SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Journal of International Law

Volume 50 | Issue 1

2018

# Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law

Carsten Stahn

# LIBERALS VS ROMANTICS: CHALLENGES OF AN EMERGING CORPORATE INTERNATIONAL CRIMINAL LAW

*Carsten Stahn*[*]

*Holding bystanders and corporate agents accountable for international crimes is often at the periphery of international criminal justice. Based on its liberal foundations, international criminal law has traditionally been strongly centered on individual agency. In the industrialist cases after World War II, individual criminal responsibility was used to demonstrate and sanction corporate involvement in crime. Ideas of corporate criminal responsibility have been voiced in the post-war era and in the context of the negotiations of the Statute. In recent years, they have witnessed a renaissance in several contexts: the jurisprudence of the Special Tribunal for Lebanon, the Malabo Protocol of the African Union and the Draft Articles of the International law Commission on Crimes Against Humanity. This contribution examines the strengths and weaknesses of individualized and collective approaches towards corporate wrongdoing. It argues that the way forward requires less 'romanticism' and more realism. The appropriate space of corporate criminal responsibility needs to be defined better. The concept is still most developed in domestic jurisdictions. Its role at the international level is likely to remain modest. The main challenge is to develop the interplay between individual and collective responsibility, and to assess more carefully in what areas and in what forums collective responsibility may be pursued best.*

* Professor of International Criminal Law and Global Justice, Leiden University.

## CONTENTS



## I. INTRODUCTION

The legal regime governing criminal liability of corporations is in flux.[1] There is a strong moral case to provide greater attention to the

[1] *See* Desislava Stoichkova, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW (Antwerpen: Intersentia, 2010); Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351 (2016) (discussing evolving trends of corporate liability in international law); See also Robert C. Thompson, Anita Ramasastry &; Mark B. Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841 (2009)(discussing the Unocal case and its impact on changing corporate liability); Daniel Leader, *Business and Human Rights - Time to Hold Companies to Account*, 8 INT'L CRIM. L. REV. 447 (2008) (discussing changes in international criminal law regarding holding businesses accountable for criminal offenses); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139 (Menno T. Kamminga &; Saman Zia Zarifi eds., Kluwer Law International 2000) (discussing the changes in jurisdiction over legal persons).; Larissa van den Herik, *Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences, in* FUTURE PERPSECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 350 (Carsten Stahn & Larissa van den Herik eds., TMC Asser Press 2010) (discussing corporations becoming future subjects of international criminal law). See also Celia Wells, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2nd ed., Oxford University Press, 2001).

contribution of businesses to conflict and crime. The human rights accountability architecture has developed significantly over past decades. Human rights were traditionally related to violations of states against individuals, but private actors can hold positions of power and control exceeding those of states. As Ronald C. Slye has argued:

> "The rise of the corporation is analogous to the rise of the modern nation-state—both unite individuals for a common purpose, and both result in entities with an enormous potential for good or ill."[2]

International companies have played a critical role in extracting or selling natural resources from conflict zones since colonial times. For instance, Belgium ruler King Leopold famously exploited the Congo through the use of concession companies, which used forced labor to extract natural resources.[3] Colonial powers justified such practices by moral and technological supremacy and the promise of access to free trade. During World War II, and in contemporary conflicts, companies have played a major role in supporting and facilitating warfare. In modern times, corporate actors have been involved in violations in several ways: as direct perpetrator of violations, through supply of goods that fuel international crimes, as providers of information or services that facilitate crimes, or through investments in conflict environments.[4]

The rise of the business and human rights movement[5] over past decades, contributed to creating a thicker accountability structure. International law has become hostile to the idea that a collective

2. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 961 (2008).

3. *See* ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA 117, 119, 125 (First Mariner Books ed. 1999) (recounting colonial times under King Leopold).

4. *See* Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here*, 19 CONN. J. INT'L L. 1, 7-8 (2003) (general discussion on MNCs various violations).

5. See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework,* OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (outlining UN standards of international business). ). See generally Larissa van den Herik and Jernej Letnar Černič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again* 8 J. Int'l Crim. Just. 7125 (2010).

company structure provides a veil against accountability'. [6] There is a rich compliance web for human rights violations that includes not only hard law, but soft law and voluntary compliance mechanisms. Violations can be subject to wide a range of sanctions, including the revocation of licenses (i.e. the 'corporate death penalty' for legal persons), temporary license suspension, the initiation of investigations and prosecutions, civil or administrative penalties, and warning or persuasion techniques. [7] At least three major liability regimes can hold companies legally accountable: civil liability, human rights accountability, and criminal responsibility. All of them expanded over time, yet the dividing lines are not always clear. There is, in particular, a deeper controversy about the limits of human rights accountability and the feasible reach of criminal responsibility. [8]

## II, THE PLURALIST LEGAL ARCHITECTURE

The idea that "companies cannot commit offences" (*societas delinquere non potest)* is a relic of the past.[9] Early criminalization started in response to the industrial revolution. Many of the traditional theoretical objections against corporate criminal responsibility, such as the difficulty to ascribe *mens rea* to a juridical person or to inflict punishment have been addressed. Shifts from a naturalistic to a more sociological vision of crime make it possible to

6. The image of the 'corporate veil' is often used to strengthen the case for accountability. On the role of metaphors, see Maks Del Mar*, Metaphor in International Law: Language, Imagination and Normative Inquiry* 86 Nordic Journal of International Law 170 (2017).

7. On penalties, see Art. 10 (4) of the UN Convention against Transnational Organized Crime. It states: Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

8. For a critique of corporate criminal responsibility, see Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 Harvard Law Review 1477-1534 (1996); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability* 46 American Criminal Law Review 1329 (2009).

9. See Gerhard O. W. Mueller, *Mens Rea and the Corporations -A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 38, 40-41, (1957) (discussing the contemporary rejection of the historical concept that legal persons are unable to form a mens rea or to be subject to criminal liability); *See also* Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L L. 899 (2008) (discussing application, by contemporary courts across the globe, of *mens rea* requirements to corporate entities).

argue that corporations can perpetrate crimes,[10] but the legal regime is highly fragmented.

Domestic legal systems diverge in their approaches. Common law jurisdictions generally recognize corporate criminal responsibility. Continental legal traditions are more diverse. Many jurisdictions allow for corporate criminal responsibility, either in general or for specific offences.[11] Other countries (e.g., Italy, Germany, Ukraine) remain more skeptical to the concept and resort to administrative offences or penalties to address wrongdoing.[12] Some systems combine civil and criminal proceedings.[13] This allows victims to link criminal charges against corporate defendants to tort claims.[14] At the international level, there are seventeen multilateral international instruments with provisions on corporate criminal liability, including the UN Convention against Transnational Organized Crime.[15] These instruments recognize the potential responsibility of legal persons. But they leave it largely in the discretion of states to determine the appropriate kind of sanctions. This approach was recently followed by the International Law Commission (ILC) in its work on crimes against humanity. It decided to include a provision on legal persons in its draft articles on Crimes against Humanity in light of the 'the potential involvement of legal persons in acts committed as part of a

10. As Bert Swart has noted, they 'do not act in a physical, but they routinely decide whether or not natural persons will perform physical acts on their behalf'. See Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. INT'L CRIM. JUST. 947, 951 (2008).

11. Kaeb, *supra* note 1, at 380-381.

12. See OHCHR, Corporate liability for gross human rights abuses (2012), 32-33, at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf. *See also Criminal Liability of Companies*, LEX MUNDI, www.lexmundi.com/Document.asp?DocID=1069 (outlining Italian legal criminal corporate liability); *See also Corporate and Commercial Disputes Review*, NORTON ROSE FULBRIGHT, http://www.nortonrosefulbright.com/ files/corporate-and-commercial- disputes-review- issue-3- 138938.pdf (discussing Germany corporate criminal liability); Sergiy Gryshko, *Ukraine: Ukraine Introduces Criminal Liability of Legal Entities Ahead of Schedule*, LEXOLOGY, https://perma.cc/MKR5-BDJ4 (discussing Ukrainian corporate criminal liability).

13. *See* Kaeb, *supra* note 1, at 386-387 (discussing hybrid civil-criminal systems).

