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Corporate Criminal Liability in International Criminal Law

ex nihilo nihil fit

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Göran Melander

Term: Spring 2017

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Summary

The Nuremberg Charter introduced corporate criminal liability into international law and the great American Chief Prosecutor Justice Robert Jackson gave a promise that any legal person who commits crimes prescribed by international law shall be prosecuted and punished according to international criminal law. However, during this period of time, a corporation was never prosecuted *per se* as the sitting judges did not seem to have the will to dwell on the establishment of the elements of crime that needed to be satisfied in order to impute criminal liability on a corporate body. Later, the same promise was reflected upon during the preparatory works of the Rome Statute; there existed a will to prosecute legal entities “with the exception of States, when the crimes were committed on behalf of such legal persons or by their agents or representatives.” Unfortunately, the time restraints of the preparatory works resulted in no inclusion of legal entities as subjects of ICC and international criminal law. Thus, it remained only a notion that has been developed and exercised in domestic practices.

As corporate criminal liability developed domestically and as time has changed, the Special Tribunal for Lebanon decided to take up a case concerning corporate criminal liability and prosecute a corporate body, which constitutes a landmark case in which a corporation has been brought before an international tribunal and had international corporate criminal liability imputed on it. Notably, as no guidance could be found in international law, the Court turned to domestic practices in order to seek clarification on how to best assess a case of such notion. The mere act of taking up such a case and turning to domestic practices is a clear indication that international corporate criminal liability is well needed in the international domain of criminal law and that domestic practices are highly influencing it. The Tribunal was very brave in its decision to widen its scope of jurisdiction to include legal entities and, therefore, serves as a source of encouragement to the ICC and other tribunals lacking such power.

Markedly, the ICC lacks jurisdiction over legal entities as aforementioned. However, a recent case indicates that change might be at hand; a case in which corporations have been complicit to crimes against humanity lays before the Court. However, as the ruling in the case is not accessible, the assessment of the ICC remains unclear and only speculations may be drawn upon. Likewise, if the ICC decides to widen its scope to include corporate entities as it was aimed to be during the preparatory work, a provision setting out possible sanctions is lacking and not much guidance can be found in the case law of the Special Tribunal for Lebanon as the cases of this Court are not of same gravity. In order to go about these problems in depth, the author will first present how domestic practices have affected international criminal law with regards to currently existing forms of liability, how they are going about the notion of corporate criminal liability and how it influences the international level. After presenting this initial analysis, the author will draw attention to how the ICC may best assess the case before it and proposes an Article with sentencing measures which may be used if a corporate body is found guilty. Because, “if corporations are *persons* under the law, then they should be more fully so.”

Preface

The author has always been of the opinion that corporate bodies should be held liable for major wrongdoings especially if the crimes committed are of high concern such as crimes against humanity and genocide. However, as she began her law studies, she realised that there is no such thing as corporate criminal liability in the international domain of criminal law which caused her to enlighten herself on the topic in order to understand the underlying reasons for it. Through the course of enlightenment, the author discovered that there has always been a will to prosecute corporations internationally but that inconvenient circumstances restrained the development of the notion. She then began to wonder *if there has been an interest to prosecute corporate entities internationally, how come it has never occurred* considering various possibilities of such a novelty? Therefore, the author found that using the prism of corporate crimes to establish international prosecution of those corporations that thirst for power and self-enrichment to the cost of innocent lives has ever been an interest of investigation of hers and to give rise to her personal view on the topic.

This thesis symbolises an outcome of many people who influenced the author divergently. The author sees herself as a mere observer who found virtuosity to document what was well contemplated by highly respected minds. For these reasons, the author would like to express her high gratitude. Firstly, the author wants to express her appreciation to the Swedish Faculty of Law at Lund University for giving her the opportunity to study law and finalise her studies with a Masters' in Human Rights and Humanitarian Law at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. Secondly, the author finds her colleagues and professors, namely, Brian Burdekin, Karol Nowak, Radu Mares and Henrik Norinder, of high value as they have challenged her, inspired her with ideas and given their support during various occasions; she is highly thankful for having them intriguing her life and is looking forward to spending many years together with them as mentors and work companions.

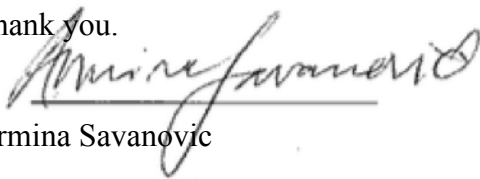
Moreover, without her internship on a specific case, dealing with international corporate criminal liability for the first time in history, at the Special Tribunal for Lebanon, she might not have been as intensely interested in the topic as that occasion made her realise the mere importance and need of such liability in international criminal law. Thus, the author regards highly Michael Mansfield QC who inspired, supported and pushed her to apply to an international tribunal. Without his faith in her, she would not have been where she is today. Moreover, the author would like to express her gratitude to the Special Tribunal for Lebanon for accepting her application of becoming an intern at the Court and admires highly the Defense Council that admitted her to be a member of his team in the case of *Al Jadeed*, STL-14-05.

Without the lasting support of her family and friends, who the author heartwarmingly values, she would not have been able to write her thesis. They believed in her abilities to become a lawyer more than anyone could ever wish for. Therefore, the author finds it convenient to mention them by name: Magdalena, Jasmina, Dinko, Mithun, Behrouz, Elvis, Maria, Davit, Marco, Sanjin, Nikola, Emelie, Kjell, Nena, Britt, Kamal, David, Bobo, Dave, Chafic, Anand, Joshua and her dear Grace. The author especially wants to thank her mother Azra who thought her about the value of knowledge and pleasures that come with it. Without her endless love and high encouragement to achieve all her goals, the author would not have had the possibility to achieve what she calls *success*. However, the greatest success that the author is in possession of is her family. Therefore, the author esteems her grandmother Beba, grandfather Said, uncle Armin, aunt Amira, cousins Azra and Alen, and other family members, namely Nail, Zemira and Jela, that supported her together with her mother. The author feels endlessly privileged to have them in her life.

Those above mentioned are to be endorsed for many joys that the author has experienced since the start of her studies at the Faculty of Law in Lund. However, her deepest appreciation is granted to her supervisor Professor Göran Melander who never for a moment doubted her academic abilities and

was the main source of inspiration causing her academic development. The author finds herself honoured to have a supervisor who cared about her as a student and her work in progress. He was actively devoted in responding to her questions and was in every way more than thoughtful. Göran Melander is a true source of kindness and inspiration, exalting the author to achieve a greater good in the name of human rights.

Thank you.



Armina Savanovic

Abbreviations

ATCA	United States Alien Tort Claims Act
AUC	Autodefensas Unidas de Colombia
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
EG	European Governments
EU	European Union
ICC	International Criminal Court
ICC Statute; Rome Statute	Statute of the International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
NGO	Non-Governmental Organisation
PMSC	Private Military and Security Companies
PSC	Private Security Service Providers
RGC	Royal Government of Cambodia
SCSL	Special Court for Sierra Leone

STL	Special Tribunal for Lebanon
STL Statute	Statute of the Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
WWII	Second World War

Definitions

International Humanitarian Law consists of essential rules applicable in armed conflicts. These duties involve endorsement of legislation and penal sanctions to prevent grave breaches of humanitarian law. A clear example is the Geneva Conventions and their two protocols. Similar duties exist in the Rome Statute.

International crimes or **universal crimes** with **universal jurisdiction** are particularly grave offences of concern to the world, having their foundation in domestic and international law. They may occur during war or as part of a larger aggressive conduct by authoritative actors within a society. These types of serious crimes are often labelled as *war crimes*, *crimes against humanity*, *genocide*, and *the crime of aggression* (also known as **atrocity crimes**), high-jacking etc in humanitarian treaties and statutes of international criminal tribunals.

Human rights are universal rights as every person has and should enjoy them and are ruled mainly by **international human rights law**. International human rights law consists of international human rights treaties and other instruments adopted since 1945. This set of rules are implemented on national level and lay down obligations which States are bound to respect.

Criminal Law consists of utilitarian rules, designated by state institutions, followed by legal consequences such as solemn punishment depending on the classification of the unlawful conduct. Furthermore, it encompasses the more general principles for attributing criminal liability, as well as proportionality and concrete practices related to sentencing that have to be taken into account before a criminal act can be fairly translated into a particular sanction against the perpetrator.

International Criminal Law is an established part of public international law facilitating international prosecution of culprits. International criminal

law encompasses regulations on responsibility for crimes under international law. Norms regulating ‘responsibility’ would seem to correspond to international law in a substantive sense, leaving out or placing less emphasis on procedural, jurisdictional, and institutional rules.

Grave crimes or **universal crimes** are certain identifiable acts that constitute grave breaches of rules of conduct, authorised or tolerated by leading powers, are punishable and require prosecution through fair trials. This definition is based on the linking of grave breaches of rules of conduct to powerful state or organisational actors in a society. While human right crimes may serve as *standard threats* to human dignity, universal crimes may be perceived to compose *extreme threats* to both people and societies.

A **corporation** or **corporate body** is a legal person/entity created by or under the authority of the laws of a state. Moreover, it may constitute of a single person and his or her heirs or be an association of individuals subsisting as a body with a persona and acts as a unit or single individual in matters concerning the common purpose of the association.

1 Introduction

1.1 Background and Problem Formulation

Corporations are entities consisting of individuals making decisions on behalf of the company. Moreover, individuals operating as a criminal enterprise, as an entity, can be held liable for crimes committed by the group. Thus, it is feasible to stress that individuals operating as a group should be held liable if they commit crimes while commencing their work as an organisation.¹ Notwithstanding, it can be argued that international treaties do not explicitly provide for corporate criminal liability; however, the European Governments and UN perceive the Universal Declaration of Human Rights² as applying to corporate entities, which makes it possible to hold corporations liable for human rights abuses.³ Additionally, the Genocide Convention⁴ may be interpreted as including corporate entities; Article 4 of the Genocide Convention does not distinguish natural persons from judicial persons.⁵ The same lack of clarification of what the term *person* refers to can be found in the Statutes of the *ad hoc* Tribunals. Contrastingly, the Rome Statute leaves out uncertainty through an explicit definition of *person* in its Article 25 by stating that it refers to natural persons only.

The notion of corporate criminal liability was first touched upon at Nuremberg during the trials of German war criminals after WWII. However, only individual corporate officers were prosecuted for crimes such as

¹ Clapham, A., 'Human Rights Obligations of Non-State Actors', 88 *International Review of the Red Cross* (Oxford University Press, Oxford, 2006), p. 61. (Clapham, 2006)

² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A (III), (UDHR).

³ *Ibid*, at 228.

⁴ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

⁵ Kelly, M.J., 'The Status of Corporations in the Travaux Préparatoires of the Genocide Convention: The Search for Personhood', 43 *Case Western Reserve Journal of International Law* (2010), p. 484 (Kelly 2010); Black, H. C., *Black's Law Dictionary* (3rd ed. 1933).

genocide⁶ despite the provision in the Nuremberg Charter⁷ that is allowing for the prosecution of a *group* or *organisation*. Some examples of this are the cases of *Flick* and *Krupp* in which the directors of the companies were prosecuted for war crimes and crimes against humanity whilst the corporations *per se* were never put on trial. This is seemingly ironic in the view of the author as this same Court constantly referred to corporate criminal liability while prosecuting these individuals.⁸ The Court held the corporation liable⁹ but restrained itself in its Rule. Moreover and as an example, it was held in the case of *Krupp* that it was the corporation *per se* acting in violation of international law through its employees and that it had the required *mens rea* for the crimes committed.¹⁰ Despite clear arguments and provisions prohibiting corporations from commencing illicit human rights violations, very little has been done to prevent and punish them from continuing with their commence.¹¹

To repeat, corporate criminal liability has been touched upon already during the trials of war criminals but has never been assessed as the concept it is nor has it ever been imputed on a corporation on the international level before the Special Tribunal for Lebanon (STL) intrepidly decided to widen its scope to include Corporate entities. Arguably, one of the reasons why other international courts and tribunals have not followed the STL, is the legal principle of *societas delinquere non potest* that prevailed at the time of the creation of the ICC and the *ad hoc* Tribunals' Statutes. This principle essentially urges that corporations lack capacity and that crimes are considered to be natural facts. In other words, corporations cannot commit crimes as acts are of natural nature and can, therefore, not be bearers of blame,

⁶ Bush, J.A., 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', 109 *Columbia Law Review* (2009), 1105–1111.

⁷ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("London Agreement"), 8 August 1945.

⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 316 (S.D.N.Y. 2003), pp. 315-316.

⁹ *Ibid.*, p. 316.

¹⁰ *Ibid.*, p. 315-316.

¹¹ Kelly 2010, p. 490.

which is the criminal judgement.¹² Moreover, as corporations lack capacity, they also lack independent free will, which is a requirement for the establishment of liability in international criminal law.¹³ Apparently, this principle has its origins in methodological individualism claiming that only individuals can be subjected to criminal law, a notion that is recognised by international courts and tribunals.

Contrastingly, ICC's first Chief-Prosecutor held that corporations should be subjected to prosecution internationally;¹⁴ captivately, the preparatory works stated that prosecution of legal entities should be enabled.¹⁵ Because "[a]t no point during the drafting of the Rome Statute was it claimed by any delegation that the 'legal person' referred to in the draft could not demonstrate the requisite legal capacity to be bearers of international obligations."¹⁶ Alas, the actual reason why the Rome Statute does not contain a provision on corporate criminal liability today is because of the time limit to create the statute and not because of the lack of will among the international actors who played a significant role in the preparatory works.¹⁷ While renowned researcher argued that no international tribunal has jurisdiction over crimes commenced by corporations,¹⁸ the author wants to stress that international courts and tribunals do have jurisdiction which will be shown through the examination of one case from the STL and one currently pending case before the ICC. As, "if corporations are *persons* under the law, then they should be more fully so"¹⁹; because, with rights come responsibility.

Moreover, corporate criminal liability has been thoroughly established in domestic law systems mainly through reference to the notion of vicarious

¹² Fieberg, G., 'National Developments in Germany: An Overview.' in A. Eser, G. Heine and B. Huber (eds), *Criminal Responsibility of Legal and Collective Entities*, (Freiburg im Breisgau: Ed. Iuscrim, 1999), pp. 86.

¹³ *Ibid.*, p. 86.

¹⁴ Podgers, J., 'Corporations in the Line of Fire', *A.B.A. Journal* (2004).

¹⁵ Clapham, (2006), p. 30.

¹⁶ *Ibid.*, p. 31.

¹⁷ *Ibid.*, p. 31.

¹⁸ Kelly 2010, p. 490.

