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The Quest for International Criminal Liability with regard to Corporations

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Table of Contents

Acknowledgements	1
Table of Contents	2
Introduction	4
Part I: International criminal liability for corporations: an illustration of its necessity and advantages.....	6
Chapter 1: <i>Nullum crimen sine lege</i> : A closer look at the international crimes as defined by the Rome Statute	6
1.1. Introduction	6
1.2. Preliminary considerations in relation to the mental element of international crimes.....	7
1.3. Crimes against humanity	7
1.4. War Crimes.....	11
1.5. Genocide	15
Chapter 2. Examples of corporate involvement in international crimes.	17
2.1. German industrialists at the Nuremberg Tribunal: the I.G. Farben-, Krupp- and Flick Trials.17	
2.2. Cases under the U.S. Alien Tort Claims Act.....	18
Chapter 3. Advantages in comparison to the existing regimes	21
3.1. Advantages of liability of the corporate entity, as opposed to the liability of individual employees and/or management.	21
3.2 Advantages of an international criminal liability regime for corporations as opposed to national criminal liability.	24
3.3. Advantages of criminal liability.....	26
Chapter 4: A bump in the road: counterarguments and possible difficulties.....	27
Chapter 5: Preliminary conclusion.....	29
Part II: An analysis of the concept's current feasibility.....	30
Chapter 1: Discussions on the Court's jurisdiction: The Draft Statute and the Rome Conference.	30
Chapter 2: Obstacles identified at the Rome Conference and their current status.....	32
2.1. Introduction.....	32
2.2. Fundamental obstacles	33
Chapter 3: Preliminary conclusion.....	39
Part III: Attribution models.....	41
Chapter 1: Models of attribution.....	41
1.1. The vicarious liability approach.....	42
1.2. The aggregation model.....	45

1.3. The identification approach.....	48
1.4. Organizational liability: the self-identity model.....	50
Chapter 2: Preliminary conclusion.....	52
2.1. Legal arguments.....	52
2.2. Political acceptability: aspiring to a future amendment of the Statute.....	54
Part IV: Corporate complicity.....	58
Chapter 1: Introduction.....	58
Chapter 2: Solicitation and induction.....	58
Chapter 3: Aiding and abetting.....	59
Chapter 4. Preliminary conclusion.....	60
Conclusion.....	62
Annex I: Top 100 economic players 2010.....	64
Annex II: Nederlandstalige samenvatting.....	67
Bibliography.....	68

Introduction

The first and foremost purpose of the establishment of the International Criminal Court¹ was to call a halt to the mounting impunity for international crimes. Although the Court has accomplished remarkable strides in this regard, its Statute currently still does not provide it with adequate jurisdiction to address all perpetrators. Legal persons, more particularly large multinational corporations, wield enormous power. In fact, when comparing the gross domestic products (GDPs) of the most prosperous nations with the revenues of the largest global corporations, one can conclude that in 2010, 40 of the world's 100 strongest economic forces were corporations.² As such, WAL-MART ranks higher than, e.g. Denmark or Austria and the revenues of ROYAL DUTCH SHELL exceed the combined GDPs of both Hungary and Qatar. A report by the INSTITUTE FOR POLICY STUDY, launched in 2000, shows that the then combined revenues of the 200 most successful transnational corporations exceeded the combined GDPs all States, minus the top ten.³

In the pursuit of profit, morality is often lost and as a result, examples of corporate involvement⁴ in international crimes are numerous and will be discussed throughout this dissertation. It is in this framework that this master's thesis, which consists of four parts, will consider an expansion of the Court's jurisdiction to include legal persons. In the following paragraphs the structure of this dissertation will be set apart, offering a brief introduction to each of its four parts.

Firstly, an evaluation will be made as to whether there exists a genuine need for international criminal liability for corporations. In this regard, the author has firstly provided an overview of the relevant aspects of the international crimes, as an understanding of the mental and physical element(s) of each of these crimes is essential. Additionally, some examples of corporate involvement in international crimes will be considered and existing regimes of accountability will be discussed, clarifying the advantages the suggested model offers. Lastly, considering the advisability of extending the Court's jurisdiction, some counterarguments presented by relevant learned authors will be evaluated.

Secondly, an assessment of the current feasibility of the concept is made, after careful consideration of the obstacles presented at the 1998 Rome Conference. Here, the most prominent obstacles appear to be the lack of an international standard in corporate criminal liability, its theoretical counterpart represented in the complementarity principle and the propriety of the existing sanctions. Another hindrance identified by the delegates at the Rome Conference, namely the attribution of *mens rea* to corporations, will form the focal point of the third and most important part of this dissertation.

It is true that many learned authors have commented on the need for international criminal liability for corporations, however few are prone to elaborate on how this can actually, practically be achieved. The author aims to bridge this gap by attempting to suggest a model for attribution, which not only represents the best legal alignment with the concept of international criminal liability, but in addition is most likely to be politically acceptable for all States Parties to the Rome Statute. Such model will be identified, only after a thorough examination of the four existing attribution models.

¹ Hereinafter referred to as 'the Court' or 'the ICC'

² This comparison was made by the author following the 2000 example of S. Anderson and J. Cavanagh in their "Top 200 comparison of global corporate power" following the 2000 example of S. Anderson and J. Cavanagh in their "Top 200 comparison of global corporate power". For further reference, please consult the bibliography included at the end of this dissertation. S. ANDERSON & J. CAVANAGH, *Top 200: The rise of global corporate power*, 2000, www.ips-dc.org/files/2452/top200.pdf, 9.

⁴ Throughout this dissertation, the term 'corporate involvement' will be used as an overarching term, covering both corporate complicity and the situation of a corporation as a primary perpetrator.

Lastly, as most corporate involvement in international crimes takes the form of corporate complicity, the final part of this dissertation will bring to light a number of difficulties inherent to the application of the current phrasing of the concept of participation in article 25 of the Rome Statute to corporate entities.

Throughout the pages of this dissertation it will be the attempt to not only present a plea for corporate responsibility for international crimes, but additionally and more importantly, to offer practically workable solutions for the existing legal problems surrounding this subject. It is the author's impression that the inquiry made in this dissertation had not been attempted in the existing doctrine thus far. As such, it is a sincere aspiration that the esteemed reader will be presented with a new take on this subject, which can serve as a point of departure for further jurisprudence.

Part I: International criminal liability for corporations: an illustration of its necessity and advantages.

In this part we aim to build a case for the possible expansion of the Court's jurisdiction to legal persons, as there is no point in answering a question no one is asking. However, in a first and introductory chapter the reader will be provided with an overview of the physical and mental element(s) of the international crimes. A thorough knowledge of the different elements composing each of these crimes will make for a better understanding of the legal considerations presented at a later stage.

Throughout the second chapter the qualification of the concept of international criminal liability for corporations as a resounding social need will be illustrated through a rendition of some of the numerous cases in which corporations engage in international crimes. These instances of corporate involvement for the most part take the form of corporate complicity.

The third chapter of this first part will be dedicated to weighing this potential model against existing models of individual liability for corporate officers and corporate criminal liability on the national level, as well as civil and administrative corporate liability regimes. Respecting the scope of this dissertation, we will refrain from going into detail on these alternative liability models, but rather focus on the advantages international corporate criminal liability could offer in comparison.

Embracing the idea of a well-rounded inquiry, a final chapter will introduce counterarguments presented by a rightfully skeptical doctrine. However, this chapter will only represent part of the counter-argumentation, as the second part of this dissertation offers an in-depth study of the obstacles identified by the delegates at the Rome Conference and how these still affect the concept's achievability at the current time.

Chapter 1: *Nullum crimen sine lege*:⁵ A closer look at the international crimes as defined by the Rome Statute

1.1. Introduction

The preamble to the ICC's Statute describes the acts, which give rise to international criminal liability as "the most serious crimes of concern to in the international community".⁶ In the following pages three international crimes included in the Court's jurisdiction, namely genocide, crimes against humanity and war crimes, incorporated in respectively articles 6, 7 and 8 of the Rome Statute, will be examined. The crime of aggression, included in the enumeration adopted by article 5 of the Rome Statute will not be discussed, as no operative definition is yet in place.⁷

This chapter will concisely set apart the criminal acts covered by each of the aforementioned articles, subsequently examining the required physical and mental element, also known as the *actus reus* and *mens rea*. This analysis will be based on the text of the Rome Statute, the jurisprudence of the existing International Criminal Tribunals as well as the Court's own interpretation of the elements of the international crimes, which it, in accordance with article 9 of the Rome Statute, has further elucidated on in its dissertation

⁵ Article 22 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁶ Preamble Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998. para 4

⁷ An amendment of the Rome Statute to include a definition of the crime of aggression was filed by means of Resolution RC/Res.6 of the Review Conference of the Rome Statute on June 11th, 2010. The amendment has thus far been ratified by Liechtenstein and requires a total of 30 ratifications. Additionally, a vote shall take place by the Assembly of States Parties at its next meeting, in conformity with article 121 Rome Statute.

ELEMENTS OF CRIMES.⁸ The order in which the crimes are discussed is inspired by the likeliness of corporate involvement in each particular crime.

1.2. Preliminary considerations in relation to the mental element of international crimes

Prior to commencing the study of the specific elements composing these three crimes, the author wishes to direct the reader's attention to article 30 § 1 of the Rome Statute, which holds that:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.⁹

This article, which defines the *mens rea* element in general terms, is referred to as the 'default rule'. It is applicable whenever either the Rome Statute or the ICC's 'Elements of Crimes' has abstained from introducing a more specific intent. This is confirmed by paragraph 2 of the dissertation's general introduction:

Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies.

The mental element consists of two components, namely knowledge, the rational component and intent, the emotional component. The article continues by giving a more detailed description of both knowledge and intent:

2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

The emotional element of intent, materialized in article 30 § 2, can pose difficulties with regard to attribution to corporations, as will be reflected in the assessment of the aggregation approach and self-identity model in the third part of this dissertation. This intent is referred to as the *dolus generalis*.¹⁰ The article links this mental element to a material element in the form of conduct, consequence or circumstance.¹¹

1.3. Crimes against humanity

The first definition of crimes against humanity can be found in the NUREMBERG CHARTER, which implies that an express prohibition of this crime by an international instrument has only been in existence for seven decades. Article 6 (c) of the Nuremberg Charter offered the following definition:

⁸ The Court applies the interpretations set forth in the Elements of Crimes in accordance with article 21 § 1 (a) of the Rome Statute

⁹ Article 30 § 1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁰ P. AKHAVAN, "The crime of genocide in the ICTR jurisprudence", *Journal of International Criminal Justice* 2005, (989) 992.

¹¹ MOHAMED ELEWA BADAR, "The mental element In the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective", *Criminal Law Forum* 2008, (473) 475.

Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.

The current definition of this crime, which defines the scope of the ICC's jurisdiction, can be found in article 7 of the Rome Statute, the *chapeau* element of the first paragraph of which states:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack¹²

Added is a list of 10 inhumane acts, which has expanded substantially since the crime was first described in Article 6 (c) of the Nuremberg Charter, now also covering such crimes as rape,¹³ torture¹⁴ and imprisonment,¹⁵ which were first provided by LAW NO. 10, issued in occupied Germany. Additionally, the crimes of sexual slavery,¹⁶ apartheid¹⁷ and forced transfer of a population¹⁸ were added. The article's second paragraph provides clarification on a number of terms utilized in the first paragraph.

The *chapeau* element of article 7 § 1 will be set apart in the upcoming paragraphs. This includes both a *mens rea*- and an *actus reus*-aspect. The material element of the crime sets a contextual threshold including two elements. Firstly, the criminal act must be part of a widespread or systematic attack and secondly, this attack must be directed against any civilian population. The *mens rea* element requires “knowledge of the attack”.

Firstly, there must be a “widespread or systematic attack”. The *ratio legis* behind such requirement is evident, namely to differentiate between crimes against humanity and isolated cases of rape, torture, murder, etcetera. Without such threshold, each of these cases could be deemed an international crime. Surely, such cannot be the concern of the International Criminal Court. Isolated cases must solely remain part of the national jurisdiction of the State.

What exactly is meant by ‘widespread’ and ‘systematic’? The term ‘widespread’ refers to the scale of the event as well as to how many victims are counted, although no fixed number of victims exists. Whether or not the threshold is reached must be judged in light of the circumstances of each case.¹⁹ The term has been addressed in the case law of the known criminal Tribunals, e.g. in the 1997 TADIC – Case, where the International Criminal Tribunal for the former Yugoslavia²⁰ held the following:

¹² Article 7 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹³ Article 7 §1 (g) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁴ Article 7 §1 (f) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁵ Article 7 §1 (e) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁶ Article 7 §1 (g) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁷ Article 7 §1 (j) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁸ Article 7 §1 (d) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

¹⁹ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 236.

²⁰ Hereinafter referred to as ICTY

[A] finding of *widespreadness*, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement.²¹

The Tribunal reaffirmed this statement in its 2001 KUNARAC – Judgment:

The adjective “widespread” connotes the large-scale nature of the attack and the number of its victims. The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind describes this as follows:

‘Inhumane acts (must) be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.’²²

In addition, article 7 § 1 further illuminates the contextual threshold through usage of the term ‘systematically’. In earlier cases, more specifically the AKAYESU – Case by the International Criminal Tribunal for Rwanda²³ and the ICTY’s BLASKIC – Case, the international Tribunals provided high thresholds. Since, this vision has been abandoned as is illustrated by more recent cases, e.g. the NAHIMANA – Judgment. The requirements for a crime to be qualified as ‘systematic’ are now limited to the “organized nature of the acts of violence” and the “improbability of their random occurrence”.²⁴

It is worthwhile noting that article 7 calls for a “widespread *or* systematic attack”, implying that either one qualification would suffice. However, article 7 § 2 (a) of the Rome Statute contradicts such assumption, holding that a certain degree of organization is inherent to the concept of an attack:

‘[An] [a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack²⁵

As a result of this definition, it is clear that a crime against humanity requires an attack that is both widespread *and* systematic. However, article 7 § 2 (a) has further implications. The clause “pursuant to or in furtherance of a State or organizational policy to commit such attack” represents the controversial ‘policy element’,²⁶ implying that the commission of these crimes must bear some involvement of either a State or an organization²⁷ and that it cannot be a random act. This causes an inconsistency in international criminal law, as it is in direct contradiction with the ICTY’s jurisprudence. The Appeal Judgment in the KUNARAC– Case clearly states that:

²¹ International Criminal Tribunal for the former Yugoslavia (ICTY) 7 May 1997, Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment), para 648 [emphasis added].

²² International Criminal Tribunal for the former Yugoslavia (ICTY) 22 February 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), para 428.; International Criminal Tribunal for the former Yugoslavia (ICTY) 3 March 2000, Prosecutor v. Tihomir Blaskic (Trial Judgement), para 206.; International Criminal Tribunal for Rwanda (ICTR) 2 September 1998, The Prosecutor v. Jean-Paul Akayesu (Opinion and Judgment), para 580.; R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 236 FN 32.

²³ Hereinafter referred to as the ICTR

²⁴ International Criminal Tribunal for Rwanda (ICTR) 28 November 2007, The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment).

²⁵ International Criminal Tribunal for the former Yugoslavia (ICTY) 3 April 2008, Prosecutor v. Haradinaj et al. (Trial Judgment), para 122.

²⁶ M. BOOT, *Genocide, crimes against humanity, war crimes: Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*, Intersentia nv, 2002, 479.

²⁷ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 238 FN 44.

[N]othing in the Statute or in customary international law[...] required proof of the existence of a plan or policy to commit these crimes²⁸

However, the ICC has since taken a contrary position and in further clarification of the contextual threshold provided in article 7 of the Rome Statute confirmed the requirement of a policy element, stating the following:

It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.²⁹

In the spirit of *lex posterior derogat legi anteriori* and in light of the current dissertation, which focuses on the jurisdiction of the International Criminal Court, the policy element must be taken into consideration. However, it is clear from article 7 § 2 (a) that the required plan or policy is not limited to that of States, but indeed includes organizations, such as corporations. Additionally, it be noted that it is difficult to conceptualize a scenario in which a corporation is the primary perpetrator of a crime against humanity. As will be illustrated by the examples set apart in the next chapter, corporate involvement in crimes against humanity predominantly takes the form of corporate complicity. The corporation either solicits or induces crimes against humanity committed primarily by dictatorial regimes, or takes the role of ‘aider and abettor’. The concept of corporate complicity faces its own challenges under the Rome Statute, a rendition of which will be provided by the fourth and final part of this dissertation.

The second part of the *actus reus* explained in the *chapeau* element of article 7 § 1 of the Rome Statute states that the crime should be part of an attack “directed against any civilian population”. From this statement three factors can be derived. The importance of the term ‘any’ dates back to the NUREMBERG TRIBUNAL and was introduced to include crimes committed against one’s own population, such as the criminal acts of the Nazi regime against German citizens of Jewish decent. Additionally, the word ‘population’, once again, entails a reference to scale. Lastly, the exact interpretation of the term ‘civilian’ gives rise to a number of questions, however this dissertation will avoid such discussion, as the question pertains mostly to the position of (former) combatants as victims and corporate involvement in international crimes would in normal circumstances be directed at civilians in the classical sense of the word.³⁰

The *mens rea* element of a crime against humanity lies in the perpetrators awareness of the contextual threshold. The perpetrator must have known that his act was part of a widespread or systematic attack against a civilian population and through these actions have intended to further the attack.³¹ However, evidence of the perpetrator’s exact knowledge of every detail of the attack is not required.³² This mental element appears to be in line with the standard mental element of “intent and knowledge” provided by article 30 of the Rome Statute.

²⁸ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 239 FN 49. International Criminal Tribunal for the former Yugoslavia (ICTY) 12 June 2002, IT-96-23 & IT-96-23/1-A, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment), para 98.

²⁹ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 238-239.;Elements of Crimes, *International Criminal Court* 9 September 2002.

³⁰ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 241.

³¹ Elements of Crimes, *International Criminal Court* 9 September 2002. 5 - 6

³² Elements of Crimes, *International Criminal Court* 9 September 2002. 5

1.4. War Crimes³³

After a long history of prosecuting and convicting perpetrators of war crimes at the national level,³⁴ the first international legal basis for prosecuting war criminals is found in article 6 (b) of the Nuremberg Charter, which defines war crimes as:

[...] violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity³⁵

Other instruments of international humanitarian law soon followed, including the four Geneva Conventions, which came into being in 1949. These are an expression of customary international law.³⁶ The crime's definition in relation to the ICC's subject matter jurisdiction can be found in article 8 of the Rome Statute and includes an exhaustive list of no less than 50 war crimes, divided into four subcategories all of which are linked to armed conflict. The first two categories apply to conflicts with an international dimension, whilst the latter two concern internal armed conflict. The following paragraphs provide a concise overview of the mental and physical element of each category in more detail.

The first category, set apart by article 8 § 2 (a), qualifies as war crimes:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention³⁷

Subsequently, a limitative list of offences includes willful killing; torture or inhuman treatment, including biological experiments, willfully causing great suffering, or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,³⁸ compelling a prisoner of war or other protected person to serve in the forces of a hostile Power, willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial,³⁹ unlawful deportation or transfer or unlawful confinement and taking of hostages.⁴⁰

³³ See also K. DÖRMANN, *Elements of war crimes under the Rome Statute of the International Criminal Court: Sources and commentary*, Cambridge, Cambridge University Press, 2003.

³⁴ T. MCCORMACK, "From Sun Tzu to the sixth committee: The evolution of an international criminal law regime" in TIMOTHY MCCORMACK & GERRY SIMPSON (ed.), *The Law of War Crimes*, The Hague, Kluwer Law International, 1997, (31).

³⁵ Article 6 (b) 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.

³⁶ R. CRYER & H. FRIMAN & D. ROBINSON & E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge, Cambridge University Press, 2010, 274.

³⁷ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 344.

³⁸ Article 50 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. Article 51 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.

³⁹ Article 130 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949.

⁴⁰ Article 147 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

The ICTY, in its DELALIC – Judgment described grave breaches of the Geneva Conventions as containing two elements:

[T]he application of Article 2 [ICTY Statute] requires the satisfaction of two conditions; first, that the alleged offences were committed in the context of an international armed conflict; and, secondly, that the alleged victims were "persons protected" by the Geneva Conventions.⁴¹

In line with this case law, the ICC's 'Elements of Crimes' further elucidates on these elements, which are common to all offences under article 8 § 2 (a) of the Rome Statute. The dissertation provides that, firstly, the offence must be directed against person(s) or property enjoying the protection of one or more of the 1949 Geneva Conventions and the perpetrator must be aware of the person or property's protected status.⁴² Additionally, a nexus is required between the criminal conduct and an international armed conflict⁴³ and the perpetrator must be aware of the existence of such armed conflict.⁴⁴ This requirement aims to distinguish between war crimes and the criminal acts of murder, torture, etcetera, taking place during, yet unrelated to armed conflict.⁴⁵ As such, the requirements for a war crime are dual, concerning both the victim and the circumstance. With regard to both requirements a physical as well as a mental component is set forth.