14. *Id.*

15. Swart, *supra* note 10, at 949; G.A. Res. 55/25, United Nations Convention against Transnational Organized Crime, Art. 10 ¶1-4 (Nov. 15, 2000).

widespread or systematic attack directed against a civilian population'.[16] It states that

> [s]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.[17]

Criminal responsibility of legal persons cannot be determined in the same way as that of natural persons. The methods differ across criminal traditions. Some theories attribute the conduct of agents to the company as a legal person.[18] Criminal responsibility is thus derived from the criminal acts of agents, i.e. corporate officers and senior managers (attribution model).[19] It is necessary to inquire whether the agent committed the offence, and whether that conduct can be ascribed to the corporation based on a relationship to the agent. The criteria used for attribution differ. The weakness of this model is that it poses causality problems in collective and decentralized networks. Newer theories admit that the conduct of agents is determined by corporate cultures and collective decision-making processes, and take into account the aggregated knowledge of agents.[20] Others hold the company itself accountable for its own wrongful conduct (organizational model).[21] This approach takes into account that collective failures such as poor organization or communication may have caused the wrong. The organizational model thus ties responsibility to organizational failures, such as lack of proper organization or control. A classic example is a corporate

16. See, ILC, Report of the International Law Commission', GAOR 71th Session, Supp No 10. UN Doc A/71/10 (2016), 264.

17. See Art. 5 (7), ibid., 248. The language is based on Art. 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

18. *See generally* Clapham, *supra* note 1 (discussion on legal persons and theories of criminal liability).

19. Thomas Weigend, *Societas Delinquere Non Potest?: A German Perspective*, 6 J. INT'L L. 927, 931-933 (2009).

20. On the 'aggregation model', see Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 Buffalo Criminal Law Review 641, 661 (2000).

21. *See generally* Cristina De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASH. U. GLOBAL STUD. L. REV. 547 (2005) (discussing different levels of accountability and organizational models).

culture that facilitates violations.[22] Corporate *mens rea* is inferred from the aggregated knowledge of agents. This approach forces companies to put in place adequate structures to prevent illegal conduct, in order to escape from criminal responsibility.

## III. TWO COMPETING SCHOOLS IN INTERNATIONAL CRIMINAL LAW

In international criminal law, the idea of corporate criminal responsibility is less developed than at the domestic level. International criminal law has traditionally concerned itself with the responsibility of individuals.[23] Neither the Nuremberg and Tokyo tribunals, nor the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) or the International Criminal Court (ICTR) were formally vested with the authority to try legal persons.[24] In national jurisdictions, courts have found business corporations complicit in gross human rights violations.[25] Company against may be held accountable in several ways: as perpetrators of violations, (for instance use of forced labor or pillaging of resources), as accomplices, or as military or civilian superiors (e.g., private security companies). But it is increasingly questioned whether the individualized approach towards criminal responsibility responds fully to challenges of business involvement in crime. In many instances, it is difficult to tie corporate crime to an individual actor. As Thomas Weigend has noted:

> "It is not a single individual who sells poison gas to a dictator to be used in war crimes, but it is a firm, organized as a legal person that is the provider of the gas. It is not a single individual who buys and re-sells stolen diamonds and thus lends critical financial support to a dictatorial regime, but an enterprise specialized in such lucrative deals."[26]

The ambition to extend criminal responsibility coincides not only with the human rights-driven anti-impunity movement, but also with broader structural critiques of international criminal law. For instance, critical legal scholars and third world approaches to

22. *Id.* at 557-560; See e.g. Criminal Code Act 1995 (Cth) S 12.4 (Austl.) (Australian statute penalizing legal persons for conduct of unsupervised employees, agents, or officers).

23. Slye, *supra* note 2, at 1.

24. Stahn, *supra* note 1, at 351, 354.

25. *See* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1239, (2009) (discussing court rulings regarding gross human rights violations of corporations).

26. Weigend, *supra* note 19 at 927-928..

International Law have long criticized the strong focus of international criminal justice on atrocity violence and its neglect of the socio-economic causes of conflict and broader issues of everyday violence.[27] Strengthening criminal responsibility of corporations and businesses responds to an ever stronger claim to penalize economic drivers of conflict, including Western companies and transnational networks. [28]

A symbolic moment is the famous decision of the Appeals Chamber of the Special Tribunal for Lebanon against a Lebanese media company in the *Al-Jadeed* case.[29] It marks the first decision in which a hybrid criminal tribunal held a corporation criminally liable for contempt of court. The reasoning is filled with historical references and normative ambition. The Chamber noted:

> "corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law… Corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law."[30]

The *Al-Jadeed* opinion represents an old cosmopolitan dream, namely to decouple international criminal law from its traditional ties to state policy. The decision challenges the individualist tradition of international law.[31] It deviates from the classical Nuremberg paradigm

27. *See* Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 91 (2003) (discussing critiques of legal scholars and third world approaches to international criminal justice); *See* Joanna Kyriakakis, *Corporations Before International Criminal Courts: Implications for International Criminal Justice Project*, 30 LEIDEN J. INT'L L. 221, 222-23 (2017) (discussing the historical tendency of international criminal justice to inadequately addresses economic crimes and actors).

28. William A. Schabas, *War Economies, Economic Actors and International Criminal Law*, *in* PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 425, 425-443 (K. Ballentine and H. Nitzschke eds., 2005).

29. *See* Prosecutor v. Al Khayat, Case No. STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 27 (Special Trib. For Lebanon Oct. 2, 2014) (discussing the decision of the Al-Jadeed case).

30. *Id.* at ¶ 67.

31. *See* Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L., 561, 594 (2002) (critiquing the historical approach of international law and stating "by focusing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background.").

according to which "crimes against international law are committed by men, not by abstract entities."[32] It argues that the famous Nuremberg passage was an *obiter dictum* and not meant to foreclose responsibility of corporations as abstract entities under international law.[33] It reflects a deeper clash, between what George Fletcher has called "liberal" and "romantic" approaches towards collective responsibility.[34] A liberal conception of responsibility focuses on individual agency and abstracts individual wrong from collective action. The romantic view admits that international crimes are typically by their very nature committed in collectivities, and thus closely connected to some degree of collective will.

The two traditions have been in conflict since the naissance of international criminal law. In the aftermath of World War II, the links between business and regime crime were investigated before military tribunals of the Allied Forces. German industrial agents, such as *IG Farben*, *Krupp*, or *Flick* faced charges for complicity in war crimes, crimes against humanity, and aggression in trials under Control Council Law No. 10. The tribunals intensely discussed theories of corporate criminal responsibility, but took a pragmatic stance. They found that private individuals could be held responsible under international law,[35] but they did not try corporations as such. In the *IG Farben* trial (Carl Krauch and Twenty-Two Others), thirteen members of IG Farben, were found guilty of enslavement or plunder. The US Military tribunal held:

> "It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term "Farben" as descriptive of the instrumentality of

32. United States v. Goring, Trial of The Major War Criminals Before the International Military Tribunal, Nuremberg, ¶ 223 (Int'l Military Trib. For Nuremberg, Germany, Nov. 14, 1945-Oct. 1, 1946).

33. Al Khayat, *supra* note 29 at ¶ 64.

34. *See* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1504 (2002)(discussing this approach to collective responsibility and guilt of nations).

35. *See* United States v. Flick, U.S. Military Tribunal Nuremberg, Trials of War Criminals Before the Nuremberg Military Tribunals, Judgment, 1191 (Dec.22, 1947) ("International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty. There is no justification for a limitation of responsibility to public officials").

> cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."[36]

Defendants were charged symbolically as company leaders and individuals to demonstrate the economic power behind Nazi atrocities.

The idea of corporate criminal responsibility was discussed since the 1950s, but its feasibility for an international criminal jurisdiction remained contested. In the context of the negotiations of the ICC Statute, the concept of corporate criminal responsibility was controversial.[37] Some delegations rejected the idea on the ground that ''there was no criminal responsibility which could not be traced back to individuals.''[38] Others supported it.[39] The discussions addressed a broad number of practical scenarios, such as involvement of companies in arms trade fueling conflict, their role in covering up of crime sites through construction work, or their indirect contribution to forcible transfer of persons. France proposed a compromise solution. Corporate criminal responsibility was made dependent on individual criminal responsibility. The scope of responsibility was limited and conditional. It required a conviction of a company agent for acts carried out 'on behalf of and with the explicit consent' of the company concerned. The proposal read:

> "Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a judicial person for the crime charged, if:

---

36. Law Reports of Trials of War Criminals, The U.N. War Crimes Commission, Volume X, 52 (1949).

37. Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETHERLANDS INT'L L. REV. 333, 336–39 (2009)(discussing the ambiguity in the ICC Statute which caused alternative accountability mechanisms).