¹⁹ *Ibid.*, p. 490, emphasis added.

liability and the theory of identification, also titled as the theory of *alter ego*. However, state practices with regards to the solicitation of the theories are divergent; conversely, similarities exist within the application of both. Vicarious liability always requires satisfaction of the element of *knowledge* regardless if the crimes commenced were executed by the directing mind, the employees or other affiliates of the legal entity. Remarkably, liability can only be imputed on the directing mind if the offender or offenders have acted with authorization and within the scope of his, her or their employment and in the name of the legal body.²⁰ Notwithstanding, this form of liability is not preferred as it aims at punishing a physical person, much alike command liability. In differentiation, the theory of *alter ego* makes an analogous interpretation of natural person in criminal law in order to explain the notion of what a legal person is. Accordingly, it can be compared to JCE where persons involved constitute the brains and limbs for the function of the entity as such. In other words, the theory of *alter ego* aims at prosecuting the corporate body *per se*²¹ for the crimes committed by the persons acting in the name of the corporation.²²

Notwithstanding, if the domestic level has affected international criminal law to develop international command liability that leads to JCE liability, domestic practices on corporate criminal liability will have a similar impact on the international domain of criminal law, which will be shown throughout the thesis. Furthermore, interesting is to see how corporate entities have been punished as a result of imputed corporate criminal liability. As it is somewhat clear, international corporate criminal liability does not exist and if it does, it is not addressed properly, which might serve as an indication that corporate crimes are acceptable. However, if corporate crimes are blameworthy

²⁰ Ferguson, G., 'The Basis for Criminal Responsibility of Collective Entities in Canada' in A. Eser, G. Heine and B. Huber (eds.), *Criminal Responsibility of Legal and Collective Entities*, (Freiburg im Breisgau: Ed. Iuscrim, 1999), pp. 163

²¹ Ledeman, E., 'Models for imposing corporate criminal liability: From adaption and imitation toward aggregation and the search for self-identity', 4 *Buffalo Criminal Law Review* (2000), 641-708, pp. 693.

²² Dubber, M. and Hörnle, T., *Criminal Law, A Comparative Approach*, (Oxford, Oxford University Press, 2014), p. 334.

internationally, there exists no legal framework on the international level that can rightfully prosecute corporate bodies for atrocity crimes.

1.2 Aim and Research Question

The aim of the thesis is to show how domestic practices affect international criminal law and that there is room for corporate criminal liability on the international level. As the author finds it not enough to just show on the potential developments she also aims to go a step further and provide the international domain with possible sentencing measurements in the event that the ICC takes up a case considering corporate criminal liability. In other words, the aim of this thesis is to investigate the legal situation, as in position, and suggest possible constructive solutions on how to best develop international criminal law without it risking undermining its core. Moreover, the author wants to open up for discussions and possible solutions to the overall academic debate.

In order to satisfy the aim of the thesis, this work will dwell on the following research question: *Is there room for international corporate criminal liability in international criminal law?*, which will be answered through examination of three underlying questions; (1) *How has domestic law affected international criminal law?*, (2) *To what extent can corporations be held liable internationally?*, (3) *If a corporation brought before an international court or tribunal is prosecuted for complicity of some sort, what are the feasible measures that can be taken against them and why?*

1.3 Methodology and Structure

In the pursuit of answers to the posed questions, the current thesis is delimited to corporate criminal liability in domestic practices. Moreover, as the thesis will explore what implications domestic practices have on international criminal law, relevant case law on corporate criminal liability in the

international domain will be surveyed. Apart from that and in the attempt to prove that there is room for corporate criminal liability in international criminal law, an argumentative explanation of how command responsibility and JCE liability serve as a basis for further development of international criminal law, which is indeed pertinent to the research problem that the author is presenting.

The author attempts to provide an answer to the research question through the application of the positivistic approach as the author aims at investigating the legal situation through observation and objective interpretation of the collected data. Correspondingly, the author endeavours to provide an accurate understanding of the current position of international criminal law with regards to corporate criminal liability. Certainly, this is a form of evaluative research. Thus, international criminal law will be subjected to appraisal in the wake of domestic practices on the topic that is subject to this thesis. To this end, the domestic practices that are considered are the ones exercising corporate criminal liability with reference to the Rome Statute. In lieu of the above mentioned, this methodological strategy enables the author to explore and venture to explain the significance of corporate criminal liability on the domestic level that affects the international domain of criminal law, the need to expand the jurisdictions of international courts and tribunals to enhance this form of liability and to see where international criminal law is lacking to hence be able to propose suggestions with constructive solutions to the problematics. In effect, the empirical research observes domestic practices and its enshrinement regarding corporate criminal liability that influences the international domain of criminal law. Likewise, the author has availed herself of the opinion of renowned scholars on the topic to validate her arguments; however, some theoretical contemplations from a human rights perspective are discussed as well.

Overall, the thesis is determined by its aim and the applicability of corporate criminal liability in international criminal law. Therefore, the author begins with a swift discussion on how domestic practices have affected international

criminal law in the creation of currently existing forms of liability in chapter two. Further on, the author continues with delimitating the notion of corporate liability and its importance in domestic law in chapter three, though a rather theoretical approach is presented in order to facilitate the understanding of the reasoning in domestic practices. This is done by way of identification of two leading theories together with the author's reasoning why she believes the one suffices more than the other in the best interest of achieving justice.

Chapter four deals specifically with corporate complicity liability and the application of the Rome Statute in domestic practices and continues with an exploration of a recent case on the same matter. The domestic practices serve as explanatory examples on how cases dealing with corporate complicity regarding grave crimes should be assessed. Furthermore, international instruments on state practices concerning the notion of corporate liability are used as means to validate the argument how domestic practices affect the international domain of criminal law and how these cases might be assessed.

As the author moves forward, she introduces the notion of international legislation, decisions and doctrine as sources of international criminal law in chapter five. Herein, the author sheds light on the novelty of the STL's attempted international prosecution of corporations for the first time in history. Accordingly, the one case of concern is depicted together with the reasoning of the of the Court when assessing the case and its sentencing judgement. As it might be interpreted that the jurisprudence of the STL lays the foundation of the essence of this thesis, it becomes highly relevant with regards to the chapters that follow. Accordingly, the author discusses the implications that this decision had on the international domain and thus present a problem concerning the application and calculation of the sentencing measures imposed on the legal person. The author's criticism addressed to the Court is based on the human rights perspective for the greater good to grant the victims justice. The author avails herself to this approach in order to evaluate to what extent justice may be achieved and how the corporate culprit might be punished as corporate power, in the global

economy, needs to be balanced to justice. Additionally, a pending case before the ICC is discussed together with possible outcomes that the author assumes will be at hand. Furthermore, this chapter serves as basis for clarification why the international courts and *ad hoc* tribunals lack jurisdiction over legal entities and how it can be developed to include corporate criminal liability. As the author has noted, explicit prohibitions on corporate behaviour are lacking in international criminal law despite encouragement to have it included in the Rome Statute during its preparatory works; because of this, sentencing measures are lacking as well. Thus, the author has been dedicated to include the creation of an Article providing possible sentencing measures in the attempt to have it possibly incorporated in the statutes of international courts and tribunals for the realisation of justice.

By way of conclusion, the author will sum up all the suppositions that she has drawn through the writing of this thesis by reference to all three questions that served as assistance to answer the research question together with other general comments on the topic in chapter six. The chapter is concluded with a concise answer to the research question regarding the scope of international criminal law and if there is room for corporate criminal liability in it.

1.4 Material

The materials used consist of mainly treaties and regulations in international humanitarian law, soft law instruments, draft codes, the statutes of ICC, ICTR, ICTY, STL, the Nuremberg Charter, human rights instruments such as the ICCPR and ICESCR, case law from the Courts above, Tokyo Tribunal, SCSL, ECCC and domestic practices. The works of renowned scholars and advocates have also been referred to.

2 Currently Existing Forms of Liability in International Criminal Law: A Background Check

2.1 Command Responsibility

The tenet of command responsibility originated in the year 1474 and the trial of *Peter von Hagenbach*, an international case in which 28 judges from the Holy Roman Empire held Peter von Hagenbach guilty for failing to prevent crimes that he as a knight, or commander, had the duty to prevent.²³ Despite the notion of command liability, the case is not considered being a case of command responsibility as it is today in international law. As international law has not been a subject of scholarship before the 16th Century,²⁴ the binding power of the will of nations was not considered until the 17th Century.²⁵ Thus, the actual development on this domain was limited to the national level.²⁶ The first recognised notion of command responsibility on the international level can be found in Article 1 of the Regulations annexed to the Fourth Hague Convention of 1907,²⁷ asserting that states are obliged to be held responsible for the delinquencies of state actors in times of war.²⁸ In contrast, there was nothing indicating the existence of criminal liability for failure to prevent or repress the delinquencies of the underlings. This was first established after the WWII during the trials of war criminals; command criminal liability for failure to prevent and punish was neither existing in the

²³ Parks, Cf. W., 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973), pp. 1, 4-5.

²⁴ Brierly, J., *The Law of Nations* (6th edn., by Humphrey Waldock, Clarendon Press, Oxford, 1963), p. 25.

²⁵ Neff, S., 'A Short History of International Law', in M. Evans (ed.), *International Law* (Oxford, Oxford University Press, 2003), pp. 31, 37 (citing Hugo Grotius, *The Law and Peace* (translated by F. Kelsey, Clarendon Press, Oxford, 1925), p. 44).

²⁶ Parks, *ibid.*, pp. 5-10.

²⁷ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.

²⁸ The term *someone* is to be read as *State*; the State was to be held liable for the acts of its forces in war.

Nuremberg Charter nor was it acknowledged at the Nuremberg Tribunal, but was perceived in judicial decisions.²⁹

Even though command criminal liability was not explicitly provided for in the Nuremberg Charter, it was discussed during the trials of war criminals. Article 6 of the Nuremberg Charter did not explicitly address modes of liability but did address the culpability of leaders executing a common plan to commit crimes, including responsibility for any person acting as co-perpetrator.³⁰ Article II(2) of the Control Council Law No. 10 stressed that anyone in lead of or participating in an organisation or group carrying out crimes was to be held criminally responsible for the crimes of his or hers underlings.³¹ Explicit command responsibility was not referred to in the provision but was asserted in the case of *US v. Wilhelm List et al.*,³² in which emphasis was laid on the *knowledge* of the commander of crimes committed by his underlings. List's underlings had committed unlawful killings of civilians while he was away from the headquarters where he had command. List denied *knowledge* of the crimes with reference to his absence. The Tribunal found that with regards to List's position, failure to obtain information constitutes a dereliction of duty which cannot be used as a defence.³³ The Tribunal also found that List did not condemn the killings of thousands of individuals as unlawful acts nor did he hold the delinquents

²⁹ *Report of the International Law Commission on the work of its forty-eighth session*, UN Doc. A/51/10, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, p. 35; the reasoning was followed by the Tokyo Trials, ICTY, ICTR and ICC.

³⁰ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, directed by the Secretariat of the Tribunal, under the jurisdiction of the Allied Control Authority for Germany, Nuremberg, Germany, 1947, vol.i, Official Documents, p. 11.

³¹ Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949, United States Government Printing Office, Washington D. C., 1950, vol. i, p. xvii (Trials).

³² Trial of *Wilhelm List and Others*, the "Hostage Case", US Military Tribunal V, Nuremberg, Judgment of 19 February 1948 - Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2. A case in which alleged criminal conduct occurred while the defendants were acting as field commanders or chiefs of staff to field commanders in south-eastern Europe. The defendants were charged with the commission of war crimes and crimes against humanity.

³³ Trials, vol. xi, p. 1271.

accountable for the vicious acts.³⁴ As List did not act against these acts nor took preventive measures, he was considered to be in breach of duty imposing criminal liability. The Tribunal, therefore, held him responsible for the acts committed by his underlings.³⁵

Command responsibility was for the first time thoroughly discussed in the case of *US v. Wilhelm von Leeb et al.*, similar to the case of *US v. Wilhelm List et al.*, at the same Tribunal.³⁶ The Tribunal acknowledged that criminal responsibility comes with breaches of international law but that it has to address issues at hand with regards to recognised central principles of criminal law on which opinion juris existed.³⁷ The Tribunal focused on Article II(2) (c) and (d) of Control Council Law No. 10 and drew the conclusion that the commander is culpable for acts of violence committed by his underlings even in the event that the commander did nothing but only stood by.³⁸ However, “this act or neglect to act must be voluntary or criminal”³⁹ and the culpability must be frankly traceable to the commander or “where his failure to properly supervise his subordinates constitutes criminal negligence [was] on his part.”⁴⁰ Commanders Hoth and Hollidt were held guilty for failing to act. The remaining defendants were held guilty for directly giving unlawful orders resulting in deaths of thousands of persons.

As the principle of command responsibility has been broadened and recognised internationally, it is not at fault to stress that the principle is rooted in and has emerged from domestic practices. But can it be held that the principle of command responsibility is the same as vicarious and strict liability?⁴¹ As it is possible to hold that command responsibility has emerged from domestic judicial decisions based on the above, it is possible to highlight

³⁴ *Ibid.*, p. 1272.

³⁵ *Ibid.*, pp. 1274 and 1318.

³⁶ *Ibid.*, pp. 462 ff; Parks, pp. 1, 38.

³⁷ *Trials*, vol. xi, p. 509

³⁸ *Ibid.*, p. 512.

³⁹ *Ibid.*, p. 543.

⁴⁰ *Ibid.*, pp. 543-544. Emphasis added.

⁴¹ ”The Doctrine of Command Responsibility: Current Problems”, 3 *Yearbook of International Humanitarian Law* (2000), pp. 131 and 162.

that this principle has derived from the specific domestic context that prevailed at the time.⁴² For example, Article 1 of the Regulations annexed to the Fourth Hague Convention of 1907, which is a source of international humanitarian law, might have been highly influenced by practices of domestic law as it voices that states are responsible for the acts of state actors. Unfortunately, personal criminal liability was not explicitly voiced *per se* but was recognised in later judicial decisions.⁴³

The landmark case in which command responsibility was discussed and developed is the case of *Yamashita*,⁴⁴ where it was held that command responsibility is well recognised under international law in accordance with Article 1 of the Fourth Hague Convention of 1907. Nevertheless, Article 1 of the Fourth Geneva Convention⁴⁵ refers to state liability, which was discussed in the case,⁴⁶ but was not very much stressed as the interpretation of the Article and its meaning was more in lieu of *de lege ferenda* than *de lege lata* as Commander Yamashita expressly conceded that he was under a duty under international law. Yamashita stressed that his duty consisted of controls of his troops to ensure that they are not committing any criminal acts. He also stressed that if a superior ordered his underlings to commit criminal acts or if he failed to prevent them from committing such crimes implies criminal liability on the superior.⁴⁷ As this was highlighted, a new principle of law was generated and was rather imputed than found; command responsibility exist when the superior fails in his duty over his subordinates and four principal elements emerged; 1) requiring the prosecution to show criminal negligence albeit his knowledge of the illicit acts committed by his subordinates, 2) that the commanders neglect resulted in compliance, 3) that the failure to act has

⁴² Parks, pp. 5-10.

⁴³ Report of the International Law Commission on the work of its forty-eight session, 6 May – 26 July 1996, UNGA, Official Records, 51st Session, Supplement No.10 (A/51/10), p. 35.

⁴⁴ Rogers, A., *Law on the Battlefield*, (Manchester University Press, Manchester and New York, 1996), p. 130; Green, L., 'Superior Orders and Command Responsibility', 27 *Canadian Yearbook of International Law* (1989), pp. 167 and 194.

⁴⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

⁴⁶ Law Reports, vol. iv, p. 32.

⁴⁷ *Ibid.*, p.29.

been voluntary and 4) that the commander could be found guilty of the illegal acts committed by his subordinates. Consequently, these judicial decisions evolved to become a source of international criminal law.⁴⁸

The *Yamashita* case created a new understanding of what law is and what international law is based on by imputing individual criminal liability to superiors. Cases of command responsibility require findings of the existence of a duty of control that was intentionally failed or culpably or maliciously disregarded despite knowledge,⁴⁹ and if severe results have stemmed, or persisted unpunished, because of the violation. As clear the doctrine seems to be, as is it flawed due to the problematic issues of *ultra vires* or *ex-post facto* law.

