the future) and general (i.e., discouraging other companies from engaging in similar criminal activities). According to Garcia,

> [r]eliance on a punitive model is the only response capable of adequately capturing social condemnation in a manner that is proportionate to the degree of blameworthiness inherent in the most serious crimes of concern to the international community, as well as the most effective means of accomplishing meaningful deterrence.

On the contrary, Huisman and Van Sliedregt observe that 'although numerous empirical tests have been conducted, there is no equivocal result that such prosecutions have a deterrent effect.'[221] Arguing somewhere in the middle between these two positions, Anderson and Waggoner suggest that 'the efficacy of that criminal punishment in deterring misconduct can and should be measured and compared with other methods',[222] such as civil sanctions. In their opinion, which is the best mechanism to obtain a deterrent effect 'is ultimately an empirical question, requiring a substantially different and much more instrumental analysis than that usually conducted when thinking about whether some action that provokes moral outrage (e.g., murder) should be criminalized.'[223] As most principles of traditional criminal law, the objective of deterrence focuses exclusively on the wrongdoer. However, it is necessary to consider victims' interests when identifying the ideal objectives of criminal punishment. In other words, when deciding how to punish the corporate wrongdoer, courts should not think only in terms of monetary compensation and the supposed deterrence that it brings about and should instead focus on what actions by the corporation could really have a positive impact on those who suffered from its wrongdoing. Therefore, an effective sanction would be one that could serve both as a deterrent and as an effective remedy for the victims.

With regard to sanctions different from an award of damages, domestic legislations provide for several other mechanisms. Garcia has categorized them into four groups: i) sanctions targeting

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[221] Huisman and van Sliedregt (n. 62), 824.
[222] James M. Anderson and Ivan Waggoner, 'The Changing Role of Criminal Law in Controlling Corporate Behavior' (2014) RAND Corporation, 39.
[223] ibid.

the assets of the corporation (e.g., fines, withholding of dividends, loss of investment); ii) sanctions targeting the activities of the corporation (e.g., temporary or permanent suspension or retraction of licenses, suspension of corporate activities, exclusion from public contracts, benefits, or aid); iii) sanctions targeting the existence of the corporation (e.g., dissolution); and iv) sanctions targeting the reputation of the corporation (e.g., publication of the sentence passed against it).[224] Out of these categories, the deterrent effect coming from fourth is the most debated. In fact, Garcia contends that 'the precondition for reputational damage is that clients, shareholders, financers, and other stakeholders take offence at the negative publicity about the corporation and consequently alter their behavior, e.g., by selling their shares or discounting their investments.'[225] However, it is interesting to note that the deterrent effect coming from reputational damage is not directly linked to the criminal investigations and proceedings *per se*.[226] Rather, it has been affirmed that 'the largest part of reputational loss due to market sanctions occurs right after cases of corporate misconduct are discovered and well before a criminal investigation or regulatory proceedings are opened.'[227]

This categorisation is an exhaustive account of traditional retributive penalties that are more focused on punishment rather than on the future improvement and 'rehabilitation' of the company. However, just as it is necessary to reintegrate into society a person after they have been incarcerated for having committed a crime, it is also important to direct the corporation towards the implementation of mechanisms that will prevent the same criminal activities from reoccurring in the future. This kind of criminal 'sanctions' could include 'orders to change internal policies and processes and reporting requirements, which may go to the heart of the company's wrongdoing.'[228] These obligations would be more incisive for a corporation than a mere award of damages, given that it will be under scrutiny for an extended period of time and will need to comply lest it be indicted for contempt of court. A similar route has been followed by the U.S. Department of Justice ('DOJ') with the adoption of so-called deferred-prosecution agreements ('DPA') and nonprosecution agreements ('NPA'). While after the enter into force of the Sentencing Reform Act 1984 and the Federal Sentencing Guidelines for Organizations 1991 the emphasis was on developing compliance programs 'and bringing in outside corporate monitors as a condition of probation, after the

[224] Garcia (n. 32), 112.
[225] ibid., 113.
[226] Huisman and van Sliedregt (n. 62), 825.
[227] ibid.
[228] n. 85, 59.

corporation was convicted',[229] over time 'these voluntary agreements became standard substitutes for the traditional criminal process of conviction and punishment.'[230] The monitor's main tasks are: 'to construct a robust compliance system and to recommend measures that would strengthen future compliance […], to perform many critical tasks, including the investigation of allegations on behalf of the [monitoring] agencies [and to] wield influence over the management of the company by virtue of their reports to the government.'[231]

On the one hand, these new mechanisms 'allowed prosecutors to accomplish their objective of reforming the corporation without the expense, delay, and risk of trial.'[232] On the other hand, they present a number of disadvantages, 'including the lack of judicial scrutiny, the lack of institutional competence of outside monitors, and the problems that are raised by partly outsourcing of the prosecutorial function to the corporations themselves.'[233] One solution to these shortcomings could be their 'judicialisation', that is, monitors could be selected by the judges and be required to report directly to the court, not the government. Moreover, this kind of monitoring and reporting requirements on their own do not seem to be an adequate response to corporate complicity in the most atrocious crimes known to humankind. Therefore, they should always accompany other sanctions, monetary or otherwise. This kind of solution could also counter the argument that '[i]increased funding for criminal investigations and prosecutions is no guarantee that the most significant obstacles to justice will even be addressed, let alone overcome'[234], given that traditional criminal prosecution will be followed by a scrupulous monitoring exercise on the part of the court and corresponding reporting obligations on the part of the company that will make it easier to address those behaviours attributable to a deviant corporate culture that a mere prosecution could unlikely change.