Firstly, the offences described by article 8 § 2 (a) must be committed against person(s) or property which enjoy the protection of the 1949 Geneva Conventions. Those persons protected by the Geneva Conventions can be found in articles 13 and 24 to 26 of the first Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, articles 13, 36 and 37 of the second Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, article 4 of the third Geneva Convention (III) relative to the treatment of prisoners of war and articles 4 and 20 of the fourth Geneva Convention (IV) relative to the protection of civilian persons in time of war.⁴⁶

Additionally, article 8 §2 (a) (iv) qualifies the unjustified destruction and appropriation of property as a war crime. As such, it is vital to know what property is protected by the Geneva Conventions. Over several articles,⁴⁷ enumerated in paragraph 81 of the 1995 ICTY decision on the defense motion for interlocutory appeal on jurisdiction in the Tadic - Case,⁴⁸ the Conventions set forth which property those engaging in

⁴¹ International Criminal Tribunal for the former Yugoslavia (ICTY) 16 November 1998, Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnir Delalic (Trial Judgement), para 201.

⁴² Elements of Crimes, *International Criminal Court* 9 September 2002. 13 - 17

⁴³ Elements of Crimes, *International Criminal Court* 9 September 2002. 12 FN 34 K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 358.

⁴⁴ Elements of Crimes, *International Criminal Court* 9 September 2002. 14 - 18

⁴⁵ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 358 - 359.

⁴⁶ International Criminal Tribunal for the former Yugoslavia (ICTY) 2 October 1995, Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), para 81.

⁴⁷ Articles 19, 33, 34 and 35 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.; Articles 22, 24, 25 and 27 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.; Articles 18, 19, 21, 22, 33, 53 and 57 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

⁴⁸ International Criminal Tribunal for the former Yugoslavia (ICTY) 2 October 1995, Prosecutor v. Dusko Tadic (Decision on the defence motion for interlocutory appeal on jurisdiction) para 81.

conflict must refrain from destroying, attacking or appropriating. This includes medical units, property of aid societies, military hospital ships, civilian hospitals, etcetera.

This physical element is complemented by a mental element, namely that the perpetrator must also be aware of the protected status of the person(s) or property under the Geneva Conventions. The Preparatory Commission provided a footnote, indicating that “this mental element recognizes the interplay between articles 30 and 32”,⁴⁹ which implies that a lack of knowledge concerning the protected status of a person or of property does not provide a negation of the mental element, as expressed in article 32 § 2 of the Rome Statute.⁵⁰ Furthermore, particular attention is paid to the protected status provided by article 4 of the fourth Geneva Convention, namely:

[T]hose who, [...], find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

In this regard the Preparatory Commission clarified that it is sufficient for the perpetrator to know that “the victim belonged to an adverse party to the conflict”.⁵¹

The second requirement of war crimes under article 8 § 2(a) is that of a nexus to international conflict, as well as the perpetrator’s awareness of such nexus. In this regard, the ICC’s Elements of Crimes clarifies that “The conduct [must have taken] place in the context of and was associated with an international armed conflict”.⁵² However, no definition of an international armed conflict is provided. The Court’s commentary was limited to the fact that the concept of an international armed conflict includes military occupation.⁵³

More interesting with respect to this requirement of international armed conflict is the mental element. With regard to the awareness of the existence of an armed conflict, the ICC’s ‘Elements of Crimes’ provides an exception to the article 30 default rule,⁵⁴ establishing a lower threshold⁵⁵ than the standard “knowledge and intent”. This is reflected in the introduction to article 8, and as such is equally applicable to the remaining three categories of war crimes. The text holds that:

- (a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- (b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- (c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'⁵⁶

⁴⁹ Elements of Crimes, *International Criminal Court* 9 September 2002. 13 FN 33

⁵⁰ E. VAN SLIEDREGT, *Individual criminal responsibility in international law*, Oxford Oxford University Press, 2012, 283.; R.S. CLARK, "The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences", *Criminal Law Forum* 2001, iss. 3, (291) 330 - 331.

⁵¹ Elements of Crimes, *International Criminal Court* 9 September 2002. 13 VN 34

⁵² Elements of Crimes, *International Criminal Court* 9 September 2002. 13 - 18

⁵³ Elements of Crimes, *International Criminal Court* 9 September 2002. 13 FN 34

⁵⁴ The possibility of exceptions to article 30 of the Rome Statute is provided by the article’s first clause (“Unless otherwise provided”)

⁵⁵ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 362.

⁵⁶ Elements of Crimes, *International Criminal Court* 9 September 2002. 13

According to learned author KNUT DÖRMANN the third paragraph implies that the perpetrator's knowledge of the factual circumstances needs only extend to the nexus.⁵⁷ The first two paragraphs set forth that, firstly, no legal evaluation of the situation is required. Additionally, the perpetrator must not be aware of the internal or international character of the conflict. The majority view of the WORKING GROUP ON THE ELEMENTS OF CRIMES holds that it suffices to demonstrate "that the accused was aware of at least some factual circumstances" implying an armed conflict, for instance through the hearing of gunfire or the observation of men in uniform. Although the wording of paragraph c is somewhat vague, the remarks of the Working Group clarify that the required mental element sets forth a lower threshold than that of 'knowledge and intent', provided by article 30. Regardless, when considering this requirement from a practical point of view one must note that it would be difficult for an accused to maintain that the offences listed in article 8 of the Rome Statute, committed amidst a zone of armed conflict, took place without the perpetrator's knowledge of such circumstance.

The second category is described by article 8 § 2 (b) as:

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law⁵⁸

The paragraph is completed with a list of 26 offences, which can be traced back to a number of Conventions,⁵⁹ such as the 1907 Hague Convention respecting the laws and customs of war on land,⁶⁰ Protocol I to the Geneva Conventions,⁶¹ the 1899 Hague Declaration concerning expanding bullets⁶² and the Protocol for the prohibition of the use of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (The Geneva gas protocol).⁶³ Once again the conduct must show a nexus with armed conflict and the perpetrator must be aware of such nexus, a condition that was already examined under the foregoing paragraphs.

Categories three and four included in article 8 § 2 (c) and (e) extend the Court's jurisdiction to war crimes committed in armed conflict, which lacks an international element. The third category, included in article 8 § 2 (c) refers to violations of common article 3, which was also included in the ICTR Statute. The *chapeau* element of this section reads:

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause

⁵⁷ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 362.

⁵⁸ Article 8 §2 (b) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁵⁹ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 344.

⁶⁰ Hague Convention (IV) Respecting the laws and customs of war on land 18 October 1907.

⁶¹ 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.

⁶² Hague Declaration (IV,3) concerning expanding bullets, 29 July 1899.

⁶³ Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 17 June 1925.

It enumerates four categories of examples of prohibited conduct, including violence to life and person, mutilation, cruel treatment, torture,⁶⁴ taking hostages,⁶⁵ executions,⁶⁶ etcetera. The ‘Elements of Crimes’ – dissertation adds to each of these offences a dual requirement which, once again, relates to the victims and circumstances. Firstly, the conduct must have taken place in the context of and be associated with “an armed conflict not of an international character” and the perpetrator must be aware of “actual circumstances that established the existence of an armed conflict”.⁶⁷ In this regard, no exact definition is provided of what exactly can be viewed as “an armed conflict not of an international character”,⁶⁸ although article 8 § 2 (d) does exclude “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence”.⁶⁹ The mental element, concerning the perpetrator’s awareness of the armed conflict, has yet been elaborated on when discussing the first category of war crimes. Additionally, the victim or victims must be “either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities”. Added to this is a mental element, stating that the perpetrator must “aware of the factual circumstances that established this status”.⁷⁰

Finally, the last category applies to “other serious violations of the laws and customs applicable in armed conflicts not of an international character”⁷¹ and provides an exhaustive list of 12 possible offences, highly reminiscent of those included in its international armed conflict - counterpart, the sources of which reside in the before-mentioned 1907 Hague Convention, as well as Protocol II to the Geneva Conventions.⁷² The requirement of an armed conflict not of an international character, as well as the perpetrator’s awareness thereof, which was discussed under the foregoing category, is repeated.⁷³

1.5. Genocide

The term ‘genocide’ originated four years prior to the conclusion of the Genocide Convention, in a book by the Polish attorney RAPHAEL LEMKIN⁷⁴ and has since been referred to as the ‘crime of crimes’.⁷⁵ To preserve the legal application of this term for cases of the utmost gravity, it adheres to a most narrow and precise legal definition. Article 6 of the Rome Statute thus defines genocide as:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

⁶⁴ Article 8 §2 (c) (i) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁶⁵ Article 8 §2 (c) (iii) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁶⁶ Article 8 §2 (c) (iv) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁶⁷ Elements of Crimes, *International Criminal Court* 9 September 2002. 31 - 34

⁶⁸ K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 397.

⁶⁹ Article 8 § 2 (d) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁷⁰ Elements of Crimes, *International Criminal Court* 9 September 2002. 31 - 34

⁷¹ Article 8 §2 (e) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁷² Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977.;K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 344.

⁷³ Elements of Crimes, *International Criminal Court* 9 September 2002. 34 – 42;K. DÖRMANN, "War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes" in A. VON BOGDANDY & R. WOLFRUM (ed.), *Max Planck yearbook of United Nations law*, 7, The Hague, Kluwer International Law, 2003, (341) 400.

⁷⁴ R. LEMKIN, *Axis of rule in occupied Europe; Laws of occupation, analysis of government, proposals for redress*, Washington, The Lawbook Exchange, Ltd, 1944, 79.

⁷⁵ International Criminal Tribunal for Rwanda (ICTR) 4 September 1998, The Prosecutor v. Jean Kambanda (Judgement and Sentence), para 16.

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

This definition is a word for word copy of the definition included in the 1948 GENOCIDE CONVENTION⁷⁶ and can also be found in the ICTY⁷⁷ and ICTR⁷⁸ Statutes.

The *actus reus* – element of genocide is addressed in article 6 (a) through (e) of the Rome Statute. Although article 6 does not provide a requirement related to scale, the ICC’s ‘Elements of Crimes’ adds to this definition, stating that in order for each of these specific acts to be qualified as genocide, it is required that:

The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁷⁹

Additionally, as for each of the international crimes, a mental element is required.⁸⁰ However, in relation to the crime of genocide, the *mens rea* element deviates from the standard element provided by article 30 of the Rome Statute, a possibility specifically provided by the article’s opening clause. The *chapeau* element of article 6 requires a specific intent or *dolus specialis*,⁸¹ namely that the perpetrator operate “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.⁸² This is referred to as the ‘genocidal intent’ and represents the foremost important element in distinguishing genocide as a separate crime.^{83 84}

The concept of this specific intent was illustrated by the ICTR in its MUSEMA – Verdict, where the Tribunal held:

The special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged.”⁸⁵

⁷⁶ Article II Genocide Convention, *UN General Assembly* 9 December 1948.

⁷⁷ Article 4 Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

⁷⁸ Article 2 Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.

⁷⁹ Elements of Crimes, *International Criminal Court* 9 September 2002. 2 - 4

⁸⁰ Article 30 § 1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

⁸¹ International Criminal Tribunal for Rwanda (ICTR) 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), para 91.; P. AKHAVAN, "The crime of genocide in the ICTR jurisprudence", *Journal of International Criminal Justice* 2005, (989) 992.

⁸² Article 6 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998..

⁸³ International Criminal Tribunal for Rwanda (ICTR) 27 January 2000, *The Prosecutor v. Alfred Musema* (Judgement and Sentence), para 164.

⁸⁴ Because a legal definition only came into being in 1948, the Nuremberg Tribunal’s jurisdiction was limited. Many crimes that fit the legal definition of genocide were tried as either war crimes or crimes against humanity. As such, no conviction for genocide can be found in the Nuremberg Judgment. Also, the ICTR, in its Kayishema – Judgment, stated quite literally that genocide is “a type of crime against humanity”

⁸⁵ International Criminal Tribunal for Rwanda (ICTR) 27 January 2000, *The Prosecutor v. Alfred Musema* (Judgement and Sentence), para 164.; See also International Criminal Tribunal for Rwanda (ICTR) 2 September 1998, *The Prosecutor v. Jean-Paul Akayesu* (Opinion and Judgment), para 518.

... [W]hich offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator.⁸⁶

The determination of the *dolus specialis* can at times prove most difficult for the Court. As such, the ICTR, in its Akayesu – Judgment, offered guidelines as to determine genocidal intent. The presence of certain factors is taken into consideration, such as a “general context of perpetration ... systematically directed against that same group”, the scale and general nature of the acts, etcetera.⁸⁷

Finally, the International Criminal Court’s ‘Elements of Crimes’ has addressed the required mental element for genocide, stating that it will “be decided by the Court on a case-by-case basis”.⁸⁸ However, a practical scenario in which a corporation would be endowed with the required genocidal intent is unlikely to occur.

Chapter 2. Examples of corporate involvement in international crimes.

The criminal activity of legal persons is not, as some may think, limited to white-collar crimes. To demonstrate this the following chapter will be dedicated to exploring a handful of the many examples of corporate involvement in international crimes. We will firstly review the German industrialists who faced prosecution before the Nuremberg Tribunal. In addition to these ‘original corporate perpetrators’ we will take a closer look at a number of corporate human rights abuse - cases prosecuted before U.S. federal district Courts under the U.S. Alien Tort Claims Act.

2.1. German industrialists at the Nuremberg Tribunal: the I.G. Farben-, Krupp- and Flick Trials.

The concept of the criminal enterprise is as old as that of international criminal law itself. The cradle of international criminal law, the Nuremberg Tribunal, offers us a beautiful point of departure for our list of corporate perpetrators, which is, naturally, non-exhaustive.

The Nuremberg Charter, more particularly article 9, provided a legal basis for the International Military Tribunals following World War II to qualify these corporations as criminal organizations:⁸⁹

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.⁹⁰

Despite its competence, the Tribunal refrained from applying this article.⁹¹ As such, the concept of international corporate criminal liability was not established, as the qualification was, firstly, never utilized and secondly, merely aimed to serve as a basis for individual liability of those who held membership to these criminal organizations.⁹²

⁸⁶ International Criminal Tribunal for Rwanda (ICTR) 27 January 2000, The Prosecutor v. Alfred Musema (Judgment and Sentence), para 166.

⁸⁷ International Criminal Tribunal for Rwanda (ICTR) 2 September 1998, The Prosecutor v. Jean-Paul Akayesu (Opinion and Judgment), para 523.

⁸⁸ Elements of Crimes, *International Criminal Court* 9 September 2002. 2

⁸⁹ K.J. HELLER, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford, Oxford University Press, 2011, 131.

⁹⁰ Article 9 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.

⁹¹ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1034 - 1035.

⁹² L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 352.

Nonetheless, three of the twelve cases tried before the Nuremberg Tribunal are textbook examples of corporate involvement in international crimes, more specifically the trials of German industrialists, prosecuted for the severe harm they, through the vehicle of their corporate entity, had cost. These are the ‘UNITED STATES OF AMERICA VS. CARL KRAUCH, ET AL.’ – Trial,^{93 94} better known as the I.G. Farben-Trial, the ‘UNITED STATES OF AMERICA VS. ALFRIED KRUPP, ET AL.’ – Trial,⁹⁵ and the ‘UNITED STATES OF AMERICA VS. FRIEDRICH FLICK, ET AL.’- Trial.⁹⁶

They were directed against the corporate officers of respectively the INTERESSEN-GEMEINSCHAFT FARBENINDUSTRIE AG, a large German chemical corporation with as its most notorious product, the highly poisonous ZYKLON B gas, FRIEDRICH KRUPP AG, manufacturing arms and ammunition and the FLICK KOMMANDITGESELLSCHAFT, a collective of corporations mostly involved in steel production. The men were charged with war crimes and crimes against humanity, including enslavement of civilians out of occupied territory and those imprisoned in concentration camps,⁹⁷ deportation⁹⁸ and coercing Jewish plant owners into giving up their property.⁹⁹ The I.G. Farben – Case additionally included charges for the supply of poisonous gas for the extermination of, and drugs for medical experiments on, those enslaved and imprisoned in the concentration camps.¹⁰⁰

Although the defendants are individuals, the transcripts of e.g. the I.G. Farben - Indictment, on numerous occasions, includes clauses such as “[a]ll of the defendants, acting through the instrumentality of Farben...”¹⁰¹ and “in that they were [...] members of organizations or groups, including Farben, which were connected with the commission of said crimes”.¹⁰² The absolute necessity of the corporate instrument for these crimes was later reaffirmed by the Second Circuit U.S. District Court in the 2010 KIOBEL V. ROYAL DUTCH SHELL - Case, where the Court held:

[It was the] corporation that made possible the war crimes and crimes against humanity perpetrated by Nazi Germany.¹⁰³

So regardless of the fact that no legal person was held accountable at the Nuremberg Tribunal, these cases provide a clear example of corporate involvement in international crimes.

2.2. Cases under the U.S. Alien Tort Claims Act

The ALIEN TORT CLAIMS ACT is reflected in the U.S. Code provision that allows for district courts to hear civil claims of an alien “for a tort only, committed in violation of the law of nations...”¹⁰⁴ The

⁹³ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949.

⁹⁴ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 352.

⁹⁵ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949.

⁹⁶ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume IX*, Londen, 1949, 1 - 59.

⁹⁷ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume IX*, Londen, 1949, 2.; UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949, 4 - 5 Count III and 69 - 70.

⁹⁸ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume IX*, Londen, 1949, 2.

⁹⁹ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume IX*, Londen, 1949, 2.; UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949, 4 Count II.

¹⁰⁰ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949, 4 - 5 Count III.

¹⁰¹ UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949, 3 Count I, 4 Count II and Count III.

¹⁰² UN WAR CRIMES COMMISSION, *Law reports of trials of war criminals: Volume X: The I.G. Farben and Krupp Trials*, Londen, 1949, 4 Count II.

¹⁰³ United States Court of Appeals for the Second Circuit 17 September 2010, *Kiobel v. Royal Dutch Shell*.

possibility to file claims against legal persons under ATCA was confirmed in the 2011 FLOMO V. FIRESTONE NATURAL RUBBER CORP. – Case,¹⁰⁵ the SAREI V. RIO TINTO – Case¹⁰⁶ and the DOE V. EXXON MOBIL CORP. – Case.¹⁰⁷ Due to a contradicting case in a second district Court in 2010 the U.S. Supreme Court is expected to settle the possibility of corporate liability under ATCA later this year.¹⁰⁸

A. Shell's actions in the Niger Delta

The WIWA V. ROYAL DUTCH PETROLEUM-Case, WIWA V. ANDERSON - Case and WIWA V. SHELL PETROLEUM DEVELOPMENT COMPANY – Case were meant to be brought before the U.S. District Court of New York under the Alien Tort Claims Act. Defendants were ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY. The original complaint included summary execution, crimes against humanity, torture, cruel inhuman or degrading treatment, arbitrary arrest and wrongful death. The cases ended in a 15,5 million USD settlement¹⁰⁹ in 2009. The (alleged) facts of the case are as follows.

Shell, which began extracting the oil in the Niger Delta in the 1950's, met with peaceful yet increasing resistance from the OGONI, a tribe of indigenous people. In 1990, the non-governmental organization 'MOVEMENT FOR THE SURVIVAL OF THE OGONI PEOPLE' was founded.¹¹⁰ Under the leadership of writer KEN SARO-WIWA, they protested the numerous oil-spills and constant gas flares, polluting their land, water and air. As resistance grew, Shell was accused of conspiring with Nigeria's dictatorial military regime to assure the movement would be silenced. With the coming into power of president ABACHA a specific military task force, the ROVER STATE INTERNAL SECURITY TASK FORCE, was established exclusively to deal with the MOSOP and allegedly engaged in numerous human rights violations, varying from unlawful detention to execution.¹¹¹ Besides frequent violent outbursts of the Nigerian military against protesting civilians, this led to the execution of the 'Ogoni nine'. After a mock trial before a special military tribunal, which set into motion a wave of international outrage, Ken Saro-Wiwa and eight other Ogoni-men were executed by hanging on November 10th, 1995.¹¹²

b. Chevron¹¹³

The BOTOWA V. CHEVRON CORP. – Case is very reminiscent of the Royal Dutch Shell – Case. CHEVRON CORPORATION is a multinational, American-based oil magnate. It was accused of colluding with the dictatorial Nigerian government and requesting the latter to intervene in a peaceful protest, where an estimated one hundred protesters occupied an offshore drilling platform. Chevron allegedly orchestrated the attack, even providing the Nigerian armed forces with company helicopters, from which they, according to witnesses, opened fire on the trapped protestors. Two men were killed, others were severely injured.