2.1.1 The Issues of *Ultra Vires* or *Ex-Post Facto* Law

The principle of command criminal liability does not constitute an offence *per se* but rather emphasises one in similarity to the doctrine of aiding and abetting and involves the establishment of a superiors' responsibility for illicit acts committed by his or her underlings or for his or her failure to prevent these criminal acts from occurring. However, the doctrine remains unclear as it does not specify whether the commander is responsible for his or her own failure to act or for the crimes of his or her underlings over which he or she had the power to prevent or repress.

Additional Protocol I to the Geneva Conventions⁵⁰ does not give much guidance in relation to the interpretation of the doctrine as its Article 86(2) is uncertain in this matter. A provision with a similar wording can be found in

⁴⁸ Jia, B.B., 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict', in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World (Essays in memory of Li Hao Pei)*, (London and New York, Routledge Studies in International Law, Routledge, 2001), pp. 77, 85, and 94.

⁴⁹ *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber Judgement and Reasons, 3 July 2002, paras. 35 and 36

⁵⁰ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

the ICTY Statute⁵¹ Article 7(3) but does not assist one in resolving the problem of uncertainty. Favourably, the UN Secretary-General held that the doctrine imposes command responsibility “for failure to prevent a crime or to deter the unlawful behaviour of his subordinates.”⁵² Accordingly, the commander is not responsible for the illicit acts committed by his underlings. Contrastingly, Article 28 of the Rome Statute provides that a commander in effective control is responsible for the illicit acts of his underlings as a result of failure to exercise control adequately over such forces including in cases over which the ICC has jurisdiction. Seen the wording of the Article, it is possible to perceive the existence of the interconnection between command responsibility and crimes committed by subordinates; the commander is seen as a co-operator in the performance of the delinquent acts. If the commander is to be seen as a co-perpetrator, Article 7(3) of the ICTY Statute would no longer be applicable as Article 7(1) prescribes liability in a diversity of roles.⁵³ Another link constituting an element of criminal liability is the inaction of the superior and the crimes committed by his or her underlings; the superior might know about the crimes committed by his or her underlings but his or her knowledge did not cause the subordinate delinquencies to take place. In other words, there is no proof of causality.⁵⁴ What approach is then correct and what is the most referred to provision in international case law?

2.1.1.1 ICTY and ICTR Case Law

As much explicit guidance about the interpretation and application of criminal liability has not been given in the statutes of international criminal tribunals,

⁵¹ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993.

⁵² UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991]*, 3 May 1993, S/25704, para. 56.

⁵³ Please compare ICTY Statute. Article 7(1) with UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994, (ICTR Statute) Article 6(1); and ICTY Statute Article 7(3) with ICTR Statute Article 6(3).

⁵⁴ Justice Murphy, Dissenting Opinion in the Matter of the Application of General Tomoyuki Yamashita, 327 U.S., October 1945, in *Law Reports*, vol. iv, pp. 35 and 39.

the tribunals have had to struggle between two interpretations and applications of command responsibility; on the one hand to impose criminal liability on the superior for his or her own failure to act, and on the other hand to impose criminal liability on him or her for crimes committed by his or her underlings.

It was held in the case of *Aleksovski* that a commander is to be considered guilty for his or her failure to act and not for the acts prescribed in Article 7(1) ICTY Statute *per se*. Accordingly, the commander is liable for the acts of his underlings in the event that he or she did not prevent the illicit acts from occurring or failed to punish the underlings for committing such crimes.⁵⁵ In the case of *Blaskic*, the Tribunal held that a person may be held accountable for the crimes committed by individuals that are not explicitly his or hers subordinates; as long as effective control exists, liability may be imposed.⁵⁶ Additionally, criminal liability exists where the accused is involved in the illicit acts and omissions falling under Article 7(3) ICTY Statute.⁵⁷

The same Tribunal found that a superior can be held liable for crimes committed by members belonging to his or her unit,⁵⁸ but only if he or she had knowledge or reason to know of the crimes and that he or she had the ability to prevent them from occurring or punish the members of the unit committing the crimes.⁵⁹ Moreover, “[c]ustomary international law recognizes that some war crimes can be committed by a member of an organized military force in the course of an internal armed conflict; it

⁵⁵ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber Judgement, 25 June 1999, para. 67.

⁵⁶ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Trial Chamber Judgement, 3 March 2000, para. 301; compare to Article 28, in UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998 (Rome Statute); see also *Prosecutor v. Zejnir Delalic*, Case No. IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, para. 198; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgement, 15 March 2002, para. 93.

⁵⁷ *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Trial Chamber Judgement, 26 February 2001, para. 843.

⁵⁸ *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Trial Chamber Judgement, 31 March 2003, para. 163.

⁵⁹ *Ibid.*, para. 116; see also *Prosecutor v. Enver Hadzihasanovic et al*, Case No. IT-01-47-AR72, Appeals Chamber Judgement, 16 July 2003, para. 18.

therefore also recognizes that there can be command responsibility in respect of such crimes.”⁶⁰ This indicates that the superior is to be held “guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*.”⁶¹ The jurisprudence of ICTR holds that individual criminal liability can only be imposed on a commander if he or she had knowledge or reason to know of possible illicit acts committed by his or her underlings and failed to take adequate measures to prevent the acts from occurring or punish the perpetrators.⁶²

Consequently, it can be argued that there is no clear guidance on how to interpret the above-mentioned Articles on whether a superior is to be held guilty for his failure to act or for the acts committed by his or her underlings. However, if command responsibility is to be understood correctly, the case of *Delalic* has to be read *e contrario*; where a superior's inaction is not the reason of the crimes committed by his or her underlings can the superior's liability in the crimes be identified by reference to the principle of command liability.⁶³ As it has been suggested in the case of *Blaskic*, a failure in command duty can be the reason for a superior's liability for either aiding and abetting or instigating crimes that are or ought to be performed by his or her underlings.⁶⁴ This becomes valid as the superior's inaction is his or her *actus reus* and his or her knowledge or probable knowledge is the *mens rea*. Thus it is reasonable to hold that failure in command duty is an accepted offence in international law and is therefore continuously used in practice.⁶⁵ On the whole, cases regarding *de jure* and *de facto* superiors are all based on the requirement of the existence of effective control.⁶⁶

⁶⁰ *Hadzihasanovic et al*, Appeal Judgement, para. 18.

⁶¹ *Ibid.*, para 32.

⁶² *Prosecutor v. Ignace Bagelishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002, para. 33.

⁶³ *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Trial Chamber Judgement, 16 November 1998, paras. 398 and 400.

⁶⁴ *Blaskic*, Trial Judgement, para. 337; M. Lippman, “The Evolution of Scope of Command Responsibility”, *Leiden Journal of International Law* (2001), p. 139.

⁶⁵ *Delalic et al.*, Trial Chamber Judgement, para 346.

⁶⁶ *Delalic*, Appeals Chamber Judgement, paras. 196-197, 226, 238 and 241; *Hadzihasanovic et al*, Appeal Judgement, para. 38; *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-T, Trial

2.1.2 Planning, Instigating and Otherwise Aiding and Abetting

The doctrine of aiding and abetting exists since early 1900 if Articles 50 and 34 of the Fourth Hague Convention of 1907 are to be read together⁶⁷ but is for the first time explicitly spelt out in Article 6(3) in the Statute of the International Military Tribunal including *accomplices* as a form of criminal liability. As Article 6(3) is not clear enough with regards to the forms of liability as of when culpability arise, one might seek a further explanation in Article II(2) of the Control Council Law No. 10 that is provided with an explanation of situations and forms of liability attached to them.⁶⁸ Notably, case-wise it was considered that the accomplices' *knowledge* of the incentive of the acts of violence by the superior was enough to meet the requirements satisfying the *mens rea* for aiding and abetting.⁶⁹ Remarkably, all cases involved a person with direct control over economic actors or an accessor within the economic actor. The corporations themselves were never charged as the principal or the accessor was held guilty according to the law.

Chamber Judgment, 16 November 2005, paras. 66, 68-69, 72-73 and 97; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, paras. 62, 72 and 83; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Trial Chamber Judgement 27 January 2000 (Musema was the director of a tea factory and used his effective control to set up road blocks. He is considered to be a military commander under the doctrine); *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Trial Judgment, 20 June 2007, paras. 792, 794 and 798; *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08 (A political superior who effectively acted as commander). Note that the mental element in the Rome Statute differs from other international tribunals as Article 28 separates military commanders from other individuals in hold of a command position; Judge Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals', 3 *Berkley Journal of International Law publicist* (2009), p. 17.

⁶⁷ Eser, A. 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J. R. W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford, Oxford University Press, 2002), p. 767, 784.

⁶⁸ See in example the case of *Flick*, VI Trials of War Criminals Before the Nuremberg Military Tribunals, p. 1192; The case of the *I.G. Farben*, VII-VIII Trials of War Criminals Before the Nuremberg Military Tribunals; The case of *Krupp*, IX Trials of War Criminals Before the Nuremberg Military Tribunals p. 1436; The case of *Zyklon B*, I Law Reports of Trials of War Criminals 93, Brit. Mil. Ct., Hamburg, Germany, 1946; The case of *Roehling*, Superior Military Government Court of the French Occupation Zone in Germany (1949), XIV Trials of War Criminals Before the Nuremberg Military Tribunals, p. 1436 (1952).

⁶⁹ *Flick*, p. 1217; *United States v. Von Weizsaecker*, IX Trials of War Criminals Before the Nuremberg Military Tribunals 621-622, 1952.

By the year of 1948, *complicity* was given acknowledgement in the Genocide Convention and two years later in the Nuremberg Principles.⁷⁰ The liability mode of *aiding and abetting* was given a clear formulation in the Draft Code of Crimes Against the Peace and Security of Mankind in 1996⁷¹ but has existed since 1949 in the four Geneva Conventions,⁷² yet not in the broad sense as of today.⁷³ With regards to the ICTY and ICTR Statutes, Articles 7(1) and 6(1) respectively, it is clear that indirect and accomplice liability besides direct criminal liability exist. Notwithstanding, as these forms of liability are sanctioned they remain unclear as *commission* and *offender* are not fully defined⁷⁴ but recalled by reference to the principle of individual responsibility⁷⁵ since it is well established in customary international law.⁷⁶ Consequently, the *actus reus* and *mens rea* were defined.⁷⁷ Regarding the

⁷⁰ Article 3 of the Genocide Convention and Principle VII of the Nuremberg Principles.

⁷¹ *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, International Law Commission, 1996, Article 2(3)(d); Rayfuse, R., 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorder at the International Law Commission', 8 *Criminal Law Forum* (1997), p. 50-52.

⁷² International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

⁷³ See Article 49 Convention I, Article 50 Convention II, Article 129 Convention III, Article 146 Convention IV.

⁷⁴ *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-A, Appeals Chamber Judgement, 15 July 1999, para. 186.

⁷⁵ *Delalic*, Trial Chamber Judgement, para. 319.

⁷⁶ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber Judgement and Opinion, 7 May 1997, paras. 666-669; *Delalic*, Trial Chamber Judgement, para. 321

⁷⁷ For ICTR case law on the matter see *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgement, 2 September 1998, para. 484; for further information on the elements see Cassese A., et al., *International Criminal Law: Cases and Commentary*, (Oxford: Oxford University Press, 24 February 2011), p. 395 at para 233; *Prosecutor v. Anto Furundzia*, Case No. IT-95-17/ I-T, Trial Chamber Judgement, 10 December 1998, paras. 232-235, 245-246 and 252; *Tadic*, Appeals Chamber Judgement, para. 229; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1 -A, Appeals Chamber Judgement, 1 June 2001, para. 186; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgement, 17 September 2003, paras. 33 and 51; *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgement, 25 February 2004, para. 102; *Blaskic*, Appeals Chamber Judgement, para. 49; *Blaskic*, Trial Judgement, paras. 286-287; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Trial Chamber II, Judgement, 31 January 2005, para. 350; *Naletilic and Martinovic*, Trial Chamber Judgement, para. 63; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber Judgement, 2 November

Rome Statute, it has a more coherent provision on the issue⁷⁸ stressing that a person is to be held liable if he or she facilitates, aids, abets or otherwise assists the commence of a crime that is about to, that is being or has been committed.⁷⁹ Equally, liability arises when an individual contributes to the commission of such an act of violence by a group of individuals acting with a common purpose.⁸⁰ Moreover, the aider and/or abettor has to have the aim to foster the criminal aim or activity involving the commence of a violent act of the group⁸¹ while in knowledge of the culpable intent of it.⁸²

Despite the well-developed provision, the notion or distinction of the *actus reus* and *mens rea* remain ambiguous.⁸³ Equally unclear is the level of participation with regards to sanctions. However, if Article 25(3) is read carefully, it can be distinguished that support is divided into two categories; 1) aiding and abetting or otherwise assisting⁸⁴ and 2) contribution to the commission of an illicit act of a group.⁸⁵ To aid, abet or otherwise assist are three separate concepts where the third concept is open-ended making the list

2001, para. 255; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1, Appeals Chamber Judgement, 30 May 2001, para. 162; *Prosecutor v. Blagoje Simic et al.*, Case IT-95-9-T, Trial Chamber Judgment, 17 October 2003, para. 163; *Krnjelac*, Trial Chamber Judgment, para. 90; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber II, Judgement, 22 February 2001, para. 392; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No. IT-02-60, Trial Chamber I Judgement, 17 January 2005, para. 727; *Tadic*, Trial Chamber Judgment, para. 692; in relation to the crime of genocide see Articles 6(1) ICTR Statute and 7(1) ICTY Statute; for complicity see Articles 2(3)(e) ICTR Statute and 4(3)(e) ICTY Statute; *Akayesu*, Trial Chamber Judgement, paras. 485, 538-548; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Chamber Judgement and Sentence, 21 February 2003, para. 787; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber Judgement and Sentence, 15 May 2003, paras. 394-395; *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Trial Chamber Judgement, 31 July 2003, paras. 531-534; *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, paras. 139-142; *Partial Dissenting Opinion of Judge Shahabuddeen*, Part G.1: There is a crime of aiding and abetting the commission of genocide, paras. 59-68; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgement, 13 December 2004, paras. 500-501; *Blagojevic and Jokic*, Trial Chamber I Judgement, paras. 678-680.

⁷⁸ Article 25(3) of the Rome Statute; *Cassese/Paola Gaeta/John R. W.D. Jones*, pp. 767 and 774.

⁷⁹ Article 25(3)(c) Rome Statute.

⁸⁰ Article 25(3)(d) Rome Statute.

⁸¹ Article 25(3)(d)(1) Rome Statute.

⁸² Article 25(3)(d)(2) Rome Statute; As regards genocide, direct and public incitement by the aider and/or abettor must exist, see Article 25(3)(e) Rome Statute.

⁸³ *Cassese/Paola Gaeta/John R. W.D. Jones*, pp. 767 and 787-788.

⁸⁴ Article 25(3)(c) Rome Statute.