38. *See* JERNEJ LETNAR CERNIC, CHALLENGING TERRITORIALITY IN HUMAN RIGHTS LAW: BUILDING BLOCKS FOR A PLURAL AND DIVERSE DUTY-BEARER REGIME, 85 (Wouter Vandenhole ed., 2015) (discussing Greece's idea of corporate criminal responsibility).

39. *See generally* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK, 210 (Jena Martin & Karen E. Bravo eds., 2016)

> (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."[40]

The proposal was primarily guided by a functional objective, namely to increase the chances of victims to obtain compensation through the ICC reparation regime. It represented a compromise between the 'liberal' and the romantic view. It went too far for those who remained opposed to the idea of extending criminal responsibility beyond moral fault and individual culpability of agents.[41] It did not go far enough for those who claim that corporate criminality cannot be reduced to individuals.[42] It also faced pragmatic concerns. Skeptics feared that corporate criminal responsibility would overburden the ICC and make criminal trials longer and more expensive.[43] The option of civil or administrative responsibility of legal persons was not thoroughly discussed.

---

40. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, ¶ 5, U.N. Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2 (Vol. II), (June 15- July 17, 1998).

41. Weigend, *supra* note 19 at 927-928.

42. BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME & ACCOUNTABILITY, 45-46, (Cambridge University Press 1996); *See e.g.* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT'L CRIM. JUST, 809, 825 (2007) ("Features such as the commonly opaque nature of accountability within corporate structures, the expendability of individuals, the practice of corporate separation of those responsible for past violations and those responsible for preventing future offences, as well as the safe harbouring within corporations of individual suspects, can all contribute to the difficulty of locating individual wrongdoers, as well undermining any deterrent value of prosecution").

43. *Cf.* David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L L. J., Spring 2016 at 35 (noting the lack of support among national jurisdiction to justify the inclusion of corporate criminal liability in the Rome Statute).

Today, there are two competing schools. One school seeks to increase corporate accountability trough an expansion and refinement of individual responsibility. It is grounded in the liberal tradition of international criminal justice.[44] It is based on the hypothesis that involvement in atrocity crimes results from the interaction of self-determined individuals in collective structures and specific situational factors that drive individual agency.[45] It cautions against the risks of overbroad standards of attribution in punishment and an excessive use of criminal law as an instrument to seek corporate compliance with the law.[46]

The second school, the romantic approach sees virtue in holding artificial legal persons accountable as collective entities.[47] It is more closely connected to the human rights tradition. It postulates that "no person, natural or legal, should be placed above the law or be allowed to operate outside of the rule of law."[48] This view accepts that the blameworthiness of the behavior of corporations may exceed the responsibility of individual.[49] It places the emphasis on the responsibility of a corporation as an autonomous agent.[50] It relies on the premise that corporations enjoy a degree of functional autonomy that allows them to determine their own objectives, organizational structure and social identity and to make choices about the law.[51] It is most vividly reflected in the passionate argument of the STL Appeals Chamber:

> "[M]odern history is replete with examples where great harm has been caused by corporations with the advantages that result

44. *See generally* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. OF IN'TL L. 925 (2008) for a discussion of the liberal tradition of international criminal justice.

45. Kyriakakis, *supra* note 37 at 345-346.

46. Robinson, *supra* note 44, at 927-29, 938.

47. *See* Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q., No. 3, 624 (Aug. 2009)(noting the general characteristics of judicial romanticism); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 461 (2001).

48. Al Khayat, *supra* note 29 at ¶ 84.

49. S*ee id.* at ¶ 82 (noting corporations' greater "power, influence and reach" than individuals corresponds to a greater responsibility which has not materialized in corporations' actions).

50. *See id.* at ¶ 83-4 (highlighting the differences between prosecuting corporations and individuals and the accountability of corporation as an entity).

51. *See id.* at ¶ 82-3 (emphasizing the characteristics of corporations which make them difficult to prosecute in the same manner as individuals).

> from the recognition of their status as legal persons […] In such a scenario, there can exist circumstances where the Tribunal may be unable, due to the complexity of corporate structures, internal operating processes, and the aggregate effect of the actions of many individuals, to identify and apprehend the most responsible natural persons within a corporation. Similarly, the prosecution of natural persons, rather than the legal persons that they serve, would fail to underline and punish corporate cultures that condone and in some cases encourage illegal behaviour. Punishing only natural persons in such circumstances would be a poor response where the need for accountability lies beyond anyone person."[52]

The scholarly reception of the STL approach reflects the clash between the liberal and the romantic view. Some have welcomed it as a step in the right direction, namely as "a foundation for further development of liability of corporate entities in international criminal law".[53] Others have decried it as a novel incarnation for international criminal law's "dream factory".[54]

The recent adoption of the Malabo protocol[55] has lent further support to this approach. The protocol extends the jurisdiction of the proposed African Court of Justice and Human and Peoples Rights to "legal persons, with the exception of States."[56] It is the first statutory

52. *Id.* at ¶ 82-3.

53. Karlijn Van der Voort, *Contempt case Against Lebanese Journalists at the STL*, SPECIAL TRIBUNAL FOR LEBANON BLOG (Apr. 30, 2014, 11:37 AM), https://perma.cc/Z7M4-3H9S.

54. *The Dream Factory Strikes Again: the Special Tribunal for Lebanon recognizes International Criminal Corporate Liability*, SPREADING THE JAM (Apr. 28, 2014) https://dovjacobs.com/2014/04/28/the-dream-factory-strikes-again-the-special-tribunal-for-lebanon-recognizes-international-criminal-corporate-liability/ [https://perma.cc/L9F4-M8Z2].

55. African Court of Justice and Human Rights, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (Jun. 11, 2000).

56. Amnesty Int'l, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, AFR 01/3063/2016, at 59 (2016), https://www.amnesty.org/en/documents/afr01/3063/2016/en/ [https://perma.cc/49Y2-4TBU] [hereinafter *Amnesty Int'l*]. Article 46C reads:

> 1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
>
> 2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.

instrument of a regional court that contains a specific article on corporate criminal responsibility.[57] It seeks to counter the *de facto* impunity that many foreign corporations enjoyed in relation to human rights violations on the continent, through the criminal responsibility of legal persons. It is drafted in broader terms than the French ICC proposal which derived responsibility from the control of company agents. As Joanna Kyriakakis has noted, it follows the 'organizational model':

> "This means that, rather than focussing upon the conduct and state of mind of specific individuals within the corporation and deriving the corporation's fault from there, corporate culpability is instead deemed to be situated within the corporation itself."[58]

It relates criminal responsibility directly to the company policies and practices of the organization (e.g., policies of compliance, information sharing systems), rather than acts and and state of mind of individual corporate agents. Corporate criminal responsibility may thus exist, irrespective of whether a natural person is held liable or convicted for the conduct. The Protocol allows use of constructive knowledge as proof, and provides that the collective (aggregated) knowledge of company agents may be used to establish responsibility. The Protocol does not require that the corporation must have caused or encouraged

---

3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

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

57. Fransizka Oehm, *Thinking Globally, Acting Globally*, VÖLKERRECHTSBLOG (May 31, 2016), http:// voelkerrechtsblog.org/ thinking-globally-acting-globally-ii/ [https://perma.cc/Z25Y-RHN7].

58. Joanna Kyriakakis, *Corporate Criminal Liability at the African Criminal Court Briefing Paper – ACRI Meeting, Arusha 2016,* AFRICAN COURT RESEARCH INITIATIVE, http://www.africancourtresearch.com/wp-content/uploads/2016/07/Kyriakakis_Briefing-Paper_-ACRI-2016-Meeting.pdf [https://perma.cc/QY99-DY75] (last visited Sept. 27, 2017).

the conduct. It was adopted quickly. It fails to define the concept of 'legal person', as well as applicable penalties. Not all legal issues may have been fully thought through.[59] It might even raise concerns relating to over-criminalization of legal persons.

International criminal law is thus at a tipping point. The classical view that international criminal law is a system without a space for corporate criminal liability is under challenge. The future of corporate liability has two potential pathways: Strengthening individualized prosecution of corporate agents, or prosecuting corporate involvement in crime through a collective organizational perspective. Both options raise significant challenges. International criminal law has a stronger stigma, and partly different rationales than human rights law. Criminalization requires caution.[60] Concepts from domestic law cannot be automatically transposed.

