Corporate Criminal Liability and International Criminal Law

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Abstract

The study investigates the question of the international criminal liability of corporations. The issue of the involvement of private corporations in international crimes has been a matter of controversy for decades. Over the years, several scholars have commented in favour or against the feasibility of holding business companies accountable under international criminal law. Both sides of the debate have often based their arguments on a narrow interpretation of the history of international criminal law centred solely on two pivotal moments: The Nuremberg trials (1946-1948) and the adoption of the Rome Statute (1998).

To those against an international criminal liability of corporations, the lack of formal recognition of such liability in Nuremberg and Rome represents a clear indication that the international criminal system rejected the concept altogether. This reading of the history of international criminal law has been embraced by the U.S. Supreme Court in its 2018 opinion in the case *Jesner v. Arab Bank*. The study contests the narrow interpretation provided by the U.S. Supreme Court and argues that, whilst never formally recognised, the question of the international criminal liability of corporations has constantly been a part of the debate on the scope of international criminal law.

Through a systematic analysis of normative and academic sources, this study explores the extent to which the criminal liability of corporate actors has been discussed in the context of international criminal law from the early 1940s to the present day. This examination highlights the ongoing relevance of the issue under consideration and the evolution of the arguments used to advance or contest the applicability of international criminal law to corporations. In doing so, it demonstrates that the challenges that have so far prevented the adoption of such concept at the international level are not without solutions. Additionally, the study offers practical solutions for the development of a feasible model to impose international criminal liability to corporations. In consideration of its centrality in the international criminal justice system, the International Criminal Court is suggested as the designated forum for prosecution.

By providing a comprehensive evaluation of the development of the debate on corporate criminal liability and international criminal law, the aims to facilitate a more genuine and open discussion on the possibility of establishing an international criminal liability of corporations.

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Introduction

The study analyses the international criminal liability of corporations for international core crimes.[1] The main theoretical question of this study enquires as to whether corporate criminal liability can be incorporated within the scope of international criminal law. To answer this question, the study looks at the history of international criminal law to assess the extent and way in which the criminal liability of corporations has been addressed over the past decades. Contrary to the idea that international criminal law has been concerned solely with individuals, the study argues that corporations have always played a part in the debate on the scope of international criminal law. Indeed, from Nuremberg onward, the question of whether corporate entities should be held accountable for their involvement in mass atrocities has repeatedly plagued the mind of those in charge of developing an effective international criminal justice system.

Even though corporate criminal liability has yet to be recognised at the international level, the study demonstrates that the obstacles which have so far prevented such a recognition are not without solution. Indeed, these obstacles rest either on a misunderstanding on the scope of corporate criminal liability or on political and practical considerations. From a theoretical perspective, thus, the concept of corporate criminal liability has never been deemed incompatible with the structure of the international criminal justice system. As such, there is scope to argue that international criminal law can - and should – incorporate corporate criminal liability to strengthen the legal framework on international accountability.

The last century has witnessed the rise of powerful corporations as new economic actors on the world stage. Characterised by complex organisational structures, corporate entities play a central role in today's globalised economy. As they often operate transnationally, modern corporations pose relevant regulatory challenges both at the domestic and international level. Over the past decades, more and more attention has been paid to the involvement of corporate entities in violations of human rights amounting to international crimes.[2] The recent indictment

[1] From a terminological perspective, this study uses the terms corporation, company, legal person, corporate body, and entity interchangeably to indicate a private business corporation as the focus of the analysis.

[2] International Commission of Jurists, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Vol. I - Facing the Facts and Charting a Legal Path (Geneva, 2008), John Ruggies, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, A/HRC/4/35, 19 February 2007. For a more general overview of the adverse impact of corporate operations on human rights see John Ruggie, Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, A/HRC/8/5/Add.2, 23 May 2008.

of Lafarge, a French corporation, for complicity in crimes against humanity committed in Syria is a recent example of corporate involvement in gross violation of international law.[3]

Prior to that, reports of corporate complicity were presented by the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo which highlighted the role played by several private companies in the ongoing conflict in the Democratic Republic of Congo.[4] Similar allegations were made against companies operating in Angola,[5] South Sudan,[6] and Sierra Leone.[7] In 2004, the former Chief Prosecutor of the Special Court for Sierra Leone observed that, in order to achieve accountability in the context of internal armed conflict, 'one must appreciate that rarely do these conflicts involve combatants alone. External players consist of States, international criminal cartels, possibly *corporations*, terrorists, and heads of government acting in their personal capacity in a type of joint criminal enterprise'.[8]