⁸⁵ Article 25(3)(d) Rome Statute.

of assisting acts non-exhaustive. However, knowledge of the commence of a crime is not satisfactory; intent must be proven in order to impose liability on the aider and/or abettor. As for contribution, it is considered to be enough to have knowledge of the intention of the group and that the aim of the contributor is to encourage the criminal activity or the purpose of the group in order to impose liability on the contributor.⁸⁶ As clarity about the distinction between the two types of assistance evolves, the wording of the latter remains uncertain as it does not explicitly determine whether or not the contributor has to be a member of the group in question.⁸⁷ However, what is the *group* in question? The provision seems to be ambiguous with regards to whether or not it is a reference to JCE, however, very little doubt exists in this regard.⁸⁸ Moreover, when examining the jurisprudence of ICTY and ICTR it becomes possible to perceive the Article as affirming the existence of both modes of liability; as aider and/or abettor not belonging to the group and as aider and/or abettor belonging to a JCE or conspiracy as of in the Rome Statute.

2.2 JCE Liability: Expanding Command Responsibility to Include Entities

JCE is a concept defined to be a form of criminal involvement and was established through the jurisprudence of the ICTY but can be traced back to the Post-WWII trials,⁸⁹ where JCE is referred to as being a conspiracy,⁹⁰ and other international treaties.⁹¹ Moreover, it is a concept not aiming at holding single perpetrators, as in superiors or those who aid and abet, liable but rather all persons involved for the joint commence of illicit acts.⁹² The morality behind the concept has been explained as being a fair strike against all persons involved as they have together commenced crimes beyond what is morally

⁸⁶ Cassese/Paola Gaeta/John R. WD. Jones, pp. 767 and 803.

⁸⁷ Ibid., pp. 767, 783, 789 and 903.

⁸⁸ *Tadic*, Appeals Chamber Judgement, para. 222.

⁸⁹ Ibid., paras. 195, 197-220.

⁹⁰ van der Wilt, H., 'Joint Criminal Enterprise: Possibilities and Limitations', *Journal of International Criminal Justice*, (2007), p. 93-95.

⁹¹ *Tadic*, Appeals Chamber Judgement, para. 221-223.

⁹² Ibid., para. 191.

acceptable, because “to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might under state the degree of their criminal responsibility.”⁹³ The existence of a JCE is determined by its characteristics provided that there has to be a common plan or purpose that is about to be, that currently is being, or has been commenced by a group of individuals. All individuals that participate through direct or indirect involvement or contribute in any other way in the commence of the illicit acts may be subjected to criminal liability.⁹⁴ The scope of JCE had been established primarily to aim at those involved in criminal organisations i.e. detention camps.⁹⁵

As regards the doctrine of JCE and aiding and abetting, JCE has been considered to be a form of accomplice liability,⁹⁶ however, aiding and abetting require that the a) aider or abettor is not directly involved in the commence of the prohibited act, b) there is no plan of commencing a prohibited act that the aider or abettor has agreed upon together with the principal perpetrator, c) the aim of the aider or abettor is to only assist and encourage the commence of the crime or the pursuance of a common plan or purpose and d) only knowledge of the commence is required,⁹⁷ it becomes hard to stress that individuals aiding and abetting should be held equally liable as the individuals belonging to a JCE; as aforementioned, aiders and abettors might have their culpability lessened thereof. Moreover, it is worth highlighting that in the scenario that one is aiding and abetting a JCE, the intent of the culprits involved is not shared with the aider and abettor. However, knowledge of such assistance must exist.⁹⁸ JCE liability is in this

⁹³ Ibid., para. 192; *Blagojevic and Jokic*, Trial Chamber, para. 695.

⁹⁴ *Tadic*, Appeals Chamber Judgement, para. 190; *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Trial Chamber Judgement, 1 September 2004, para. 258.

⁹⁵ van der Wilt, p. 92.

⁹⁶ *Tadic*, Appeals Chamber Judgement, para. 220.

⁹⁷ Ibid., para. 229.

⁹⁸ *Kvočka et al.*, Trial Chamber Judgement, paras. 273 and 282-289.

sense aptly different from accomplice liability.⁹⁹ Additionally, there are three modes of JCE liability identified by the ICTY and are referred to as *basic*, *systemic* and *extended* JCE liability.¹⁰⁰ Contrastingly, as regards the Rome Statute, the notion of JCE or *conspiracy*¹⁰¹ can be derived from the wordings *jointly with another, a crime by a group of persons with a common purpose and aiding, abetting or otherwise assisting*. “The idea that when the sum of the co-ordinated individual contributors of a plurality of persons result in the realization of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principle to the whole crime.”¹⁰² There are three sorts of classifications of perpetration in the meaning of *strictu sensu*; direct individual perpetration, joint perpetration commenced through co-operation and indirect individual perpetration commenced through another person,¹⁰³ all of which are based on the *control over crime* approach entailing two additional requisites besides intent and knowledge; *mutual knowledge* and *knowledge of the importance of their role*,¹⁰⁴ which is not much different from JCE.¹⁰⁵

⁹⁹ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber Judgement, 28 February 2005, para. 79; *Blagojevic and Jokic*, Trial Chamber, para. 696.

¹⁰⁰ see *Tadic*, Appeals Chamber Judgement, paras. 195-196, 202-204, 220 and 228; *Simic et al.*, Trial Chamber Judgement, 156-157; *Kvočka et al.*, Appeals Chamber Judgement, paras. 82-83, 86, 96, 99, 110, 118-119, 183, 209, 243, 263 and 421; *Kvočka et al.*, Trial Chamber Judgement, para 96; *Brdjanin*, Trial Chamber Judgement, para. 258, 352 and 709; *Vasiljevic*, Appeals Chamber Judgement, paras. 99, 101 and 131; *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, Trial Chamber Judgement, 29 November 2002, paras. 68-69; *Stakic*, Trial Chamber Judgement, para. 436; *Krnjelac*, Appeals Chamber Judgement, paras. 31 and 81; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Trial Chamber Judgement, 30 November 2005, para. 511; *Prosecutor v. Milan Babic*, Case No. IT-03-72-A, Appeals Chamber Judgement, 18 July 2005, para 38.

¹⁰¹ Article 25, Rome Statute.

¹⁰² *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision: Charges Confirmed, Pre-Trial Chamber, 29 January 2007, para. 326.

¹⁰³ *Ibid.*, paras. 318 and 333-367.

¹⁰⁴ *Lubanga*, Pre-Trial Chamber Decision, paras. 361-365 and 367; see also Article 30 Rome Statute

¹⁰⁵ Olasolo, H., 'Reflections on the Treatment of the Notion of Control of the Crime and Joint Criminal Enterprise in the Stakic Appeal Judgement', 7 *International Criminal Law Review* (2007), pp. 156-157 (Olasolo); Olasolo, H. and Perez Cepeda, A., 'The Notion of Control of the ICTY: The Stakic Case', 4 *International Criminal Law Review* (2004), p. 485. (Olasolo and Perez); *Lubanga*, Pre-Trial Chamber Decision, paras. 116, 329-332, 342, 351 and 357-360; *Stakic*, Trial Chamber Judgement, paras. 440-441 and 587; *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Appeals Chamber Judgement, 22 March 2006, para. 62.

3 Leading Theories on Corporate Criminal Liability in the Wake of Domestic Practices

3.1 Vicarious Liability

Vicarious liability is based on the notion that judicial persons are imputed with corporate criminal liability for crimes commenced by natural persons and originates from the notion of command responsibility.¹⁰⁶ In English law exists a rule stressing that the principal should not be held liable for acts committed by his or her subordinate. However, this rule is only applicable in the event that the crime has been committed without knowledge or authorisation by the principal, even in the event that the crime has been commenced within the scope of the subordinates employment.¹⁰⁷ However, the principle of *extensive construction* and the *delegation principle* constitute two notions that are one exception to the previously mentioned rule. The primary principle holds the principal liable in cases where the employee has commenced illicit acts while the second principle holds the principle liable if and when the principal has authorised a statutory duty to the employee.¹⁰⁸ Another exception to the rule imputes liability on the principal if public nuisance occurs.¹⁰⁹ Other explicit exceptions do not exist. On the other hand, US legislation holds that it is irrelevant what position an employee has hierarchically; the corporation is to be held liable regardless. The main difference between English law and US legislation lays in the wake of the penal provisions requiring both guilt and a judicial requisite; where such elements exist, the superior defendant should not be penalised if it can be proven that he or she carried out adequate *due diligence* measures to prevent the commence of the crime. If the prohibited crime that is commenced by an employee lacks the guilt requisite, the *Model Penal Code* that constructs strict

¹⁰⁶ Ledeman, p. 652.

¹⁰⁷ Card, R., *Card, Cross and Jones: Criminal Law*, (21st ed., Oxford: Oxford University Press, 2014), p. 773.

¹⁰⁸ Smith, J., *Smith and Hogan Criminal Law*, (9th ed., London: Butterworth 1999), p. 173

¹⁰⁹ Wells, C., *Corporations and Criminal Responsibility*, (2nd ed., Oxford: Oxford University Press, 2001), p. 88.

liability is applied.¹¹⁰ Contrastingly, Canada applies vicarious liability more narrowly; it is only applied in cases where the prohibition of a commenced crime lacks the guilt requisite. The Canadian provisions are categorised in two branches of regulations; absolute criminal liability and strict criminal liability. The primary cover acts of administrative crime while the latter is basically based on the same approach as the prior with the additional requirement of proof of lack of *due diligence* measures taken by the principal in order to thoroughly prevent the commenced crime. The prerequisite required in order to impute corporate criminal liability on a company is that the employee has commenced the crime within the scope of the employment.¹¹¹

However, there are some problems that need to be discussed in relation to this theory. Imputing corporate criminal liability through vicarious liability is not ultimate as it aims at punishing a physical individual for the crimes committed by another and not a corporation *per se*. Seemingly, the theory is controversial as it does not follow the principle of guilt; it punishes a person that has not committed a crime.¹¹² However, as the theory is of the notion of the economic-industrial social sphere, which is an exception in criminal law theory due to efficiency, prosecution of an individual for the crimes commenced by another is justified and in accordance with criminal law standards.¹¹³ In *sum*, vicarious liability can be seen as command responsibility where the leading official is culpably liable for the crimes committed by his or her soldiers. The author would like to stress that as important the theory might seem, it does not help the author to fully answer the question of whether or not corporations *per se* can be held criminally liable, which allows for further discussions on another theory dealing with the issue at hand.

¹¹⁰ Ibid., pp. 13

¹¹¹ Ferguson, pp. 163.

¹¹² Dubber and Hörnle, p. 336.

¹¹³ Wells, pp. 67.

3.2 Theory of Identification

The so-called theory of *alter ego* holds the judicial person liable *per se* and differs from the previous model as it does not touch upon vicarious liability of natural persons and their culpability; it simply constructs independent criminal liability of corporations, which allows criminal law to preserve its strong core in cases where the provision of the prohibited act has a vague or is lacking the guilt requisite.¹¹⁴ In difference from vicarious liability, the theory of *alter ego* is broader and deeper as it establishes corporate intent and involves a penalty for corporations that have commenced intentional offences. Moreover, natural persons are considered as organs of the corporate body in the sense that they are the limbs and brains of the company.¹¹⁵ In this way, the theory of *alter ego* gives the corporation all the physiognomies of a physical individual, which fulfils the criterion for vicarious liability. Thus, the requisite for independent, non-vicarious, liability is fulfilled and the strong core of criminal law is maintained.

English practices extend corporate criminal liability to cover acts of which the prohibition requires guilt; namely, through identification of the director as he or she constitutes the directing mind.¹¹⁶ Seemingly, only the superior that constitutes the leader or equivalent can attribute corporate criminal liability to the company through *incarnation* as he or she is acting in the name of the company.¹¹⁷ In other words, the incarnation of the corporation opens up for the court to impute corporate criminal liability on the company *per se*.¹¹⁸ However, what is conclusive is whether or not the directing mind was acting within his or her official capacity.¹¹⁹ Contrastingly, US practices

¹¹⁴ Ledeman, pp. 693.

¹¹⁵ Dubber and Hörnle, p. 334.

¹¹⁶ Horder, J., *Ashworth's Principles of Criminal Law*, (8th ed., Oxford: Clarendon Press 2016), pp. 168-169.

¹¹⁷ Wells, p. 98; *Legislating the Criminal Code. Involuntary Manslaughter: item 11 of the Sixth Programme of Law Reform: Criminal Law*, LawCom. (Series) no. 237, (London: Her Majesty's Stationery Office, 1996), p. 78. (LAW COM No 237).

¹¹⁸ LAW COM No 237, p. 74; *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705; *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1QB 159, both cited in LAW COM No 237, p. 75.

¹¹⁹ Ledeman, p. 655; LAW COM No 237, p. 78.

impute corporate criminal liability on legal entities in cases where the corporate leading representative has allowed, ordered or through negligence accepted wilful commence of illicit crimes.¹²⁰ Same standards are applied in Canadian¹²¹ and French¹²² doctrine if the provision on the commenced crime requires guilt.

In difference from vicarious liability, the theory of *alter ego* provides subjectivity to the notion of what a legal person is through analogy to the physical individual in criminal law. However, what seems problematic is the delimitation allowing corporate criminal liability only in cases where the director of the company is involved.¹²³ Therefore, questions equivalent to “What approach should be applied when individuals that hierarchically stand below the superior commit prohibited crimes?” arise. It might, in theory, be possible to solve the problem through analogy drawn upon the mode of JCE discussed above and punish the entity as a whole especially in cases where a leader or directing mind does not exist. In this way, all individuals involved will constitute the directing mind, limbs and other organs and construct the corporate person’s *alter ego*.

¹²⁰ Wells, pp. 131.

¹²¹ Ferguson, p. 168.

¹²² Wells, p. 139.

¹²³ Ferguson, p. 657.

4 Corporate Criminal Liability in Domestic Practices

In brevitatis, domestic law has laid the foundation for individual and entity liability. Thus, the author urges the discussion of national practices regarding corporate criminal liability on the domestic level in order to generate possible similarities between individual, group and corporate criminal liability in this chapter. Subsequently, a chapter depicting how these domestic practices have and may continue to influence international criminal law in its future development will follow.

4.1 Corporate Complicity in Domestic Practices

Generally, if a corporation acts in violation of international criminal law, there is a full possibility for prosecution of the corporate accused domestically. For example, if a company commits acts that constitute atrocity crimes¹²⁴ it can be brought before US Courts under the ATCA.¹²⁵ This applies especially to cases of complicity in which contractors have, for example, provided various interrogation methods to the US at the Abu Ghrab prison.¹²⁶ Another example is the lawsuit against *Blackwater* that allegedly is liable for war crimes connected to massive killings of civilians in September of 2007.¹²⁷ Notably, these corporations have been in association with the government when commencing these crimes, which naturally calls for state liability with regards to international humanitarian law. However, recent rulings at the US Courts have held that corporations that have committed atrocity crimes should

¹²⁴ Note that the list is not exhaustive.

¹²⁵ United States' Alien Tort Claims Act, also known as the Alien Tort Statute, allows for lawsuits against those that have committed crimes such as genocide, crimes against humanity, violence against women, slavery, forced labour etc in order to grant justice to the victims.