In addition to these punitive mechanisms, one could also think about innovative ways to target behaviours that are specific to MNCs. One of them could be the prohibition imposed on the parent company to carry on commercial relations with the member of the corporate group that engaged in the commission of international crimes, which could fall under the category of 'sanctions targeting

[229] Anderson and Waggoner (n. 222), xi.
[230] ibid.
[231] Kaeb (n. 50), 393.
[232] Anderson and Waggoner (n. 217), xi.
[233] ibid.
[234] Alston (n. 68), 665.

the activities of the corporation'. After all, the parent company benefits from the activities of its subsidiaries, and it could be difficult for it to find a substitute in a timely manner without suffering some sort of economic loss. If on the one hand this could be seen as a potentially strong incentive for parent companies to carry out an effective and thorough due diligence when it comes to the other members of the corporate group for fear of losing an important commercial partner were it to be implicated in criminal activities, on the other hand one must take into consideration the negative effects that this kind of punishment could have on third parties, especially on the subsidiary's employees. In fact, Vázquez observes that 'the claim that multinationals are on the whole detrimental to human rights has […] been disputed'[235] and that 'from a multi-factored statistical analysis […] the presence of MNCs is positively correlated with both civil liberties and political freedoms in developing countries.'[236] Moreover, they provide (often very underpaid) jobs to millions of people in those countries. If these subsidiaries were to lose their commercial relation with one of their major Western buyers, a lot of people will probably lose their jobs and their life conditions would significantly worsen. In other words, when thinking about ways to hold MNCs accountable for complicity in international crimes by one member of the corporate group, it is important to engage in a balancing exercise between the need to punish the corporation and the negative effects that those types of sanctions could have on vulnerable third parties. Therefore, a prohibition to carry on commercial relations with a subsidiary could be issued only in the gravest cases of complicity, perhaps when the subsidiary has participated repeatedly and systematically in the commission of international crimes and the parent company has failed to prevent and/or stop such a behaviour. Precisely the 'potential collateral damage that aggressively pursuing a corporate prosecution can entail' was behind the rise of NPAs and DPAs in the US, as seen above.[237]

Another measure that could be employed has to do with corporate reputation and could therefore be included in the fourth category identified by Garcia. A common mechanism adopted by corporations to escape or mitigate the reputational consequences of criminal proceedings against them is to change their denomination. This has been the case for Lundin Energy,[238] which has

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[235] Carlos Manuel Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 Colum. J. Transnat'l L. 927, 949.
[236] ibid.
[237] Anderson and Waggoner (n. 222), 42.
[238] Both its former chairman and CEO have been indicted for aiding and abetting war crimes in Sudan during the period 1999-2003.

changed its name into Orrön Energy AB, and United Brands Corp., now Chiquita Brands International.[239] This allows the corporation to look like a 'new' legal entity in the eyes of customers and investors and to distance itself from its past wrongdoing. Given this common practice, imposing a prohibition to change denomination for a set period of time could also add to the deterrent effect that comes out of reputational damage.

Finally, going back to the considerations made earlier about the effectiveness of a sanction and the fact that it must be victim focused, one could also look at other fields, such as that of transitional justice. A typical measure of transitional justice that could be employed also in criminal cases against corporations could be reparations, which are 'rooted in private law remedies, such as tort and delicts, reflecting […] principles of corrective justice'[240] and 'are intended to redress harm caused to victims.'[241] They can have different shapes, but the main types are 'restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition.'[242] Including these mechanisms and tailoring them to the specific harm that has been caused in each case could be a valid effort in trying to make the whole process more victim centered and less concentrated on mere punishment. Ordering specific reparative measures, such as the restitution of land that has been ruthlessly exploited by extractive companies causing thousands of deaths or the implementation of programmes designed to empower local communities after the commission of atrocious crimes, could make an actual difference in the victims' lives and would surely be more burdensome for a corporation than simply paying a sum of money. The main difference lies in the fact that companies will be obliged to specifically address the wrongdoing they caused and to remedy it, instead of merely paying an amount of money that will be likely treated like any other cost.