Those allegations of corporate collusion with corrupted governments or armed groups in the perpetration of international crimes have called for a reconsideration of the existing framework on corporate accountability. The issue of corporate involvement in international crimes, however, is not a new phenomenon. Already in the Second World War, the German industrial sector played a central role in the Nazi's war effort. This compelled the Allied Powers to adopt drastic measures against German corporations, *in primis* against the chemical and pharmaceutical conglomerate I.G. Farben.[9] This ongoing relevance of the question of corporate accountability for international crimes demonstrates the significance of the present study. As

[3] Alexandru Tofan, 'The Lafarge Affair: A First Step Towards Corporate Criminal Liability for Complicity in Crimes against Humanity' (Business Right Blog (Asser Institute), 2 October 2018).
[4] UNSC S/2001/357, 12 April 2001. On corporate involvement in gross human rights abuses in DRC see also *Anvil Mining Ltd. v. Canadian Association Against Impunity* (CAAI) [2012] C.A. 117 (Can. Que.)
[5] Philippe le Billon, 'Angola's Political Economy of War: The Role of Oil and Diamonds' (2001) 100 African Affairs 55.
[6] *Presbyterian Church v. Talisman Energy*, 582 F.3d 244, 246 (2d Cir. 2009).
[7] *Kadie Kalma & Others v. African Minerals Limited, African Mineral (SL) Limited and Tonkolili Iron Ore (SL) Limited* [2020] EWCA Civ 144.
[8] David M. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts' (2005) 37 Case Western Reserve Journal of International Law 1, 7 (emphasis added)
[9] Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof' (30 November 1945), reprinted in Enactments and Approved Papers of the Control Council and Coordinating Committee, 225, Military Government of Germany, Control of I.G. Farben, Special Report of Military Governor U.S. Zone (1 October 1945), 1. See also Leora Yedida Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business* (The University of Michigan Press 2017), Annika van Baar, 'Corporate involvement in the Holocaust and other Nazi crimes' in Judith van Erp et al. (eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015).

evidence of corporate wrongdoing is growing,[10] it is time for a re-assessment of the role that international criminal law can play in addressing corporate involvement in international crimes.

Over the past decades, the scholarship on corporate criminal liability and international criminal law has grown significantly. Several scholars and legal practitioners have commented on the role of corporations in international crimes and the consequent opportunity of holding them accountable at the international level.[11] However, the existing literature on the topic often adopts a narrow approach to advance or contest the international criminal liability of corporations. The focus of the analysis so far conducted on corporations and international criminal law has mostly centred on two Grotian Moments: The Nuremberg trials, on one side, and the adoption of the Rome Statute, on the other.[12] Indeed, conflicting interpretations of these two moments have been presented to argue in favour or against the inclusion of corporations within the scope of international criminal law. However, only limited attention has been paid to other developments occurred either in the years between Nuremberg and Rome or after the adoption of the Statute of the International Criminal Court.

This study proposes a comprehensive analysis of the debate on the international criminal liability of corporation by combining a detailed examination of Nuremberg and Rome with the examination of previously overlooked initiatives such as the drafting of a Code of Offences against Peace and Security of Mankind and the 1951 and 1953 Committees on International Criminal Jurisdiction. This analysis is also complemented by a review of significant post-1998 international and domestic developments around corporate criminal liability. By examining the way in which the question of the criminal liability of corporations

[10] See, e.g., International Commission of Jurists, Corporate Complicity and Legal Accountability, Vol. I, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (Geneva, 2008)

[11] See, e.g., Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010), Larissa van den Herik, 'Corporations as Future Subject of the International Criminal Court: An Exploration of the Counterarguments and Consequences' in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, (T.M.C. Asser Press 2010), Andrew Clapham, 'Corporations and Criminal Complicity' in Gro Nystuen, Andreas Follesdal and Ola Mestad (eds), *Human Rights, Corporate Complicity and Disinvestment* (Cambridge University Press 2011), Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000), Florian Jeßberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' (2016) Journal of International Criminal Justice 327, James G Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 New York University Journal of International Law and Politics 121, Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33 Brooklyn Journal of International Law 955.