¹²⁶ *Saleh et al. v. Titan Corporation.*, Order of 26 June 2006, 436 F.Supp2d 55. p. 5; *Ibrahim et al. v. Titan Corporation et al.*, and *Saleh et al. v. Titan Corporation.*, Order of 6 November 2007, US District Court for the District of Columbia, James Robertson US District Judge, Case 1: 05-cv-01165-JR, p. 7.

¹²⁷ *Abtan et al. v. Blackwater Worldwide et al.*, Case 1:07-cv-10831 (RBW). filed 26 November 2007.

be held liable *per se* even in cases where state association is lacking.¹²⁸ Moreover, most of these cases concern the prohibited act of aiding and abetting acts that are sanctioned in international criminal law¹²⁹ and therefore turn to accomplice liability.

The US has considered the Rome Statute when applying relevant provisions in the ATCA, especially regarding the rule on complicity as it allows a claim to be made against a corporation. Markedly, for corporate criminal liability to be imputed on a company, it is considered to be enough if it can be shown that a corporate entity is complicit in human rights violations committed by a government. However, the act of accomplice must stem in a corporate obligation towards the government as in the case of *Khulumani v. Barclay National Bank, Ltd*; *Ntsebeza v. Daimler Chrysler Corporation* where several multinational corporations that commenced business in South Africa by providing the government with resources, which lead to the commence of genocide and human rights violations amongst others.¹³⁰ As regards the identification of corporate intent, the US Court turns to the Rome Statute and its Article 25(3) that has been discussed above. It was held that the *mens rea* for complicity is satisfied when it can be shown that a group of persons acted with a common purpose to facilitate the commence of a crime by another person(s).¹³¹ Seemingly, it is quite easy to hold a corporation liable according to these practices, which might appear virtuous.

However, the author does not want to be too enthusiastic and will thus present, according to her, two flaws. What strikes the author *in hoc casu* is that the discussions have been centrally based upon the relationship between the

¹²⁸ *Wiwa v. Royal Dutch Shell Petroleum*, 28 February 2002, US District Court for the Southern District of New York, p. 39; *John Doe et al. v. Unocal Corporation; Total S.A.*, US. Court of Appeals for the Ninth Circuit, 18 September 2002, para. 3ff.

¹²⁹ Human Rights Watch and the Centre for Human Rights and Justice, 'On the Margins of Profit: Rights at Risk in the Global Economy', 20 *Human Rights Watch Reports*, 3(g), (2 February 2008), p. 2; *John Doe et al. v. Chiquita Brands International*, Complaint before the US District Court of New Jersey, 18 July 2007.

¹³⁰ *Khulumani v. Barclay National Bank, Ltd*; *Ntsebeza v. Daimler Chrysler Corporation*, US Court of Appeals for the Second Circuit, 12 October 2007, 05-2141-cv. 05-2326-cv., pp. 46-47. (*Khulumani v. Barclay National Bank, Ltd* and *Ntsebeza v. Daimler Chrysler Corporation*)

¹³¹ *Ibid.*, p. 36.

corporation and the government; not once has the relationship between a corporation and for instance a JCE been touched upon despite the fact that aiding and abetting a group with a common purpose is prohibited under the Rome Statute.¹³² In cases of assistance to a JCE, the corporation does not need to have a purpose but rather *knowledge* of the intention of the JCE, which is a different approach requiring another level of proof to be satisfied indifference from the discussed approach. The other issue at stake is the suggestion that the *assistance test* is of divergent nature and is thus not consistent with customary international law.¹³³ Notably, the Rome Statute does refer to other treaties and decisions by other international tribunals, but that does not *per se* indicate that the *assistance test* in the Rome Statute is different from customary international law.

Ad cuius evidentiam, the first issue regarding assistance to a JCE has been clarified by the ICTY stressing that anyone involved in the commence of a crime committed by a group with a common purpose is to be held liable regardless of the nature of the participation. In other words, it is irrelevant if the participation was of direct or indirect nature; what is significant is that the mere contribution was necessary for the fulfilment of the JCE's common plan.¹³⁴ Moreover, there are three forms of JCE liability, all of which have different requirements for the fulfilment of the mental element of crime; *basic*, *systemic* and *extended* JCE liability.¹³⁵ The ICC holds that in cases of complicity, two forms of *mens rea* must be shown; *intent to contribute* and *knowledge of the JCE's intention*, could mean that corporate criminal liability can be imputed on a corporate body if it (1) intends to achieve the criminal aim of the JCE or if it (2) complies with the JCE despite knowledge of the JCE's aim and possible outcomes that can result from achievement of the aim.¹³⁶ *Paraetera*, as regards knowledge and intention, three types of *dolus*

¹³² Article 25(3)(d) Rome Statute

¹³³ Comment on Article 25(3)(c) Rome Statute, *Khulumani v. Barclay National Bank, Ltd and Ntsebeza v. Daimler Chrysler Corporation*, p. 36.

¹³⁴ *Tadic*, Appeals Chamber Judgement, para. 191

¹³⁵ *Ibid.*, paras. 195-196 and 202-204; *Kvočka et al.*, Appeals Chamber Judgement, paras. 81-83.

¹³⁶ *Lubanga*, Pre-Trial Chamber Decision, paras. 334-336.

exist; *dolus directus* of first degree, *dolus directus* of second degree and *dolus eventualis*, all of which are examined separately.¹³⁷ The author finds it not necessary to go into depth with them as she rather wanted to show how corporate complicity can be understood and how the rules of the Rome Statute can be used in domestic courts in order to impute corporate criminal liability on corporate bodies.

Regarding the second issue, the issue of *actus reus*, the US Court of Appeal held that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”¹³⁸ However, it was never clarified what *substantial effects* involve. Seen to the reference, it might be argued that it indicates on compliance through presence; most accordingly, as encouragement through presence in war zones, not lucrative facets¹³⁹ as the issue of the *assistance test* is founded in cases where all the defendants have been in a command position and have been acting as the directing mind.¹⁴⁰ Now, the author wants to stress that *if* the ideology of the *assistance test* is to be interpreted as in necessitating corporate presence in the state or area where the crime is committed, alike command presence, criminal law would lose its strong core as it would allow for culprits to commence criminal acts from abroad. Logically and despite lack of discussions in relation to Article 25(3)(c) of the Rome Statute, it can be held that the corporate accomplice does not need to be based where the crimes are committed, nor does it have to share the particular intent of the directing mind but should at least be aware of their contribution and what it is resulting in.¹⁴¹

¹³⁷ Ibid., paras. 351, 353-355 and 357-360; *Stakic*, Trial Chamber Judgement, para. 587.

¹³⁸ *Furundzia*, Trial Chamber Judgement, cited in *Khulumani v. Barclay National Bank, Ltd and Ntsebeza v. Daimler Chrysler Corporation*, pp. 38-39.

¹³⁹ *Kvočka et al.*, Trial Chamber Judgement, paras. 253-257.

¹⁴⁰ See for instance the case of *Tadic*.

¹⁴¹ Werle, G., 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice* (2007), p. 970; *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, para. 421.

As the US has considered the Rome Statute and interpreted its rules when dealing with complaints under the ATCA, many other national jurisdictions have adopted their national law to correspond to the Rome Statute to facilitate prosecution of those that have committed international crimes. Holland is one example. The Judiciary of the Netherlands convicted a man working in a supply chain for complicity as he was contributing with chemicals to Iraq, which could be used to produce mustard gas, this chemical weapon was used as means to commit genocide. A quantum of questions of concern arose while dealing with the case; namely, how genocidal intent is supposed to be established and what degree of effect of the contribution is needed to impute compliance liability on the contributor. It was held that “[t]hrough his conscious contribution to the production of mustard gas in a country at war, the defendant knew under those circumstances that he was the one who supplied the material and created the occasion for the actual use of the gas, in the sense that he was very aware of the fact that in the given circumstances the use of this gas could not and would not fail to materialise. Particularly: the defendant was very aware of the fact that ‘in the ordinary course [*sic*] of events’ – the gas was going to be used” for wrongful purposes. The Court then held that “the defendant [...] was aware of the – also then known – unscrupulous character of the Iraqi regime” and was therefore held liable for complicity in international crimes.¹⁴² The author finds this case of particular interest as it holds that persons, alike in vicarious liability, can be held liable for complicity in international crimes if they do not exercise improved awareness.¹⁴³ However, this same case is less appealing to base further arguments on as it holds natural persons liable and not companies *per se*.

Nevertheless, French law extends the liability in cases of complicity to be applicable and attributable to corporate bodies. The French Penal Code

¹⁴² Case of *van Anraat*, Official Translation, International Law in Domestic Courts (ILDC) 753 (NL 2007), para. 11.16.

¹⁴³ *Ibid.*, para. 16; a relatively new case in which corporate accountability has been imputed on a Dutch man, a former timber baron, of war crimes in Liberia. However, as no official translation in English exists, the case may only be found in Dutch: ECIL:NL:GHSHE:2017:1760, Gerechtshof’s-Hertogenbosch, Parketnummer 20-001906-10, 21 April 2017, Tegenspraak.

provides for corporate complicity liability in cases where legal persons contributed states with some form of assistance in the commence of international crimes.¹⁴⁴ Paradoxically, French Law has required an explicit provision inquiring corporate liability;¹⁴⁵ however, new legislation is stressing that explicit provisions under the Penal Code are not needed in order to hold corporations liable.¹⁴⁶ Some critiques that have pointed out that the revision of the law is useless as it is highly impossible to hold corporations accountable for the crime of rape. The author agrees on that. However, corporations have full potential to carry out these crimes as accomplices and can thus be held liable for all crimes encompassed in the French Penal Code.¹⁴⁷ Moreover and as aforementioned, corporate bodies have to take *due diligence* measures before operating and commencing any work or cooperation that might result in complicity or direct involvement in illicit crimes.¹⁴⁸ This includes the persons working at the company and operating as the directing mind as they are considered to be its organs but only in the event that the legal entity acts on its own behalf through its directing mind, employees or other staff. In other words, the corporate body cannot be held liable if the director, employees or other staff act on their own behalf.¹⁴⁹ Interestingly, this same approach has been discussed but abolished during the Rome conference establishing the ICC and the Rome Statute,¹⁵⁰ which will be further discussed in forthcoming chapters.

¹⁴⁴ French Penal Code of 31 December 2005, Act 2004-204 of 9 March 2004; *Re: Criminal liability of private law legal entities under French law and Extraterritoriality of the laws applicable to them: Review of the situation and discussion of issues*, (Ministrie des Affaires Etrangeres, Human Rights Coordination Mission, 5 June 2006), 5 June 2006, p. 1. (Human Rights Coordination Mission)

¹⁴⁵ *Ibid.*, p. 2.

¹⁴⁶ Article 121.2 is reversed to not contain "in the case provided for by the statute and regulation", French Penal Code of 31 December 2005, Act 2004-204 of 9 March 2004, "Perben II".

¹⁴⁷ Human Rights Coordination Mission, p. 3.

¹⁴⁸ Human Rights Coordination Mission, p. 2.

¹⁴⁹ *Ibid.*, pp. 3-4.

¹⁵⁰ See in example Clapham, A., 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (the Hague: Kluwer, 2000), 139-135. (Clapham, 2000)

In difference from domestic practices that urge to identify the directing mind, Australian law, that has enhanced the Rome Statute in its domestic criminal law, takes another approach. Australian criminal law has formed the element of *mens rea* to explicitly fit a corporate body; it deals with the elements of fault other than negligence and negligence *per se*.¹⁵¹ The first category simply stresses that if a provision on the prohibition of a certain crime requires individual fault, the element of fault has to be imputed on the corporation if the corporate body in any way has authorised the commence of the crime. Certainly, corporate criminal liability cannot be linked to the corporation if it can be proven that it executed *due diligence* to inhibit the commission of the illicit act. Namely, corporate criminal liability is not imputed on the corporation when the corporate body authorises the commencement of illicit acts, regardless of the hierarchical position of the individuals that authorises the crime.¹⁵² The second category imputes corporate criminal liability on the corporation in the event that its employees, agents or officers commit but only if the commenced crime is a result of negligent corporate behaviour through in example inadequate corporate management and control.¹⁵³ Noting the importance of corporate liability, the Australian Centre for Policy Development and the Future Business Council have recently drafted a legal opinion on climate change and director's duties.¹⁵⁴ In this memorandum, it is held that directors have a duty of care and diligence owed to the company¹⁵⁵ and that they should consider climate change risks before commencing any corporate conduct¹⁵⁶ as such work might render “*economic, environmental and social sustainability risks*.”¹⁵⁷ These risks involve i.e. “flooding and rising sea levels, which might [...] damage property,”¹⁵⁸ which in turn might

¹⁵¹ Australian Criminal Code Act of 1995, C2016C01150, Articles 12.3 and 12.4.

¹⁵² A definition of persons with the power to authorise certain acts is contained in Article 12.3 of the Australian Criminal Code.

¹⁵³ Article 12.4 of the Australian Criminal Code.

¹⁵⁴ Hutley, N. SC and Hartford-Davis, S., *Legal Opinion on Climate Change and Director's Duties*, Centre for Policy Development and the Future Business Council Memorandum of Opinion, 7 October 2016.

¹⁵⁵ *Ibid.*, para. 10.

¹⁵⁶ *Ibid.*, para. 11.

¹⁵⁷ *Ibid.*, para. 12.

¹⁵⁸ *Ibid.*, para. 15.

amount in i.e. health-related deaths and displacement of people.¹⁵⁹ Thus, if corporate directors do not exercise environmental diligence before any corporate conduct resulting in economic development, they should be rightfully held liable.¹⁶⁰ The author finds this memorandum of high value as it raises awareness of the importance of corporate liability so that great tragedies alike the Bhopal disaster in India, can be avoided.¹⁶¹ The dilution of the topic to include environmental aspects will not be furthered as there is no room for it within the scope of this thesis. The slight expansion serves simply as an example to show to what extent corporate directors may be held liable for commencing corporate conduct to the cost of lives of innocent people.

Additionally, as the discussions above are focusing on corporations committing or that are in complicity to the commence of atrocity crimes, the author wants to move back over the Ocean to Europe, namely the UK. The UK is of specific interest as it has adopted an Act on Corporate Manslaughter and Corporate Homicide.¹⁶² This specific Act holds corporations liable “if the way in which its activities are managed or organized by its senior management is a substantial element in the breach [of the duty of care].” Moreover, “a breach of a duty of care by an organisation is a ‘gross’ breach if the conduct alleged to amount to a breach of that duty falls far below what can be reasonably expected of the organisation in the circumstances.” These circumstances might be in “the making of decisions about how the whole or substantial part of its activities are to be organized, or [...] the actual managing or organising of the whole or a substantial part of those activities.”¹⁶³ In other words, the Act forms a new form of *mens rea* in order

¹⁵⁹ Ibid., paras. 17.4-17-5.

¹⁶⁰ Ibid., paras. 34, 36, 37 and 51-52.

¹⁶¹ 2nd December 1984 is the date when a toxic gas escaped from a tank of a fertilizer plant, owned and operated by Union Carbide India Ltd., resulting in the death of over 2300 people and another 500.000 people that have been affected in different ways i.e. blindness and birth defects as a direct effect of being in contact with the gas. Nanda, V. P. and Bailey, B. C., ‘Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law’, 17 *Denver Journal of International Law and Policy* (1988-1989), pp. 165-170.

¹⁶² Corporate Manslaughter and Corporate Homicide Act of 6 April 2008.