## IV. Extending Individual Criminal Responsibility of Corporate Agents

One path to develop accountability is to develop the legal regime concerning individual criminal responsibility of corporate agents. This rationale is in line with the growing privatization of international criminal. It is nowadays widely agreed that business corporations are bound by the prohibitions relating to core crimes under international law.[61] Corporate actors have made direct and substantial contribution to international crimes. Certain forms of economic crime have become part of atrocity crime.

The legal regime has developed significantly since Nuremberg. Many of the crime structures and principles of individual criminal

59. See Larissa van den Herik and Elies van Sliedregt, International Criminal Law and the Malabo Protocol: About Scholarly Reception, Rebellion and Role Models, in Steven Dewulf, LIBER AMICORUM CHRIS VAN DEN WYNGAERT (Maklu 2018) 511.

60. *See* James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity*, 16 NEW CRIM. L. REV. 261, 276 (2013) (explaining that corporate criminal liability may be too blunt in some circumstances).

61. Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT'L CRIM. JUST. 895 (2010), https://academic.oup.com/jicj/article/8/3/895/876111/Core-Crimes-and-Transnational-Business [https://perma.cc/BMX3-BXYA]; G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I (July 18, 1976), http://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf [https://perma.cc/H9RC-NCGL] (expressly acknowledging the capacity of organizations and institutions to commit the crime of apartheid).

responsibility have been extended to capture conduct by private actors. The ICC has made it clear since the outset that corporate agents may face criminal responsibility for the use suppliers who commit crimes under international law.[62] It has received various communications relating to business involvement in crime.[63] In 2016, the Office of the Prosecutor has devoted some attention to the problems of economic involvement in conflict in its Policy Paper on Case Selection and Prioritisation. The Paper states that the "impact of the crimes may be assessed in light of the social, *economic* and environmental damage inflicted on the affected communities."[64] It mentions specific categories of crimes that are typically under prosecuted, namely

> "crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land." [65]

This statement did not mention business accountability specifically, but had a strong expressivist effect.[66] It triggered a wave of communications relating to land grabbing in Cambodia and corporate

62. Press Release, ICC Prosecutor, Communications Received by the Office of the Prosecutor of the ICC (May 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-0D2C271A9A63/277502/16_july___english.pdf [https://perma.cc/75Q9-2NFV]( [T]he Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted. The Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries).

63. Lachlan Markay, *ICC Won't Prosecute Chevron*, THE WASHINGTON FREE BEACON (Apr. 2, 2015, 3:15 PM), http://freebeacon.com/issues/icc-wont-prosecute-chevron/ [https://perma.cc/3ESS-BW5N].

64. Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 41 (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/6FSR-WZ9Z] [hereinafter *Policy Paper*] (emphasis added).

65. *Id.*

66. *See* Nadia Bernaz, *An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights*, 15 J. IN'TL CRIM. JUST. 527 (July 1, 2017), https://academic.oup.com/jicj/article/doi/10.1093/jicj/mqx031/4080836/An-Analysis-of-the-ICC-Office-of-the-Prosecutors [https://perma.cc/KP7T-9CU5](explaining that the policy paper could lead to a "surge of communications referring to business related crimes").

involvement in crimes against asylum seekers in detention centers in Nauru and Manus Island.[67] In May 2017, a coalition of human rights groups requested the Prosecutor to investigate corporate complicity of Chiquita Brands executives in crimes against humanity committed by Colombian paramilitaries.[68] But, extending individual criminal responsibility faces several challenges.

### *A. The enforcement dilemma*

The first challenge is the enforcement dilemma. Business related prosecutions happen at a comparatively low rate.[69] Domestic jurisdictions can prosecute corporate agents, irrespective of whether the company is in incorporated in their jurisdiction. States, however, are often reluctant to engage in investigations and prosecutions against foreign agents, due to fears of negative economic consequences or dependence on foreign investment, or difficulties to obtain evidence. [70] Crimes are often part of a larger supply chain that is difficult to establish or linked to violations that do not cross the threshold of international crimes. The underlying cases are complex in legal terms, due to the need to establish the nexus between the agent and the crime and to prove the necessary mental element. They may require significant resources and exceed the capacity of local courts. Universal jurisdiction cases are rare. [71] Cases are usually initiated by

67. *See* Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute, *The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention of Refugees and Asylum Seekers*, at 96, 103 (February 14, 2017), https://www.academia.edu/31462935/The_Situation_in_Nauru_and_Manus_Island_Liability_for_crimes_against_humanity_in_the_detention_of_refugees_and_asylum_seekers [https://perma.cc/2DF3-GC44] (explaining the corporate involvement in crimes in Nauru and Manus Island).

68. See FIDH, 'Human Rights Coalition Calls on ICC to Investigate Role of Chiquita Executives in Contributing to Crimes against Humanity', 18 May 2017, at https://www.fidh.org/en/region/americas/colombia/human-rights-coalition-calls-on-icc-to-investigate-role-of-chiquita.

69. *See* Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes against Humanity*, 56 A.F.L. REV. 167, 169 (2005) (explaining the "hesitance to prosecute people for just 'doing business'").

70. For a recent survey, see Dieneke de Vos, *Corporate Responsibility for International Crimes*, Just Security, 30 November 2017, at https://www.justsecurity.org/47452/corporate-criminal-accountability-international-crimes/.

71. On the Dutch situation, see WODC, DUTIES OF CARE OF DUTCH BUSINESS ENTERPRISES WITH RESPECT TO INTERNATIONAL CORPORATE

the national state of the offender, or the territorial state. Moreover, powerful states often have less political incentive to initiate cases for atrocity crimes than classical economic offences, such as corruption.[72] Prosecuting anti-corruption practices in foreign states reduces local competitive advantages. It thus benefits the interests of foreign investment. Atrocity crime prosecution may offer less material benefits.

International criminal courts and tribunals are highly selective in their selection of cases.[73] Corporate involvement in crime has enjoyed limited attention.[74] In mass atrocity situations, Prosecutors try to capture a blueprint of the criminality in a given conflict situation, focusing on the most responsible leaders or the most serious crimes.[75] Bystanders or economic drivers of conflict are often at the margins.[76] Extending individual criminal responsibility of corporate agents would require a slightly different prosecutorial strategy, namely a more pronounced commitment to certain thematic prosecutions focused on business criminality.

### *B. The scope of liability*

A second challenge is the legal approach towards network criminality. In past decades, international criminal law has been significantly developed to capture new types of criminality. It has developed techniques to hold persons accountable who act remotely

---

SOCIAL RESPONSIBILITY, December 2015, 10 ('From the very limited number of criminal cases in the ICSR context that the Public Prosecutor's Office has decided to prosecute, it seems to follow that the Public Prosecutor's Office does not opt for the prosecution of business-related human rights abuses in prioritizing the types of cases for which to deploy the scarce means for criminal investigation and prosecution'). The report is at https://www.wodc.nl/binaries/2531-summary_tcm28-124392.pdf.

72. Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1044 (2009).

73. Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 WTR LAW & CONTEMP. PROBS. 3, 3 (2001).

74. Bernaz, *supra* note 59.

75. Paper on Some Policy Issues Before the Office of the Prosecutor, at 3-7, ICC-OTP (2003), https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf [https://perma.cc/62W7-JHFF].

76. *See* Otto Spijkers, *Bystander Obligations at the Domestic and International Level Compared*, 6 GOETTINGEN J. INT'L LAW 47, 51 (2014), http://www.gojil.eu/issues/61/61_article_spijkers.pdf [https://perma.cc/CEJ2-F9JH] (explaining why many States do not hold bystanders legally responsible for standing idly by during a criminal offense).

from the scene of crime.[77] There is a fundamental tension between individual culpability and responsibility for involvement in collective crime.

1. Perpetration

It is uncontroversial that corporate agents may face direct responsibility as perpetrators.[78] For instance, private security contractors or company officials may be held accountable if they commit war crimes, crimes against humanity or genocide.[79] Classical examples are sexual offences, torture, slave labor or modern types of slavery that meet the definition of international crimes. For instance after World War II, Flick and IG Farben officials were convicted for using prisoners of war to meet their production quota.