In 1999 the Botowa v. Chevron Corp.- Case was filed under the U.S. Alien Tort Claims Act. The original complaint, in its second claim for relief, includes crimes against humanity, referring to the willful killings, torture, arbitrary arrest and detention as part of a widespread and systematic attack on a civilian

¹⁰⁴ Alien Claims Tort Act, 1789.

¹⁰⁵United States Court of Appeals for the seventh circuit 11 July 2011, Flomo v. Firestone Natural Rubber Co.

¹⁰⁶ United States Court of Appeals for the Ninth Circuit en banc, Sarei v. Rio Tinto.

¹⁰⁷ United States Court of Appeals for the District of Columbia Circuit 8 July 2011, John Doe VIII v. Exxon Mobil Corporation.

¹⁰⁸ STEPHEN M. NICKELSBURG & ERIN LOUISE PALMER, "Supreme Court To Decide Corporate Liability Under Alien Tort Claims Act", *The Metropolitan Corporate Counsel* 2011, (6) 6.

¹⁰⁹ M. KRAUSS, *Shell Settles ATCA Nigeria Suit*, <http://www.ratical.org/corporations/OgoniFactS.html> (consultatie 28 April 2012).

¹¹⁰ Hereinafter referred to as 'MOSOP'

¹¹¹ B. MANBY, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis*, unpubl., 5 - 6.

¹¹² B. MANBY, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis*, unpubl., 1.

¹¹³ C. BASSIOUNI, *International enforcement*, 3, Leiden, Koninklijke Brill NV, 2008, 436.

population. However, the U.S. District Court for the Northern district of California acquitted Chevron in 2008.¹¹⁴

*C. Rio Tinto*¹¹⁵

The facts of the SAREI V. RIO TINTO - Case take place in PANGUNA, a small village on the island of BOUGAINVILLE, a province of Papua New Guinea. In the 1960's the mining corporation RIO TINTO started constructing a massive copper- and goldmine in the village. As was the case in Nigeria after the arrival of Shell, local inhabitants suffered under the grave pollution brought about by the mine and began protesting. In 1988 the protest became increasingly intense and the mine had to be closed. The mining conglomerate had it be understood that unless the government acted to assure local cooperation, it would relocate. Fearing to lose its 19,1 % share of the profit, the government quickly took action by deploying a defense force in 1989. In response the BOUGAINVILLE REVOLUTIONARY ARMY was formed and the two collided in a civil war, which lasted 10 years and claimed approximately 15 000 lives. All the while, the Papua New Guinean government was allegedly encouraged and offered logistic assistance by Rio Tinto PLC. Starting April of 1990 the government added a blockade of all medicine and humanitarian assistance to the region, which lasted seven years. Rio Tinto stands trial for its involvement in war crimes and crimes against humanity.

These examples represent just a minor selection of the many cases of corporate involvement, a notion of which covers a wide spectrum, ranging from corporations taking the role of primary perpetrator to several possible versions of corporate complicity. An example of the former are the ever-growing number of private security companies, also referred to as private military companies, which have made warfare a lucrative business activity. For instance, ACADEMI, a corporation which caused quite the uproar under its former name, BLACKWATER, through its involvement in the shootings that took place in Bagdad on September 16th, 2007, claiming the lives of 17 Iraqi civilians. However, the majority of cases concern corporate complicity. The extent the practical examples of corporate involvement in international crimes will depend heavily on which definition of corporate complicity one chooses to apply, ranging from direct complicity, which is the approach wielded by the Rome Statute, to beneficiary or even silent complicity.¹¹⁶ Examples of corporate complicity, additional to the examples discussed under this chapter and dependent upon the applicable complicity approach, can be found in the actions of Canadian Oil company TALISMAN ENERGY INC. and its alleged complicity in the forceful transfer of Sudanese citizens,¹¹⁷ the actions of UNOCAL in constructing its YADANA gas pipeline in Birma or the purchasing of so-called 'blood diamonds' by Western corporations in conflict zones, the revenues of which finance rebel forces and as a result, perpetuate civil wars in countries such as Sierra Leone.

These examples serve to illustrate that regardless of whether or not the concept of international criminal liability for corporations is practically feasible at this time, what will perspire in the following chapters is more than an academic exercise, but rather serves a genuine purpose. It is a reaction to a current and tangible problem.

¹¹⁴ X, *Bowoto v. Chevron Trial Blog* <http://bowotovchevron.wordpress.com/> (consultatie 23 April 2012).

¹¹⁵ N. BEISINGHOFF, *Corporations and Human Rights: An Analysis of ATCA Litigation against Corporations* 81, Frankfurt, Gilbert Gornig, 2009, 148 - 149.; J.G. HOLT, "The international law exception to the act of State doctrine: Redressing human rights abuses in Papua New Guinea", *Pacific rim Law and policy journal* 2007, afl. 2, (459) 463 - 464.

¹¹⁶ For more information on these theoretical approaches to corporate complicity, please consult INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008.

¹¹⁷ United States Court of Appeals for the Second Circuit 2 October 2009, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*; S.J. KOBRIN, "Oil and politics: Talisman Energy and Sudan", *International law and politics* 2004, (425).

Chapter 3. Advantages in comparison to the existing regimes

3.1. Advantages of liability of the corporate entity, as opposed to the liability of individual employees and/or management.

A corporation has a personality of its own distinct from the personalities which compose it, a 'group personality' different from and greater than ... the sum of its parts and [i]n the same way that a house is something more than a heap of lumber and an army something more than a mob a corporate organization is something more than a number of persons.¹¹⁸

- Charles Abbott

Regardless of the individualistic nature of criminal law and without the pretense of aiming to replace the existing individual liability regime, the concept of corporate criminal liability offers a number of advantages, which we will enumerate and discuss, after first having identified the corporate entity as a subject of international law.

When weighing corporate liability against individual liability of the employee at an international level, the first thing that must be assured is the existence of corporations as a subject under international law.¹¹⁹ It is well known and all-round accepted that individuals can be held liable under international criminal law, as is confirmed by the jurisdiction of the Court, described in article 25 § 1 of the Rome Statute. Although the ICC currently has no jurisdiction over corporations, three reasons seem to justify that corporations are to be seen as subjects of international law. Firstly, because legal persons, like natural persons, enjoy the protection of rights under international law. Secondly, for the reason that corporations have standing before certain international Courts and lastly because they are the indirect subjects of international obligations. In the following paragraphs each of these three arguments will be explained in more detail.

Firstly, corporate entities, as legal persons, are the bearers of rights under international law. Most applicable *in casu* are human rights, as expressed in THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.¹²⁰ The application of the rights proclaimed in such Convention is most clear with regard to article 1 of the Convention's first Protocol. This appertains to the rights to private property. The article clearly states that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions"¹²¹ However, the fact that such provision is not included in each of the Convention's articles cannot lead to the conclusion that it is merely the right to private property that applies to legal persons. In fact, article 1 of the Convention includes legal persons¹²² through its statement that "[t]he High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention."¹²³

The existence of corporations as subjects of international law is also illustrated by article 34 of the Convention, which grants them standing before the EUROPEAN COURT OF HUMAN RIGHTS:

¹¹⁸ C.C. ABBOTT, *The rise of the business corporation*, Edward Brothers Inc., 1936, 15 - 16.

¹¹⁹ For authors opposed to this concept, please see C.M. VAZQUEZ, "Direct vs. Indirect Obligations of Corporations Under International Law", *Columbia Journal of Transnational Law* 2005, (927).

¹²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series* 4 November 1950.

¹²¹ Article 1 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952.

¹²² M. EMBERLAND, *The human rights of companies: Exploring the structure of ECHR protection*, Oxford, Oxford University Press, 2006, 2, FN 16 -17.

¹²³ Article 1 European Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series* 4 November 1950.[emphasis added]

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.¹²⁴

The European Court of Human Rights has interpreted this article to mean that the concept of a non-governmental organization covers corporate entities as well, and thus is broader than the concept of a NGO as would be interpreted in a United Nations context.¹²⁵ When looking at the *travaux préparatoires*, it becomes quite clear that the article was always meant to include corporations. This can be deduced from article 7 (a) of the Convention's 1948 draft version, which addressed a right of petition for any "natural or corporate person".¹²⁶ However the exact scope of the above-mentioned article is perhaps most clearly illustrated by the fact that the Court has always allowed corporations to take the position of applicant. The first corporate applicant is found in the 1991 SUNDAY TIMES VERSUS UNITED KINGDOM case.¹²⁷ Since, the Court has encountered numerous cases with corporations taking the position of private litigants.^{128 129} In addition to the European Court of Human Rights, the NORTH AMERICAN FREE TRADE AGREEMENT - more specifically articles 1115 to 1138 - allows for enterprises to defend their claims against Canada, the United States and Mexico,¹³⁰ through arbitration.

It thus appears legitimate to say that on the international forum companies are not only protected by certain rights, including human rights, but can additionally call upon the juridical system if and when those rights are violated. However, this blade appears to be one-sided and corporate actors find themselves in a particularly beneficiary position. They bear the protection of rights, however when they choose to grossly breach the same rights they bear, they cannot be held accountable.

Furthermore, the before-mentioned claim is supported by the fact that international law obligations are imposed upon corporations, be it indirectly. In this regard, the international community often imposes on States the duty to assure its nationals' compliance with international law, including that of its corporations. This has led to the instalment of domestic corporate liability regimes. The fact that corporations are the indirect subject of international law is reaffirmed through the preamble to the UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS,¹³¹ which reads:

Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive [...] to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance¹³²

After having established the fact that corporations are subjects to international law, let us examine the advantages such collective liability offers, compared to the liability of the individual employee or corporate

¹²⁴ Article 34 European Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series* 4 November 1950.

¹²⁵ E.g. European Court of Human Rights 24 October 1991, *Sunday Times v. The United Kingdom*.

¹²⁶ M. EMBERLAND, *The human rights of companies: Exploring the structure of ECHR protection*, Oxford, Oxford University Press, 2006, 2, FN 20. A. ROBERTSON, *Collected Editions of the 'Travaux Préparatoires' of the European Convention on Human Rights* Dordrecht, Martinus Nijhoff 1975.

¹²⁷ European Court of Human Rights 24 October 1991, *Sunday Times v. The United Kingdom*.

¹²⁸ E.g. the Case of *Agrotexim and others v. Greece*

¹²⁹ M. EMBERLAND, *The human rights of companies: Exploring the structure of ECHR protection*, Oxford, Oxford University Press, 2006, 2, FN 21.; R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 958.

¹³⁰ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 958.

¹³¹ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 959.

¹³² Preamble Universal Declaration of Human Rights, 10 December 1948.

organ.

A first advantage offered by the concept of corporate criminal liability pertains to the practical scenarios in which corporate liability is not only desirable, but rather indispensable. What happens when the alternative of individual liability does not exist? This can be the result of a number of different scenarios. One is simple absence, when an individual culprit is lacking. Often the individual perpetrating organs or employees are either deceased or have fled to escape prosecution. At times the intricate internal structure of the corporation might render it impossible to indicate a single culprit. When the commission of the international crime results from a collective decision of the management, this may render it impossible to pinpoint a single corporate organ. In this case criminal liability for the legal person is more appropriate.¹³³ Another example of this is found in the so-called 'fatherless omission'.¹³⁴ Simply put, this pertains to the scenario when the company is legally obliged to fulfill a certain duty, but consciously refrains from doing so. Once the harm has been done, it turns out to be impossible to ascertain which individual employee is responsible. Alternatively, it is possible that a number of perpetrators are identifiable, however, none of them provide all criminal elements required to constitute a crime. In other words, when one individual has conducted the criminal act without the required intent and another is endowed with the necessary *mens rea* but lacks the *actus reus*, then the requirements for liability are not unified in a single natural person. Thus, the corporate sum of a number of individual "harmless" actions, can add up to a corporate crime under the aggregation model for corporate liability, yet leave no one individually liable.¹³⁵

In all of the above-mentioned cases, the choice lies between corporate criminal liability and no liability at all.¹³⁶ Thus, lest the corporation be held accountable, the crime remains unpunished and the victims uncompensated. Such difficulties can be remedied through application of the aggregation or self-identity model. When the physical act is committed by an employee following an order of a high-ranking corporate officer, the identification model could equally be applied. However, an application of the vicarious liability model would not result in corporate responsibility in this particular scenario.¹³⁷

Secondly, there is the element of prevention. In order to bring about change and successfully influence corporate policies, to steer them away from human rights violations one must create accountability. This requirement is amplified in the prior-mentioned scenario, where neither corporate, nor individual criminal liability is provided. In this case, no one takes the punch and the incentive necessary for change remains absent. Either way, with or without individual liability, one must provide the proper incentives to influence the corporate policies of these global players. When the threat of liability is imminent, this can influence the corporation's decision-making process and work in a dissuasive manner. In a nutshell, corporate criminal liability is much more likely to bring about fundamental reforms in corporate policy, needed to prevent future violations, than the individual liability of its corporate officials or employees.¹³⁸

The third argument reflects the position of the French delegates at the Rome Conference,¹³⁹ namely that the inclusion of legal persons in the jurisdiction of the Court could give way to a positive effect on the compensation of victims. The financial resources of individual perpetrators often dry up during the

¹³³ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 56.

¹³⁴ M. KREMNIETZ, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 913.

¹³⁵ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 962.

¹³⁶ M. KREMNIETZ, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 913.

¹³⁷ The reasons for this will become clear with a reading of part III of this dissertation.

¹³⁸ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 963.

¹³⁹ U.N. Doc. A/CONF.183/C.1/L.3 (1998), article 23 para 5 - 6.

lengthy and costly process of their trial, leaving victims uncompensated. Accountability for corporations could provide an answer to these difficulties.

Fourthly and in subsidiary order, one may also take note of the price tag attached to the prosecution of the individuals involved. Corporations are often large and complex, a vast amount of time and money would have to be invested in order to detangle the corporate veil, to identify and prosecute the individuals responsible. From an economic perspective, it would be more cost-efficient to choose to prosecute the corporate entity itself.¹⁴⁰

Lastly, when addressing the subject from a philosophical rather than an academic point of view, imposing liability on the corporate actor can provide a greater symbolic sense of justice. More often than not, the crimes committed by the organs serve to enrich the corporation. In fact, the internal structure of the corporation serves as a catalyst for the commission of crimes and simultaneously impedes the detection of the criminal activity, through a separation of power.¹⁴¹ Nevertheless, it is only the individual employee or manager that is sanctioned, whilst the corporation sits quietly in the background, reaping the profits and basking in immunity... When a corporate organ acts well, this reflects beautifully on the company's reputation... However, when the organ displays criminal behavior the company gets off scot-free? Surely, no aspect of justice can appear to be done when our legal system is faced with such inconsistency. Perhaps corporate liability can inspire a more balanced international criminal justice system.

In conclusion it is clear that the concept of corporate liability not only offers numerous advantages in comparison to individual responsibility, but additionally, and most importantly, offers a much-needed safeguard for those instances where no individual liability is available.

3.2 Advantages of an international criminal liability regime for corporations as opposed to national criminal liability.

A number of States have incorporated international crimes into their domestic criminal legislation. Often, these criminal codes apply to legal persons as well as natural persons and in a minority of cases, States even endow themselves with universal jurisdiction.¹⁴² So, is an international forum truly necessary? Though it may seem that the possibilities for addressing corporate liability for international crimes at the national level suffice, one must keep in mind that States, throughout history, have not always been the best allies of their citizens.

It is well known that the most extreme corporate human rights violations take place in zones of conflict. These zones often host production or extraction by companies incorporated in the West¹⁴³ or attract illicit enterprises, which regard them as lawless areas. In the former case, two sets of legal systems could address the human rights breaches. Nevertheless, these corporate perpetrators or accomplices mostly remain immune to prosecution... Why is this? In the following paragraphs we will discuss why States that are endowed with the necessary jurisdiction to prosecute, refrain from utilizing it.

The host State is often a third-world country, which is either unable or unwilling to act. Host States may have underdeveloped legal systems and as such corporate conduct often does not constitute a criminal offence under the domestic law of the State where it is committed. Alternatively, an underdeveloped

¹⁴⁰ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1043.

¹⁴¹ M. KREMNIETZ, "A possible case for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 912.; T. WEIGEND, "Societas delinquere non potest? A German Perspective" *ibid.* 2008, afl. 5, (927) 928.

¹⁴² E.g. United Kingdom, Norway, Canada and France

¹⁴³ K. HAIGH, "Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 200.

Court system may not be able to provide the means necessary for prosecution. Lastly, one must not lose sight of the issue of severe corruption often crippling the judicial systems of these conflict zones. These elements, either individually or combined, have the power to render the host State unable to prosecute. Even more staggering are the numerous cases in which the State is unwilling to take action against corporate criminal activity. When confronted with a choice between protecting the human rights of its citizens and increasing economical activity through much-needed foreign investment, many host States shall choose the latter.¹⁴⁴ However, the State can be more than a silent bystander and either act alongside the corporation as an accomplice¹⁴⁵ or render the corporation an accomplice, the State itself being the primary perpetrator.

Companies engaging in criminal activity mostly have their seats in States with developed legal systems, referred to as the 'home State'. International law indicates that a State has a duty to protect against human rights violations by third party non-State actors, including corporations.¹⁴⁶ However, there exists debate as to whether this obligation also applies to *extraterritorial* human rights abuses by domestic corporations. A 2008 report by JOHN RUGGIE, special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, states that the greater consensus lies with the idea that States are "not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States."¹⁴⁷ Such basis of jurisdiction seems to be automatically provided with regard to international crimes, which give way to universal jurisdiction, such as genocide, war crimes and crimes against humanity.¹⁴⁸ However, the fact that it is "not prohibited" hardly equals an obligation and most home States demonstrate a sense of detachment, appearing most reluctant to exercise this right.¹⁴⁹ In other words, the inability or unwillingness of the host State, combined with the reluctance of the developed home State creates a legal vacuum in which these corporations operate freely, without the threat of indictment.

Additionally, the existence of universal jurisdiction in a number of national legal systems presents a moot argument and cannot undermine the need for an international forum. For a State to investigate the commission of an international crime to which it holds no ties whatsoever, imposes many practical obstacles and is a burden to its limited resources. Additionally, it holds judgment towards the State where the events are taking place or which holds some other close link to the commission of the crime, e.g. the positive personality concept. It is far from evident that a State, regardless of its theoretical legal possibility thereto, will be quick to invoke its universal jurisdiction.

It is for all these reasons that national criminal corporate liability cannot cure the lack of an international forum. In the current framework, those who are able to prosecute lack either the will or the possibility to

¹⁴⁴M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 916.

¹⁴⁵M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 917.

¹⁴⁶J. RUGGIE, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, A/HRC/8/5, UN HUMAN RIGHTS COUNCIL, 7 April 2008, 7 § 18.

¹⁴⁷J. RUGGIE, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, UN HUMAN RIGHTS COUNCIL, 7 April 2008, p 7 § 19.

¹⁴⁸J. RUGGIE, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations*

and other business enterprises: Addendum - Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops, A/HRC/4/35/Add.2, UN HUMAN RIGHTS COUNCIL, 15 February 2007, 14 § 42.

¹⁴⁹K. HAIGH, "Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 200.

do so. In the scenarios set out above, international criminal liability offers the option of indictment before an international Court,¹⁵⁰ more precisely the International Criminal Court and helps end the current state of impunity.

3.3. Advantages of criminal liability...

*a. ... as opposed to administrative liability.*¹⁵¹

The administrative law system, at the international level, is not yet fully developed. It is only at the States' domestic levels that a socio-historic legal culture of administrative law with regard to corporations exists.¹⁵² Some States, Germany being the best-known example, have chosen to sanction even the most anti-social and serious of crimes through administrative liability. Although the punishment may remain severe – e.g. the heavy financial sanctions known in the German *Ordnungswidrigkeiten* – administrative sanctioning is still regarded by many learned authors¹⁵³ as an inept way of dealing with international crimes and this for several reasons...¹⁵⁴

Firstly, the severity of the crime itself calls for a criminal prosecution, as well as a criminal sanction. Imposing administrative sanctions for international crimes takes away from the gravity of the offence, sending a wrong signal to the international community.

Secondly, imposing criminal sanctions has a greater deterring effect, as it is far more damaging for a corporation's reputation than an administrative fine. This is of importance, as the proper incentive can steer a corporations actions in the right direction and prevent the (further) commissioning of crimes,¹⁵⁵ as we have mentioned earlier.

Finally, one must consider that the sanctions imposed by these administrative liability systems are not minor. For example, the aforementioned administrative fines imposed by the *Ordnungswidrigkeiten*, called *geldbussen*,¹⁵⁶ can, provided there is an illicit profit, exceed the amount of one million euros. In the absence of such profits, the threshold of one million euros is maintained. The question arises as to whether administrative liability can be considered the appropriate vessel for such severe sanctioning, and whether a penal instrument would not be more in place, given the circumstances.¹⁵⁷

b. ... as opposed to civil liability.