¹⁶³ Ibid., Section 1(4).

to facilitate prosecution of corporations in the event that their acts have contributed to some kind of loss of life.

4.1.1 The Case of *Chiquita Banana*

The multinational banana company Chiquita has pled guilty for knowingly providing material support of “prolonged, steady, and substantial” character as it stretched over a seven years period of time¹⁶⁴ to the illegal paramilitary organisation AUC known for its illegal actions involving mass killings of Colombian civilians. Chiquita’s manager was working in accomplice with the AUC commander establishing organisations to better handle the financial aids functioning as legal fronts for the AUC,¹⁶⁵ all of which were of illegal character.¹⁶⁶ Besides the finances, the AUC received help from Chiquita to smuggle weapons and other ammunition through Chiquita’s private port,¹⁶⁷ all of which was used to commit the crime of mass killing.¹⁶⁸ Chiquita’s gain consisted of uninterrupted banana plant areas where it could commence its work, without any competition, resulting in “monopolistic control over the banana commerce. [...] Chiquita intended to and did financially benefit in the United States from the AUC’s systematic killings”¹⁶⁹ of “social activists, teachers, community leaders, trade unionists, human rights defenders, religious workers and leftist politicians.” The AUC “also targeted people it considered socially undesirable, such as indigenous persons, drug addicts and petty criminals.”¹⁷⁰

Notably, the corporation was acting in this way due to benefits that it was gaining through the supporting finances.¹⁷¹ Therefore, the author wants to

¹⁶⁴In *RE: Chiquita Brands International, Inc. Alien Tort Statute Litigation*, Case No. 12-14898-B, United States Court of Appeals for the Eleventh Circuit, On Appeal from the United States District Court for the Southern District of Florida, No. 08-md-01916, Plaintiffs-Appellees-Cross-Appellants’ Response Brief and Cross-Appeal Opening Brief, (In *RE: Chiquita Brands International, Inc. Alien Tort Statute Litigation*), p. 1.

¹⁶⁵ *Ibid.*, pp. 10-11.

¹⁶⁶ *Ibid.*, pp. 10-11.

¹⁶⁷ *Ibid.*, p. 12.

¹⁶⁸ *Ibid.*, p. 13.

¹⁶⁹ *Ibid.*, p. 13.

¹⁷⁰ *Ibid.*, p. 14.

¹⁷¹ *Ibid.*, p. 2.

stress that Chiquita in its accomplice role is nothing less blameworthy than the AUC for the mass killings of Colombian civilians. The plaintiffs are survivors of the by AUC targeted groups¹⁷² claiming their rights under the ATCA.¹⁷³ The reason why the US Court is dealing with this international case is founded on the fact that Chiquita is based in the US,¹⁷⁴ because crimes against humanity (alike genocide) is an atrocity crime of *jus cogens* character,¹⁷⁵ and due to the touch and concern with reference to the case of *Kiobel*.¹⁷⁶

Chiquita pled guilty¹⁷⁷ before the US Court as the “*mens rea* of conspiracy is *purpose* and that of aiding and abetting is *knowledge*,”¹⁷⁸ and that the requisite for conspiracy to war crimes is fulfilled according to international standards¹⁷⁹ despite Chiquita’s argument that in order to be held liable the corporation must have intended to kill the assassinated individuals claiming that “those complicit in widespread slaughter are immune.”¹⁸⁰ Because, with reference to international law, despite the fact that Chiquita did not intend to kill each and every victim, it is enough that the corporation agreed to at least one unlawful act out of which abuses have arisen for the achievement of the shared goal. For this statement, Chiquita’s intent to commence the assassination of each and every particular victim must not have been of existence.¹⁸¹ As regards aiding and abetting, knowledge of the injuries that emanated from the acts of the aider and abettor is insufficient.¹⁸² What suffices is that Chiquita was or should have been aware of that crimes might

¹⁷² Ibid., p. 2.

¹⁷³ Ibid., p. 5.

¹⁷⁴ Ibid., pp. 3, 6 and 24-26.

¹⁷⁵ Bassiouni, M. C., ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’, 59 *Law and Contemporary Problems*, 4 (Autumn 1996), p. 68.

¹⁷⁶ It was first held that petitions against Chiquita cannot be held before US Courts under the ATCA due to “the underlying presumption against extraterritorial application of federal statutes.” However, as the claims against Chiquita under the ATCA “touch and concern the territory of the United States [...] with sufficient force” there was nothing preventing the US Court from taking the case., In RE: Chiquita Brands International, Inc. Alien Tort Statute Litigation, pp. 3, 15 and 19-24.

¹⁷⁷ Ibid., p. 15.

¹⁷⁸ Ibid., p. 17.

¹⁷⁹ Ibid., pp. 35-37, 51-53 and 55.

¹⁸⁰ Ibid., pp. 17, 26 and 46.

¹⁸¹ Ibid., p. 56.

¹⁸² Ibid., p. 56.

be committed.¹⁸³ Unfortunately, the lawsuit was dismissed as it was found that the ATCA does not apply extraterritorially. Judge Beverly Martin claims the opposite in her dissenting opinion.

4.2 International Instruments on State Practices

Despite the abolishment of criminalising corporate criminal behaviour during the Rome Conference, several other treaties have included corporate liability with reference to the importance of its existence. Guided or influenced by the discussion about imputing liability on a corporation through identification of the directing mind, corporate criminal liability is enhanced in the Council of Europe's Criminal Convention on Corruption.¹⁸⁴ Moreover, the EU goes a step further and enumerates various sanctions depending on the gravity of the committed crime in its Joint Action Plan consisting of two Conventions and Protocols. Remarkably, it asks the Member States to take appropriate measures to sanction corporate bodies, enumerates some possible sanctions but also stresses that the list of sanctions is not exhaustive.¹⁸⁵ The author will not draw more attention to sanctions as they will be separately discussed in a forthcoming chapter.

Furthermore, in a plenary sitting report on corporate liability for serious human rights abuses in third countries¹⁸⁶ the European Parliament stressed the importance of international conventions with regards to human rights and asked corporations to “embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards,

¹⁸³ Ibid., p. 57.

¹⁸⁴ Article 18 of the *Council of Europe's Criminal Convention on Corruption*, ETS No.173, Strasbourg, 27.I.1999.

¹⁸⁵ *Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector*, Official Journal L 358, 31/12/1998, p. 2-4; *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, Official Journal C 195, 25/06/1997 P. 0002 – 0011, p. 2-11; *Convention on the protection of the European Communities financial interests*, OJ C 316, 27 November 1995, p. 49-57.

¹⁸⁶ *Report on Corporate Liability for Serious Human Rights Abuses in Third Countries* (2015/2315(INI)), A8-0243/2016, 19 July 2016.

the environment and the fight against corruption, making a commitment to those values and integrating them into their business operations on a voluntary basis”¹⁸⁷ as they are major players in the global economy;¹⁸⁸ because violations of rights committed by corporate bodies are a concern of global character¹⁸⁹ and the protection of human rights is of essential importance to the Member States and the EU.¹⁹⁰ Moreover, as the European Parliament has noted, exists does a lack of a holistic approach to corporate liability in cases where corporations have committed human rights abuses¹⁹¹ and require a proper legal framework on the matter.¹⁹² Because human rights *due diligence* have to be carried out regardless as it is a moral and legal obligation to respect them. If *due diligence* is not taken, corporations should be subjected to i.e. pay restitution and compensation to the persons that have suffered harm from the corporate act.¹⁹³ In lieu of this, the European Parliament encourages its Member States to partake in the preparation of a binding UN treaty on Business and Human Rights and to enact action against those corporate culprits and grant the victims access to effective remedy while the treaty is in progressive creation as the defence of human rights is of urgent matter.¹⁹⁴ In the creation of the treaty, the European Commission is urged to create a “consistent body of law, including rules governing access to justice, jurisdiction, the recognition and enforcement of judicial decisions in civil and commercial matters, the applicable law, and judicial assistance in cross-border situations.”¹⁹⁵ To that end, it should “involve personal criminal liability, and [call] for those responsible for such crimes to be prosecuted at the appropriate level.”¹⁹⁶

¹⁸⁷ Ibid., under *The European Parliament* first section under the heading and para. C.

¹⁸⁸ Ibid., para. D.

¹⁸⁹ Ibid., para. F.

¹⁹⁰ Ibid., para. H.

¹⁹¹ Ibid., para. I.

¹⁹² Ibid., paras. 2-4.

¹⁹³ Ibid., paras. 6-11.

¹⁹⁴ Ibid., paras. 12-13, 15, 17 and 25.

¹⁹⁵ Ibid., para. 32.

¹⁹⁶ Ibid., para. 35.

Interestingly, the UN has also approached the question of legal entities and their participation in the commence of illicit acts together with an organized criminal group through the creation of a convention; UN Convention against Transnational Organized Crime was created in order to prevent international criminals from operating successfully and grant the world citizens safety and dignity in their homes and communities.¹⁹⁷ Article 10 of the Convention prescribes that each State Party *shall* adopt necessary measures giving rise to corporate liability. However, despite the international character of the Convention, corporate liability remains to only be dealt with on the domestic level and not in the international domain.

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict is an additional document pertaining to the matter at hand.¹⁹⁸ This intergovernmental document serves to promote and respect international humanitarian law and international human rights law whenever PMSCs are present in international armed conflicts.¹⁹⁹ “As companies, PMSCs *per se* are not bound to respect international humanitarian law, which is binding only on parties to a conflict and individuals, not corporate entities. Nor are PMSCs bound by human rights law, which is only binding on States. [...] [H]owever, insofar as those bodies of law are integrated into national law and made applicable to companies, PMSCs are nonetheless obliged to hold them. The same holds true, obviously, for all national law.”²⁰⁰ The document is not legally binding *per se* but as it consists of a compilation of international standards, it does serve as a crucial guideline on how to best prevent corporations from commencing crimes and how liability is imputed on the ones in breach of

¹⁹⁷ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Foreword by Secretary-General Kofi A. Annan, pp. iii-iv., see also Articles 10 and 31

¹⁹⁸ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, International Committee of the Red Cross, August 2009.

¹⁹⁹ *Ibid.*, p. 31.

²⁰⁰ *Ibid.*, p. 36.

international humanitarian law.²⁰¹ Notably, this only serves as basis guidelines in armed conflicts and not in non-armed conflicts, which is actually not true. The Montreux Document explicitly says that despite the fact that it is underpinned with international humanitarian law standards that only apply in armed conflicts, the document highlights best practices confined in peacetime as well indicating that there is no necessity of the existence of an armed conflict in order for these principles to be respected by states.²⁰² In the event that corporations commit illicit crimes, corporate criminal liability is imputed through superior criminal liability²⁰³ as a form of vicarious liability. At some times, corporate liability can be imputed on the State as a question of international law but that is only if the corporation is acting in support of the government.²⁰⁴ State responsibility will not be further discussed as it falls outside the scope of the thesis.

The International Code of Conduct for Private Security Service Providers²⁰⁵ is similar to the Montreux Document as it endorses its rules and is an agreement that serves as a first step in the promotion of effective control and impunity of PSCs. Since September 2013, over 700 corporations are formally committed to operating according to the rules set out in the Code of Conduct and the main focus now is to establish an autonomous legal instrument for corporate control and surveillance to raise awareness and promote good practices and human rights.²⁰⁶ However and yet again, if corporate criminal liability is found, it is to be dealt with on the domestic level, not internationally until further development gives rise to the formation of a mechanism allowing international corporate prosecution for major wrongdoings, which takes us to the next chapter.

²⁰¹ Ibid., p. 31.

²⁰² Ibid., p. 32.

²⁰³ Ibid., p. 37.

²⁰⁴ Ibid., p. 35.

²⁰⁵ Schweizerische Eidgenossenschaft, International Code of Conduct for Private Security Service Providers, 9 November 2010.

²⁰⁶ The Geneva Centre for the Democratic Control of Armed Forces, International Code of Conduct for Private Security Service Providers.

5 Corporate Criminal Liability in International Criminal Law

One of the reasons why corporate criminal liability has not been accepted as a mode of liability in international criminal law are the objections with reference to difficulties of the assessment and well established principles of international criminal law, mainly through argumentation that the principle of *societas delinquere non potest* has to be upheld as corporations have *no body to kick and no soul to damn*.²⁰⁷ Furthermore, the argumentation concludes that corporate criminal liability is a form of vicarious, collective liability that results in major consequences for all natural persons having interests in the corporation. However, the author wants to stress that despite the fact that this argument is underpinned with some truth there is still reason to punish the legal person; because, if a corporation is commencing illicit crimes through its employees with authorization from the directing mind, it is beyond reasonable doubt that the persons involved do not lack knowledge of the outcomes of their actions. Furthermore, if the crimes that are being commenced or have been commenced are of high blameworthiness and of a high notion, underpinned with facts of what the corporation is doing, persons having interests in the legal person should take appropriate measures to prevent and punish those persons that are commencing or have commenced these crimes. If such *due diligence* has been avoided, the shareholders or holders of interest should not have the possibility to avoid this form of collective responsibility; the corporation should be punished as a whole. Because, if not the whole corporation is punished, the corporation may continue with its commence, which is fully unacceptable, especially if the crimes committed constitute genocide.

To further demonstrate corporate criminal liability, the author presents a recent case in which a legal person has been brought before the STL. The nature of the case does not involve aiding and abetting illicit crimes, but rather

²⁰⁷ Coffee Jr, J., “No Soul to Damn, No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’, 79 *Michigan Law Review* (1981), 386-459, p. 386.

contempt of court. As the case might seem irrelevant, the author wants to stress that it is of great value for discussion as it discusses the possibilities of prosecution of legal entities and the assessment thereof.

5.1 Case of *Al Akhbar*, STL-14-06²⁰⁸

In the establishment of corporate criminal liability, the Court decided to draw attention to the argumentation put forward by the *Amicus Curiae* Prosecutor who held that in order to impute corporate criminal liability on a corporation three requirements attributed to the *corporation's principals, employees, and/or affiliates* must be satisfied; the identified person(s) must have “(1) acted within the scope of their employment; (2) had authority on behalf of the corporation; and (3) acted on behalf of the corporation.”²⁰⁹ The Defence stressed that such elements do not exist under international law and that the *Amicus* cannot derive them from national practices as there is no international consensus on the matter. Additionally, it was argued that this constitutes a breach of the principle *nullum crimen sine lege* because these elements did not exist during the time period prior to the corporate accused's acts.²¹⁰ Contrary to the Defence, the Court found that these elements are envisaged in international law through the applicable Rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence,²¹¹ but acknowledged the lack of international conventions and international custom principles on this specific matter.²¹² However, the Court found that there is an increasing number of nations that are criminalising unacceptable corporate behaviour but that the approach and penalty systems vary across nations, especially in cases where the acts of an

²⁰⁸ *Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin*, Case. No. STL-14-06/T/CJ, Trial Chamber Judgement, 15 July 2016 (*Akhbar*, Trial Chamber Judgement)

²⁰⁹ *Al Jadeed [CO.] S.A.L./ NEW T.V. S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/T/CJ, Trial Chamber Judgement, 18 September 2015, para. 56 (this is the first case in which corporate criminal liability has been discussed. However, as the corporate body was acquitted of all charges, the argumentation herein serves only as basis for understanding of the reasoning of the Court).

²¹⁰ *Ibid.*, para. 57.