One of the problems of determining responsibility as a perpetrator is the collective and decentralized nature of decision-making processes in corporate structures. International criminal law has developed special doctrine to deal with system criminality. There are different theories. In the *Lubanga* case, the ICC held that

> "principals to a crime are not limited to those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."[80]

This control theory has expanded to include "control over an organization". [81] In these cases, a perpetrator commits the crime through another person by means of control over an organization. The

77. *See* Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 J. INT'L CRIM. JUST. 851, 864-65 (2010), https://academic.oup.com/jicj/article/8/3/851/876077/Business-Leaders-and-the-Modes-of-Individual [https://perma.cc/Y62L-UE8V] ("A person who contributes 'in any other way' to the . . . commission of a crime 'by a group of persons acting with a common purpose' will, according to Article 25(3)(d) ICC Statute, also incur individual criminal responsibility").

78. C. Lehnhardt, *Individual Liability of Private Military Personnel under International Criminal Law*, 19 EUR. J. INT'L L. 1015,1022 (2008).

79. *Id.* at 1030.

80. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 920 (Jan. 29,2007), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

81. *Prosecutor v. Germain Katanga*, *Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07-3436-tENG, 07 March 2014, paras. 1404-1410. See Jens David Ohlin, Elies van Sliedregt, and Thomas Weigend, *Assessing the Control-Theory ,* 26 LJIL 725 (2013); Neha Jain, *The Control Theory of Perpetration in International Criminal Law,* 12 Chicago Journal of International Law 158 (2011).

organizational theory has traditionally applied in the context of crimes committed through hierarchical organizations of power. German Scholar Claus Roxin developed the idea that a person who leads a hierarchically structured military or political organization may be held accountable as principal for crimes committed by subordinates in that organization if he or she dominated the will of that organization.[82] The decisive criterion is whether the choice of members of the organization is controlled through leadership. Roxin used three criteria: the existence of hierarchical organizational structures that facilitates rule determined processes, the exchangeable nature of the members of the organizations, and a focus of organizational activity that is outside the law. The classical example is state-organized criminality. Roxin sought to capture crimes committed by Nazi leaders through organizations such as the SS.[83] But the relevance of this theory goes beyond state-based crime. The ICC extended it to control structures inside non-state actors, such as organized armed groups. It held that

> "this type of structure … is not …inconsistent with the very varied manifestations of modern-day group criminality wherever it arises." [84]

The theory has also relevance for business criminality. For instance, German courts have suggested extending the concept of organizational control to business enterprises.[85] They have argued that leaders of business organization can be held accountable as perpetrators for crimes committed by subordinates in corporate structures, based on the organizational rules and structures found within corporations.[86] The idea of organizational control might for instance, apply in relations between parent corporations and its subsidiaries. But in the business context, criteria such as hierarchical structure, the replaceable nature of company members, or the lawless nature of the operation are more difficult to establish than in the context of military or para-military structures.[87]

82. *See* Thomas Weigend, *Perpetration through an Organization: The Unexpected Career of German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 107 (2011).

83. *Id.*

84. *Prosecutor v. Germain Katanga*, *supra* note 81, para. 1410. See also Prosecutor v. Germain Katanga, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 1179 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05296.PDF.

85. *Judgment of 26 July 1994 against Former Minister of National Defense Kebler and Others*, 9 J. INT'L CRIM. JUST. 211, 221 (2011).

86. *Id.*

87. Weigend, *supra* note 82 at 98.

### 2 The controversy over aiding and abetting

Most types of business involvement in international crime happen indirectly. It is difficult to determine under what circumstances professional commercial activities may constitute assistance or otherwise participation in a crime.[88] The treatment depends on the nature of the contribution. Inconsequential or trivial contributions might not cross the line from a human rights violation to a criminal act. Criminalization requires a departure from regular commercial behavior. The treatment might vary according to the nature of the traded object (e.g., harmless goods vs dangerous, risky or prohibited goods) or the nexus of the contribution to the relevant crimes (e.g., loan to an atrocity regime).

Due to novel human rights and fact-finding mechanisms, international crimes are relatively well documented internationally. There are increasing due diligence duties. For instance, Art. 6 (3) of the Arms Trade Treaty prohibits transfers of arms in cases where a state has knowledge that the items would be used to commit genocide, crimes against humanity or certain serious violations of international humanitarian law.[89] It requires risk determinations.[90] This changing normative environment has repercussions for standards of corporate behavior. Certain commercial activities, such as trade with certain militia forces or regimes with a track record in serious human rights violations, are more suspect than others. A relevant criterion for accessorial liability is whether the contribution of the corporate agent increases the risk in relation to the commission of crimes.[91]

The International Commission of Jurists has developed a useful taxonomy that might provide some guidance. [92] It includes, first of all,

88. *See* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. Red Cross 439 (2001).

89. G.A. Res. 69/49, The Arms Trade Treaty art. 6 (Dec. 24, 2014) ("A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party").

90. ANDREW CLAPHAM ET AL., THE ARMS TRADE TREATY: A COMMENTARY 208-209 (Oxford 2016).

91. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 165 (Oxford 2013).

92. *See* Magda Karagiannakis, *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*, 2 CORP. COMPLICITY & LEGAL ACCOUNTABILITY 1, 37 (2008),

the provision of goods or services used in the commission of crimes.[93] Classical examples are delivery of chemicals or arms. An early example is the Trial of *Bruno Tesch* and two others before the British Military Court in 1946.[94] The two co-accused were convicted for supplying the poison gas, Zyklon B, to the SS for use in concentration camps.[95] The trial showed they had knowledge that the gas was used to exterminate detainees. human beings provision of information which leads to the commission of crimes. Two more recent examples are the cases against two Dutch businessmen in the Netherlands.[96] Cornelius Van Anraat delivered of tons of thiodiglycol (TDG) to the Saddam Hussein regime which was used to create mustard gas.[97] Anraat was convicted as an accessory to war crimes committed through the use of chemical weapons, since it was evident that the quantity of TDG was not used for agricultural purposes, but for military activity.[98] In 2017, Guus Kouwenhuven, the president of the Oriental Timber Company and director of the Royal Timber Company during the civil war in Liberia, was convicted as an aider or abettor for supplying weapons, and material, personnel and other resources to former Liberian President Charles Taylor and his armed forces between 2000 and 2002.[99] The Court held that Mr.

https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf [perma.cc/JC8B-ZQEL] (referring to the ICJ's analysis of situations in which companies are alleged to have participated in human rights abuses).

93. *Id.*

94. *Id.* at 38. British Military Court, The Zyklon B Case, Trial of Bruno Tesch and Two Others, in LAW REPORTS OF TRIALS OF WAR CRIMINALS, THE UNITED NATIONS WAR CRIMES COMMISSION, VOL. 1 (London: H.M.S.O., 1947) 93 103

95. *Id.*

96. *Id.*

97. *Id.*

98. Van Anraat was convicted as an accessory to the mustard gas attacks in the years 1987 and 1988. He was acquitted of complicity in genocide since it could not be established that he had knowledge of Saddam Hussein's intent to destroy (in part) the Kurdish population. See *Prosecutor v. van Anraat*, Court of Appeal of The Hague, Judgment, 9 May 2007, at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat_Appeal_Judgment_09-05-2007_EN.pdf. See generally Harmen van der Wilt, *Genocide, Complicity in Genocide and International versus Domestic Jurisdiction: Reflections on the van Anraat Case* , 4 J. Int'l Crim. Just. 239 (2006)..

99. See *Prosecutor v. Kouwenhoven*, Court of Appeal, Judgment, 21 April 2017, at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:1760. See Dieneke De Vos, *Corporate Accountability: Dutch Court Convicts Former "Timber Baron" of War Crimes in Liberia*, F. FOR INT'L CRIM. JUST. NEWSL.: MAY 2017 (Forum

Kouwenhoven "must have been aware" that "in the ordinary course of events" the weapons and ammunition he supplied and helped import *would* be used.[100]

Providing information that leads to the commission of crimes may constitute aiding and abetting. Juan Tasselkraut, a Mercedes Benz Manager during the military dictatorship in Argentina, was charged for sharing private information about company officials with the military regime that led enforced disappearances.[101] A similar case was brought against the Ledesma sugar company. Company officials were charged for providing personnel that aided in the disappearances of trade unionists.[102]

Other forms of assistance include: "the procurement and use of products or resources (including labor) in the knowledge that the supply of these resources involves the commission of crimes," or "the provision of banking facilities so that the proceeds of crimes can be deposited."[103]

The key problem is that the primary purpose of business activity is mostly to make economic gain, rather than to commit crimes. The scope of liability depends on the relevant *mens rea*. Domestic and international approaches differ in this respect. For instance, Dutch Courts held in *van Anraat* that *dolus eventualis* of the defendant in relation to the commission of crimes might be sufficient in relation to war crimes, but cannot support a conviction for aiding and abetting of genocide as a special intent crime.[104]

---

for Int'l Criminal Justice, The Hague, Neth.), May 2017, at 5, http://www.iap-association.org/getattachment/ c2983e59-0d5e-465c-911d-723bcb05f1ba/FICJ-Newsletter-May-2017.aspx [http://perma.cc/ALN3-G78X].