There are numerous advantages criminal liability offers in comparison to civil liability. Firstly, a number of advantages explained under the former title deserve to be repeated, as they are equally applicable to the present comparison. Once again, the corporation's reputation will suffer more at the hands of a criminal

¹⁵⁰ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 7.

¹⁵¹ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 915.

¹⁵² L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 367.

¹⁵³ E.g. Thomas Weigend, M. Kremnitzer...

¹⁵⁴ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 915.

¹⁵⁵ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 915.

¹⁵⁶ A.I. POP, *Criminal liability of corporations – comparative jurisprudence*, unpubl. Paper, Michigan State University College of Law, 2006, http://www.law.msu.edu/king/2006/2006_Pop.pdf, 13.

¹⁵⁷ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 916.

sanction than at the hands of its civil counterpart. Also, the gravity of the offence calls for criminal sanctioning.¹⁵⁸

Additionally, a number of advantages stem from the criminal procedure, the most important of all having to do with the position of the victim. When confronted with large-scale corporations committing international crimes, the relationship with its victims is often one comparable to that between David and Goliath. Criminal law procedure, more so than its civil equivalent, is victim-oriented. In this regard reference is made to the practice known in civil law countries as *partie civile*, according to which the victim is allowed to take part in the criminal proceedings. The ICC seems to draw from these criminal procedures, as chapters 4 and 5 of its Regulations of the Court indeed allow the victims to take part in the proceedings, be it through an agent.¹⁵⁹ Other advantages stemming from criminal procedure include its commitment to due process, less lengthy proceedings and proper means for the collection of evidence.¹⁶⁰

Chapter 4: A bump in the road: counterarguments and possible difficulties.¹⁶¹

In order to provide the reader with a complete view of our subject, the following chapter includes argumentation distilled from opposing doctrine. A number of possible counterarguments will be explored concerning the individualistic nature of criminal law, the sanctioning dilemma, political will, the evolution of international criminal law and the interests of shareholders. It be noted that certain counterarguments will only be addressed rather briefly at this point, in light of the upcoming chapter regarding counterarguments set forth in the context of the 1998 Rome Conference.

Our first argument pertains to the very nature of criminal law, which is to target individual natural persons. It has engaged this anthropocentric view since its conception.¹⁶² It aims to punish those who possess the required consciousness to 'do wrong'. Corporate actors, as fictitious legal entities, are seemingly not endowed with the necessary state of mind, the consciousness needed to set forth a criminal intent or knowledge.¹⁶³ Thus, the missing link is the element of culpability.¹⁶⁴ The attribution of *mens rea* to legal persons was identified as a possible challenge at the Rome Conference and forms the focal point of the third part of this dissertation.

A second and more imminent aspect of adding legal persons to the Court's jurisdiction is the possibility that these will serve as lightning rods, diverting liability from the individuals responsible. The concept of corporate criminal liability might offer culprit-individuals a possibility to seek refuge behind the corporate veil, attempting to offer the corporation as a scapegoat and as such not incur liability themselves. The consequences are threefold. First and foremost, there is the obvious abstention from punishment for the individual perpetrator, an injustice which must be avoided at all cost. Secondly, this would diminish the deterrent effect. We have argued that the introduction of liability for the corporate entity would affect corporate policy. However, personal liability undoubtedly presents an important incentive as well. Lastly,

¹⁵⁸ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 916.

¹⁵⁹ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 6.

¹⁶⁰ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 916.

¹⁶¹ In this regard we refer to difficulties surrounding the recognition of the International Criminal Court by certain States, as well as to the financial means of the ICC.

¹⁶² INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

¹⁶³ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

¹⁶⁴ M. KREMNIETZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 915.

there exists an undesirable effect on the corporation's shareholders,¹⁶⁵ who possibly have no link to the criminal activity and would ultimately be punished for the crimes of others. In other words, the guilty would walk free and the sanction will be dispersed amongst the innocent.

Regardless of the importance of corporate criminal liability, criminal law by its very nature is individualistic and must remain so. The emphasis must always be on the individual committing the crime, in order for justice to be served. Nevertheless, corporate criminal liability can serve as a valuable addition to the existing regime. Thus, when amending the Rome Statute to introduce corporate liability, the complementary nature of such liability should be specifically emphasized, preventing the possibility of an escape route for culprit – organs. The corporate entity may never serve as a shield for individual perpetrators. However, it is worth noting that the risk for this is the greatest when the responsibility to prosecute lies with the State, for it might be susceptible to political pressure exercised by powerful corporate entities. An international criminal law forum, such as the ICC, will be much less susceptible to such pressure. As such, the need for international as opposed to national jurisdiction is illustrated once again.

The third counterargument questions the appropriateness of the sanctions available in the classic criminal law system. Naturally, corporations are not susceptible to the same punishments as natural persons are. They cannot be imprisoned and pecuniary sanctions, which are not sufficiently severe, risk being transferred to the customer.¹⁶⁶ However, this concern is subject to an in depth analysis in the upcoming chapter.

Fourthly, great difficulty lies in the lack of political will.¹⁶⁷ In the spirit of public service, it is counter-instinctual for a politician to stomp economic growth by introducing measures which are likely to render corporations reluctant to invest. This political hesitance is natural and understandable, for it is not unlikely that a corporation will simply move its production elsewhere, where it mustn't fear prosecution.¹⁶⁸ However, the fact that domestic legislation concerning corporate criminal liability be enacted is of importance relating to the principle of complementary, which will be elucidated on in the second part of this dissertation.

In a fifth and final counterargument, it is the critique of certain learned scholars that by introducing international criminal liability for corporations, a re-collectivization of international criminal law would begin, meaning a step backwards from the progress of individualization obtained through the Nuremberg Tribunal.¹⁶⁹

Crimes are committed by men, not by abstract entities, and only by punishing the individuals who commit such crimes can the provisions of international law be enforced¹⁷⁰

¹⁶⁵ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1043 -1044.

¹⁶⁶ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

¹⁶⁷ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 367.

¹⁶⁸ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

¹⁶⁹ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 350.

¹⁷⁰ International Military Tribunal for Nuremberg 1 October 1946, Judgment, 447.

This quote formed the primordial break in State sovereignty with regard to international accountability. The Tribunal focused on individual accountability, preventing those responsible from hiding behind the dictatorial governments they chose to serve. The concept of individual criminal responsibility on an international level, at the time, was revolutionary.¹⁷¹ However, one cannot interpret the before-mentioned quote as excluding the possibility of criminal responsibility for corporations. The abstract entity referred to by the Tribunal is the State. As such, it aims solely to exclude State criminal responsibility.¹⁷² This was confirmed by the ICTY in the Blaskic-Case, where the Tribunal expressed that:

[U]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.¹⁷³

Naturally, States and corporations are two distinctly different entities. From an international public law stance, a State should escape criminal liability for reasons of sovereignty and equality between States.¹⁷⁴ This does not apply to corporations. Hence, this does not in any way impede the oncoming concept of international corporate criminal responsibility.

Chapter 5: Preliminary conclusion.

When confronted with a legal concept such as the subject of the current dissertation, the first question we are confronted with is: Does this concept present an answer to a need? What can this concept add to the existing liability systems? The desirability of international corporate criminal liability has been a lively subject in the legal doctrine for some time now. Throughout these last chapters it has been the author's intention to set apart the reasons for introducing corporations into the International Criminal Court's jurisdiction and negate possible counterarguments. In answering the first question, the concept was anchored in reality through the inclusion of a number of concrete examples of corporate involvement in international crimes. In this regard, the attempt is to demonstrate that this is more than a purely academic exercise. In relation to the latter question, an enumeration was made of a number of advantages this concept offers in comparison to individual liability for corporate actors, national corporate criminal liability and administrative and civil liability regimes. The most prevalent advantages reside in the concept's possibility to remedy the difficulties posed by exceedingly complex corporate structures which aim to mask individual liability, as well as the fact that an overarching forum would call a halt to the current practice of corporations operating in a grey zone created by the inability of the host State to prosecute and the indifference of the home State.

¹⁷¹ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 354.

¹⁷² L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 354.

¹⁷³ International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) 29th October 1997, IT-95-14, The Prosecutor v. Blaskic (Judgement on the request of the republic of Croatia for review of the decision of Trial Chamber II), para 25.

¹⁷⁴ Article 2 (1) Charter of the United Nations.

Part II: An analysis of the concept's current feasibility

Following the establishment of the desirability of the concept of international corporate criminal liability, the following chapters will assess its feasibility. Practically speaking, an extension of the Court's jurisdiction requires an amendment of the Rome Statute. However, the concept of jurisdiction over legal persons is no novelty to the Court, as it was considered and declined at the Rome Conference in 1998. At the conference delegates were faced with a number of hurdles, which led to the rejection of the concept. An inquiry as to these past obstacles will allow for a reasonable assessment of the possibilities for amending the Statute at the present time.

In the following pages we will firstly look back at the course the concept of corporate responsibility ran during the Rome Conference itself, including the position of legal persons in the Draft Statute and the amendments proposed by the relevant working group. Afterwards, some of the reasons for its rejection will be considered more closely, in particular the need appropriate penalties and lack of an international standard. Lastly, a conclusion will be made as to the current practical possibilities for amending the Statute in order to extend the Court's jurisdiction.

Chapter 1: Discussions on the Court's jurisdiction: The Draft Statute and the Rome Conference.^{175 176}

Between June 15th and July 17th, 1998 delegations of 160 States attended the UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, which we will further refer to as the ROME CONFERENCE.¹⁷⁷ The conference was anticipated by the work of the Preparatory Commission, which throughout the likes of six sessions over the course of three years (1996 – 1998) shaped a Draft Statute for the International Criminal Court.^{178 179}

In this Draft Statute, when discussing the Court's jurisdiction, particular attention was given to the possibility of including legal persons. More particularly, article 23 § 5 stated:

The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.¹⁸⁰

The following paragraph addressed the coexistence of criminal liability of a legal person and that of a natural person and made perfectly clear that these are non-exclusive:

The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.¹⁸¹

¹⁷⁵ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 56.

¹⁷⁶ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) Margin No. 4.

¹⁷⁷ COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *History of the ICC: Rome Conference*, <http://www.iccnw.org/?mod=rome> (consultatie 28th February 2012).

¹⁷⁸ P. COMMITTEE, *Report of the preparatory committee on the establishment of an international criminal court*, Rome, 14 April 1998, <http://www.un.org/law/n9810105.pdf>.

¹⁷⁹ COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *History of the ICC: Preparatory Committee*, <http://www.iccnw.org/?mod=prepcommittee> (consultatie 28th February 2012).

¹⁸⁰ P. COMMITTEE, *Report of the preparatory committee on the establishment of an international criminal court*, Rome, 14 April 1998, 49.article 23

Additionally, the Draft Statute specifically addressed possible penalties for legal persons in article 76. Included were fines, prohibition of the exercise of activity, dissolution, etcetera.¹⁸²

Included with these paragraphs was a footnote, explaining the deep wedge in belief between those in favor and those opposed to the inclusion of legal persons in the jurisdiction of the Court.

Thus, during the course of weeks, delegates of States Parties gathered at the Rome Conference to discuss, amongst other things, the extend of the Court's jurisdiction. The delegates showed no enthusiasm regarding the concept of jurisdiction over legal persons, as a French¹⁸³ delegate noted:

... [it] had met with resistance on the part of many delegations on the grounds that either the legal systems of their countries did not provide for such a concept or that the concept was difficult to apply in the context of an International Criminal Court.¹⁸⁴

At the Conference a French proposal was launched, containing a new take on corporate criminal liability, finding accordance with the principles set forth during the Nuremberg Tribunal.¹⁸⁵ More specifically, the proposal contained the possibility for the International Criminal Court to qualify an organization or group as criminal. This would render the corporation susceptible to sanctioning. This differs from the concept of the criminal organization inscribed in the Nuremberg Charter, where article 10 allowed for the sanctioning of the individual members to the organization that had been deemed criminal.¹⁸⁶

However, during the discussion in the WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW, the proposed accountability was quickly minimalized. Through adding a substantial number of strict preconditions, the possibility for utilization of the proposed concept lessened drastically.¹⁸⁷

Firstly, the concept of the 'legal person' was replaced by that of the 'juridical person', the strict definition of which excluded all but private corporations seeking profit:¹⁸⁸

A corporation whose complete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international

¹⁸¹ P. COMMITTEE, *Report of the preparatory committee on the establishment of an international criminal court*, Rome, 14 April 1998, 49.article 23

¹⁸² P. COMMITTEE, *Report of the preparatory committee on the establishment of an international criminal court*, Rome, 14 April 1998, 121.article 76

¹⁸³ The French delegation itself was very much so in favor of including legal persons in the Court's jurisdiction, hence the French proposal. See K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) para 4.

¹⁸⁴ K. HAIGH, "Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 202.

¹⁸⁵ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 353.; Article 9 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.

¹⁸⁶ Article 10 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.

¹⁸⁷ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 353.

¹⁸⁸ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) Margin No. 4.

body or an organization registered, and acting under the national law of a State as a non-profit organization¹⁸⁹

Besides this restriction in possible subjects for liability, which matches the desired scope of the present thesis, an additional number of conditions were introduced. Learned author KAI AMBOS summarizes these as:

[A link] to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities.¹⁹⁰

The Working Paper stated:

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a Judgment over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.”

However, the reluctant attempt to introduce even this severely diluted version of corporate liability turned out to be in vain, as it was rejected by the delegates.¹⁹¹ As such, legal persons were not included in the Court’s jurisdiction, as article 25 § 1 of the Rome Statute provides that “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute”.

Chapter 2: Obstacles identified at the Rome Conference and their current status

2.1. Introduction

The delegates offered a number of reasons for the final rejection of the proposal, which can be divided into philosophical and practical considerations on the one hand and fundamental legal ‘obstacles’ on the other hand.

Regarding the more philosophical observations, it was firstly believed that the incorporation of liability for legal persons would diminish the focus on the individual criminal liability of natural persons, regardless of the explicit reference to non-exclusivity made in article 23 § 6 of the Draft Statute. Some delegates additionally observed a slight hypocrisy by the States Parties, stating that it was “morally obtuse for States

¹⁸⁹ WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW, *Document A/CONF.183/C.1/WGPP/L.5/REV.2: Working paper on article 23, paragraphs 5 and 6, 3 July 1998*, 2.

¹⁹⁰ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* München, Hart Publishing, 2008, (743) Margin No. 4.

¹⁹¹ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 354.

to insist on the criminal responsibility of all entities other than themselves.”¹⁹²

Practical concerns were expressed as to the considerable obstacles that were sure to occur with regard to the collecting of evidence.¹⁹³ Delegates feared these difficulties would make the concept of jurisdiction over legal persons unworkable. The author would like to point out that it is hardly likely that the complexity of such a case would surpass the complexity of cases against State or rebel leaders, currently taken on by the Court. Delegates further inquired as to how the indictment would be served and who would represent the corporations.¹⁹⁴ Some found that the Conference had provided too little time for an in depth discussion of the matter.¹⁹⁵ However, besides these practical and philosophical considerations, some more fundamental hurdles truly thwarted the inclusion of legal persons in the Rome Statute.

2.2. Fundamental obstacles

Two of the three essential legal obstacles identified at the Rome Conference will now be considered in more detail, i.e. the sanctioning of legal persons and the lack of an international standard for corporate criminal liability. The third obstacle, namely the challenge of attributing *mens rea* to legal persons will be thoroughly explored in the final part of this dissertation.

a. Sanctioning

Firstly, the sanctioning of legal persons poses a problem for the expansion of the Court’s jurisdiction. Currently, article 77 of the Rome Statute, which provides two penalties to be applied by the Court, focuses mainly on imprisonment, a sanction that is clearly not applicable to legal persons. Article 77 § 2 provides:

In addition to imprisonment, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.¹⁹⁶

The propriety of the available sanctions appears inadequate. The possibility of monetary penalties is made dependent upon the attribution of a prison sentence. However, even if this were not the case, three reservations must be addressed concerning the concept of financial penalties for corporations.

Firstly, pecuniary sanctions may only have a minor deterring effect on corporation. This is linked to the fact that corporations often factor possible fines into their cost-benefit analysis in advance.¹⁹⁷ A rather notorious example of this is the FORD PINTO case. In 1971 Ford Motor Co. designed and produced a new car, namely the Ford Pinto. The 1971-1976 model of this car showed significant safety defects, the most important one being that when involved in a rear-end collision, even at a medium speed, the Pinto’s fuel tank would get punctured and start to leak, which gave way to massive fuel tank explosions. FORD MOTORS CO. was aware of the problem, and conducted a cost-benefit analysis. To mend the tanks would require 11 USD per sold Ford Pinto, which was estimated to total 137 million USD. In comparison, Ford

¹⁹² OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1039.

¹⁹³ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 56.

¹⁹⁴ K. HAIGH, "Extending the International Criminal Court’s jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 203.

¹⁹⁵ K. HAIGH, "Extending the International Criminal Court’s jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 203.

¹⁹⁶ Article 77 § 2 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.[emphasis added]

¹⁹⁷ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1042.

had calculated that the compensation 180 deaths and 180 victims of severe burns would cost a total of 49,5 million USD. As such, Ford made the 'informed decision' to refrain from calling back any vehicles and upwards of 500 lives were lost in rear-end collisions resulting in fuel tank explosions with Ford Pintos.¹⁹⁸ Even when no prior cost-benefit analysis is made, there is still the risk that the corporation will transfer the cost to its customers, ex post.¹⁹⁹

Secondly, one must take caution, assuring an adequate difference with the sanction's non-criminal counterparts, namely administrative and civil pecuniary sanctions, given the more potent procedural requirements protecting the criminally indicted.²⁰⁰ Although fines can be imposed civilly or administratively as well, this argument can be negated with the thesis that there is a certain stigma attached to a criminal fine. It provides adverse publicity and can pose a sort of modern pillory, which perhaps brings about a greater sense of justice and retribution. This extra element will provide a greater incentive for corporations to refrain from the behavior than a non-criminal fine could, thus providing adequate distinction with the latter.

Lastly, whenever a financial sanction is imposed for the purpose of compensating victims, one must take into account the source of the money used for this compensation and the will of the victims. When the money that is put towards compensation represents a portion of the profits gained through exercising gross human rights abuses, then the cave is twofold. First and foremost, lest the fine exceed the profits, the purpose of retribution will not be served. Secondly, a victim might not find comfort, solace or justice in financial compensation derived from the suffering of others, which is the same suffering he himself endured.

Regardless of the advantages and concerns relating to monetary sanctions, the introduction of legal persons to the Court's jurisdiction would require an amendment of the penalties provided in article 77 of the Statute. Besides the more creative, new sanctions such as management intervention and community-service orders,²⁰¹ exist a number of more traditional corporate sanctions, which will be introduced in the following pages, namely restraints, structural injunctions, adverse publicity, equity shares, probation and dissolution. Which of these is most likely to be incorporated into the Statute depends upon what is politically acceptable for all States Parties, given the sanctions incorporated in their domestic corporate criminal liability regimes.

A first option for corporate sanctioning lies in the concept of restraints. This entails that the corporation is, either temporarily or indefinitely prohibited from exercising part of its regular activity. This can result in geographic exclusion, prohibiting the corporation from operating in a certain region. However, it is equally possible that this will simply come down to the prohibition of (part of) the corporation's activity in general.

Secondly, whenever the corporation's culture, its policies and procedures, lie at the root of the criminal activity, the propriety of sanctioning by means of a structural injunction cannot be overestimated. A

¹⁹⁸ T. KAWASAKI, "White-collar crime and reactions of the criminal justice system in the United States and Japan" in HENRY N. PONTELL & GILBERT GEIS (ed.), *International handbook of white-collar and corporate crime*, New York, Springer, 2007, ((552)) 559.

¹⁹⁹ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58 - 59.

²⁰⁰ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 969-970.; A.I. POP, *Criminal liability of corporations – comparative jurisprudence*, unpubl. Paper, Michigan State University College of Law, 2006, 5.

²⁰¹ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1042. A. VERCHER, "Some Reflections on the Use of Criminal Law for the Protection of the Environment" in EDMONDO BRUTI LIBERATI ET AL. (ed.), *Social defence and criminal law for the protection of coming generations in view of the new risks* 2002, (103) 115.

structural injunction aims to amend the internal structure of the corporation, altering faulty decision-making processes.²⁰²

The difficulty in sanctioning corporations lies in their lack of moral consciousness and culpability. However, one human emotion that can be said to be transferrable to a corporate entity, and that is shame. The corporation's reputation is fragile. Because of this, the third sanctioning-method of adverse publicity orders is most relevant. Varying from the most basic public admission of fault, sometimes only taking up a single sentence, to a detailed public account of the events which transpired, a listing of every sanction the corporation incurred or even a plan for future improvement of corporate policies. These public admissions can form an incentive for reform and certainly serve the purpose of retribution. One example of adverse publicity are the reports, published by the PANEL OF EXPERTS ON THE ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH OF THE DEMOCRATIC REPUBLIC OF THE CONGO and the 'naming and shaming effect' they produced.²⁰³

Fourthly, the concept of equity awards represents a more controversial sanction and consists of creating shares in the indicted corporation, which are then awarded to the victims. The result is twofold: On the one hand, the power of the original shareholders is weakened. Not only can this steer future corporate policy, it also has a retributive value vis-à-vis the existing shareholders of the corporation. On the other hand, this course of action creates an economic connection between the corporation and the victim. This entails that when the company gains profits, this now also benefits our victim. However, these revenues are possibly obtained through the same crimes the newfound beneficiary fell victim to. Ay, there's the rub,²⁰⁴ as similar to the before-mentioned scenario of compensation through fines, it is hardly infeasible that perhaps even a majority of victims will be unwilling to gain from the suffering they once endured.