²¹¹ *Ibid.*, para 60; Special Tribunal for Lebanon, *Rules of Procedure and Evidence* (as corrected on 3 April 2014), 20 March 2009, STL-BD-2009-01-Rev.6-Corr.1.

²¹² *Ibid.*, para. 61.

individual can be attributed to the corporation.²¹³ Furthermore, the Court stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law.²¹⁴ Thus, the Court found it reasonable to look into Lebanese Criminal Law under which corporations can be held liable and would in that sense not violate the rights of the accused.²¹⁵ The Lebanese Criminal Code holds corporations liable for the acts committed by the directing mind, representatives and other employees in the case that the crimes have been committed on behalf of the corporation.²¹⁶ Moreover, in order to impose corporate criminal liability on a company, it is enough to identify the physical individual that has committed the crime.

The Court held that the *mens rea* can only be fulfilled if the natural accused has *knowingly* and *wilfully* interfered with the administration of justice and that the act has been committed merely *knowingly* and *wilfully* in order to show culpability.²¹⁷ The Court held that the *Amicus* had to prove that the accused “(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal’s ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses.” As regards *knowledge* and *wilful blindness*, the Court held that actual *knowledge* that the disclosure poses a threat to the public’s confidence in the Tribunals work can be inferred from various circumstances. Moreover, if only *wilful blindness* is established, that alone suffices *knowledge* which

²¹³ Ibid., para. 63.

²¹⁴ Ibid., para. 66.

²¹⁵ Ibid., paras. 67-68.

²¹⁶ Article 210 Lebanese Criminal Code, *Selected Articles*, STL official Translation, Version of September 2015.

²¹⁷ *Akhbar*, Trial Chamber Judgement, para. 42.

gives reason to impute criminal liability. However, in order to establish *wilful blindness*, it must be established that “Accused had suspicion of the likelihood”, that he “must have wilfully kept himself unaware of facts that would confirm this likelihood, as so to be able to deny knowledge of it and therefore escape liability.”²¹⁸ As regards corporate criminal liability, it can only be imputed on the corporation if it can be “(1) establish[ed that] the criminal responsibility of a specific natural person [exists]; (2) demonstrate[d] that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and (3) prove[d] that the natural person’s criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.”²¹⁹

As the identified Editor-in-Chief, Mr Al Amin fulfilled all the required elements of both *actus reus* and *mens rea*, the Court found beyond reasonable doubt that he holds all requirements for prosecution.²²⁰ To this end, criminal responsibility of the directing mind has been established²²¹ and found beyond reasonable doubt that Mr Al Amin fulfilled the qualifications required for the second element of corporate criminal liability.²²² Also, the first required element was considered to be fulfilled beyond reasonable doubt as it was evident that the articles were issued by the corporate accused and that Mr Al Amin was using the means of the corporation and commenced the criminal conduct of on behalf of Al Akhbar.²²³ Therefore, the Court concluded that corporate criminal liability should be imputed on Al Akhbar.²²⁴

²¹⁸ Ibid., para. 43.

²¹⁹ Ibid., para. 45, emphasis added.

²²⁰ Ibid., paras. 48, 50-51, 59, 70, 75, 84, 89, 101, 109-111, 114-116, 118-121, 139-140, 145-146 and 148.

²²¹ Ibid., paras. 168-169.

²²² Ibid., para. 170.

²²³ Ibid., para. 171.

²²⁴ Ibid., p. 62 of 70.

The author finds it interesting to note that the case of *Al Akhbar* is the first case in which corporate criminal liability has been imputed on a corporation which resulted in sentencing. Accordingly, Al Akhbar was sentenced to pay a fine of 6.000 Euros²²⁵ based on the Rule 60 *bis* (J).²²⁶ The rule implies that “(t)he maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100.000 Euros, or both.”²²⁷ Reading the provision, the author wants to stress that she is of the belief that the fine that the Court has imposed on the company is ironically low considered the scope of the crime committed and the effects it has had on the victims and public, especially with regard to the ceiling of 100.000 Euros. The author is presenting her view due to her belief that such a low fine generally will not prevent a corporation from continuing with its commences that is breach of the law. Notably, Al Akhbar has before the publication of the two articles in the case at hand committed similar crimes²²⁸ as its main purpose seems to be to publish provoking materials that will catch the readers’ attention irrespective of the possible outcome that constitutes a crime in order to obtain self-enrichment. As the provoking purpose seems to be the ideology of the corporate accused in order to obtain self-enrichment, the author wants to open up for discussion and ask if this low fine actually will make the corporate entity stop with its illicit commences?

The Court stressed that the penalty should be based on the gravity of the commenced act taking a few indicators, such as aggravating and mitigating circumstances, into account²²⁹ and that the principles used should be based on those applicable on natural persons.²³⁰ The author interprets the Sentencing Judgement as implying that the fine imposed on the natural person is enough of a punishment already, that it is to be seen as a mitigating

²²⁵ *Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin*, Case. No. STL-14-06/S/CJ, Reasons for Sentencing Judgement, 5 September 2016, para. 2. (*Akhbar*, Sentencing Judgement)

²²⁶ *Ibid.*, para. 12.

²²⁷ *Ibid.*, para. 12.

²²⁸ See in example *Akhbar*, Trial Chamber Judgement, paras. 102-103 and 137-139.

²²⁹ *Akhbar*, Sentencing Judgement, paras. 14-15.

²³⁰ *Ibid.*, paras. 21 and 24.

circumstance, and that the corporation thus should not be sentenced as harshly as it could be. Again, the author does not see this as a solution to the misbehaviour of the corporation and wants to hold the Court at fault for not imposing a higher fine.

Despite negative reactions inherent to the thoughts of the author, the author wants to highlight the beauty of the Sentencing Judgement. As aforementioned, the Court could not rely on international standards with regards to corporate criminal liability as it held that such standards are non-existent. However, despite the lack of *opinion juris* and common rules, the Court chose to rely on rules used domestically, which proves the author's statement that international law has its roots in domestic law that lays the foundation to the continuously changing international criminal law.

5.2 Corporate Criminal Liability before the ICC: the Case of *Land Grabbing in Cambodia*

As aforementioned, the ICC does not have jurisdiction over legal entities as such. However, the attempt of bringing corporations to trial lays in the wake of identifying the directing mind of corporate bodies involved and bringing him or her to trial, which might be perceived as the first step in introducing corporate criminal liability at the ICC. Previously, corporate directing minds have stood trial at the ICC for indirect co-perpetration for crimes against humanity as the directing mind used coded messages in his radio broadcasts to commit crimes such as murder and persecution.²³¹ However, as the prosecution of the directing mind was in connection pursuant to a larger investigation, the Trial Chamber acquitted all charges brought against him²³² *sic*. Despite the overwhelming decision of the Trial Chamber, corporate directing minds will face prosecution if their actions consist of atrocity crimes

²³¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.

²³² *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016.

and are attributable to an overall situation that is pursuant to an investigation by the ICC.²³³ However, they might only be subjected to prosecution if the referred situation of investigation falls under the jurisdiction of the ICC; in the event that a corporate directing mind is operating in a state that is not a State Party or if its commence is not referred to the ICC by other qualified bodies, the corporation will not face prosecution and might well commit illicit crimes. Luckily, a safety well exists to this end; atrocity crimes committed by corporate bodies that are in complicity with the governmental conduct of such crimes with the aim of self-enrichment might well trigger prosecution at the ICC,²³⁴ which serves as a basis for the case of *Land Grabbing in Cambodia*.

Since the collapse of Khmer Rouge in Cambodia a new Constitution arose protecting the right to private ownership of property.²³⁵ Despite the constitutional change, land grabbing has continued to be a major issue in Cambodia as a lot of land has been granted to corporations as a form of enterprise in which approximately half a million Cambodians have been affected by suffered fear and pain in various ways and have had their lives and livelihoods aggravated.²³⁶ In October 2014, a communication²³⁷ was filed to the ICC against the Cambodian *ruling elites* together with corporate directing minds who allegedly have been systematically carrying out attacks against the civilian population²³⁸ in order to achieve self-enrichment stemming from land grabbing.²³⁹ These attacks are seen as grave human rights

²³³ Articles 13, 15 and 28 of the Rome Statute.

²³⁴ International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, 29 February 2016; Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation 16 July 2015 and Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13-6-AnxA, Article 53(1) Report, 6 November 2014.

²³⁵ Art. 44 of the Constitution of Cambodia; Peou, S., *Intervention and Change in Cambodia: Towards Democracy?*, (Singapore: Institute of Southeast Asian Studies Publications 2000), pp.186 and pp. 471.

²³⁶ *Land Grabbing in Cambodia* (LICADHO Canada, Cambodian League for the Promotion and Defense of Human Rights)

²³⁷ Global Diligence, *Communication Under Article 15 of the Rome Statute of the International Criminal Court; The Commission of Crimes Against Humanity in Cambodia*, July 2002 to Present (Communication to the ICC).

²³⁸ *Ibid.*, paras. 4, 11, 18, 21, 27.

²³⁹ *Ibid.*, paras. 6-9 and 12-14.

violations²⁴⁰ that amount to crimes against humanity²⁴¹ and thereof, fall within the scope of Article 7 of the Rome Statute.²⁴² Notably, the case of *Land Grabbing in Cambodia* satisfies all requisites for crimes against humanity under the Rome Statute.

However, the question how the ICC will deal with all the actors involved as accomplices is unclear. The author believes that the Court may examine each and every individual separately or possibly regard them as belonging to a conspiracy imposing liability thereof. Either way, directors or the directing minds of corporations may be subjected to liability for doing everything in their power to achieve self-enrichment for the cost of the wellbeing of

²⁴⁰ Ibid., paras. 2-4 and 15.

²⁴¹ Ibid., paras. 4, 11 and 27.

²⁴² 6% of the Cambodian population has been affected, which is enough to state that the crimes committed in the state are of widespread character satisfying the *chapeau* of Article 7. Furthermore, as the commenced crimes were committed as a course of state policy to gain self-enrichment, intent was established. Notably, the crimes committed in Cambodia involved threats, assassinations, forced displacements, illegal detentions and other inhumane acts, all satisfying the requisite of the existence of an attack. Additionally, *knowledge* can be inferred from the showing of intent to further the commence in order to achieve State or organisational policy. Thus, the element of *knowledge* and *intent* is satisfied. See Communication to the ICC, para. 4 and 7-15; Antonio Cassese, *International Criminal Law*, Oxford, 2008, p. 109; International Law Commission, *Draft Code of Crimes 1996*, at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf, Article 18, Commentary (3) and (4); Schabas, W. A., *The International Criminal Court: A Commentary on the Rome Statute*, (New York: Oxford University Press, 2010), p. 152-153 and 156; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23/1-A, Appeals Chamber Judgement, 12 June 2002, para. 86; *Vasiljevic*, Trial Chamber Judgement, paras. 29-30; *Akayesu*, Trial Chamber Judgement, para. 581; *Musema*, Trial Chamber Judgement, para. 204; International Criminal Court, *Elements of Crimes*, 2011, Article 7, *Crimes Against Humanity*, Introduction at p. 5, para. 2. <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

As regards the question of *deportation* or *forcible transfer* of population. Some guidance can be found in the case-law of the *ad hoc* Tribunals and other doctrine. Compare Article 7(2)(d) of the Rome Statute to *Schabas*, p. 163; see also Article 12(1) and 17 in UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (ICCPR) and Article 4 in UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (ICESCR), *Stakic*, Trial Chamber Judgement, para. 677; *Prosecutor v. Vujadin Popovic et al.*, Case No. IT-05-88-T, Trial Chamber Judgement, 10 June 2010, para. 923; *Naletilic and Martinovic*, Trial Chamber Judgement, paras. 518-519; Hall, C.K., 'Article 7', in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Oxford, Hart Publishing, 2008), para. 105; Case 002/01, Case No. 002-19-09-2007, Trial Chamber Judgement, 7 August 2014, para. 549; Article 44 of the Constitution of Cambodia; Article 5 of the Cambodian Land Law; Article 7 of the Cambodian 2010 Law on Expropriation; Communication to the ICC, paras. 3 and 22.

numerous civilians. If this will be the outcome, this case may serve as a safety valve for future convictions of corporate directing minds.

5.3 A Question of Jurisdiction

As aforementioned, atrocity crimes are international crimes recognised as *jus cogens* norms calling for international jurisdiction.²⁴³ However, as only the STL has explicit jurisdiction over legal entities, international criminal law and other international courts and tribunals might be perceived as giving room for corporations to commit *jus cogens* crimes. This is a misinterpretation as the absence of jurisdiction does not alleviate the corporate international legal obligations²⁴⁴ nor does it mean that for instance, ICJ lacks jurisdiction in ditto cases or that the Statutes of the existing tribunals cannot be broadened to include legal entities as subjects for prosecution.²⁴⁵ Taking genocide as example, the Genocide Convention provides for domestic²⁴⁶ or international prosecution if an international court or tribunal prohibits the act in its Statute²⁴⁷ and leaves the question of interpretation to the ICJ.²⁴⁸ Despite these provisions, legal entities cannot be brought before the ICC, ICTY, ICTR or the ECCC as they only have jurisdiction over natural persons. This does however not dismiss the existence of will among international actors, such as advocates, prosecutors and judges, to prosecute legal entities.

ICC's first Chief-Prosecutor held that corporations should be subjected to international criminal law before international courts and tribunals²⁴⁹ but was consequently overheard. Interestingly, the preparatory works stated that prosecution of legal entities should be enabled "with the exception of States,

²⁴³ See para XX of the thesis

²⁴⁴ Clapham, 2006, p. 31.

²⁴⁵ Clough, J., 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses', 33 *Brooklyn Journal on International Law* (2008), p. 903.

²⁴⁶ Article 5 of the Genocide Convention; Abtahi, H. and Webb, F., *The Genocide Convention: The Travaux Préparatoires* (2nd Volume, Leiden and Boston: Martinus Nijhoff Publishers, 2008), p. 1674.

²⁴⁷ Article 5 of the Genocide Convention.

²⁴⁸ Article 9 of the Genocide Convention.

²⁴⁹ Podgers.

when the crimes were committed on behalf of such legal persons or by their agents of representatives.”²⁵⁰ Because, “[a]t no point during the drafting of the Rome Statute was it claimed by any delegation that the ‘legal person’ referred to in the draft could not demonstrate the requisite legal capacity to be bearers of international obligations.”²⁵¹ Unfortunately, the actual reason why the Rome Statute does not contain this provision today is because of the time limit to create the statute and not because of the lack of will among the international actors who played a significant role in the preparatory works.²⁵² Thus, the Rome Statute only admit jurisdiction over physical persons.²⁵³

Despite the underlying inconvenience that resulted in the narrow jurisdiction of the ICC, the problem of exclusion of legal entities can be overcome. Of course, the task is not easy as it requires legal incentive and political cover by the ICC State Parties; without such motivation, a change of the Rome Statute to include legal entities might be hard to achieve. However, as globalisation is developing, the view of corporate criminal liability within domestic practices is changing to be more and more acceptable,²⁵⁴ which might induce a change of the Rome Statute. A change of the Rome Statute does not strictly need to be all-embracing; only single Articles might be amended. Sheffer suggests that Article 25(1) may read “The Court shall have jurisdiction over natural *and juridical persons* pursuant to this Statute” and that Article 1 can embrace jurisdiction over legal persons if it may read “It shall be a permanent institution and shall have the power to exercise its jurisdiction over *natural and juridical persons* for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. *Any use of ‘person’ or ‘persons’ or the ‘accused’ in this Statute shall mean a natural or juridical person unless the text connotes an exclusive*

²⁵⁰ Clapham, 2006, p. 30.