100. *Id.* at 7.

101. Victoria Basualdo et al., *The Cases of Ford and Mercedes Benz*, *in* 1 THE ECON. ACCOMPLICES TO THE ARGENTINE DICTATORSHIP 159-73, 168 (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., Laura Pérez Carrara trans., 2016).

102. Press Release, European Ctr. for Constitutional and Human Rights, Argentine Managers Summoned for Questioning on Complicity in Dictatorship-Era Crimes (May 15, 2012). https://www.ecchr.eu/en/our_work/business-and-human-rights/corporations-and-dictatorships.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Ledesma%2C%20press%20release%202012-05-15.pdf [https://perma.cc/8ZN8-YMZ3].

103. Ken Roberts, *Corporate Liability and Complicity in International Crimes*, *in* 1 SUSTAINABLE DEV., INT'L JUST., & TREATY IMPLEMENTATION 190-211, 197 (Sébastien Jodoin & Marie-Claire Cordonier Segger, eds.).

104. Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. OF INT'L L. 43, 61 (2013).

In international criminal law, there has been significant confusion as to whether aiding and abetting requires knowledge or specific direction.[105] In the *Perišić* Appeals Judgment, the majority found that "specific direction" is a necessary element of aiding and abetting.[106] It held that:

> "[I]n most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary."[107]

The Taylor Appeals judgment and the *Sainovic* et al. judgment rejected this reasoning.[108] These decisions argued that specific direction is not an element of aiding and abetting under customary international law based on an independent review of post-WWII jurisprudence.[109] The trend points thus towards a knowledge-based approach.

This controversy has direct relevance for business accountability. A specific direction standard would set a very high threshold for corporate criminality. It would imply that the corporate agents needs to share the perpetrator's intent to commit the underlying crime. This would make it very difficult to bring cases against corporate actors that are mainly profiteers of war. The knowledge-based approach is more realistic. It implies that persons can be responsible as accomplices if they have knowledge that the main perpetrator uses the contribution to commit crimes. The relevant knowledge relating to the impact of contribution is enough even if the corporate agent merely intends to perform business activities. Tribunals have

105. Charles Chernor Jalloh, *International Decisions: Prosecutor v. Taylor*, 108 AM. J. OF INT'L L. 58, 64 (2014).

106. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgment of Judge Meron, ¶ 73 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf [https://perma.cc/MH8Z-V9DK].

107. *Id.* at ¶ 44.

108. Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Judgment of Judge Daqun ¶ 1649-50 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf [perma.cc/UT7Q-NBE5].

109. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment of Judge King ¶ 474 (Special Ct. for the Sierra Leone Sep. 26, 2013) http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf [perma.cc/BSN4-UPHT].

established that the aider and abettor must know the main perpetrator's specific intent in the context of specific intent crimes, such as genocide.[110]

The ICC Statute is in many ways a *sui generis* instrument. It has a specific threshold. It requires that the contribution must be made for purpose of facilitating the crime.[111] Neutral acts of assistance, i.e. acts that are *per se* harmless, become criminal only when committed with the relevant *mens rea*.[112]. The implications of this qualifier are contested. Some argue that this requires shared intent between accessory and principal.[113] Other claim that a certain degree of knowledge is sufficient to establish the purpose requirement, since it relates to the consequences of a person's conduct.[114] The purpose requirement might be satisfied by oblique intent, i.e. certainty that the crime will occur in the ordinary course of events. This second interpretation is more in line with the Statute's *mens rea* approach in relation to consequences and existing case law, such as the *van Anraat* case.[115]

110. Prosecutor v. Kristic, Case No. IT-98-33-T, Judgment, at ¶ 638 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001) http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

111. Rome Statute of the International Criminal Court art. 69(3)(d), July 17, 1998, 2187 U.N.T.S. 105 [hereinafter Rome Statute] ("a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person…in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime . . . .").

112. Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgment ¶ 251 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 2, 1991) http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

113. MASS. MODEL JURY INSTRUCTIONS § 4.100, at 2-3 (2009).

114. Elies van Sliedregt and Alexandra Popova, Interpreting "for the purpose of facilitating" in Article 25(3)(c), at https://cicj.org/2014/12/interpreting-for-the-purpose-of-facilitating-in-article-253c/. See also Shriram Bhashyam, *Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 30:1 CARDOZO L. REV. 245, 271 (2008) (arguing that aiding and abetting liability under the ATCA espouses a knowledge-based standard under both international law and domestic law).

115. Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*, 4 J. OF INT'L CRIM. JUST. 239, 239 (2006) (discussing the *mens rea* requirement for complicity in genocide).

3. Common purpose liability

Some systems contain even further-reaching concepts to hold persons accountable for contributions to collective crime. For instance, Art. 25 (3) (d) of the ICC Statute provides a specific liability regime for contribution to a group crime.[116] It differs from the concept of Joint Criminal Enterprise developed by the ad hoc tribunals.[117] It offers a potentially wide basis to hold business leaders accountable.[118] It penalizes "any contribution' made with (i) 'the aim of furthering the criminal activity of criminal purpose of the group'; or with (ii) 'the knowledge of the intention of the group to commit a crime."[119] This clause is framed so wide that it has been limited to "significant" contributions.[120] It requires a minimum threshold in order not criminalize standard business behavior or contributions to non-criminal activities of collectives.[121]

4. Superior responsibility

A final concept to establish individual criminal responsibility is the concept of superior responsibility. [122] This theory combines

116. Rome Statute, *supra* text accompanying note 111.

117. Allison M. Danner and Jenny S. Martinez, Guilty *Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law* (2005) 9 California Law Review 150 (2005); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109 (2007). See also Sofia Lord, Joint Criminal Enterprise and the International Criminal Court: A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime Under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability?, at 57 (May 26, 2013) (unpublished Faculty of Law thesis, Stockholm University) (on file with Stockholm University).

118. Vest, *supra* note 77 at 852-853 (providing possible modes of individual criminal responsibility for business leaders with regard to typical business activities).

119. Rome Statute, *supra* text accompanying note 111.

120. *Prosecutor v Mbarushimana*, ICC-01/04-01/10. Decision on the Confirmation of Charges, 16 December 2011, para. 285. See also Zurab Sanikidze, *The Level of 'Contribution' Required Under Article 25(3)(D) of the Rome Statute of the International Criminal Court*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 221, 226 (2012) (examining the contribution threshold in Article 25(3)(d)).

121. THOMAS WEIGEND, *How to Interpret Complicity in the ICC Statute*, INT'L CRIM. JUST. BLOG, at 5 (Dec. 15, 2014) http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/.

122. See Jenny Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond,* 5 J. Int'l Crim.

omission liability and responsibility for crimes of others based on failure to exercise proper control in superior-subordinate relationships. Superior responsibility is grounded in duties of order and obedience in collective entities.

The concept has its origin in duties of authority in military command structures.[123] It has been extended to other contexts, such as police structures, private military companies or business enterprises.[124] An early example in the field of business crime is the *Flick* case. Flick was convicted as superior because he knew and approved forced labor, and failed to prevent the acts of his subordinates.[125]

Controversy surrounds what types of civilian superior-subordinate relationships the concept should apply to. In civilian settings, in particular contractual employer-employee relationships, concepts of effective control and disciplinary powers of superiors differ from military settings.[126] Civilian superiors do not necessarily enjoy the same degree of disciplinary power over their subordinates as military superiors. This difference makes analogies between the two contexts unreliable. Mere positions of influence within corporate structures would not suffice to meet the effective control test. An ICTY Chamber has argued that it suffices that

> "the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant."[127]

The ICTR applied a relaxed threshold in the *Musema* case.[128] The case concerned the responsibility of Alfred Musama, the director of a tea company, for participation of his employees in the Rwandan

Just. 638 (2007); Ilias Bantekas, *The Contemporary Law of Superior Responsibility* 93 AJIL 573 (1999).