Complementary to these four proposed sanctions, the concept of probation allows for a corporation to be placed under surveillance. At this time a separate entity, e.g. a Court, a domestic agency, NGO or international organization, will monitor the corporation's actions, for instance by installing obligatory periodical reports,²⁰⁵ ensuring it applies the given sentence and refrains from illegal activity.

Lastly, the most severe possibility is found in the revocation of a corporate charter or registration, resulting in the corporate counterpart of the death penalty, namely dissolution. Without judgment as to the propriety of this sanction, two concerns must be addressed.

Firstly, one must bear in mind the economic and social interests of the community. Closing down a company can have a grave effect on the local prosperity and must not be taken lightly.²⁰⁶ On the national level, this would result in an understandable lack of political will.²⁰⁷ In the spirit of public service, it is counter-intuitive for a politician to stomp economic growth by introducing measures which are likely to render corporations reluctant to invest. This political hesitance is natural and understandable, as it is not

²⁰² INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 59.

²⁰³ OLE KRISTIAN FAUCHALD & JO STIGEN, "Corporate responsibility before international institutions", *The George Washington International Law Review* 2009, (1027) 1042.

²⁰⁴ And enterprises of great *pitch* and moment, with this regard their Currents turn *awry*, and lose the name of Action

²⁰⁵ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 59.

²⁰⁶ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

²⁰⁷ L. VAN DEN HERIK, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences" in C. STAHN & L. VAN DEN HERIK (ed.), *Future Perspectives on International Criminal Justice*, The Hague, Asser Press, 2010, (350) 367.

unlikely that a corporation will simply move its production elsewhere, where it mustn't fear prosecution.²⁰⁸ This illustrates once again, the importance of an overarching, international forum.

Additionally and in the same way that the mere punishment of corporate officials can result in the criminal actions of the corporation getting carried on by a different set of managers, one must never limit the sanctioning to the dissolution of a corporation without punishing the individuals responsible, as to prevent these individuals from engaging in the same activity through a newly founded corporate entity. This is essentially a reaffirmation of the non-exclusivity of these two concepts, however it is an issue that can also be resolved by imposing restraints on the future professional activity of these individuals.

As was stated earlier, what penalties will ultimately be introduced to the Rome Statute depends heavily on finding a consensus that is acceptable to all 121 States. In this regard reference is made to the list of sanctions included in a number of Council Framework Decisions combatting crimes such as terrorism, child pornography, fraud, etcetera. The model for corporate liability introduced by these European instruments will be discussed in detail further on. However, the sanctions included in these Council Framework Decisions are likely to reflect that what is politically acceptable for all Member States, given the finality of these instruments.

These are, in addition to monetary fines, exclusion from entitlement to public benefits or aid,²⁰⁹ temporary or permanent disqualification from the practice of industrial or commercial activities,²¹⁰ placing under judicial supervision,²¹¹ a judicial winding-up order²¹² and temporary or permanent closure of establishments

²⁰⁸ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 2: Criminal Law and International Crimes*, Geneva, 2008, 58.

²⁰⁹ E.g. Article 9 § 1 (a) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *European Union: Council of the European Union* 29 May 2000.; Article 8 § 1 (a) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *European Union: Council of the European Union* 28 May 2001 ; Article 8 (a) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002.; Article 3 § 1 (a) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *European Union: Council of the European Union* 28 November 2002.; Article 6 § 1 (a) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *European Union: Council of the European Union* 22 July 2003.

²¹⁰ E.g. Article 9 § 1 (b) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *European Union: Council of the European Union* 29 May 2000.; Article 8 § 1 (b) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *European Union: Council of the European Union* 28 May 2001 ; Article 8 (b) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002.; Article 3 § 1 (b) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *European Union: Council of the European Union* 28 November 2002.; Article 6 § 1 (b) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *European Union: Council of the European Union* 22 July 2003.

²¹¹ Article 9 § 1 (c) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *European Union: Council of the European Union* 29 May 2000.; Article 8 § 1 (c) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *European Union: Council of the European Union* 28 May 2001 ; Article 8 (c) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002.; Article 3 § 1 (c) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *European Union: Council of the European Union* 28 November 2002.; Article 6 § 1 (c) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *European Union: Council of the European Union* 22 July 2003.

which have been used for committing the offence.²¹³

As the observant reader has noticed, the penalty of judicial supervision phrases a form of probation and the concept of the structural injunction is reflected in “the obligation to adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded”. Dissolution, although seemingly not fully represented, finds expression in the possibility of disqualification from certain activities and the closure of certain establishments.

In conclusion, the introduction of sanctions for legal persons into the Statute of the Court requires dual reflection. On the one hand, it must represent a political compromise of the corporate sanctions included in the domestic legal regimes of the different States Parties, in the same way that this is required for the attribution model. This is a balancing act that has already been exercised for part of the States Parties, namely the Member States of the European Union, in the sanctions included in the above-mentioned Council Framework decisions.

However, taking into consideration the grave and serious nature of international crimes, one could argue that the gravity of these criminal acts and the extent of the harm inflicted upon victims perhaps overshadows this need for compromise and justifies an application of the full range of available sanctions.

b. Lack of an international standard

We now turn to the second fundamental obstacle identified at the Rome Conference and the last to be discussed under this part of the dissertation, namely the lack of an international standard concerning corporate criminal liability.²¹⁴ This is still the most fundamental hindrance to extending the Court’s jurisdiction.

The differences in the national interpretations of corporate criminal liability, which prevented the establishment of an international consensus on the subject during the Rome Conference, present themselves in a two-stepped manner: Firstly, there is a division between those States Parties that simply do not recognize the concept of corporate criminal liability in their domestic legal systems and those that do. Amongst the second category, States Parties that recognize the concept of corporate criminal liability, there is a further *subdivision*, as different models of attribution are utilized by different States. We will address the former concept now, the latter will make up the focal point of the third part of this dissertation.

States that do not accept corporate criminal liability in their domestic legal systems affect the feasibility of introducing this concept on the international level negatively in two ways: Practically speaking, these States will thwart the two-thirds majority that is legally required for amending the Court’s Statute. In the unlikely

²¹² E.g. Article 9 § 1 (d) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *European Union: Council of the European Union* 29 May 2000. Article 8 § 1 (d) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *European Union: Council of the European Union* 28 May 2001. Article 8 (d) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002. Article 3 § 1 (d) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *European Union: Council of the European Union* 28 November 2002. Article 6 § 1 (d) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *European Union: Council of the European Union* 22 July 2003.

²¹³ Article 8 (e) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002.

²¹⁴ M. KREMNITZER, "A possible cas for imposing criminal liability on corporations in international criminal law", *Journal of International Criminal Justice* 2010, (909) 917.

event that the required majority is reached, the States that do not incorporate corporate criminal liability in their domestic legal systems – *in casu* less than one-third of all States Parties – will represent a hindrance according to the complementary principle. Both these concepts will be addressed in the following paragraphs.

However, the first question is: How many States Parties include corporate criminal liability in their legal systems? The answer is simple: We don't know. Currently, 121 countries, spanning five continents, are States Parties to the Rome Statute.²¹⁵ To establish the status of corporate criminal liability in each of these States is beyond the scope of this dissertation. At this given time, large-scale comparative studies are lacking. The general trend does seem to indicate a greater acceptance and incorporation of corporate criminal liability. In 2006, FAFO administered a survey of 16 countries, concerning business and international crimes. The legal systems of 11²¹⁶ out of those 16 States allowed for the criminal liability of legal persons.²¹⁷ Additionally, a number of States in the civil law tradition have introduced legislation exposing corporations to criminal liability, generally or for specific crimes.²¹⁸ The latter is also true for two of the five Fafo-surveyed States that did not allow for general corporate criminal liability, namely Argentina and Indonesia. Both these States have introduced specific legislation pertaining to corporate criminal liability for crimes such as corruption, terrorism, etcetera.²¹⁹ However, the pool of States Parties also includes a large number of States with an underdeveloped legal system and the assumption that the concept of corporate criminal liability is not included in their domestic legal systems is reasonable.

Firstly, concerning the implications for a possible amendment of the Rome Statute, which has been possible since 2009,²²⁰ article 121 reads:

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.²²¹

Given the (lack of) available information, a decisive and well-informed conclusion as to the probability of the required threshold of a two-thirds majority being reached, is impossible to make. However, given the

²¹⁵ INTERNATIONAL CRIMINAL COURT, *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (consultatie 1 May 2012).

²¹⁶ Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States

²¹⁷ ANITA RAMASASTRY & ROBERT C. THOMPSON, *Commerce, crime and conflict: Legal remedies for private sector liability for grave breaches of international law: A survey of sixteen countries*, 2006, 13.

²¹⁸ J. KYRIAKAKIS, "Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare", *Criminal Law Forum*, 2008, afl. 1, (115) 117-118.

²¹⁹ ANITA RAMASASTRY & ROBERT C. THOMPSON, *Commerce, crime and conflict: Legal remedies for private sector liability for grave breaches of international law: A survey of sixteen countries*, 2006, 13.

²²⁰ Article 121 § 1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

²²¹ Article 121 § 1, 2 and 3 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

underdeveloped legal systems of a large number of the States Parties, a negative conclusion is to be assumed.

In addition to the practical need to reach the required number of approvals to amend the Statute, there is the concept of the complementary principle. Engrained in the philosophy of the Court is the idea of complementarity, the notion that the Court “shall be complementary to national criminal jurisdictions”.²²² This principle is expressed in article 17 § 1 (a) of the Rome Statute, which holds:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless* the State is unwilling or unable genuinely to carry out the investigation or prosecution²²³

It refers to the admissibility of cases to the Court and allows the Court the position of *ultimum remedium*, stating that it may only exercise its jurisdiction when States Parties are unable or unwilling to do so. As such, the primary possibility for prosecution lies with the State.

At the Rome Conference, delegates of States which did not recognize corporate responsibility for criminal actions expressed concern that they would be deemed ‘unable to prosecute’, thus forfeiting their right to firstly try the case before their domestic Courts and automatically providing the ICC with jurisdiction, whenever the defendant is a legal person.²²⁴ This concern appears to remain relevant until this day. Although certain learned authors question its sustainability,²²⁵ the majority of modern doctrine still describes the complementary principle as a grave obstacle.²²⁶

Chapter 3: Preliminary conclusion.

In light of the foregoing chapters, a negative conclusion as to the current feasibility of an amendment of the Court’s Statute is presented. A number of specific obstacles were identified by the delegates at the 1998 Rome Conference.

The first obstacle set forth was a lack of appropriate sanctions. Indeed, the only sanction currently offered by article 77 of the Rome Statute which is applicable to legal persons is that of a monetary fine, which gives rise to several counterarguments, the most important one being its minor deterrent effect on corporations due to the inclusion in the corporation’s cost-benefit analysis. However, this obstacle is hardly insurmountable and, on that note, a number of possible sanctions which provide a greater propriety in relation to legal persons were suggested. These include restraints, structural injunctions, adverse publicity, the more controversial issuance of equity shares and dissolution.

²²² Preamble Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998. para 10; Article 1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

²²³ Article 17 § 1 (a) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.[emphasis added]

²²⁴ K. HAIGH, "Extending the International Criminal Court’s jurisdiction to corporations: overcoming complementarity concerns", *Australian Journal of Human Rights* 2008, afl. 1, (199) 204.

²²⁵ For further information, please see J. KYRIAKAKIS, "Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare", *Criminal Law Forum*, 2008, afl. 1, (115).

²²⁶ J. KYRIAKAKIS, "Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare", *Criminal Law Forum*, 2008, afl. 1, (115) 117.; M. FRULLI, "Jurisdiction Ratione Personae" in A. CASSESE (ed.), *The Rome Statute of the International Criminal Court: A commentary*, 2002, (527) 532-533.; A. ESER, "Individual Criminal Responsibility" in A. CASSESE (ed.), *ibid.* (767) 779.; K. AMBOS, "General Principles of Criminal Law in the Rome Statute", *Criminal Law Forum*, 1999, (1) 7.

Additionally, a number of sanctions are proposed which stem from European Council Framework Decisions. Given that these instruments are aimed at approximation, the sanctions they propose are likely to represent that which is politically acceptable for the E.U. Member States. These sanctions are not minor and include e.g. temporary or permanent disqualification from the practice of industrial or commercial activities and temporary or permanent closure of establishments which have been used for committing the offence. Although political compromise is of the essence with regard to an amendment of the Rome Statute, consideration must be given to the gravity of the offences at hand and to whether the exceptionally serious and grave nature of these crimes would not justify the application of the full range of available sanctions.

The second obstacle, however, presents more difficulties. It concerns the lack of an international standard in relation to corporate criminal liability. States Parties are divided between those that do not recognize the concept of corporate criminal liability in their national legal systems and those that do. Amongst States Parties that recognize the concept, there is a further subdivision, as different models of attribution are utilized by different States. The third part of this dissertation is aimed at unveiling a solution to the challenge posed by this latter category. The challenge posed by the first category is twofold.

Firstly, there is the (perhaps more theoretical) objection, often come across in doctrine, of the complementary principle. Article 17 of the Rome Statute provides competence for the Court in cases where the States Parties are unable or unwilling to prosecute. The complementary objection holds, *in casu*, that if the Court's jurisdiction were to be expanded to include legal persons, this would cause those States that are unfamiliar with the concept of corporate criminal liability to be deemed 'unable or unwilling' in the sense of article 17. As such, the ICC would be endowed with automatic jurisdiction for all cases in which the defendant is a legal person, which goes against the complementary nature of the Court.

However, the most prominent hurdle presented by the absence of an international standard is linked to the two-thirds majority vote required to amend the Rome Statute. States Parties that are not familiar with the concept of corporate criminal liability are unlikely to vote in favor of or ratify an amendment to the Statute to that accord. Due to the absence of large-scale studies on this subject, the exact status of corporate criminal liability in each of the States Parties' domestic law regimes is unknown and as such no definite conclusion can be presented as to the probability of a two-thirds majority vote in favor of an amendment of the Statute. However, given the fact that a number of States Parties to the Rome Conference have underdeveloped legal systems, it is not unreasonable to assume that these would not apply criminal liability to legal persons. Hence, despite the limited information available, it is unlikely that an amendment to of the Court's Statute to include legal persons is practically achievable at this time.

In conclusion, the lack of an international standard concerning corporate criminal liability remains the first and foremost obstacle preventing the extension of the Court's jurisdiction to legal persons. At this time, an amendment of the Rome Statute in order to extend the Court's jurisdiction does not seem feasible. Regardless of this negative conclusion, the upcoming part of this dissertation will focus on providing an answer to the last fundamental hurdle set forth during the Rome conference, namely providing a workable model of attribution, which is politically acceptable for all States Parties.

Part III: Attribution models

In the past chapters inquiry was made as to the feasibility of the concept of corporate liability for international crimes. A negative conclusion was imminent, mainly due to the absence of an international standard for corporate criminal liability. It appears that the time is not yet ripe to further extend the Court competences. However, this does not take away from the advisability of corporate responsibility for international crimes, illustrated in the first part of this dissertation. Many authors have presented strong cases in favor of the concept, without attempting to offer solutions for its many challenges, the most prevalent one concerning the attribution of criminal intent to corporate entities.

In the first chapter an examination will be made of the existing attribution models, namely the vicarious liability model, the aggregation model, the identification model and the self-identity model. In the final chapter, an assessment will be made as to which of these three models is most suitable for the concept at hand. Even if the acquired model is not practically workable at this moment, this is still a valuable theoretical exercise, which can perhaps serve as a starting point at a later time.

Chapter 1: Models of attribution

This chapter shall set apart four different models of attribution, which allow for corporate responsibility. They are embodied in the many national takes on corporate criminal liability.

Firstly, there are two models of ‘derivative’ liability, wielded in the Anglo-American law systems, which aim to ascribe to the corporation the actions of its agents.²²⁷ These are the ‘vicarious liability model’ and the ‘identification model’. A common element to both systems of liability attribution is that they copy and adapt the attribution of criminal liability to natural persons. As has been made clear, certain human traits are required in order for an offence to occur, namely criminal intent, a mental state, and a criminal action, which in its essence is human behavior. A corporation, as a legal entity, cannot express criminal intent or pose a criminal action. Through legal constructions embodied in these liability regimes, there is a wish to apply even those norms that require human actions to corporations and transfer the responsibility for the offence from the natural person(s) to the legal person.²²⁸

Added to the vicarious liability model is ‘the aggregation doctrine’, which extends the former’s scope and applicability. When dealing with a fractured offence, meaning that the *mens rea* and/or *actus reus* are spread amongst multiple agents, the aggregation model allows for the necessary elements of the offence to be united in the corporate entity, even if it is not united in a single corporate agent.

The fourth and final attribution model, namely the self-identity model, differs from the former models in that it provides primary, rather than derivative liability. This model focuses on the internal workings of the corporation, implying liability when the corporation’s policies tolerated or encouraged the commission of the crime.

²²⁷ ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), *"Corporate culture" as a basis for the criminal liability of corporations*, February 2008, 4.

²²⁸ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 651.

1.1. The vicarious liability approach.²²⁹

The first of the four models is immediately the strictest and most conservative model, namely that of vicarious liability. Vicarious liability, abstractly speaking, implies the absolute liability of one, usually higher-ranking, party for the actions of another, lower-ranking party.²³⁰ The following paragraphs will set apart its content, taking a closer look at which natural persons can provoke corporate liability, the concept's practical application and preconditions whilst briefly exploring its application at the U.S. federal level. This is intended to demystify an otherwise very abstract commentary. The choice for the United States federal level is considered logical, as the application of vicarious liability to a corporation was first established by the U.S. Supreme Court in 1909.

The vicarious liability model is a 'derivative liability' model, in the sense that it aims to take the elements of offences committed by the corporation's agents and ascribe them to the corporation. A corporation, as a legal entity, cannot express criminal intent or pose a criminal action and as such a legal construction is put in place to transfer the *mens rea* and *actus reus* from the natural person to the legal person,²³¹ resulting in corporate criminal responsibility.

Under the vicarious liability regime corporate criminal responsibility can be brought about by the criminal actions of all corporate agents, regardless of their rank or responsibility within the corporation. This is a first essential distinction from the identification model, which only takes into consideration the conduct of high-ranking corporate officers.

The practical attribution of the conduct to the principal, *in casu* the legal person, is a two-stepped process: When all necessary elements of the crime are present in the conduct of the employee, the conduct is attributed to the corporation based on the legal relationship of employment,²³² resulting in vicarious liability for the latter.²³³ As such, the essence of the vicarious liability approach is found in a legal fiction through which the acts of the agent appear to be those of the corporation and as such attributed to the latter.²³⁴

Absolutely vital in this respect is that the corporate agent is not equated with the corporation, as opposed to the identification model, but rather, acts "on behalf of" the corporation.²³⁵ This is described most poignantly by learned author ELI LEDERMAN, who states:

The law does not claim that the principal or the employer actually acted or actually knew. The law knows that reality is different and that these are two separate and independent entities, only one of which the agent or employer is actually involved in the actions or thoughts at stake. Yet, due to considerations of proper legal policy anchored in the association and the relationship of subordination between them, a fiction is devised, whereby

²²⁹ ARTHUR ALLENS ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture" as a basis for the criminal liability of corporations*, February 2008, <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>, 6.

²³⁰ R.H. KRAAKMAN, "Vicarious and corporate civil liability" in M. FAURE (ed.), *Tort law and economics*, Volume 1: Encyclopedia of law and economics, Cheltenham, Edward Elgar Publishing, 2008, (134) 134.

²³¹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 651.

²³² G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 56.

²³³ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 56.

²³⁴ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 652-653.