²⁵¹ Ibid., p. 31.

²⁵² Ibid., p.31.

²⁵³ Huisman, W. and van Sliedregt, E., ‘Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity’, 8 *Journal of International Criminal Justice* (2008), p. 804.

²⁵⁴ Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), pp. 13-16.

usage.”²⁵⁵ If two-thirds of the State Parties approves such amendments and if the amendments are acknowledged by seven-eighths of the State Parties,²⁵⁶ corporate criminal liability within international criminal law will be fully established.

On the other hand and in the event that the State Parties do not agree on amending the Rome Statute, there actually exist a possibility to turn to the ICJ, as stated above. It is true that the ICJ does not hear criminal cases concerning individuals as it only has jurisdiction to solve disputes among states.²⁵⁷ Nevertheless, there is nothing banning the ICJ from giving advisory opinions to organs of the UN.²⁵⁸ Therefore, the UN Security Council, that is an authorised body by the UN, may, on behalf of the ICC, request an advisory opinion on the matter of expanding its jurisdiction from the ICJ. If the ICJ gives its opinion in the affirmative, there would have to be a change of the Rome Statute to include jurisdiction over legal entities as it has been discussed in the preparatory works; notably, this will only be the case in the event that the majority of signatory states agree on the opinion of the ICJ.

Another solution would be that the Security Council creates a new *ad hoc* Tribunal alike the ICTY and ICTR to only deal with cases of corporate security force nature. However, this solution is not the most adequate as the tribunal perhaps would not be able to prosecute corporations that have commenced illicit acts that are not of security force nature. Thus, the author would like to suggest the establishment of a treaty-based multilateral tribunal on illicit acts adjudicating criminal complaints against corporate bodies. This approach is seemingly time comprising and depends highly on the will of states. However, if there is a will among states that are and are not State Parties to the Rome Statute, this might be the most effective solution to hold corporate entities liable for the commence of illicit acts. In the event that

²⁵⁵ Scheffer, D., 'Corporate Liability under the Rome Statute', 57 *Harvard International Law Journal* (Spring 2016), pp. 38-39.

²⁵⁶ Articles 121(3) and 121(4) of the Rome Statute.

²⁵⁷ United Nations, *Statute of the International Court of Justice*, 18 April 1946.

²⁵⁸ *Ibid.*, Article 65.

states do not have a will to create such a tribunal, a final solution to be mentioned is perhaps to engage human rights activists and NGOs to actively advocate on the importance of the existence of an international convention prescribing illicit corporate behaviour, as it was done in the achievement of the Convention on Landmines.²⁵⁹

5.4 Potential Sentencing Measures

The opportunity to achieve justice today is much alike the opportunity discussed during the trials of war criminals *sic*.²⁶⁰ There exists a good and, nevertheless, a strong case before the ICC dealing with crimes against humanity in which corporations have been complicit to. Now, assume that the ICC gains jurisdiction over legal entities and that the ICC rules in their disadvantage, but ambiguous remains the question of what the sentence should consist of? Guidelines are almost non-existent if the ICC sought for an answer in international criminal law and practices by international criminal tribunals as only one court has dealt with prosecution of corporations, namely the STL, that speculation-wise did not know how to rightfully address the issue of the financial amount of the penalty. Perhaps the Court was unwilling or felt uncomfortable to seek guidance in other jurisdictions on the matter? Perhaps the Court was afraid to impose a higher fine in order to avoid criticism by major corporate actors? Either the way and from a human rights perspective, this signals that corporations have major power and that they stand above the law.

In the light of the global economy, corporations have grown big pursuing trade with a high margin of financial gain of which shareholders benefit from.²⁶¹ Additionally, if a corporation is gaining power and finances by being

²⁵⁹ United Nations, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997.

²⁶⁰ Kelly, M.J., 'The Evolution of International Law: Arcs and Cycles', 44 *Case Western Reserve Journal of International Law* 1 (2011), pp. 5–6. (Kelly 2011); Robert H. Jackson, Report to The President on Atrocities and War Crimes (1945), at http://avalon.law.yale.edu/imt/imt_jack01.asp.

²⁶¹ See in example Kelly 2011, pp. 5-6; Jackson.

in accomplice to the commence of illicit crimes, it should, accordingly, be punished with such high fines that the core of international criminal law is not undermined; because, with rights come responsibility. These shareholders or owners must take appropriate *due diligence* measures to assure that the legal entity cannot and will not commence crimes prescribed in international law. For their realisation of the gravity of their commence, a high set of standards with regards to sentences need to be established. If this is not established, generally low fines will undermine the core of criminal law and more or less encourage the corporate body to continue with its illegal commence. As have seen in the case of *Al Akhbar*, the company has committed similar crimes and does not seem to have guilt for its actions, which indicates that it might continue in the same manner due to its aim of profiting, regardless of what its acts might result in. Therefore, the author wants to hold the STL at fault for committing a major mistake in a case that might serve as a landmark case for future convictions. Furthermore, a new question has arisen: what is an appropriate sanction to be imposed on a corporate body for being complicit in crimes prescribed in the Rome Statute?

5.4.1 Sanctions for Legal Persons

Below is presented an Article that can be directly inserted in the Rome Statute or any other Statute of the existing international tribunals, followed by a commentary with the opinion of the author. As the placement of the Article might vary depending on the statute concerned, the author has decided to name it *Article X*. Additionally and for the sake of clarity, instead of referring to Articles regarding grave crimes specifically in the presented *Article X*, the author will refer to them as *Articles Y* Due to the same reason of difference in placement. Note that *Articles* stand for multiple articles despite the common denominator *Y*.

Article X

The Court shall take necessary measures to guarantee that a legal person

held liable pursuant to Articles Y is punishable by effective, proportionate and dissuasive sanctions, which may include fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the relevant practice of commercial activities or placing under judicial supervision.

Temporary or permanent disqualification might seem harsh and controversial with regard to the global economy, but should be understood and applied as a preventive measure; if a corporation has directly assisted in the commence of a crime, temporal disqualification from the relevant market should apply - if a corporation has commenced crimes directly, permanent disqualification from the relevant market should be applied. Generally, judicial supervision is characterised of both administrative actions and of measures of administrative supervision. The aim of this provision is to “undo” the caused harm and provide compensation to the affected/survived victims and family members of the victims that have not survived. In other words, this is a financial security valve serving to compensate the life losses. The exact amount of compensation is not included as Article X states that every conviction should be effective, proportionate and dissuasive. The author leaves this matter to the Court. As regards the term *family members*, the author leaves it to the Court to decide what that involves.

The aim of this section is to provide a framework of sanctions that are to be imposed on legal entities by an international court or tribunal. The author is aware that some questions with regards to the terminology are unanswered but because of lack of space in this thesis, the author has decided to leave them open to the Court to decide. Hypothetically, if the Court itself decides on the scope of the terminology through interpretation and influences from other cases, concise case law will be created and the questions will be solved. The author is aware of the forthcoming question in lieu of this: how and by whom will these sentences be executed? The author leaves this question to be answered by other scholars as it falls outside the scope of the thesis.

6 Concluding Remarks

The aim of the thesis is to show how domestic practices have affected the international domain with regards to prosecution of individual and group perpetrators that have committed atrocity crimes in order to show that domestic practices on corporate criminal liability is affecting the international domain to apply the same prosecuting standards in relation to corporations. *Id est*, the author seeks to illustrate that there might be room for a greater scope for corporate criminal liability in international criminal law, based on the historical development of international criminal law. Furthermore, as the author does not only want to stress the impact of domestic practices on international criminal law, she takes a step beyond the overall impact of domestic practices and provides with possible solutions on how the ICC and *ad hoc* Tribunals might widen the scope of their statutes in order to satisfy the will among international judicial actors to be able to hold corporations accountable for the wrongdoings of their directing minds and employees. Thus, an Article with possible sanctions is introduced as a proposal to the international domain of criminal law, as that is what it lacks.

The research question reads *Is there room for international criminal liability in international criminal law?* has been answered through examination of three overall themes formulated as questions; (1) *How has domestic law affected international criminal law?*, (2) *To what extent can corporations be held liable internationally?*, (3) *If a corporation brought before an international court or tribunal is prosecuted for complicity of some sort, what are the feasible measures that can be taken against them and why?*

As noted throughout the thesis, command responsibility of individuals that have committed atrocity crimes has emerged from domestic practices and is rooted in the notion of vicarious strict liability deriving from the context of the domestic context at the time of the formation of international individual responsibility. As context and society change, the notion of superior or command responsibility develops to explicitly be imputed on the individual

culprit. Subsequently, command liability developed by giving rise to another form of criminal liability; namely, JCE liability that holds groups or entities of persons liable as this form of liability is a fair strike against all persons involved who jointly act with a common plan and aim to achieve something that is morally unacceptable. The *actus reus* and *mens rea* of both forms of liability have been addressed to illuminate how they are imposed on individuals and entities respectively in domestic cases in which corporate criminal liability has been imputed on corporate bodies. Should individuals that operate as group or an entity be held liable jointly for the acts committed, then why should an organisation be disregarded in terms of liability for the commence of international crimes committed in the name of the corporation?

After an evaluation of domestic practices, it has been shown that it is a trend among most states to prosecute corporations and in doing so, the states most often refer to two forms of theories that serve as a basis for command responsibility and JCE liability; namely, vicarious liability and the theory of *alter ego*. The application of these theories vary among states; however, great similarities exist within the application of both. As regards the theory of vicarious liability, this form of liability is not to be preferred as it aims at punishing a physical person, much alike command liability, which gave reason to examine the theory of *alter ego*. In difference from vicarious liability, the theory of *alter ego* aims at holding the corporate body liable *per se* as it makes an analogous interpretation of natural person in criminal law in order to explain the notion of what a legal person is; the persons acting in the name of the corporation constitute its mind and limbs, alike a JCE in which the persons involved constitute the brains and limbs for the function of the entity as such.

Generally, prosecution of corporate entities for breaches of international criminal law is fully possible on the domestic level which, moreover, has generated the creation of international instruments on state practices on how to best prosecute corporate entities domestically. In the light of the development of international instruments on state practices, it is possible to

stress that the international domain urges the importance of such liability, which might serve as legal basis for the foundation of international prosecution. Previously, corporate criminal liability has been touched upon internationally and referred to during the trials of war criminals. However only directors of corporations have been held liable for the commence of war crimes and crimes against humanity during WWII despite the fact that the Nuremberg Charter provided for prosecution of corporate bodies. Conversely, the STL found that corporate criminal liability is of high importance and decided to advocate for the notion through prosecution of a corporate body. Not being able to rely on international standards, the Court sought guidance in domestic practices. Highly dependent on domestic practices, the STL established the *actus reus* and *mens rea* of corporate entities and found a corporate body criminally liable for contempt of court. Arguably, references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability.

As regards the ICC and other international tribunals, their statutes explicitly limit their jurisdiction to natural persons. However, prior to the findings presented, the ICC has for the first time received a communication in which, among the *ruling elites*, corporations have been in complicity to crimes against humanity. As the case is of classified nature, only speculations can be made on the outcomes. The author has presented her views stressing that the Court might not prosecute the legal entities *per se* but rather the directing minds of the corporate body involved through command responsibility or conspiracy (JCE) liability. Certainly, the first approach may be perceived as a form of imposition in the form of corporate criminal liability that falls under the theory of vicarious liability to be imposed on the directing mind representing the corporate body. The second aspect might entail all corporate shareholders that have not taken *due diligence* measures. Markedly, this may

be the first step towards expanding the scope of the Rome Statute allowing the court to have jurisdiction over legal entities.

Moreover, and contingent upon that the ICC would find that prosecution of corporate entities *per se* should be commenced, the UN Security Council may request an advisory opinion on the matter of expanding ICC's jurisdiction from the ICJ if the signatory states are unwilling to allow for expansion of it. If the ICJ finds that expansion of the Rome Statute occurs as appropriate, the ICC would have the freedom to sentence corporate bodies for the crimes committed as the Member States are expected to follow the advice. The author notes that this argumentation might seem farfetched; however, it is not precluded to be the case, especially if the preparations of the Rome Statute and suggestions on changes from renowned scholars are born in mind. To conclude the argumentation vis-à-vis the ICC and its Statute, the position on the subject of corporate criminal liability remains unclear as there is no case or judgement to rely on. However, the author wants to stress once again that the ICC has already taken a step towards incorporation of practices with regards to corporate criminal liability as it has a case on its table regarding corporations that have been in complicity to crimes against humanity, and by sentencing the directing minds, corporate criminal liability, in form of vicarious liability or other natural persons forming a conspiracy group, will be achieved. With this said, corporations may be held liable before the ICC even if it is not to that degree that the author aims at.

Another solution involves the creation of a new *ad hoc* Tribunal only hear cases of corporate security force nature. However, this might not be an adequate solution due to its limited character. Suggestion-wise, the establishment of a treaty-based multilateral tribunal on illicit acts adjudicating criminal complaints against corporate bodies is sufficient despite its time comprising nature. A solution of last resort is perhaps to engage human rights activists and NGOs to actively advocate on the importance of the existence of an international convention prescribing illicit corporate behaviour, as it

was done in the achievement of the Convention on Landmines in order to achieve a greater good for all in the name of human rights.

As has been provided above, there exists a legal framework that holds corporate entities liable for the commence of illicit crimes even though explicit provisions on the matter are lacking. If a legal person is gaining power and enrichment through acts of accomplice to the commence of illicit crimes, it should, accordingly, be punished; because, with rights come responsibility. For this, a high set of standards with regards to sentences needs to be established. Thus, the author has composed an Article with possible sentencing measures - with the aim not to restrict state sovereignty, the global economy or to abolish certain actors from the financial market but to rather assure transparency for legal entities to know the consequences in the event that they contribute to grievous harm such as mass killings of civilians - that she believes will serve as the ultimate guideline for Courts and Tribunals in the event that corporate criminal liability becomes explicitly recognized as a form of liability in international criminal law. This Article is based on what the author believes is the rightest solution in order to achieve justice for the greater good and should by no means be seen in the light of negativity. Aware is the author of the leading question regarding the execution of the penalty; however, as it falls outside the scope of the thesis, the author has chosen not to discuss it but rather leave it to the international Courts, Tribunals and other researchers for clarification.

In brevitatis, despite the lack of legal framework among the majority of international Courts and Tribunals, corporate criminal liability is becoming more acceptable as a form of liability in international criminal law. Domestic law serves as legal basis for interpretation and application of criminal law when grave crimes have been commenced by corporate bodies and provide the courts with concise examples on how it is best applied in practice. Accordingly, justice demands to hold legal entities liable for the commence of illicit acts regardless of the gravity of involvement; therefore, it is time for international criminal law to develop to the better. To answer the research

question, domestic practices, internationally recognised theories and recent case law from STL provide the tools on how to best approach the question of how a corporate body can best be prosecuted despite the current lack of an explicit legal framework in international criminal law. In other words, there is room for corporate criminal liability in international criminal law. However, if it will be achieved is a matter of future developments.

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