123. René Värk, *Superior Responsibility*, 15 ENDC PROCEEDINGS 143, 144 (2012) (discussing the historical background of superior responsibility).

124. *Id.*

125. *See* The Flick Trial, Case No. 48, 9 L. Rep. Trials War Crim. 1 [US Mil. Trib., Nuremberg] (Apr. 20—Dec. 22, 1949).

126. *See* Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 281 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf.

127. See *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 15 June 1999, para. 78.

128. *See generally* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence (Jan. 27, 2000), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf.

genocide. The employees used inter alia factory vehicles and property in the commission of crimes.[129] The tribunal derived Musema's effective control from his power to appoint and remove employees.[130] It argued that he violated his supervisory duties and failed to take reasonable measures to prevent the crimes.[131] This approach has been criticized for blurring the distinction between psychological pressure, influence and effective control.[132] The reasoning implied that company managers may face responsibility for mere managerial failures.[133] The crucial point is the knowledge of the crimes and the failure to report them. As Alexander Zahar has argued:

> "[The reasoning] does not distinguish Musema from any ordinary factor director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the sole reason that they were only linked to them through commonplace ties of labour."[134]

Companies active in conflict must put in place proper management structures to ensure that superior exercise due diligence duties and take necessary and reasonable measures to prevent crimes by subordinates. Superior responsibility may, for instance, be invoked, if a business leader fails to prevent his employees from selling weapons to states or armed groups that are known for their involvement in international crimes.[135] The doctrine should be applied with a certain degree of caution in business contexts, in order to avoid the risk of over-criminalization.

Art. 28 (b) of the ICC Statute requires that crimes concern "activities that were within the effective responsibility and control of the superior."[136] This implies that crimes of employees that are not connected to their business functions. i.e. crimes committed outside working hours or company structures, might not be covered.[137]

---

129. *Id.* at ¶ 901.

130. *Id.* at ¶ 880.

131. *Id.* at ¶ 905.

132. Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT'L L. 593, 601-02 (2001).

133. *Id.* at 603.

134. *Id.* at 602.

135. Vest, *supra* note 77 at 871.

136. Rome Statute, *supra* note 111 at art. 28.

137. OTTO TRIFFTERER, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1102 (3d ed. 2016).

### *C. Critiques*

Overall, existing law provides multiple legal options to hold business leaders accountable. There is no shortage of theories to link corporate agents to international crimes. There are, however, some structural concerns. The liberal school faces several fundamental constraints.

One critique is that the path of individual criminal responsibility focuses the blameworthiness of corporate crime too much on company individuals.[138] It struggles to take into account the collective dynamics of corporate crime.[139] Corporate wrongdoing exceeds the wrongdoing of its individuals. Extending individual criminal responsibility to all different types of human rights violations by corporate actors risks placing excessive culpability on individuals for collective harm. Exclusive punishment of individual business leaders might produce judgments that exceed the share and guilt of individuals.[140] Violations of individual business agents are often linked to corporate policies.[141] Some of them might not have occurred, had the individuals not been placed into a specific context by the company. The possibility to correct this through contextual sentencing considerations are limited. Due process concerns therefore place certain limits on the liberal approach.

Second, criminal responsibility of individuals is often unsatisfactory from a victim's perspective.[142] Individual criminal convictions can be used for purposes of civil claims, but they often address only a fraction of the facts and causes of liability.[143] The option to obtain reparations through criminal proceedings is still

138. Al Khayat, *supra* note 29 at ¶ 82.

139. *See generally* Brent Fisse and John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Acccountability*, 11 Syd. LR 468 (1988).

140. Al Khayat, *supra* note 29 at ¶ 83; *See also* Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT'L L. 43, 73 (2013)("Others have added that collectives have their own social dynamics, enticing individuals to conquer moral inhibitions. From that perspective, it would be unfair to single out the individual, as the crimes of the collective are incommensurate to his contribution and his guilt").

141. Weigend, *supra* note 19 at 932.

142. *See* JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 79 (2003)("Derivative liability, however, can be unsatisfactory for victims and companies alike. For victims and their families seeking explanations, the role of the company may not be revealed at trial, for it is sufficient for the prosecutor to show that an individual has committed an offence and that the individual is a person for whose acts the company bears responsibility").

143. *Id.*

limited at the international level.[144] This creates critical frictions. Individuals may bear symbolic responsibility, while corporations are allowed to retain the profits gained from corporate activities.[145]

## V. MERITS AND RISKS OF CORPORATE CRIMINAL RESPONSIBILITY

The option of corporate criminal responsibility remains underdeveloped in international criminal law. The STL decision marks an important step to address a structural bias inside international criminal law against the responsibility of legal persons. It seeks to counter some of the weaknesses of the liberal approach. It acknowledges that functional individual accountability alone is not likely to satisfy the problem of corporate involvement in international crime.

### *A. The case for corporate criminal responsibility*

The idea of holding companies accountable as collective entities serves as a corrective from a retributive perspective. It is also attractive from a restorative justice perspective. Victim participation in criminal proceedings has increased in past decades.[146] This has created high expectations among victim communities.[147] Existing international and hybrid courts struggle to satisfy demands for reparation.[148] Many defendants before international criminal tribunals are indigent.[149] Reparations awarded by the International Criminal

144. Fisse and Braithwaite, *supra* note 139 at 475.

145. *See* Michael McGregor, *Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources* 42 CASE W. RES. J. OF INT'L L. 469, 490 (2009)("[B]y focusing on the liability of directors and officers, the international community is allowing corporations to walk away with billions of dollars in profits").

146. *See* Carolyn Hoyle & Leila Ullrich, *New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court*, 12 J. OF INT'L CRIM. JUST. 681, 681-83 (2014)(discussing general shift toward greater victim recognition and participation and the nature of expanded victim participation, protections, and reparations).

147. *See also* Charles P. Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 807 (2008)("[S]ome commentators are concerned that victims may have unreasonable expectations about the compensation they may receive and will subsequently feel cheated when they are awarded nominal or symbolic reparations.").

148. Trumbull, *supra* note 147 at 804, 806-807.

149. On the ICC approach, see Carsten Stahn, Reparative *Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and*

Court, the Extraordinary Chambers in Cambodia or the Extraordinary Chambers in the Courts of Senegal have remained largely symbolic.[150] Corporate responsibility may offer a new pathway to award individual or collective reparation that is more commensurate to the harm caused. As Harmen van der Wilt has shown, in many cases "where business leaders as natural persons have been convicted on charges of complicity in international crimes, the corporation itself would have easily qualified for criminal responsibility as well".[151]

### *B. Caveats*

There are important caveats. The merits of the romantic approach should not be overstated. Some of the arguments in favor of broader recognition of corporate criminal responsibility deserve careful scrutiny.

The first is the deterrence argument. It is often argued that corporate criminal responsibility sheds greater light on corporate misconduct and helps deter offences.[152] This argument is pertinent in relation to natural persons. Business agents are even more likely than other perpetrators of international crimes to consider risks of criminal prosecution in their cost-benefit analysis.[153] But legal persons do not

---

*Participatory Justice or 'Juridified Victimhood' by Other Means?* 13 J. Int'l Crim. Just. 801 (2015)..

150. *See DRC: For the First Time, ICC Awards Symbolic Individual Reparations*, FIDH: WORLDWIDE MOVEMENT FOR HUMAN RIGHTS (Mar. 24, 2017), https://www.fidh.org/en/issues/international-justice/v international-criminal-court-icc/for-the-first-time-icc-awards-symbolic-individual-reparations [https://perma.cc/B9VX-2Q8A](describing the ICC's first symbolic reparations award to victims in Germain Katanga case); *See also* Andrew B. Mamo, *History and the Boundaries of Legality: History Evidence at the ECCC*, 29 COLUM. J. ASIAN L. 113, 170 (2015)(implying that actual reparations have not been awarded to victims of the Khmer Rouge, but arguing that such awards would "redeem [the victims'] struggles in a ways that all the narration and fact-gathering never could.").