²³⁵ C. WELLS, *Criminal Responsibility of Legal Persons in Common Law Jurisdictions*, unpubl. Paper prepared for OECD Anti-Corruption Unit, Working Group on Bribery in International Business transactions, 2000, 5.

the behavior and the thoughts of one individual, following the orders of another, appear as the behavior and the thoughts of that other.²³⁶

This represents another essential distinction from the identification model, where the corporation and the agent demonstrating the illicit behavior are considered one and the same. As such, the mental state of the agent *is* the mental state of the corporation. This extensive assimilation allows for the identification model to provide a much better ground for attribution in relation to *mens rea* offences²³⁷ in comparison to the vicarious liability model, where the agent's conduct is imputed to the corporation. However, as stated above, "the law knows that reality is different".²³⁸ Because the culpability of another is attributed to the corporate entity, the vicarious liability approach represents a form of vicarious strict liability, offering a lesser propriety for criminal offences requiring *mens rea* than for strict or absolute liability offences. Nevertheless, the model has been vigorously and consistently applied in United States federal Courts to hold corporations criminally liable.²³⁹

Originating from civil law, the vicarious liability approach was transferred into the criminal law system to impose liability on principals for the acts of their subordinates.²⁴⁰ Its application to the corporate entity was introduced by common law Courts, more specifically the United States' Supreme Court, which first applied corporate criminal liability to a crime requiring a fault element²⁴¹ in the 1909 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CORPORATION V. UNITED STATES – Case.

This case concerned a breach of the 1903 ELKINS ACT, a federal law altering the 1887 INTERSTATE COMMERCE ACT.²⁴² This act held the following provision, creating corporate liability for the actions of agents:

In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier, as well as of that person.²⁴³

The Supreme Court upheld the Act, stating that in the interest of public policy the Court would take the doctrine "only one step further". As such, it would be able to impute the actions of the agent "to his employer and impos[e] penalties upon the corporation for which he is acting."²⁴⁴

²³⁶ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 652 - 653.

²³⁷ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 57.

²³⁸ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 652.

²³⁹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 654.

²⁴⁰ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 652; L.H. LEIGH, *Strict and Vicarious Liability: A Study in Administrative Criminal Law*, London, Sweet & Maxwell Limited, 1982; F.B. SAYRE, "Criminal Responsibility for the Acts of Another", *Harvard Law Review* 1930, (689); C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 130.

²⁴¹ A.I. POP, *Criminal liability of corporations – comparative jurisprudence*, unpubl. Paper, Michigan State University College of Law, 2006, 4.

²⁴² Elkins Act, 19 February 1903.

²⁴³ C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 133.

²⁴⁴ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 653; U.S. Supreme Court 1909, 212 U.S. 481, *New York Cent. & Hudson River R.R. Co. v. United States*.

Generally speaking, the possibility for imposing criminal liability on a corporate entity under the vicarious liability doctrine is depended upon the fulfilment of two preconditions. Firstly, it is necessary for the employee to have acted within the scope of his or her employment and secondly, the perpetrator must have intended for his or her criminal actions to benefit the corporation. Although this reflects the main rule, United States' federal Courts have given both conditions a broad reading.²⁴⁵

In the general framework of the vicarious liability regime, the first condition would require that the criminal conduct posed by the subordinate is either actually or apparently authorized by the corporation,²⁴⁶ apparent authorization meaning that "a third party reasonably believes that the agent has the authority to perform the act in question".²⁴⁷

However, U.S. federal Courts have provided that a corporate agent's act is deemed within the scope of his employment even when these actions are expressly forbidden, either by a direct order of a superior officer or through corporate policy. An example of the former possibility is found in the US v POTTER – Case.²⁴⁸ Here an agent, in contradiction with direct orders from his superior, had bribed JOHN HARWOOD, speaker of the Rhode Island House of Representatives to influence state legislation in a way that would be favorable to the corporation, then known as LINCOLN PARK INC. Here, the Court stated:

For obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized²⁴⁹ ... The principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal.²⁵⁰ ... despite the instructions [the individual in question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable even if he overstepped those instructions.^{251 252}

In the same line, federal Courts have found that a corporation can be held liable regardless of whether there exists any internal rule prohibiting the behavior.²⁵³ Such case law will encourage corporations to actively implement their internal regulations and reduce the gateway for these same corporations to put forward a certain set of rules, simply to keep up appearances and later refrain from implementing these regulations.

²⁴⁵ C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 135.

²⁴⁶ A. GERAGHTY, "Corporate criminal liability", *American Criminal Law Review* 2002, (327) 330.

²⁴⁷ A. GERAGHTY, "Corporate criminal liability", *American Criminal Law Review* 2002, (327) 330.

²⁴⁸ United States Court of Appeals, First Circuit 8 September 2006, 463 F.3d 9, United States of America v. Nigel Potter, Daniel Bucci and Lpri, Llc.

²⁴⁹ United States Court of Appeals, First Circuit 8 September 2006, 463 F.3d 9, United States of America v. Nigel Potter, Daniel Bucci and Lpri, Llc, para 90.

²⁵⁰ United States Court of Appeals, First Circuit 8 September 2006, 463 F.3d 9, United States of America v. Nigel Potter, Daniel Bucci and Lpri, Llc, para 92.

²⁵¹ United States Court of Appeals, First Circuit 8 September 2006, 463 F.3d 9, United States of America v. Nigel Potter, Daniel Bucci and Lpri, Llc, para 94.

²⁵² ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 30.

²⁵³ United States Court of Appeals, Ninth Circuit 26 September 1972, 467 F.2d 1000, United States v. Hilton Hotels Corp; C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 135.; A. GERAGHTY, "Corporate criminal liability", *American Criminal Law Review* 2002, (327) 330.

The second precondition requires that the agent intends to benefit the corporation.²⁵⁴ However, it suffices that this be but one of the agent's motives, the other probably being personal gain. Additionally, no actual material benefit for the corporation is required,²⁵⁵ this must only be the intent.²⁵⁶ When the actions of an employee are truly in contradiction with the corporation's interests, intended to defraud the corporation, no liability is incurred.²⁵⁷

When applied to the concept of international crime, author RONALD SLYE offers us the example of war crimes; Involvement in war crimes can seriously harm a company's image. Although it appears unjust for this corporation to incur liability, it is the learned author's opinion that liability will act as the proper catalyst for the implementation of an obviously much-needed system of control, including prevention, detection and punishment.²⁵⁸

In sum, the vicarious liability model allows, through a fiction of the law, for the criminal conduct of any employee to be imputed to the corporate entity, resulting in corporate criminal liability, under the condition that the conduct aimed to benefit the corporation and was fell within the scope of the perpetrator's employment.

1.2. The aggregation model

The second attribution model, the aggregation approach, allows for corporate criminal liability to be incurred, even when the different elements of the crime are not united in one employee. This title offers an account of the *ratio legis* behind the aggregation approach as well as a further exploration of its content and practical application. Additionally, as was done for the vicarious liability model, excerpts from U.S. federal level case law are presented to illustrate the concept. Once again the U.S. federal level is deemed a logical choice, as it were the United States federal Courts whose case law built the aggregation model, by exaggerating the legal fiction which allows for attribution in the vicarious liability regime.²⁵⁹

The *ratio legis* behind this attribution model is a quest to remedy difficulties stemming from the decentralization and increasing complexity, brought about by the growing expansion of corporate structures.²⁶⁰ It aims to build on the legal fiction of attribution introduced by the vicarious liability regime and exaggerate this fiction, taking it beyond its former scope as to expand the possibilities for corporate criminal liability.²⁶¹ However, it does not mean to replace the vicarious liability regime, only to simplify and expand its application. The models are not mutually exclusive, but rather complementary. The aggregation approach addresses those situations left unresolved under the previous liability regime.

²⁵⁴ C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 135.

²⁵⁵ United States Court of Appeals, Fourth Circuit 13 February 1945, 147 F.2d 905, *Old Monastery Co. v. United States*.

²⁵⁶ United States Court of Appeals (District of Columbia Circuit.) 1998, 138 F.3d 961, *United States of America v. Sun - diamond growers of California*; United States Court of Appeals, Fourth Circuit 15 August 1985, 770 F.2d 399, *United States of America v. Automated Medical Laboratories, Inc*; United States Court of Appeals, District of Columbia Circuit 20 March 1998, 138 F.3d 961, *United States v. Sun Diamond Growers of California*.

²⁵⁷ United States Court of Appeals, Fifth Circuit 15 August 1962, 307 F.2d 120, *Standard Oil Company of Texas and Pasotex Pipe Line Company v. United States*

²⁵⁸ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 964.

²⁵⁹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 661 - 662.

²⁶⁰ C. WALSH & A. PYRICH, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?", *Rutgers Law Review* 1995, (605) 625.

²⁶¹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 661 - 662.

It is innovative in the sense that the requirement for the different elements of the crime to be united in a single individual agent in order for corporate liability to be incurred is abandoned. The different elements of the crime simply need to exist within one corporate entity and can be represented by different individual employees. In other words, the aggregation approach creates the possibility of connecting the thought patterns and knowledge of several of the corporate entity's actors in order to achieve the required criminal intent or *mens rea*.²⁶² Alternatively, it is possible for the *mens rea* of one agent and the *actus reus* of another to be linked and attributed to the corporation, once again providing all necessary elements for its criminal liability.²⁶³ Thus the actual perpetrator(s), who commit(s) the material act, need(s) not be aware of committing the crime, as long as the required *mens rea* is provided, either united in a single agent or fractured amongst various agents within the corporation other than the person posing the physical act.²⁶⁴

Practically speaking, the model utilizes the same technique as the vicarious liability approach, in the sense that a two-step process is applied: Firstly, inquiry is made as to whether all necessary elements of the offence are represented, *in casu* spread over the conduct of several corporate agents. Subsequently, the conduct of each of these agents, each containing a segment of the elements constituting the offence, is attributed to the corporation based on the legal relationship of employment. As a result, *mens rea* and *actus reus* are united in the corporate entity, resulting in its criminal liability.

As could be expected, the aggregation doctrine finds its roots in the case law of the United States federal Courts. The concept of aggregated knowledge has been around for approximately seven decades and can be retraced to the 1951 INLAND FREIGHT LINES V. UNITED STATES - Case.²⁶⁵ It has since emerged in numerous cases,²⁶⁶ the most prevalent case being the UNITED STATES V. BANK OF NEW ENGLAND.²⁶⁷ The latter case provides a clear example of the concept of aggregated liability. Therefore the following paragraphs will briefly elucidate on its facts and outcome. In addition, two quotes are included to further illustrate the concept and shed light on the *ratio legis* behind this model.

The facts of the case are as follows: According to THE CURRENCY TRANSACTION REPORTING ACT, banks are obliged to report to the Treasury cash withdrawals by clients upwards of 10 000 USD. Between May of 1983 and July of 1984 the BANK OF NEW ENGLAND had allowed a client, JAMES McDONOUGH, to make a total of 31 withdrawals. However, the bank had refrained from any currency transaction reports. With each withdrawal, the client had used multiple checks, each of which lower than the 10 000 USD threshold. However, the sum of the checks amounted to a transfer of over 10 000 USD, presented to the client by a single teller.²⁶⁸ On several occasions different tellers were presented with such groups of checks. The CURRENCY TRANSACTION REPORTING ACT required a specific intent, more specifically that the bank must *willfully* fail to report these transactions "as part of a pattern of any illegal activity involving

²⁶² E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 662.

²⁶³ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 663.

²⁶⁴ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 968.

²⁶⁵ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 664 FN 67. United States Court of Appeals, Tenth Circuit. 18 August 1951, 191 F.2d 313, *Inland Freight Lines v. United States*.

²⁶⁶ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 665.FN 68

²⁶⁷ C. WELLS, *Corporations and criminal responsibility*, Oxford, Oxford University Press, 2001, 134-135. E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 663.FN 61

²⁶⁸ United States Court of Appeals, First Circuit 10 June 1987, 821 F.2d 844, *United States v. Bank of New England*, para 2.

more than \$100,000 in a 12-month period".²⁶⁹ To attain this *dolus specialis*, the judge urged to jury to utilize the aggregation model:

You have to look at the bank as an institution. As such, its knowledge is the sum of all the knowledge of all its employees. That is, the bank's knowledge is the totality of what all of the employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the banks know them all. So, if you find that an employee within the scope of his employment knew that the [reports] had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed.²⁷⁰

As a result the Bank of New England was prosecuted for and convicted of 31 violations of the before-mentioned act. The Court of Appeals, which upheld the lower Court's Judgment, added:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administrating one component of an operation know of the specific activities of employees administrating another aspect of the operation ²⁷¹ [...] Since the bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.²⁷²

The application of this model will allow for greater possibilities of prosecution and conviction of legal persons. It represents an expansion of the vicarious liability regime in the sense that the acts of these separate agents, which aggregated give way to a criminal offence, by themselves may very well lack the necessary intent to result in a crime. Thus, it can in certain cases result in the sum of innocent actions amounting to corporate criminal liability.²⁷³ This is the broadest model of attribution.

However, concerning our current context of international crimes, the following consideration must be addressed. It was noted discussing the vicarious liability approach that this model offers less appropriate context for offences requiring *mens rea*, such as the international crimes. The aggregation model adds to this lack of propriety. U.S. federal case law,²⁷⁴ contrary to what may be implied by the U.S. v. Bank of New England – Case, has displayed caution concerning the aggregation of *mens rea* for offences requiring criminal intent. A distinction is made between the two elements of *mens rea*, namely knowledge and intent,

²⁶⁹ United States Court of Appeals, First Circuit 10 June 1987, 821 F.2d 844, United States v. Bank of New England, para 1. ; 31 U.S.C. Sec. 5322(b)

²⁷⁰ United States Court of Appeals, First Circuit 10 June 1987, 821 F.2d 844, United States v. Bank of New England, para 46.

²⁷¹ United States Court of Appeals, First Circuit 10 June 1987, 821 F.2d 844, United States v. Bank of New England, para 54.

²⁷² United States Court of Appeals, First Circuit 10 June 1987, 821 F.2d 844, United States v. Bank of New England, para 56.

²⁷³ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 663.

²⁷⁴ United States Court of Appeals, Tenth Circuit. 18 August 1951, 191 F.2d 313, Inland Freight Lines v. United States.

the former being a rational element and the second an emotional element.²⁷⁵ The aggregation model applies to a fractured knowledge and can result in collective corporate knowledge. However, when the mental element of a crime requires more than knowledge, namely a criminal intent, this latter element must exist within a single individual employee.²⁷⁶

In this regard, reference is made to article 30 of the Rome Statute, which holds:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.²⁷⁷

In conclusion, it can be held that the impossibility to aggregate partial details of this required intent, takes away even further from the propriety of the aggregation model for corporate liability in light of international crimes.

1.3. The identification approach.²⁷⁸

The third model for attribution is the identification approach, also known as the theory of corporate organs, the direct liability doctrine or the alter ego doctrine. This principle, unlike the vicarious liability approach, was introduced into the criminal law arena specifically for corporate criminal liability. The model entails corporate criminal liability for acts committed by high-ranking corporate officers and management, those who - consistent with the organ theory - are the 'brains' of the corporation. In the following paragraphs inquiry will be made as to the model's content, preconditions, actors, etcetera. In light of the model's roots in the English legal system, we will at times illustrate our theoretical statements with quotations taken from relevant cases found in English case law.

The identification approach, once again, embodies a 'derivative liability' model, ascribing the elements of offences committed by high-ranking corporate agents to the corporation. This model of attribution utilizes a legal fiction, pertaining to a personification of the corporation,²⁷⁹ which is seen as a (legal) body. The direct liability approach, like the vicarious liability model, acknowledges that corporate entities lack the capacity to pose certain actions. To remedy this shortcoming it views specific individuals that take part in the corporate activity as organs of the corporation, through which the corporation must act. When these organs engage in criminal conduct, the corporation incurs criminal liability.

Under the identification approach corporate criminal responsibility can be brought about by the criminal actions of those corporate agents, which because of their rank and responsibility within the corporation are viewed as its *brain*, rather than its *hands*. They represent the upmost layer in the corporate hierarchy. As mentioned earlier, an important distinction with the vicarious liability model can be detected here, as the latter allows corporate criminal liability for the misconduct of all employees.

²⁷⁵ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 668. G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 58.

²⁷⁶ United States District Court, S.D. New York 22 July 1988, *First equity corporation of florida v. Standard & Poor's Corporation*.

²⁷⁷ Article 30 § 1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

²⁷⁸ ARTHUR ALLENS ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 6.

²⁷⁹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 655.

It is seemingly vital to determine exactly which individuals can be qualified as corporate organs. Using the organ theory, these are those agents who represent the brain of the corporation.²⁸⁰ The concept generally refers to senior officers, who enjoy authority and control over the corporation and are endowed with the power needed to direct the corporate policy,²⁸¹ as these are characteristics of the corporate organ that are common to a number of national definitions. For instance, the UNITED STATES' MODEL PENAL CODE, in its section 2.07 (4), refers to a "senior managerial agent" endowed with "duties of such responsibility that his conduct may fairly be assumed to represent the policy of the association".²⁸² Alternatively, the Bill of the 1989 English Law Commission states that in order to bind the corporation, the individual must participate in "the control of the corporation in the capacity of a director, manager, secretary or other similar officer."²⁸³ The House of Lords 1972 *TESCO SUPERMARKETS LTD V. NATTRASS*-Case is considered a leading case with regard to applying the identification model to corporate criminal liability in the United Kingdom.²⁸⁴ Here the honorable Lord Reid described those who could be qualified as corporate organs as:

The board of directors, the managing director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company²⁸⁵

Like the vicarious liability doctrine, the identification model is practically applied in two steps, more specifically as a dual inquiry. Firstly, as to whether or not the natural person's conduct can be qualified as an offence and secondly concerning the propriety of considering the agent as a corporate organ given the circumstances of the case.²⁸⁶ With regard to the latter, one must firstly qualify the natural person as a corporate organ. To do so one looks at the ranking of the individual in the internal structure of the corporation. This inquiry must be substantial and surpass the individual's title or job description. The fact that one is not a member of the Board of Directors or the General Meeting of shareholders does not exclude the possibility of qualification as a corporate organ. In order for corporate liability to occur, it must be shown that the individual is part of the corporation's senior management and that he or she is in the position to influence the corporate policy.²⁸⁷ Secondly, investigation must be made as to the 'functional element' of the offence. Can the criminal activity, *in casu*, be considered as committed by the corporation itself? The aim of this inquiry is to shield the corporation from liability for those offences committed by natural persons who occupy a position of substantial importance in the corporate hierarchy, but whose actions bear no relation to the corporation whatsoever. In this regard, learned author ELI LEDERMAN provides us with the example of the Chief Executive Officer of corporation X brutally attacking his next-door neighbor. This is a clear example of an offence that should in no way give rise to corporate liability.²⁸⁸

²⁸⁰ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 657.

²⁸¹ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 656.

²⁸² E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 658.

²⁸³ Law Commission, Report No. 177, supra note 25, at para. 30 (3) (a).

²⁸⁴ C. WELLS, *Criminal Responsibility of Legal Persons in Common Law Jurisdictions*, unpubl. Paper prepared for OECD Anti-Corruption Unit, Working Group on Bribery in International Business transactions, 2000, 5. R. WICKINS, "Confusion worse confounded: the end of the directing mind theory?", *Journal of Business Law* 1997, (524) 535. LAW COMMISSION, *Criminal liability in regulatory context: A consultation paper*, United Kingdom, Crown Copyright, 2010, 93.

²⁸⁵ House of Lords 1972, AC 153, *Tesco Supermarkets Ltd v. Natrass*

²⁸⁶ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 656.

²⁸⁷ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 659-660.

²⁸⁸ Lederman 660

As was briefly explored in the foregoing title, the corporate agent's conduct is not attributed to the corporation. Instead, an assimilation between the corporate agent and the corporation takes place.²⁸⁹ The corporate organ is identified as the corporation and as such, its acts and thought-patters become those of the corporation. Thus, the corporation itself is seen as the perpetrator. This concept of assimilation is further illustrated by a quote of the aforementioned Lord REID, made during the *Tesco v. Natrass* - Case, in which the honorable Lord addressed the incorrectness of the term "alter ego doctrine":²⁹⁰

The person who speaks and acts as the company is not alter. He is identified with the company.²⁹¹

In other words, when committing an offence, the corporate organ *is* the corporation. This as opposed to the vicarious liability regime, where the offences of the agents are *imputed to* the corporation.²⁹² Under the former title an explanation was set forth as to why the identification model of attribution is more appropriate in relation to offences requiring *mens rea*.

In sum, we have established that the identification doctrine creates a legal fiction through which high-ranking corporate officers, who enjoy a sufficient amount of responsibility for, and influence on, the corporate policy, when posing illicit actions, are equated with the corporation, resulting in criminal liability for the latter.