A final aspect that should be addressed about sanctions is the lack of international criminal *forum* to issue them. The fact that the ICC has no jurisdiction over legal persons has led Fauchald and Stigen to think about alternative international actors.[243] In particular, the authors contend that 'the Security Council, acting under Chapter VII of the U.N. Charter, can impose indirect sanctions

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[239] Chiquita is accused of crimes against humanity, in particular the funding of Colombian paramilitaries, who are responsible for extrajudicial killings, torture, forced disappearances, war crimes, among other crimes.
[240] Luke Moffett, 'Transitional justice and reparations: remedying the past?' (2017) in C. Lawther, L. Moffett, & D. Jacobs (eds.), *Research handbook on transitional justice* (Edward Elgar Publishing Ltd, 2017) 2.
[241] ibid., 1.
[242] ibid., 4.
[243] Ole Kristian Fauchald and Jo Stigen, 'Corporate Responsibility Before International Institutions' (2009) 40 The Geo. Wash. Int'l L. Rev. 1025.

on corporations when their activities threaten peace and security.'[244] These measures would be indirect since only States are obliged to comply with Security Council's resolutions and they would be the ones directly sanctioning the designated corporations. While this might seem like an interesting way through which sanctions could be issued, it is both unrealistic and undesirable. It is unrealistic because the majority of the biggest corporations (i.e., those that are usually involved in the commission of international crimes) either come from the States that are members to the Security Council or have strong commercial ties with them. This route is also undesirable given the highly politicised nature of that institution, which would make any decision to punish a corporation be to their own national and geopolitical advantage. The issue of which *forum* could and should be preferred when it comes to corporate international criminal law is indeed a complex one, and this is what Chapter 4 will be focused on.

Conclusion

In light of the very intricate structures that characterise multinational corporations, in this Chapter it has been suggested that the most effective way of holding the corporate group accountable is by imposing direct due diligence obligations on the parent company itself and then prosecute it when a member of the corporate group participates in the commission of an international crime and the parent company failed to prevent and/or stop the criminal activity. Moreover, given the dissatisfaction that comes from the sanctioning system, mechanisms that are different from mere monetary compensation have been explored. On that aspect, the conclusion that has been reached is that sanctions should be tailored to each specific case and should focus not only on deterrence and the wrongdoer but should also be creative in trying to find ways that can benefit victims in a meaningful way and can help the corporation change the internal policies that allowed those deviant behaviours to occur in the first place.

CHAPTER 4: INTERNATIONAL CRIMINAL LAW BEFORE NATIONAL COURTS: UNIVERSAL JURISDICTION

[244] ibid., 1050.

Naturally, the substantive issues regarding the international criminal responsibility of corporations translate also into procedural issues. In particular, the fact that the jurisdiction of the ICC does not include legal entities implies that there is no international *forum* where they could stand trial. Therefore, such a competence falls back to domestic courts, given that many jurisdictions do recognise their criminal responsibility. Surely, national courts could prosecute corporations that have aided and abetted the commission of international crimes on the basis of 'traditional' jurisdictional links, that is, the personal and territorial ones. Following this connection with the prosecuting state, domestic courts would adjudicate on cases in which either the perpetrator or the victim is a citizen of the prosecuting state or on cases in which the crime has been committed on the territory of the prosecuting state. However, the traditional application of jurisdiction in cases of international crimes – especially when committed with the complicity of corporations – is not in itself sufficient to guarantee effective justice. This is due to the fact that there are prevailing obstacles both of a practical and of a political character. This is why the mechanism of universal jurisdiction should be taken into consideration. According to this tool, any state could adjudicate on the commission of international crimes, regardless of the identity of the perpetrator and the victim and of the *locus criminis*. In this chapter, first we will explore the issues that characterise the application of traditional jurisdictional links. Then, we will explore the tool of universal jurisdiction as a solution to those problems.

Section I: International Criminal Law and Domestic Courts: Issues with Traditional Jurisdictional Links in the Attainment of Justice

The inexistence of an international *forum* that could adjudicate on corporate complicity in international crimes makes it so that only domestic courts have this competence. Given that the prohibitions to commit genocide, crimes against humanity, the crimes of aggression and torture are considered to be *jus cogens* norms or peremptory norms of general international law – that is, norms 'accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted, and which can be modified only by a subsequent norm of general

international law having the same character'[245] – States are under an obligation to either extradite or prosecute (*aut dedere aut punire*) those responsible for their commission.

However, the application of traditional jurisdictional links, that is, the personal and territorial ones, is less than satisfactory, especially in the case of corporate involvement in the commission of international crimes. On the one hand, with regard to the territorial link, it has been observed that 'there are several advantages of conducting legal proceedings in the host state, above all a better access to the evidence, specifically to witness testimonies.'[246] Moreover, 'proceedings that are conducted in proximity to the scene of the crime may better contribute to the social and political discourse that is necessary to properly deal with human rights abuses'.[247] However, it must be highlighted that international crimes usually take place in developing countries, which tend to lack the necessary resources to prosecute powerful corporations and present inadequate and corrupt justice systems.[248] Moreover, 'large-scale prosecutions would depend on regime change in the state in which the atrocities occurred, and even in those circumstances there are always strong pressures to keep prosecutions to a minimum in order to facilitate reconciliation'.[249] On the other hand, with regard to the personal link, the state of incorporation or home state would have jurisdiction over the crimes committed by its corporations. Given that the majority of parent companies are based in Western States, which 'have relative power parity with corporations, as well as being sufficiently resourced to handle complex corporate cases',[250] they appear to be more well-equipped to carry out this kind of criminal proceedings. Moreover, it could be said that '[a]s economic beneficiaries of extraterritorial corporate activity, home states arguably have a corresponding moral duty to regulate that corporate behaviour.'[251] Further, '[a]ccess to legal aid, legal expertise and class action tools may also be an advantage of pursuing litigation in some states over others.'[252] However, those States may be reluctant to prosecute their own corporations, given their contribution to the economic power and well-being of the country. Given the shortcomings that characterise the application of traditional