[12] On the definition of Grotian moment see Michael P Scharf, 'The Grotian Moment Concept' (2011) 19 ILSA Quarterly 16, Boutros Boutros-Ghali, 'A Grotian Moment' (1994) 18(5) Fordham International Law Journal 1609. An attempt to look beyond these two moments has been made in Michael J. Kelly, *Prosecuting Corporations for Genocide* (OUP 2016) and Clapham (n 11).

has been addressed since the early 1940s to the present day, this study demonstrates that the failure to prosecute corporations at Nuremberg and their exclusion from the scope of the Rome Statute can no longer be used as decisive arguments against the recognition of international corporate criminal liability.

From a methodological perspective, the study adopts a doctrinal legal approach based on the analysis of both normative and judicial sources – such as international treaties, UN documents and international and national decisions – and authoritative sources – such as academic literature – that address, accept, or reject the concept of corporate criminal liability for international crimes. Through this examination, the study provides unique insight into the evolution of the debate on the international criminal liability of corporations to facilitate a more genuine and open discussion on the possibility of including corporations within the scope of international criminal law. Additionally, the study offers suggestions for the development of a amendment to hold corporations criminally accountable under the Statute of the International Criminal Court.

A clarification in the use of term liability is required to understand the scope and limit of this study. Liability is a broader concept than complicity as it includes not only secondary forms of liability such as aiding and abetting (often improperly referred as 'complicity') but also direct liability. In this sense, the present study uses 'liability' – as specifically corporate criminal liability – as an umbrella term, which covers both direct liability and secondary or accomplice liability. This use of terminology is functional to the analysis conducted in the study. Indeed, as the research analyses the historical development of the debate on whether corporations should be recognised as subjects of international criminal law, it necessarily approaches the question of corporate criminal liability in its broader sense as the possibility of ascribing legal liability to a corporation for international crimes.

In light of this, the present study does not aim to concentrate on the issue of corporate 'complicity' (i.e., aiding and abetting),[13] but it employs a holistic approach to the question of

[13] For an analysis on the concept of corporate complicity see, inter alia, Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 Hastings International Law and Comparative Law Review 339, Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8(3) Journal of International Criminal Justice 803, Leigh A. Payne and Gabriel Pereira, 'Corporate Complicity in International Human Rights Violations' (2016) 12 Annual Review of Law and Social Science 63, Marina Aksenova, 'Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen' (2021) 30 Washington International Law Journal 255. See also International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability, Vol I: Facing the Facts and Charting a Legal Path, (Geneva, International Commission of Jurists 2008). International Commission of Jurists

corporate criminal liability for international crimes. As such, the study does not specifically consider the different ways in which corporations can participate in the commission of an international crime.[14] Rather, it focuses on the preliminary question of whether legal liability can be imposed to corporate actors under international criminal law, irrespectively of the role played by the business company in the commission of the crime – principal or accessory. In answering this question in a positive way, the study proposes a model of international corporate criminal liability that – if incorporated within the scope of Article 23 of the Rome Statute – can apply to both direct perpetration (Article 23(3)(a)) and other forms of participation in a crime (Article 23(3)(b) to (f)) (see Chapter 7).

The work is organised in seven chapters. The first chapter examines the 2018 opinion delivered by the U.S. Supreme Court in the case *Jesner v Arab Bank* which dismissed the possibility of holding corporations accountable under the U.S. Alien Tort Statute for human rights violations.[15] While the U.S. Supreme Court's decision in *Jesner* concerns solely the domestic liability of corporate entities, it still assumes a specific relevance in the context of a study on corporate criminal liability under international criminal law. This is because it heavily relies on international criminal law considerations to evaluate whether domestic civil liability can be imposed upon corporate actors for their involvement is gross violations of international law. Indeed, in the context of the case, both the Court and the parties paid particular attention to the history of Nuremberg and Rome to assess the position of corporations under international criminal law. This assessment was subsequently used either to support or contest corporate criminal liability under the Alien Tort Statute.

The chapter identifies the shortcomings of the arguments presented by the parties and the Court to highlight certain limitations in the way in which the question of an international corporate criminal liability is currently debated. On one side, the chapter contests the black-and-white interpretation of the history of international criminal law provided by the Supreme Court as it failed to appreciate the complexity of the issue under consideration and provided an incomplete representation of the extent to which the question of corporate criminal liability has been part of the broader debate on the scope of international criminal law. On the other, it looks at the counterarguments presented by the petitioners and by various Amici Curiae to recognise

Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability, Vol II: Criminal Law and International Crimes (Geneva, International Commission of Jurists 2008).

[14] On this point, see specifically Clapham and Jerbi (n 1), and Huisman and van Sliedregt (n 1).

[15] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

weaknesses in the argumentation. The analysis of each of the limitations identified in this part of the study is further developed in the subsequent chapters.