1.4. Organizational liability: the self-identity model.

The last attribution model to be discussed is that of organizational liability, also known as the self-identity model. Under this model, corporate liability is incurred as a result of the internal structures and policies of the corporation, rather than the actions of its human agents.²⁹³ Although some authors are of the opinion that the self-identity model lies in the continuum of the former attribution models,²⁹⁴ its theoretic point of departure and consequences differ significantly. As such, this model does not wish to add to the former attribution models. It stands on its own as an alternative model.²⁹⁵

Prior to engaging in analysis, it must be noted that the self-identity model remains a severely debated approach to the attribution challenge,²⁹⁶ inspiring little consensus. Practical application in national legal systems appears limited. Doctrine is divided between advocates and opponents. In the following paragraphs, for the reader's information, a basic abstract model will be presented, offering insight into the elements that are taken into consideration when determining the corporation's responsibility, two distinct variations of the organizational model, the concept of primary as opposed to derivative liability as well as that of corporate criminal intent. Additionally, a number of situations will be presented which lie at the

²⁸⁹ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 57.

²⁹⁰ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 657.

²⁹¹ House of Lords 1972, AC 153, *Tesco Supermarkets Ltd v. Natrass* [per Lord Reid]

²⁹² ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 1.

²⁹³ ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 4.

²⁹⁴ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 679.

²⁹⁵ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 681.

²⁹⁶ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 59.

intersection of the diffuse and numerous takes on this attribution model and as such, give way to corporate criminal liability, regardless of what variation is wielded. However, the lack of an international standard will present the first and foremost obstacle in relation to the propriety of this model at the international level, which will be discussed in more detail in the following chapter.

The self-identity model embodies a new approach, particularly distinct from the former three models, in the sense that the corporation's liability is not a *derivative* liability.²⁹⁷ In other words, there is no attribution of the agent's conduct to the corporation. Rather, the corporation is seen as having its own, separate identity²⁹⁸ and in turn its responsibility stems from its internal workings, referred to as corporate *ethos*²⁹⁹ or corporate culture. Hence, the incurred liability is not derivative, but rather primary. As a result, the two-step process included in the aforementioned models, no longer stands. Liability is incurred directly by the corporation, without the necessity of human interference.

As was the case with the aggregation model, the self-identity model seeks to remedy the difficulties resulting from the growing complexity of the corporate structure. The corporate maze often represents a major obstacle when attempting to identify the individual culprit.³⁰⁰ Application of the self-identity model eliminates this need, allowing corporate liability to take form based on the corporation's policies and how they contribute to the illicit conduct.

There are two distinctly different takes on the concept of corporate liability through self-identity.³⁰¹ The first requires a direct causal link between the corporate culture and the commission of these crimes. This entails that the enforced policies lie at the basis of the crime. Without this policy, the crime would not have occurred. A second approach is that the internal system of the corporation must prevent criminal activity and when it fails to do so, this will amount to corporate liability. Clearly, the second variation is stricter for the corporation, requiring it to take necessary precautions to prevent criminal behavior by its employees and providing an increased risk of corporate responsibility.

In the Australian Criminal Code, the corporate culture is described as the "attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place"³⁰²

A number of elements are taken into consideration in determining whether or not the 'corporate culture' encouraged, explicitly or implicitly, the commission of the offence,³⁰³ such as the corporation's policies, its control mechanisms, ethical codes³⁰⁴ as well as its ex-post reaction³⁰⁵ to the offence. Different

²⁹⁷ ARTHUR ALLENS ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 1.

²⁹⁸ J.A. QUAID, "The assessment of corporate criminal liability on the basis of corporate identity: An analysis", *McGill Law Journal* 1998, (68) 81.

²⁹⁹ P.H. BUCY, "Corporate ethos: A standard for imposing corporate criminal liability", *Minnesota Law Review* 1991, (1095) 1121.

³⁰⁰ ARTHUR ALLENS ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 2.

³⁰¹ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 967.

³⁰² Part 2.5 section 12.3 (6) Australian Criminal Code Act, 1995.

³⁰³ ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture*" as a basis for the criminal liability of corporations, February 2008, 1.

³⁰⁴ HENRY J. AMOROSO, "Organizational ethos and corporate criminal liability", *Campbell Law Review* 1995, afl. 1, (47).

³⁰⁵ P.H. BUCY, "Corporate ethos: A standard for imposing corporate criminal liability", *Minnesota Law Review* 1991, (1095) 1138 - 1139.

interpretations of the model will model provide different parameters. However, generally speaking, the following scenario's, distilled by learned author Eli Lederman will give way to corporate liability:

- (1) The performance of illegal acts by employees or agents of the corporation, when it is plausible to expect that the policy or procedures of the corporation might lead to the perpetration of such offences.
- (2) The actual performance of an illegal act by the corporation's high managerial agents, or when the said level of management instructed, encouraged, or supported the perpetration of such acts.
- (3) The corporation's ratification or explicit support ex post facto of illegal acts committed by its employees or agents.

Lastly, it is worthwhile noting that, under the self-identity model, the *mens rea* element appears to take a different form. Referred to as 'corporate criminal intent', it embodies the corporation's rational choice for illicit behavior over regulatory conduct, abandoning the typically human emotional element.³⁰⁶

Chapter 2: Preliminary conclusion

The objective of the current section of this dissertation has been to tackle a fundamental obstacle, which hindered the inclusion of legal persons in the Court's jurisdiction at the Rome Conference, namely how the attribution of the mental element to the legal person is to take place. The answer to this question must be obtained through the careful consideration and thorough examination of four different attribution models, which the reader has been provided with in the foregoing chapter. This has allowed for an evaluation of the propriety of each of these models for attributing criminal conduct, meaning both *actus reus* and *mens rea*, to corporations. In this conclusive chapter, a choice for the identification model as the most suitable model for corporate liability for international crimes will be substantiated through both legal argumentation and considerations in relation to the political feasibility of the concept.

2.1. Legal arguments.

From a legal perspective, the advantages presented by the identification model are threefold. Firstly, the assimilation of the individual perpetrator and the legal person provides for a more appropriate context for *mens rea* offences. Secondly, the identification model seems to find alignment with the possibilities for perpetration provided in article 25 § 3 (a) of the Rome Statute and thirdly and lastly, it is an expression of a clearly distinguishable tendency in international criminal law towards applying a *top-down* approach. Each of these three arguments will be explored in more detail in the upcoming paragraphs.

a. The implications of the different attribution models for mens rea offences

The identification model offers a number of favourable elements in relation to the question of attributing the mental element of an offence to a corporation. In comparison to the vicarious liability approach and the aggregation model, its advantage lies in the assimilation of the individual perpetrator and the corporation, rather than the attribution of the former's conduct to the latter. Through this assimilation, the mental element exists in respect of the corporation itself, a quality that is particularly preferable for *mens rea* offences.³⁰⁷ As was explained earlier, the vicarious liability approach as well as the aggregation model, which utilizes vicarious liability-techniques, attributes the culpability of the corporate agent to

³⁰⁶ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 692.

³⁰⁷ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 57.

corporation, thus representing a form of strict liability. Contrary to what may be deducted from the case law of the U.S. federal Courts, such strict liability does not offer a suitable context for *mens rea* offences in general, least of all for core crimes such as genocide, crimes against humanity and war crimes. The self-identity model does not pose these problems with regard to attribution, as it implies a primary, rather than a derivative form of liability. However, the foregoing has shown that the mental element provided by the self-identity model only provides the rational element of knowledge, whilst article 30 of the Rome Statute requires both knowledge and intent. It is concluded that only the identification model will allow for both the required knowledge and intent to exist in respect of the corporation itself, rather than be imputed to it on the basis of the criminal conduct of another.

b. The identification model and article 25 of the Rome Statute.

The following pertains to the (less common) case a corporation taking the role of primary perpetrator. The more prevalent concept of corporate complicity will be addressed in the final part of this dissertation.

In cases of corporate involvement in international crimes, often times the offence is split. The physical exercise of the offence will most likely be carried out by *foot soldiers*, lower ranking employees who may or may not be aware of the illegality of their actions,³⁰⁸ whilst the criminal intent behind those actions is likely to reside with corporate organs. Article 25 of the Rome Statute aims to capture responsibility for “acts committed in a collective context and systematic manner”³⁰⁹ and as such introduces different and extended forms of perpetration of and participation in these crimes. Remarkably, alignments of the identification model with one the possibilities for perpetration provided in article 25 § 3 (a) and (b) appears evident. More specifically, the former paragraph provides the possibility of liability for what is known as ‘perpetration by means’, pertaining to the commission of a crime “through another person”.³¹⁰ The concept differentiates between the direct perpetrator, in our case the lower-ranking agent physically committing the crime and an indirect perpetrator, *in casu* a high-ranking corporate officer. In the corporate context, the control of the latter over the former can be derived from a “hierarchical organizational structure”.³¹¹ The same concept, linked to the dominance of one person over another, finds expression in the liability provided in article 25 § 3 (b) for the person ordering the crime, which is also a form of perpetration (by means), rather than participation.³¹² This form of liability is highly reminiscent of the superior responsibility principle, provided by article 28 of the Rome Statute, which implies liability of civilian superiors for crimes committed by their subordinates, given that these were committed within the superior’s control.³¹³ However, rather than identical, the two concepts are complementary. A position of superiority can bring about liability through article 25 § 3 (a) and (b) as a result of a positive act, e.g. coercion practically materialized in an order, whilst article 28 implies liability when the superior was unable

³⁰⁸ Knowledgeable of the fact that the following certainly does not apply to all cases, there are scenarios conceivable where especially the mental element is more likely to be located in the higher-ranking corporate officers than in agents of a lower rank. For instance, an employee endowed with the task of transporting a number of people to a different location, may very well not know that this concerns forcible transfer. He may very well be clueless as to the fact that his action is part of a widespread and systematic attack and thus have no intention whatsoever to further such attack.

³⁰⁹ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) para 3.

³¹⁰ Art 35 § 3 (a)

³¹¹ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) para 9.

³¹² K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) para 12.

³¹³ Article 28 (b) (ii) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

to prevent, due to “failure to exercise control”,³¹⁴ the criminal act of a subordinate. As such, the articles cover the complementary loads of commission and omission.³¹⁵

In conclusion, the concept of ‘perpetration by means’, included in article 25 § 3 (a) and (b) provides the legal basis that is required for international criminal liability for corporate officers for the perpetration of international crimes by means of their corporate subordinates. The identification approach provides assimilation between the high-ranking corporate officer and the legal person at the moment of the crime. As such, the missing element required for the international criminal liability for the corporate entity itself, appears limited to the inclusion of legal persons in article 25 § 1 of the Rome Statute.

c. International Criminal Law’s tendency towards prosecution of high-ranking figures

The last legal argument reflects on the observation that, out of the reviewed attribution models, the identification approach is most in line with a tendency detected in international criminal law practice. In the past, the Statutes of the Tribunals have shown a clear preference for targeting those at the top of the pyramid, the leaders and architects of evil, as author and philosopher AGNES HELLER might describe them³¹⁶³¹⁷ and tend to show less interest in foot soldiers. This is reflected in Rule 11bis of the RULES OF EVIDENCE AND PROCEDURE of the ICTY, which pertains to referral of the indictment to another court. The article introduces the concept of a ‘referral bench’, with the competence to refer certain cases to domestic Courts. Paragraph C specifically calls to take into consideration in determining this referral “the level of responsibility of the accused”.³¹⁸ Additionally, article 1 of the LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA refers to the need to bring the senior leaders, those who are most responsible, to trial.³¹⁹ This preference for the leaders rather than mere executors is undoubtedly best reflected in the identification model.

2.2. Political acceptability: aspiring to a future amendment of the Statute.

Although the question of the feasibility of this concept at the current time was answered negatively in the second part of this dissertation, political acceptability must still be taken into consideration when pinpointing a particular attribution model, as not to thwart the possibility of future developments. In a way, this represents the practical side of the equation. Throughout this dissertation every effort was made not to regard this concept merely from a purely academic point of view, but rather to remain conscious of its possibilities for implementation in the Rome Statute. As was stated earlier, an amendment of the Court’s Statute will require a two-thirds majority vote. As such, one must remain cognizant of the fact that the identification model offers a wide consensus as to its form and content and would inspire the least amount of controversy out of the four models. The upcoming paragraphs will offer a comparison of the identification model to the three remaining models in order to substantiate this claim.

a. In comparison to the vicarious liability model and aggregation model.

When comparing the scope of the identification model with that of the vicarious liability approach, it is clear that the former is the more narrow option. The vicarious liability model attributes to the corporation

³¹⁴ Article 28 (b) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

³¹⁵ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) para 12.

³¹⁶A. HELLER, "The Natural Limits to Natural Law and the Paradox of Evil" in STEPHEN SHUTE & SUZAN HURLEY (ed.), *On human rights the oxford amnesty lectures 1993*, BasicBooks, 1993, (149) 155-157.

³¹⁷ R. SLYE, "Corporations, veils, and international criminal liability", *Brooklyn Journal of International Law* 2008, afl. 3, (955) 965.

³¹⁸ Rule 11bis § c, Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (as amended 20 October 2011), 11 February 1994.

³¹⁹ Article 1 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea as amended on October 27, 2004 by Royal Decree No. NS/RKM/1004/006 27 October 2004.

all misconduct by all employees, whilst the identification approach is limited to the criminal actions of high-ranking corporate officers. Thus, those who trigger corporate liability under the identification doctrine, are equally included under the vicarious liability approach. In other words, States that engage the vicarious liability model can provide corporate criminal liability in response to criminal conduct by high-ranking corporate officers, whilst States engaging the identification model cannot provide corporate criminal liability for the criminal acts of low-ranking corporate agents. As was formerly explained in more detail, the aggregation model only broadens the scope of the vicarious liability model, allowing for the fracturing of the criminal elements amongst multiple corporate agents. Hence, the identification model represents the greatest common divisor, rendering it the most likely to be deemed politically acceptable for States Parties.

However, it must be noted that the theoretical legal difference that exists between these models, namely that of attribution versus assimilation, prevents a description of the identification model as a genuine and complete intersection of these three models. This could possibly be an issue for certain States Parties, engaging a form vicarious liability. Whether or not this would be a justified objection, is left to the reader's discretion.

b. In comparison to self-identity approach

The self-identity model offers a completely new approach to the concept of corporate criminal liability. However, it embodies a dual obstacle with regard to its political feasibility. Firstly, what is provided for the vicarious model and aggregation approach is equally true for the self-identity model, as the scope of the latter model encompasses all three previous models.³²⁰ Through application of the self-identity model the corporation can incur criminal liability for the actions of any employee or for a fractured criminal act, which is the result of the aggregation of different components divided amongst several employees, provided the criminal conduct was tolerated or encouraged by the corporate culture. Once again, the identification model appears to offer greatest common divisor.

In addition to this broad scope, another counterargument is found in the seeming lack of consensus surrounding this model. As opposed to the identification model, the self-identity model does not represent an all-round accepted approach to attributing criminal conduct to corporations. This is illustrated by the fact that doctrine is divided between advocates and opponents.³²¹ Scholars differ on its complex relation to the former three models³²² and different versions of the model provide different parameters in relation to determining the corporate culture.³²³ This lack of consensus translates to a limited inclusion of the self-identity model in domestic legal systems. The most prevalent example of such inclusion is found in the Australian Criminal Code, which holds that "[The] fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence."³²⁴ Furthermore, a number of other States incorporate the model to a lesser degree,³²⁵ e.g. the United States federal level incorporates the self – identity model through its sentencing and

³²⁰ M.J. WEINSTEIN & P. B. BALL, "Criminal law's greatest mystery thriller: Collective guilt through collective knowledge", *New England Law Review* 1994, (65) 67. E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 681 and 695 - 696

³²¹ G. VERMEULEN & W. DE BONDT & C. RYCKMAN, *Liability of legal persons for offences in the EU*, 45, Antwerpen, Maklu, 2012, 59.

³²² E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 678 - 681.

³²³ E. LEDERMAN, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", *Buffalo Criminal Law Review* 2000, afl. 1, (641) 693.

³²⁴ Part 2.5 Section 12.3 (1) Criminal Code Act.

³²⁵ For further examples, please see ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY- GENERAL ON HUMAN RIGHTS AND BUSINESS), "*Corporate culture" as a basis for the criminal liability of corporations*, February 2008.

prosecution guidelines, which aim to temper the otherwise broad regime by taking into consideration positive elements provided by the corporate policies. Chapter 8 of the UNITED STATES SENTENCING COMMISSION'S GUIDELINES MANUAL,³²⁶ concerning the sentencing of organizations clarifies that sentencing should be less severe if the corporation's internal structure can provide certain positive elements, such as:

If the organization [...] prior to an imminent threat of disclosure or government investigation and [...] within a reasonably prompt time after becoming aware of the offence, reported the offence to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct³²⁷

If the offence occurred even though the organization had in place at the time of the offence an effective compliance and ethics program³²⁸

In conclusion, the propriety of the identification model over the model of self-identity in light of the possibilities for an amendment of the Rome Statute is substantiated by the former's stability, reflected in its numerous applications in the domestic legal systems of the States Parties. The identification model can offer the required all-round acceptance and stability, which is most likely to allow for incorporation in the Rome Statute.

c. An affirmation of the identification model's propriety through E.U. Council Framework Decisions

The interpretation of the identification model as the most politically acceptable model appears to find affirmation in an attribution model set forth in a number of E.U. Council Framework Decisions,³²⁹ concerning offences ranging from corruption to child pornography. Each of the Council Framework Decisions holds that "[e]ach Member State shall take the necessary measures to ensure that legal persons can be held liable" for the relevant criminal conduct. It then introduces the identification model, stating the criminal act must be committed for the benefit of the legal person by a person ...

Acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a. A power of representation of the legal person
- b. An authority to make decisions on behalf of the legal person, or

³²⁶ Guidelines Manual *United States Sentencing Commission* 2011.

³²⁷ Chapter 8 Section G (1) Guidelines Manual *United States Sentencing Commission* 2011. 527

³²⁸ Chapter 8 Section F (1) Guidelines Manual *United States Sentencing Commission* 2011. 536

³²⁹ E.g. Article 8 Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *European Union: Council of the European Union* 29 May 2000; Article 7 Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *European Union: Council of the European Union* 28 May 2001; Article 7 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, *European Union: Council of the European Union* 13 June 2002; Article 5 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *European Union: Council of the European Union* 22 July 2003; Article 8 Council Framework Decision 2005/222/JHA of 21 February 2005 on attacks against information systems, *European Union: Council of the European Union* 21 February 2005; Article 5 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *European Union: Council of the European Union*; Article 12 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *European Union: Council of the European Union* 13 December 2011.

c. An authority to exercise control within the legal person

Additionally, corporate responsibility is incurred in case of “lack of supervision or control” by the natural person in a leading position. This obligation of supervision represents an expansion of the *pure* form of the identification approach, which – logically – is often come across in continental Europe.³³⁰

The *ratio legis* behind the Council’s option for the identification model is difficult to demystify. However, what is known is that the Council Framework Decisions set forth a certain result, which Member States, through the means of their own choice and liking, must obtain. In this respect, the assumption that the Council has opted for a model that is achievable and acceptable for all Member States is reasonable and resonates within the identification model.

³³⁰ ALLENS ARTHUR ROBINSON (FOR THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND BUSINESS), “*Corporate culture*” as a basis for the criminal liability of corporations, February 2008, 4.

Part IV: Corporate complicity³³¹

Chapter 1: Introduction

Hitherto, this dissertation has introduced the reader to examples of corporate involvement in international crimes, set apart the advantages of introducing corporate criminal liability at the international level and evaluated the feasibility of this concept. The foregoing pages set forth the focal point of this master's thesis, namely a plea in favor of the identification approach as an answer to the question of attributing *mens rea* to legal persons.

In this fourth and final part, consideration will be given to the concept of the corporate participation or complicity in international crimes. Although this does not represent the prime focus of this dissertation, this final part wishes to concisely pinpoint a number of difficulties relating to the application of accomplice liability as provided in article 25 § 3 (b) and (c) of the Rome Conference to corporate complicity in international crimes. Given the necessary limitations to this dissertation, the accomplice liability for contributions to the commission of crimes by a group, provided in article 25 § 3 (d) will not be discussed.

The vast majority of corporate involvement pertains to participation rather than perpetration, as is reflected in the examples enumerated in the first part of this dissertation. In fact, it is difficult to conceive a case in which the corporation takes the role of a primary perpetrator. As such, the alignment of the concept of perpetration by means, provided by article 25 § 3 (a) and (b) of the Rome Statute, with the results of the application of the identification approach in order to qualify the corporate entity as a primary perpetrator, undertaken in the foregoing chapter, is mostly an academic exercise. Although the high-ranking corporate officer, whom is to be equated with the legal person at the time of the criminal conduct, can theoretically fulfil the requirements for liability in accordance with article 25 § 3 (a) and (b), examples are sparse.

Article 25 of the Rome Statute covers a variety of forms of participation, aiming to provide a legal basis for liability for the wide range of possible contributions to international crimes. The upcoming pages contain a review of the forms of participation provided by the Rome Statute, which are seemingly in line with the most prevalent examples of corporate involvement in international crimes, namely 'soliciting or inducing' an international crime and the concept of 'aiding and abetting'. However, despite the propriety of the physical elements of these different forms of participation for corporate involvement in international crimes, it will be shown that the required *mens rea* represents an obstacle in applying article 25 § 3 (b) and (c) to corporate actors.