[245] Report on the work of the seventy-first session of the ILC on the topic "Peremptory norms of general international law (jus cogens)" Chapter V (2019).
[246] Kaleck and Saage-Maaß (n. 18), 714.
[247] ibid., 715.
[248] ibid.
[249] Alston (n. 68), 671.
[250] Joanna Kyriakakis, 'Industry and atrocity: the business and human rights context' in Joanna Kyriakakis (ed), *Corporations, accountability and international criminal law* (Edward Elgar 2021) 23.
[251] ibid.
[252] ibid.

jurisdictional links, the alternative of universal jurisdiction should be considered as a possible tool through which justice for the commission of the most heinous crimes can be attained.

Section II: Universal Jurisdiction

Thanks to the mechanism of universal jurisdiction any court of any State has jurisdiction to adjudicate on the commission of international crimes regardless of the identity of the perpetrator and victim and of the place of commission of the crime. Being an exception to traditional jurisdictional rules, this tool is generally accepted by the international community only insofar as it concerns only the most egregious crimes, such as international crimes. On this point, it has been observed that '[e]xceeding these limited crimes would make justifying the use of universal jurisdiction more difficult.'[253]

Even if it has been applied with increasing frequency in the past decades, it still presents three main points of criticism. First, according to Kaleck and Saage-Maaß,

> no matter which national jurisdiction is chosen to pursue claims against corporate actors for the commission of international crimes, such cases always face a variety of legal and factual challenges in any legal forum. National legal systems are generally not well equipped to deal with international crimes caused by corporations.[254]

On the same line of thought, Kremnitzer argues that '[t]o the extent that the power to prosecute is in the hands of states, powerful firms may activate political pressure and prevent criminal charges against individuals, for instance, by offering states a deal that will limit criminal liability to the corporation alone.'[255] Moreover, he observes that 'states may prefer the investments and the economic activity of a culprit-corporation over the need to protect their citizens from such a corporation.'[256] According to the author, the only solution is 'to deal with criminal liability of corporations through an international criminal law forum, where corporations have less power and

[253] Kendra Magraw, 'Universally Liable – Corporate Complicity Liability Under the Principle of Universal Jurisdiction' (2009) Minn. J. Int'l L. 458, 490.
[254] Kaleck and Saage-Maaß (n. 18), 715.
[255] Kremnitzer (n. 60), 917.
[256] ibid., 916.

possible impact.'[257] Second, there is the issue of coordination among different states and the risk of multiplication of criminal proceedings in more than one jurisdiction. Finally, there is the contention that universal jurisdiction – having been mainly by Western courts against non-Western citizens – represents an instantiation of 'jurisdictional imperialism',[258] thus perpetuating some kind of dominance and control of Western powers over other parts of the world.

These criticisms are not insurmountable. With regard to the first, Magraw contends that many domestic court systems 'have the expertise and knowledge to deal with a complex and developing area of the law.'[259] In particular, according to the Clooney Foundation for Justice, [a]n important development in the successful prosecution of [war] crimes has been the establishment of specialised prosecutors and units in 26 countries so far.'[260]

Moreover, Magraw notes that

> [s]ince corporations are not subject to criminal proceedings in many states, they are able to slip through the "governance gap" in the justice system. […] Therefore, universal jurisdiction without a jurisdictional requirement, such as that set forth in the ICC, provides the means to hold corporations accountable, while allowing states to prosecute offenders of grave crimes.[261]

Further, the possibility of holding corporations liable through the mechanism of universal jurisdiction could constitute a deterrent for corporations, which would then be subject to prosecution by different countries, facing a greater risk of being held liable. While abstractedly an international court like the ICC could be more independent and less prone to pressures from single corporations, at the moment the ICC has no such jurisdiction, and it is unlikely that its statute will be changed any time soon. Therefore, from a pragmatic point of view, domestic courts are still the best option there is to attain justice for corporate complicity in international crimes.

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[257] ibid., 917.
[258] Dana Ahdab, 'Universal Jurisdiction: Jurisdictional Imperialism or Syria's Only Hope for Justice' (2021) Colum. J. Transnat'l L.
[259] Magraw (n. 253), 495.
[260] Yola Verbruggen, 'War crimes: proponents of universal jurisdiction target multinational corporations' (2023) International Bar Association.
[261] ibid., 492.