151. Van der Wilt, *supra* note 140, at 72.

152. *See generally* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 271 (2008)("[T]he threat of going out of business is commonly perceived as providing firms with powerful incentives to contain misconduct"); *see also* Van der Wilt, *supra* note 128, at 273 ("Commentators typically assume that harsh corporate penalties, including the threat of going out of business, provide firms with powerful incentive to contain wrongdoing").

153. *See* Harmen van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 7 J. OF INT'L CRIM. JUST. 557, 567 (2009)("While the average perpetrator of international crimes, whether imbued with ideological fervor or forced by the circumstances to participate in crimes, will perhaps be uninfluenced by the possibility of trial and punishment, the

necessarily follow the same behavioral patterns. Deterrence arguments relating to individuals cannot be automatically transposed to legal persons. Corporations are highly sensitive to reputational benefits. Human rights strategies, such as naming and shaming or transparency of violations may have more immediate effects than criminal justice. Criminal justice is typically slow and an *ultima ratio* instrument. Its added value to deterrence may be more limited than assumed. The expressivist effect may be more important.

Second, in many situations, corporations are not the masterminds of international crimes, but rather benefit from a given situation. Corporate criminal responsibility is thus likely to remain exceptional in international criminal justice. The STL decision does not go as far as some business and human rights advocates might have hoped.[154] That decision concerned responsibility for contempt of court, rather than for core crimes under the jurisdiction of the STL.[155] It was visibly driven by the hybrid nature of the tribunal. The criminal accountability of legal persons under Article 210 (2) of the Lebanese Criminal Code influenced the choice in favor of corporate criminal responsibility.[156] The Malabo Protocol approaches corporate misbehavior as a regional problem.[157] It is questionable whether a regional approach does justice to the global nature of corporate involvement in international crime. The extended scope of corporate criminal responsibility contrasts with the sweeping immunity concessions to senior state officials based on their functions during their term of office.[158] This may hamper the prosecution of cases in which governments are involved in corporate crime.

Third, detaching corporate criminal responsibility too much from individual criminal responsibility has downsides. As Van der Wilt rightly points out, "[p]utting the blame exclusively on the corporation entails the risk that at the end of the day no one is guilty but the abstract entity."[159] It is thus important to find the synergies and

calculating businessman will probably incorporate the prospect of criminal prosecution into his cost-benefit analysis").

154. Kaeb, *supra* note 1, at 367-368.

155. *Prosecutor v. Al Jadeed*, STL-14-05/T/CJ, Public Redacted Version of Judgment, ¶ 5 (Sept. 18, 2015).

156. *Id.* at ¶ 69-71.

157. Amnesty Int'l, *supra* note 56 at 5.

158. *See* Amnesty Int'l, *supra* note 56, at 58. ("Article 46A bis Immunities: No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office").

159. Van der Wilt, *supra* note 140 at 74.

connections between individual and collective responsibility.[160] The turn to a fully autonomous organizational model facilitates proof. It enables judges to infer corporate *mens rea* from the collective knowledge of the members of the company or corporate policies. It recognizes that the blameworthiness of the company may differ from that of individual agents. It might fill accountability gaps in cases where no individual cannot or should not he held responsible for the harm caused. But it stands in contrast to the individual-centered investigative and trial culture of international criminal courts and tribunals. The attribution model is still more common in many domestic jurisdictions that recognize corporate criminal responsibility.[161] For efficiency and expressivist purposes, it might be more feasible to pursue corporate criminal responsibility in conjunction with individual criminal responsibility.

Fourth, the issue of corporate sanction deserves attention. Legally, it is perfectly possible to inflict criminal sanctions on corporations, such as fines and forfeiture measures, or even company dissolution as ultima ratio. The typical counterargument is that sanctions may conflict with shareholder innocence.[162] This claim is difficult to make in relation to corporate involvement in international crimes. Shareholders who fail to check or control company policies are not truly innocent, but it is questionable whether criminal sanction is a more effective remedy for victims than civil sanction. The standard of proof required in criminal proceedings is higher than in civil cases. There is not a culture of litigation of mass claims. The scope of charges and incidents prosecuted is typically limited, and in the hands of the Prosecutor.[163] This means that victims have considerably less control. Cases may be longer, and harder to win. Reparations are determined in a separate procedure, in which individual interests are often balanced against collective interests.[164]

160. *See id.* at 77 (arguing that "complicity in international crimes of individual business leaders should . . . be a prerequisite for corporate criminal liability").

161. Anca Iulia Pop, Criminal Liability of Corporations – Comparative Jurisprudence, 25-26 (Spring 2006) (unpublished thesis, Michigan State University College of Law).

162. Albert Alschuler, *Two Ways to Think about the Punishment of Corporations* 13 (Nw. Univ. Sch. of Law Scholarly Commons, Working Paper No. 192, 2009).

163. Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. OF INT'L CRIM. JUST. 145, 147-48 (2005).

164. Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. OF L. & SOC'Y 294, 299-300 (2005).

## VI. CONCLUDING REFLECTIONS

Investigating and prosecuting business criminality is an important prerogative. Selectivity has been one of the original sins of international criminal law.[165] The failure to prosecute foreign businessmen and profiteers who financed and benefited from atrocity crime has been one of the weaknesses of international criminal justice. This challenge is gradually being addressed. It is widely recognized since Nuremberg that the corporate veil does not protect individuals from criminal responsibility. Despite the developing consensus about corporate accountability, the tension between liberals and romantics that has existed since World War II has never fully gone away.

Modern criminal law doctrine remains largely dominated by a focus on the role of individuals in collective crime.[166] It provides extensive, and sometimes maybe even overbroad concepts to hold individuals accountable in collective structures.[167] Limited efforts were made to develop viable counter-models.[168] The idea that crimes against international law can be committed by 'abstract legal entities' was only re-considered recently.[169] The famous Nuremberg *dictum* is open to challenge. Corporate ethos is often a significant part of the conduct of individual agents. But the question as to how corporate responsibility can be addressed best is still open.

The idea of corporate criminal responsibility should not be romanticized. The benefits of criminal responsibility over civil liability or human rights accountability are not always fully clear. It is certainly too early to claim that corporate criminal responsibility is a general principle of law. The ILC has been visibly more cautious in its draft articles on crimes against humanity. It recognizes the responsibility of legal persons, but leaves states the option to choose between criminal, civil or administrative responsibility.[170]

---

165. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. OF INT'L L. 265, 267 (2012).

166. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. OF INT'L L. 694, 720 (2011).

167. *Id.* at 738.

168. Marion Smiley, *Collective Responsibility*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Mar. 27, 2017), https://plato.stanford.edu/entries/collective-responsibility/.

169. Silvia Rodríguez-López, *Criminal Liability of Legal Persons for Human Trafficking Offenses in International and European Law*, 1 J. OF TRAFFICKING & HUM. EXPLOITATION 95, 96 (2017).

170. See above note 16.

The road has been paved by trial and error. The French proposal for corporate responsibility before the ICC very restrictive.[171] The idea to insist on conviction of an individual before the pursuit of corporate criminal responsibility would have posed many practical obstacles for the Court. The Malabo Protocol moved to the other extreme. It disassociates corporate criminal responsibility fully from individual criminal responsibility. This poses a different set of problems.[172]

The way forward requires less romanticism and more realism. Both individual and corporate responsibility are needed. But the appropriate space of corporate criminal responsibility needs to be defined better. The concept is still most developed in domestic jurisdictions.[173] Its role at the international level is likely to remain modest. The main challenge is to develop the interplay between individual and collective responsibility, and to assess more carefully in what areas and in what forums collective responsibility may be pursued best.

The role of the ICC will remain limited. The effect of the 2016 Policy Paper should not be overstated. It is unlikely that there will be a broad range of new cases regarding corporate involvement in crime. But the transparency and stigma of communications may have a certain alert effect, with reputational costs for companies. It might have an indirect effect on compliance strategies, not necessarily through trials, but through the shadow of potential cases and the advocacy of civil society organizations.

171. Richard T. De George, *Peter French, Collective and Corporate Responsibility*, 21 NOÛS 448, 449 (1987) (reviewing PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984)).

172. Briefing Paper from Dr. Joanna Kyriakakis on Corporate Criminal Liability at the African Criminal Court to the ACRI Meeting, ¶ 14-15 (2016).

173. Pop, *supra* note 161, at 49-50.