Chapter 2: Solicitation and induction.

Article 25 § 3 (b) pertains to the form of participation by which the accomplice influences the primary perpetrator to commit a crime. This is conceptualized through the terms 'solicits or induces', apparently catching all forms of influence.³³²

³³¹ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 1: Facing the facts and charting the legal path*, Geneva, 2008, 8.

³³² K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) 13.

This form of participation seems particularly adequate for some of the examples of corporate complicity outlined in the first part of this dissertation, specifically in those cases where corporations face accusations for their influence on the governments that are the primary perpetrators of crimes against humanity. For instance, the influence Shell allegedly exercised on the Nigerian government resulting in the latter's crackdown on the MOSOP movement and the execution of the 'Ogoni nine'³³³ or Rio Tinto's threat of relocation, lest the Papua New Guinean Government assure the cessation of local protests.

However, despite this material propriety, the possibilities for the application of liability for soliciting or inducing an international crime to legal persons are thwarted by the required intent. Article 30 states that:

*Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*³³⁴

Seeing how article 25 § 3 (b) provides no deviation, the standard included in article 30 applies. This is particularly inconvenient in relation to corporate complicity, as the corporation, through its involvement, seldom wishes to further the commission of the crime. Rather, the corporation has a legitimate intent, namely profit, which it wishes to obtain through illicit means. In conclusion, this form of participation liability shows little practical propriety for corporate involvement in international crimes.

Chapter 3: Aiding and abetting.

Article 25 § 3 (c) provides a legal basis for the liability for those who...

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.³³⁵

The physical element of article 25 § 3 (c) catches a wide variety of contributions, as it encompasses a low threshold for liability. The ICTY shed light on the terms 'adding and abetting' in its 1998 Furundzija – Judgment:

[T]he Trial Chamber holds 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 crime³³⁶

The apparent threshold implied by the use of the term "substantial" is remedied in article 25 § 3 (c) through providing an additional variety of accomplice liability for *otherwise assisting* in the commission of a crime. In other words, article 25 § 3 (c) also encompasses liability for those whose assistance has a less than substantial effect on the commission of the crime.

When applied to the subject matter at hand, this form of accomplice liability could apply not only to the Shell – and Rio Tinto – cases, described under the foregoing title, but also to such cases as those of

³³³ For more information see page 19

³³⁴ 30 §1 Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998. [emphasis added]

³³⁵ Article 25 §3 (c) Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998.

³³⁶ International Criminal Tribunal for the former Yugoslavia (ICTY) 10 December 1998, Prosecutor v. Anto Furundzija (Trial Judgement), para 235.

corporations purchasing rough diamonds from conflict zones and as such providing rebel groups that engage in crimes against humanity with funds. Another example is that of corporations which provide arms to dictatorial regimes.³³⁷

Yet another example is found in the highly interesting ZYKLON B-Case. This post-World War II case was held in Hamburg, before a British military Court in March of 1946. BRUNO TESCH, a German chemist and entrepreneur, who provided poisonous Zyklon B³³⁸ gas to the Nazi Schutzstaffel, or SS,³³⁹ was charged with and convicted of supplying the poisonous gas used for the exterminations of the prisoners in the AUSCHWITZ concentration camp and sentenced to death by hanging.

Once again, the difficulty lies in the fulfilment of the mental element. In ICTY case law, the mental element of aiding and abetting is fulfilled provided that the accomplice is knowledgeable of the fact that his actions provide assistance in the primary perpetrator's commission of the crime.³⁴⁰ However, article 25 § 3 (c) holds that the physical act, giving expression to the concept of aiding, abetting or otherwise assisting in the commission of a crime, must be posed "[f]or the purpose of facilitating the commission of such a crime".

Doctrine is divided as to the exact *mens rea* threshold this clause installs, providing a wide variety of interpretations. Some authors hold that this clause goes "beyond the ordinary *mens rea* requirement within the meaning of article 30 [Rome Statute]³⁴¹ and that it must be the objective of the accomplice to further the commission of the crime,³⁴² whilst others maintain that the purpose referred to in article 25 § 3 (c) must not be the primary purpose. The latter holds that "[a] secondary purpose, including one inferred from knowledge of the likely consequences, should suffice".³⁴³ In other words, from the accomplice's knowledge of the consequences his actions will imply, a secondary purpose, subsidiary to his primary purpose of gaining profit, can be deducted. In line with ICTY case law, a third opinion interprets the clause to mean that knowledge suffices and thus negates the notion of a shared intent with the primary perpetrator.³⁴⁴

Although the author would reasonably assume that article 25 § 3 (c) indeed incorporates a more severe test, requiring the participant to share the intent of the primary perpetrator, a complete analysis of the relevant doctrine falls outside of the scope of this dissertation and this ambiguity must be resolved by means of an interpretation of the Court through future case law.

Chapter 4. Preliminary conclusion

The foregoing pages served to highlight the difficulties in relation to the application of the Rome Statute's current complicity regime to legal persons. Under the case law of the ICTY, the *mens rea* standard for accomplice liability was limited to a knowledge-test. However, it appears that both the forms of

³³⁷ Possibly in violation of a United Nations embargo, although such falls outside of the scope of this dissertation.

³³⁸ UNITED NATIONS WAR CRIMES COMMISSION, *Law-Reports of Trials of War Criminals*, London, 1947.

³³⁹ INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL, *Corporate Complicity & Legal Accountability: Volume 1: Facing the facts and charting the legal path*, Geneva, 2008, 28.

³⁴⁰ International Criminal Tribunal for the former Yugoslavia (ICTY) 10 December 1998, Prosecutor v. Anto Furundzija (Trial Judgement), para 236.

³⁴¹ K. AMBOS, "Article 25. Individual criminal responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* Munchen, Hart Publishing, 2008, (743) 10. Bader 34

³⁴² MOHAMED ELEWA BADAR, "The mental element In the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective", *Criminal Law Forum* 2008, (473) 507.

³⁴³ D. CASSEL, "Corporate aiding and abetting of human rights violations: Confusion in the courts", *Northwestern Journal of International Human Rights* 2008, afl. 2, (304) 312.

³⁴⁴ G. WERLE, "Individual criminal responsibility in article 25 ICC Statute", *Journal of International Criminal Justice* 2007, (953) 969.

participation provided in article 25 § 3 (b) and (c) have abandoned this position. Article 25 § 3 (b), which provides liability for soliciting or inducing international crimes, does not include a deviation from the 'knowledge and intent'-standard provided by article 30 of the Rome Statute.

Additionally, article 25 § 3 (c) provides that 'aiding and abetting' of the commission of an international crime must be done '[f]or the purpose of facilitating the commission of such a crime'. This clause has been the subject of diverse interpretations by doctrine. To obtain certainty as to its exact meaning and, most importantly, as to whether or not the accomplice must be endowed with the same intent as the primary perpetrator, the interpretation of the Court itself must be awaited.

The application of *mens rea* threshold, which is higher than the knowledge standard applied by the ICTY, to legal persons would pose great difficulties for the concept of international corporate criminal liability. The vast majority of cases of corporate involvement are cases of corporate complicity. However, the corporation's primary purpose is to gain profit and does not imply a shared intent with the primary perpetrator. In conclusion, should the ICC confirm the assumption that the mental element required for aiding and abetting is a shared intent with the primary perpetrator, that the concept of corporate complicity would be rendered unworkable under the current text of the Statute. To allow for prosecution of legal persons, an amendment of the current complicity regime would be required.

Conclusion

This dissertation has adhered to a narrow and limited scope, namely to provide the reader with a substantiated assessment of the possibilities for and implications of a hypothetical extension of the International Criminal Court's jurisdiction to include legal persons. At this time, the adagium *societas delinquere non potest* continues to perpetuate the impunity legal persons are endowed with at the international level.

In the first and introductory part of this thesis the desirability of international corporate criminal liability was substantiated by means of a review of a number of prominent examples of corporate involvement in international crimes, such as the actions of Shell and Chevron Corp. in Nigeria and the trials of the German industrialists Flick and Krupp, following World War II. Additionally, a number of advantages were set forth in comparison to the existing liability regimes serving to remedy corporate involvement in international crimes, such as corporate criminal liability at the national level, liability for individual corporate agents and administrative and civil liability regimes. As stated before, the most prominent advantages reside in the concept's possibility to remedy the difficulties posed by exceedingly complex corporate structures which aim to mask individual liability, as well as the fact that an overarching forum would call a halt to the current practice of corporations operating in a grey zone created by the inability of the host State to prosecute and the indifference of the home State.

The inclusion of legal persons in article 25 of the Rome Statute was discussed at the 1998 Rome Conference. However, due to the delegates' many objections, the jurisdiction of the Court was limited to natural persons. Since 2009 an amendment of the Statute is possible if, in accordance with article 121, a two-thirds majority vote is reached. The second part of this dissertation concludes that at this current time such an amendment is unlikely to occur. A number of obstacles were identified at the Rome Conference and throughout the second and third part of this thesis, an attempt was made to build bridges and offer solutions for some of these hindrances.

However, one important obstacle remains, namely the lack of an international standard concerning the incorporation of corporate criminal liability in the domestic legal systems of the States Parties. Such provides a dual hurdle in relation to an extension of the Court's jurisdiction. Firstly, it is noted that an extension of the Court's jurisdiction to legal persons would cause for it to lose its complementary nature in relation to those States Parties which do not include corporate criminal liability in their domestic legal systems. The latter would be deemed 'unable or unwilling' in the sense of article 17 of the Rome Statute, thus providing the ICC with automatic jurisdiction, which contradicts with the Court's role as *ultimum remedium*. However, a more immediate obstacle in this regard is the fact that States Parties whose domestic legal systems are unfamiliar with corporate criminal liability are unlikely to vote in favor of or ratify an amendment to the Statute to that accord. In order to amend the Statute, a two-thirds majority vote is required. Although no conclusive data is available which would allow for an assessment of the exact status of corporate criminal liability in the different national legal systems of each of the States Parties, the fact that a substantial number of States Parties to the Rome Conference have underdeveloped legal systems, allows for the assumption that these would not apply criminal liability to legal persons. In this light, the probability of reaching the required two-thirds threshold is considered to be low.

Regardless, all change starts in theory. This negative conclusion does not take away from the value of the acquired solutions for some of the hurdles presented at the Rome Conference, be it as a theoretical exercise. These could perhaps serve as a point of departure at a later stage, when a greater international

consensus concerning this subject arises. In this regard, the second part of this dissertation included some suggestions in relation to the lack of appropriate sanctions for legal persons, including restraints, structural injunctions, adverse publicity, the more controversial issuance of equity shares and even dissolution.

However, the focal point of this master's thesis resides in its third part, which aims to offer a solution to the challenge of attributing *mens rea* to legal persons. From a legal as well as a political perspective, the propriety of the identification model was argued. Three legal arguments are presented, the first one pertaining to the assimilation of the legal person with the corporate officer at the time of the criminal conduct. As such, *mens rea* exists in respect of the corporation, rather than it being imputed to the corporation. The latter approach, wielded by the vicarious liability model and the aggregation model, implies a form of strict liability. It is widely accepted that this assimilation of the corporate officer and the legal person offers a more appropriate context for *mens rea* offences, such as the international crimes. Secondly, the possibility of perpetration by means, included in article 25 § 3 (a) and (b) of the Rome Statute, allows for a remarkable alignment with the identification model. The third and last legal argument in favor of the identification model is found in the general tendency held in international criminal law to prosecute high-level perpetrators. This preference for those at the top of the pyramid, rather than the foot soldiers, is reflected in the identification model which only allows for liability for the actions of high-ranking corporate officers

Additionally, a number of arguments were presented relating to the political feasibility of the chosen attribution model. In relation to the vicarious and aggregation model, it is presented that the identification model embodies the narrowest scope and lies at the intersection of these three models. Practically speaking, States wielding either the vicarious liability model or the aggregation model can provide corporate criminal liability in response to criminal conduct by high-ranking corporate officers, whilst States engaging the identification model cannot provide corporate criminal liability for the criminal acts of low-ranking corporate agents. The same is true for the self-identity model, which, regardless of its novel approach, covers the cumulative scope of the three former models. Additionally, little consensus exists in relation to this last attribution model, making it unfit for the international level. The propriety of the identification model is confirmed through its inclusion in a number of European Council Framework Decisions.

In a fourth and final part, some points of difficulty were brought to the reader's attention in relation to the possibilities for applying the current accomplice liability regime provided by article 25 § 3 (b) and (c) of the Rome Statute to legal persons. The vast majority of cases concerning corporate involvement are cases of corporate complicity. However, the difficulty lies in the fact that a corporation's involvement in international crime is most likely to be inspired by the pursuit of profit. Often times, the corporate officer, who is to be equated with the corporation in accordance with the identification model, does not share the *mens rea* of the primary perpetrator. Although the current complicity regime included in the aforementioned articles inspires doctrine to produce a wide range of interpretations, it appears to require that the accomplice be endowed with the same intent required for the primary perpetrator. This high threshold renders the current complicity regime moot in relation to corporate actors. Regardless of the exact meaning of the wording of these articles, in order to allow for prosecution of legal persons, an amendment of the current complicity regime would be required, preferably lowering the *mens rea* element for accomplice liability to a knowledge-standard.

In conclusion, it has been the purpose of this dissertation, in light of the desirability of the concept of corporate liability for international crimes, to build bridges in an attempt to remedy some of the obstacles which prevented the inclusion of legal persons in the Court's jurisdiction during the Rome Conference, some 14 years ago. Although the current feasibility of the concept seems grey, it is the author's sincere

hope that the foregoing pages have provided the reader with food for thought and that this master's thesis can serve as a stepping-stone for much-needed further inquiry on this subject.

Annex I: Top 100 economic players 2010

Top 100 economic players 2010

	Country/ Corporation	GDP/sales (\$mil)		Country/ Corporation	GDP/sales (\$mil)
1.	European Union	16,242,256	51.	Nigeria	202,576
2.	United States	14,526,550	52.	Japan Post Holdings	202,196
3.	China	,878,257	53.	Philippines	199,591
4.	Japan	5,458,797	54.	Czech Republic	192,030
5.	Germany	3,286,451	55.	Sinopec	187,518
6.	France	2,562,742	56.	Romania	185,315
7.	United Kingdom	2,250,209	57.	State Grid	184,496
8.	Brazil	2,090,314	58.	Pakistan	176,870
9.	Italy	2,055,114	59.	AXA	175,257
10.	India	1,631,970	60.	China National Petroleum	165,496
11.	Canada	1,577,040	61.	Chevron	163,527
12.	Russia	1,479,825	62.	ING Group	163,204
13.	Spain	1,409,946	63.	Algeria	157,759
14.	Australia	1,237,363	64.	General Electric	156,779
15.	Mexico	1,034,308	65.	Total	155,887
16.	South Korea	1,014,482	66.	Peru	153,802
17.	Netherlands	780,668	67.	Bank of America Corp.	150,450
18.	Turkey	735,487	68.	Kazakhstan	148,047
19.	Indonesia	706,752	69.	Volkswagen	146,205
20.	Switzerland	527,920	70.	New Zealand	140,509
21.	Poland	469,401	71.	Conoco Phillips	139,515

22.	Belgium	467,779	72.	Ukraine	137,934
23.	Sweden	458,725	73.	Kuwait	132,569
24.	Saudi Arabia	448,360	74.	BNP Paribas	130,708
25.	Taiwan	429,845	75.	Hungary	130,421
26.	Norway	412,990	76.	Qatar	127,332
27.	Wal-Mart Stores	408,214	77.	Assicurazioni Generali	126,012
28.	Iran	407,382	78.	Allianz	125,999
29.	Austria	377,382	79.	AT&T	123,018
30.	Argentina	369,992	80.	Carrefour	121,452
31.	South Africa	363,655	81.	Ford Motor	118,308
32.	Thailand	318,908	82.	ENI	117,235
33.	Denmark	309,866	83.	J.P. Morgan Chase & Co	115,632
34.	Greece	305,415	84.	Hewlett-Packard	114,552
35.	United Arab Emirates	302,039	85.	E.ON	113,849
36.	Venezuela	293,268	86.	Berkshire Hathaway	112,493
37.	Colombia	289,433	87.	GDF Suez	111,069
38.	Royal Dutch Shell	285,129	88.	Daimler	109,700
39.	Exxon Mobil	284,650	89.	Nippon Telegraph & Telephone	109,656
40.	BP	246,138	90.	Samsung Electronics	108,927
41.	Finland	239,177	91.	Citigroup	108,785
42.	Malaysia	237,959	92.	McKesson	108,702
43.	Portugal	229,154	93.	Verizon Communications	107,808
44.	Hong Kong	224,459	94.	Crédit Agricole	106,538
45.	Singapore	222,699	95.	Banco Santander	106,345
46.	Egypt	218,465	96.	Bangladesh	105,560
47.	Israel	217,445	97.	General Motors	104,589

48.	Ireland	206,985	98.	HSBC Holdings	103,736
49.	Toyota Motor	204,106	99.	Siemens	103,605
50.	Chile	203,299	100	Vietnam	103,574

Sources: Countries: International Monetary Fund – Companies: Fortune issue July 26, 2010

Annex II: Nederlandstalige samenvatting

De masterproef “The Quest for International Criminal Liability with regard to Corporations” is opgedeeld in vier onderdelen en onderzoekt de mogelijkheden voor een uitbreiding van de bevoegdheid van het Internationaal Strafhof tot rechtspersonen.

In een eerste onderdeel wordt de maatschappelijke vraag naar internationale strafrechtelijke aansprakelijkheid voor rechtspersonen aangekaart. Eerst en vooral licht de auteur de relevante aspecten van de internationale misdaden, zijnde genocide, oorlogsmisdaden en misdaden tegen de mensheid, toe. Een goed begrip van de mentale en fysieke elementen van deze misdaden is onontbeerlijk voor de daaropvolgende theoretische uiteenzetting. Verder beargumenteert dit eerste onderdeel de maatschappelijke relevantie van het concept door middel van een aantal praktijkvoorbeelden van bedrijven betrokken in internationale misdaden. In een laatste hoofdstuk wordt internationale strafrechtelijke aansprakelijkheid voor bedrijven afgewogen tegen andere aansprakelijkheidsmodellen, zoals daar zijn de strafrechtelijke aansprakelijkheid van bedrijven op nationaal niveau, individuele aansprakelijkheid voor bedrijfsleiders, administratiefrechtelijke en civielrechtelijke aansprakelijkheid.

In het tweede onderdeel van dit schrijven ligt de nadruk op de haalbaarheid van het voorgestelde model. De incorporatie van rechtspersonen in de bevoegdheid van het Internationaal Strafhof werd reeds overwogen, doch afgewezen, tijdens de Rome Conferentie. Dit onderdeel biedt een uiteenzetting van de redenen voor deze negatieve beslissing, zoals daar zijn het gebrek aan geschikte sancties voor rechtspersoon en de afwezigheid van een internationale consensus betreffende strafrechtelijke aansprakelijkheid voor rechtspersoon. Waar mogelijk wordt getracht een oplossing te bieden voor de toenmalige probleempunten. Eén essentieel obstakel dat naar voren geschoven werd op de Rome Conferentie wordt echter niet hier besproken. Aan de mogelijkheden voor het toeschrijven van *mens rea* aan rechtspersonen wordt een apart deel van het schrijven gewijd.

Het derde deel betreffende de attributie van *mens rea* aan rechtspersonen vormt het zwaartepunt van deze masterproef. Na een grondige uiteenzetting van elk van de vier bestaande attributiemodellen volgt een pleidooi voor het identificatiemodel als meest geschikt model voor het bewerkstelligen van internationale strafrechtelijke aansprakelijkheid voor rechtspersonen, zowel vanuit juridisch als vanuit politiek oogpunt.

In een vierde en laatste deel worden een aantal pijnpunten aangehaald met betrekking tot de mogelijkheden voor medeplichtigheid van rechtspersoon in het licht van de huidige bewoording van artikel 25 §3 (b) en (c) van het Statuut van het Internationaal Strafhof. Meer bepaald het intentionele element, hetgeen schijnbaar dient overeen te komen met het intentionele element van de dader, is moeilijk toepasbaar op rechtspersonen, dewelke steeds in de eerste plaats winst nastreven.

Samenvattend bevat dit schrijven een pleidooi voor de maatschappelijke noodzaak van internationale strafrechtelijke aansprakelijkheid voor rechtspersoon, een afweging van diens praktische haalbaarheid, een theoretisch-juridische studie betreffende de mogelijkheid van het toeschrijven van de elementen van de internationale misdaden aan rechtspersonen en een duiding van de moeilijkheden in verband met het huidige medeplichtigheidsregime.

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