With regard to the issue of coordination and the risk of multiple proceedings being carried out in different jurisdictions, it is fundamental for states to collaborate with each other in order to implement the mechanism of universal jurisdiction in a coherent manner. An example of international cooperation in this field can be seen in the Lundin case, where 'Swedish prosecutors are indebted to Switzerland for ordering its police to raid the company's Geneva office to seize documents that have proven critical to the case.'[262] On the 26th of May 2023 the Ljubljana-The Hague Convention On International Cooperation In The Investigation And Prosecution Of The Crime Of Genocide, Crimes Against Humanity, War Crimes And Other International Crimes was adopted with a view 'to facilitate international cooperation in criminal matters between States Parties with a view to strengthening the fight against impunity'[263] for international crimes. Its adoption shows that there is a certain awareness in the international community regarding the need to act in a coordinated and coherent way when engaging in the fight against impunity for the most egregious crimes. On this point, de Schutter has provided a list of concrete ways in which this collaboration could take place. According to him,

> [s] uch a list could include assisting foreign courts in taking evidence or statements from persons; in effecting service of judicial documents; in executing searches and seizures, in freezing evidence, in providing originals or certified copies of financial, corporate, or business records, or in identifying and tracing proceeds of crime, property, instrumentalities, or other things for evidentiary purposes; or in facilitating the voluntary appearance of persons in the requesting state. It could also include co-operating in the execution of judgments, by identifying, freezing, and tracing proceeds of crime or facilitating the recovery of assets.

Finally, the contention that universal jurisdiction is just another tool through which Western States perpetuate their dominance over other States is perhaps the most difficult to counter. Interestingly, however, '[t]he growing attention drawn to companies' involvement in international crimes is remarkably also leading to the first trial under universal jurisdiction in a western country against the national of another western country.'[264] That is the aforementioned case of Lundin Energy, where the Swiss citizen Alex Schneiter is indicted in Sweden for complicity in war crimes as former head of

[262] Paul Fraioli, 'Strategic Comments: The proliferation of corporate war-crimes cases' (2023) 29 (32) IISS 3.
[263] Article 1.
[264] Trial International, 'Universal Jurisdiction Annual Review 2023', 11.

exploration of the Swedish oil company Lundin Energy. This case is particularly important because it 'highlights [the] potential use [of universal jurisdiction] in a systematic and principled way, countering accusations of double standards.'[265] While it is important to always monitor how these proceedings are initiated and against whom they are directed in order to find out whether there is a bias towards people or companies coming from certain parts of the world, it is also true that Western countries are usually those that have the resources to actually carry out complex investigations and legal proceedings in cases of international crimes committed abroad.

On a practical note, there are at least three issues that need to be addressed. First, there is the question of whether universal jurisdiction should be resorted to every time there is corporate complicity in international crimes, regardless of which form that complicity takes. According to Magraw, however, 'corporations should be held liable, at a minimum, when they engage in direct aiding and abetting of human-rights violations, [given that] it might prove too difficult to hold corporations liable under a looser standard in an already controversial doctrine such as universal jurisdiction.'[266] Second, the issue of presence on the territory of the prosecuting state must be discussed. In fact, while in theory universal jurisdiction does not require any link to be there between the international crime committed and the prosecuting state, in reality many states have introduced – either through statute[267] or through caselaw[268] – the requirement for the perpetrator to be 'present' on the territory of the prosecuting state.[269] In the case of transnational corporations, this requirement could be satisfied every time they have some kind of office or activity which goes beyond just selling their products in the prosecuting state. Finally, as regards the *mens rea* standard that should be considered when holding corporations liable for complicity in international crimes, domestic courts should focus only on those conducts that have been put in place by corporations for the purpose of facilitating the commission of such crime. In fact, following the reasoning around functional pluralism that has been made in section II), the issues that universal jurisdiction rises around

[265] ibid.
[266] Magraw (n. 253),
[267] In Italy a legislative proposal is currently under consideration.
[268] In the *Guatemala Genocide* case, the Spanish Supreme Court found in customary international law a need for a 'connecting nexus', be it the presence of the defendant, the victims' nationality, or some other point of contact with national interests.
[269] According to Eurojust, in the European context this link is required by Austria, Croatia, Denmark, Netherlands, Romania and Spain.

sovereignty must be considered. Given that it impinges on the 'traditional' jurisdiction that another State has, perhaps the knowledge standard is too loose and instead purpose must be considered.

Conclusion

Given the absence of an international tribunal before which parent companies could stand trial for complicity in international crimes, such a competence remains in the hands of national courts. In order to be effective, their jurisdiction should not be limited neither personally nor territorially and that is where the concept of universal jurisdiction becomes very appealing: any court of any state can adjudicate on the commission of any international crimes regardless of the identity of the perpetrator and victim and of the place of commission of the crime. A key aspect for this doctrine to be beneficial to justice is coordination and collaboration between states.