Building on the result of the analysis conducted in Chapter I, Chapter II starts by considering the early intersections between international criminal law and corporate criminal liability to evaluate to what extent this latter concept was addressed in the aftermath of the Second World War. In particular, the chapter sheds light on the implication of Nuremberg and the post-World War II trials on the development of an international criminal liability of corporations. It first considers the position of groups and organisations during the trial conducted by the International Military Tribunal of Nuremberg in accordance with Articles 9 and 10 of the London Charter. The focus of the analysis then shifts to subsequent trials conducted by the US Military Tribunals pursuant Control Council Law No. 10. Particular attention is paid to the *I.G. Farben* case due to its significance in the debate on an international criminal liability of corporations.

The historical analysis continues in Chapter III which follows the evolution of the debate on corporate criminal liability under international criminal law in the late 1940s-early 1950s. The chapter considers to what extent efforts were made to include legal persons within the domain of international criminal law in the years after Nuremberg. The analysis is intended to demonstrate that, even though it was often overshadowed by the more pressing issue of State liability, the international criminal liability of corporations did remain a part of the debate on the scope of international criminal law. The chapter focuses, in particular, on three initiatives promoted by the United Nations: the drafting of the Genocide Convention, the work of the International Law Commission on the Draft Code of Offences against Peace and Security of Mankind, and the work of the 1951 and 1953 Committees on International Criminal Jurisdiction. To date, the vast majority of the literature on the subject matter has mostly ignored the contribution provided by those developments. By looking beyond Nuremberg, the chapter proposes a more comprehensive account of the way in which the question of corporate criminal liability has been addressed at the international level and fills a gap in the existing literature on the international criminal liability of corporations.

As to Chapter IV, it focuses on the drafting history of the Statute of the International Criminal Court. The negotiation of the Rome Statute necessarily occupies a central place in the debate on corporate criminal liability under international criminal law. The chapter looks at the attempts made by the French delegation to support the inclusion of juridical persons within the

statute of the International Criminal Court. The chapter analyses the drafting history of the French proposal (from 1995 to 1998) to identify the approach suggested to impute international criminal liability to legal persons. It discusses in detail the challenges that the proposal faced during the negotiation of the Rome Statute and the factors that ultimately led to its withdrawal. The examination highlights the complexity of the debate on international corporate criminal liability and offers insights into the views expressed by states delegations on the opportunity of extending the Court's jurisdiction beyond natural persons.

While the withdrawal of the French proposal has been interpreted as the swan song of corporate criminal liability for international crimes,[16] it is incorrect to assume that Rome signalled the end of the discussion on the subject matter. Chapter V considers developments occurring after the Rome Conference to highlights the ongoing nature of the debate on international corporate criminal liability.

The chapter is structured in three parts. Firstly, it analyses the decision of the Special Tribunal for Lebanon to indict two Lebanese corporations (New TV S.A.L. and Akhbar Beirut S.A.L) for contempt to court. It examines the positions adopted by the Tribunal in the preliminary stage of the proceedings to recognise or reject its jurisdiction over legal persons and considers the overall value of the arguments discussed in the case. The chapter then looks at the 2014 Malabo Protocol which amended the statute of the (proposed) African Court of Justice and Human Rights to expand its jurisdiction over international and transnational crimes to offences perpetrated by corporations. It examines in detail Article 46C to offer insights on the merits and shortcomings of model proposed in the Protocol. Lastly, the chapter considers the draft Articles on Crimes Against Humanity. Specifically, the analysis focuses on draft Article 6(8) which mandates State Parties to provide for the liability of legal entities for their involvement in the crimes listed in the proposed convention. The examination of these three key international developments is essential to appreciate the way in which the arguments in support of the inclusion of corporations within the framework of international criminal law have evolved over the past twenty years.

Shifting the focus from the international level to the domestic level, Chapter VI examines the way in which national developments have been seen as evidence of a change in states' attitude towards corporate criminal liability. It has been argued that such a change of attitude may provide solid ground for the transposition of corporate criminal liability at the

[16] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1400-1 (2018).

international level. The argument has merit as it challenges one of the main points made against the inclusion of corporations within the Statute of the International Criminal Court: the lack of general recognition of corporate criminal liability at the domestic level. The chapter analyses the relevance of what can be defined as the comparative law argument and assesses its value and intrinsic limitation. Lastly, it considers whether the growing adoption of corporate criminal law provisions at the domestic level can be used as evidence of the emergence of a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice and the practical implications (or lack thereof) of such an argument for the international criminal liability of corporations.