CONCLUSION

In conclusion it can be said that the accountability gap left by the lack of criminal prosecution of corporations complicit in international crimes can and should be filled. First of all, thanks to the developments that took place in the past decades, corporations are now to be considered as subjects of international law and should therefore be held criminally responsible for their role in the commission of international crimes. We argued that no proper legal argument has been put was forward against the concept of corporate criminal responsibility in international law during either the Nuremberg Trials or the negotiations that preceded the adoption of the ICC Statute. In any case, the international legal landscape has changed significantly since the late 1990s when the Rome Statute was discussed, with numerous soft law instruments having been adopted which indirectly impose obligations on corporations in the field of international human rights. Moreover, an increasing number of States have recognised corporate criminal responsibility. Given these changes, it can be said that a customary rule of international law is emerging to the effect that corporations can and should be held responsible for their involvement in the commission of international crimes. We then suggested that it is highly desirable that individual responsibility be coupled with collective liability and that criminal law should be preferred over civil law mechanisms. These conclusions were reached taking into consideration the point of view of victims, in an effort to identify the most

effective route to proper justice. Finally, it has been specified that criminal responsibility should concern only core international crimes and not all human rights violations. Further, we saw that the most frequent mode of liability for corporations in international crimes is aiding and abetting (or complicity) and that such involvement may take many forms – from direct collaboration with oppressive regimes to an active role in providing arms to war criminals. Moreover, we observed that mainly two *mens rea* standards have been applied in international *fora* – that is, purpose and knowledge – and it has been argued that these different standards be accepted in the name of functional pluralism. Furthermore, we noticed that one of the major difficulties in the realm of corporate criminal responsibility lies in the attribution of acts committed by natural persons to the corporation itself. As regards the *actus reus*, we argued that the theory of command responsibility – according to which the legal entity will be held accountable for the criminal acts of one of its executives or employees when they have acted for the benefit or in the interests of the company itself – should be adopted. Regarding the *mens rea*, we suggested that an aggregation model of all the information held by different high-ranking officers within the corporation regarding those criminal acts be followed, and that the knowledge of such information be ultimately attributed to the legal entity. Further, in light of the very intricate structures that characterise multinational corporations, we suggested that the most effective way of holding the corporate group accountable is by imposing direct due diligence obligations on the parent company itself and then prosecute it when a member of the corporate group participates in the commission of an international crime and the parent company failed to prevent and/or stop the criminal activity. Moreover, given the dissatisfaction that comes from the sanctioning system, mechanisms that are different from mere monetary compensation have been explored. On that aspect, the conclusion that has been reached is that sanctions should be tailored to each specific case and should focus not only on deterrence and the wrongdoer but should also be creative in trying to find ways that can benefit victims in a meaningful way and can help the corporation change the internal policies that allowed those deviant behaviours to occur in the first place. Finally, given the absence of an international tribunal before which parent companies could stand trial for complicity in international crimes, such a competence remains in the hands of national courts. In order to be effective, their jurisdiction should not be limited neither personally nor territorially and that is where the concept of universal jurisdiction becomes very appealing: any court of any state can adjudicate on the commission of any international crimes regardless of the identity of the perpetrator and victim and of the place of commission of the crime.

A key aspect for this doctrine to be beneficial to justice is coordination and collaboration between states.

Given the amount of cases of corporate complicity in international crimes and the way international criminal law have evolved in the past decades, 'the recognition of corporate criminal liability at the international level is not only desirable and feasible, but that it should be the next logical step considering the developments that have taken place in the field since the Nuremberg Trials.'[270] The application of international criminal law also to corporations is fundamental not only in the victims' interests and, more generally, in the interests of justice, but also for the credibility of the field in itself as a whole. As Blumtritt put it, '[c]losing the eyes before socio-economic realities risks nothing less than degrading the international criminal justice project into a farce.'[271]

[270] Garcia (n. 32), 129.
[271] Blumtritt (n.158), 331.

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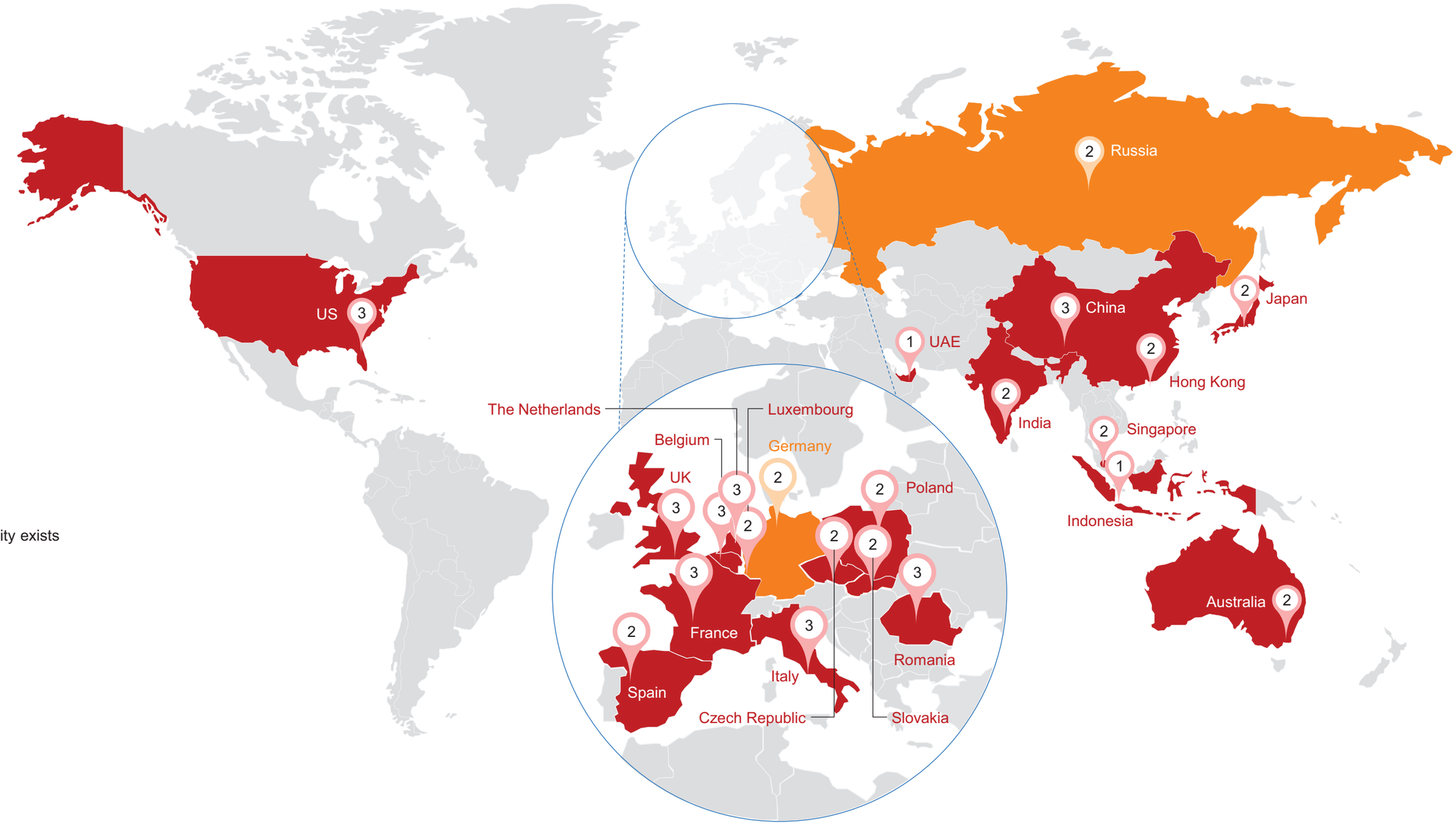
CLIFFORD
CHANCE

Corporate Criminal Liability
April 2016

To accompany our recently published **Corporate Criminal Liability report** we have drawn together some of the high level trends. We have ranked the various jurisdictions on the basis of whether or not corporate criminal liability exists and the enforcement enthusiasm of the authorities.



Key:

- Corporate Criminal Liability exists
- Quasi Criminal/ Administrative liability exists
- No Liability Exists
- 1 No or little interest
- 2 Some interest
- 3 Very enthusiastic

Source: Clifford Chance reviewed the corporate criminal liability landscape in 22 major markets and ranked them according to their level of corporate criminal liability and their enthusiasm for enforcing it.

Australia: An Australian corporation may be subject to investigation and prosecution by a range of different authorities, each operating pursuant to distinct statutory regimes, as a result of which the landscape of corporate criminal liability is fragmentary and constantly changing. Although the trend is still to pursue individuals rather than corporates, there are current high profile corporate investigations such as the investigations by the Australian Federal Police and the Australian Securities and Investments Commission into allegations of foreign bribery involving Leighton Holdings Limited.

China: Whilst corporate criminal liability is a longstanding concept under PRC law, the high criminal fines being imposed on corporations is a newer phenomenon. The distinction between corporate and individual liability is blurred so that companies need to have strong corporate governance policies to avoid this risk.

Hong Kong: Whilst corporates may be held criminally liable for most offences, the Hong Kong authorities tend to target individuals for criminal prosecution, whereas corporates will face greater regulatory enforcement action. Unlike in some other jurisdictions, there is no specific statutory offence of corporate manslaughter which meant that following the ferry disaster in October 2012 when 39 people died, although the two vessels' captains were prosecuted, their respective employers were not, but were instead fined for criminal breaches of marine safety rules.

India: Corporate criminal liability is a relatively new concept in Indian law (established by a Supreme Court decision in 2005). The Supreme Court has recently confirmed that a corporate is in virtually the same position as an individual in terms of prosecution and can be convicted for most common law and statutory offences. Nevertheless, criminal enforcement remains focused on individuals, although there is a growing emphasis on good corporate governance under the Companies Act.

Indonesia: Currently, under the Indonesian criminal code, only individuals can be prosecuted although corporate criminal liability exists for certain specific offences including bribery and money laundering. Despite this, law enforcement agencies have been reluctant to bring charges against corporate entities and instead focus their efforts on bringing charges against culpable individuals. There is currently a draft bill before Parliament to amend the code to establish corporate criminal liability more broadly.

Japan: Corporates can only incur criminal liability pursuant to specific statutory language expressly imposing such liability and where a director, officer or employee has been found to have committed the offence in question in connection with the corporate entity's activities or assets. The trend is increasingly high maximum fines to be set out in legislation for corporates. Criminal prosecution is now seen as a real risk by the vast majority of corporate entities in Japan. In July 2013 Olympus, one of Japan's most well known corporates, was convicted of submitting false statements in its annual securities filings.

Singapore: Corporate criminal liability operates in a similar way to the UK. Financial institutions are subject to increasing scrutiny in Singapore. Legislation is being amended to create new offences and sanctions created relating to the manipulation or attempted manipulation of financial benchmarks.

Belgium: Since the adoption of legislation in 1999 enabling corporate entities to be prosecuted a significant number of corporate entities have faced criminal investigations and/or prosecutions and public prosecutors have enthusiastically used their powers to prosecute. Criminal prosecution is now seen as a real risk by the vast majority of corporate entities in Belgium.

Czech Republic: In 2012, legislation was introduced enabling the prosecution of corporates as part of the Czech government's anti-corruption strategy and its international commitments. Since its enactment, there have been approximately 30 convictions and some severe sentences imposed – including dissolution and, in another case, prohibition of business activities for a period of 10 years. Also in 2012 DPAs were introduced although have not been used with any great frequency so far. As DPAs become a greater feature of the international prosecutorial landscape, it is likely that the use of DPAs for corporate offending in the Czech Republic will increase.

France: The principle of corporate criminal liability in France was introduced in 1994 since when the number of prosecutions and convictions of corporates has grown significantly, in particular more recently. The level of fines on corporates is also increasing. In December 2013 a new prosecutor's office was created dedicated to financial crime which has recently been very active in investigating corporate and financial institutions.

Germany: Currently, corporates cannot be held criminally liable in Germany although whether German law should be amended to include criminal liability for corporate entities is the subject of increasing debate. There is a draft law on corporate criminal liability for the State of North Rhine-Westphalia due to be debated in the German Parliament in the near future.

Italy: Law 231 enables a corporate to be prosecuted if an offence has been committed for its benefit by an employee, even if that employee is not prosecuted. Italy's appetite for prosecuting crime committed for the benefit for the benefit of corporations continues to remain high. Moreover, following recent events damaging the environment, Italy has increased its interest and efforts in prosecuting corporate for actions and conducts that harm the environment and in 2015 has enacted a piece of legislation that expands the punishable offences and increases sanctions, which now also include a temporary suspension from business activity. Italy has seen a positive trend in this area with the number of prosecutions of corporates increasing.

One of the most high profile recent cases before the Italian Supreme Court related to the Thyssenkrupp fire in which seven employees died. The company was convicted for failing to implement adequate management and organisational control protocols for the prevention of the offence and fined 1 million Euros, banned from bidding for government contracts and from advertising products for six months. It had to disgorge profits of € 800.000,00 and publicise the sentence.

Luxembourg: Corporate criminal liability was only introduced into Luxembourg law in 2010 and is largely untested in practice. However, the Luxembourg legal community expects that public prosecutors will utilise the new law.

Poland: Corporate criminal liability was introduced in Poland in 2003. Unlike Italy, a corporate can only be held criminally liable after the person who committed the offence on its behalf has been convicted. It is a defence for a corporate to prove that due diligence was conducted in the hiring or supervision of the alleged offender. There has been a growing number of corporate prosecutions and recently the Polish anti-corruption authorities have indicated that they want to start taking tougher action against corporates including banning those guilty of corruption from taking part in public tenders.

Romania: Although corporate criminal liability is a relatively new concept in Romania, numbers of cases are growing rapidly. There is a shift towards pursuing foreign corporate entities doing business in Romania and prosecutors are showing a degree of pragmatism, entering into arrangements similar to deferred prosecution agreements in some cases.

Slovakia: A new law providing for corporate criminal liability in Slovakia will become effective on 1 July 2016. It will replace the existing quasi-criminal liability regime for a range of offences.

Spain: Corporate criminal liability was introduced in Spain in 2010. New legislation came into force in July 2015 which will provide a defence to a corporate if it can show that it has an has implemented a crime prevention or compliance programme.

The Netherlands: In the last few years, the pace of the authorities in prosecuting and reaching substantive settlements with corporate entities has picked up dramatically. The Prosecution Office has entered into unprecedented settlements with internationally operating Dutch companies.

UK: Historically few prosecutions have been brought against corporates in the UK (other than small companies) given the legal challenges of having to establish culpability of a senior director. However, this is changing: recent legislation, including the Bribery Act 2010, has changed the basis of corporate criminal liability for certain offences; the Serious Fraud Office is specifically targeting corporates; and the UK Government is currently considering the case for a new offence of corporate failure to prevent economic crime and the rule on establishing corporate criminal liability more widely. 2015 saw some important developments, with the conclusion of the first deferred prosecution agreement and the first use of the corporate offence of failing to prevent bribery.

Russia: Currently corporates cannot be criminally liable in Russia but can be liable under the RF Administrative Offences Code if crimes are committed by their management or employees. The question of criminal liability for corporates is currently of great interest in Russia because the current "quasi-criminal" administrative liability has proved quite ineffective.

UAE: Whilst corporate criminal liability exists, it is regulatory sanctions which are most frequently imposed against authorised firms by the Dubai Financial Services Authority.

United States: The aggressive pursuit of corporates continues unabated in the US. US prosecutors, including the US Attorney General, have made repeated public statements that no entity or institution is "too big to jail". Furthermore, the Department of Justice recently emphasised that if a company wants full cooperation credit they need to secure for the government the evidence sufficient to prosecute individuals, including their senior most executives.