The analysis conducted in Chapters II to VI sheds light on the ongoing relevance of the debate on corporate criminal liability and provides a more accurate picture of the challenges faced by those who attempted to promote its inclusion at the international criminal law level. Building on this analysis, the final chapter offers some suggestions for the development of an appropriate international model to hold corporations criminally accountable for their involvement in international crimes. The chapter adopts the Statute of the International Criminal Court as the relevant frame for the discussion on the idea that the Court is the most appropriate forum to establish the international criminal liability of corporations. Specific attention is paid to the definition of a model of attribution of international criminal liability to legal persons, the applicability of fundamental procedural rights such as the presumption of innocence and the right to be present at trial to the case of corporate defendants, and the question of sanctioning.

Overall, the study demonstrates how the question of corporate criminal liability under international criminal law is far from settled and necessitates further attention. Contrary to what was assumed by the U.S. Supreme Court in *Jesner*, it is submitted that the criminal liability of corporations has never been labelled as incompatible with the international criminal justice system. Conversely, the question of how to tackle the issue of corporate involvement in international crimes has continually been raised to the attention of those tasked with promoting the development of international criminal law. In today's globalised world, where corporations are more and more present in conflict scenarios and in countries with poor human rights records, this question cannot be ignored. To further its fights against impunity, the international criminal justice system must evolve to recognise corporations as potential subjects of international criminal liability.

Chapter 1: The Interpretation of the Status of Corporations under International Criminal Law in the Jurisprudence of the U.S. Supreme Court: the case *Jesner v. Arab Bank*

1. Introduction

On 24 April 2018, the U.S. Supreme Court delivered its opinion in the case *Jesner v Arab Bank*, addressing the question of whether corporations could be held accountable under the U.S. Alien Tort Statute for human rights violations.[1] In a 5-4 decision, the Court closed the door to future litigations involving the liability of (foreign) corporations for human rights abuses by establishing that corporate entities cannot be subject to lawsuits under the Alien Tort Statute.[2] The long-awaited opinion in *Jesner* has been seen by many scholars and business and human rights advocates as a setback and elicited a fierce debate on the effectiveness of the current framework on corporate accountability for human rights abuses.[3]

The Supreme Court's position in *Jesner* assumes a specific relevance in the context of the analysis of the status of corporate criminal liability under international criminal law. Indeed, it provides a judicial interpretation of the status of corporate liability for international wrongdoings which is mostly based on a peculiar understanding of the position of corporations within the framework of international criminal law. In doing so, the *Jesner* decision sets a precedent which may have relevant ramifications on the development of state practice on corporate accountability for human rights violations and international crimes.[4]

It is therefore necessary to start this study with an analysis of the arguments presented in *Jesner*, focusing on what can be defined as the 'international criminal law argument', to understand in which way international criminal law has been interpreted both in support and against the recognition of the liability of businesses. The chapter starts with a contextualisation of the *Jesner* case to define the peculiar nature of the U.S. Alien Tort Statute and its relevance

[1] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).
[2] Ibid at 1408.
[3] See, *inter alia*, Benjamin Estes, 'May the Fourth Be with You: Charting the Future of Corporate Liability under the Alien Tort Statute after Jesner v. Arab Bank' (2019) 2019 Columbia Business Law Review 1031; William S. Dodge, 'Corporate Liability under the US Alien Tort Statute: A Comment on Jesner v Arab Bank' (2019) 4 Business and Human Rights Journal 131; Emily Mendoza, 'Jesner v. Arab Bank, PLC: Corporate Enemies and the Alien Tort Statute' (2019) 96 Denver Law Review 699; Claire Burkes, 'Jesner v. Arab Bank: Crime or Punishment - Differing Interpretations of the Alien Tort Statute' (2018) 27 Tulane Journal of International and Comparative Law 219; Jonathan Kolieb, 'Jesner v Arab Bank: The US Supreme Court Forecloses on Accountability for Corporate Human Rights Abuses' (2018) 24 Australian International Law Journal 209.
[4] On the role of domestic judicial decisions as evidence of state practice see International Law Commission, 'Draft Conclusions on Identification of Customary International Law', Conclusion 6, (2018) A/73/10, para 65.

in the field of corporate accountability. The focus will then shift to the key legal precedent upon which the *Jesner* case is based: *Kiobel v. Royal Dutch Petroleum Co*.[5] The analysis of *Kiobel* is of pivotal importance as it allows to identify the genesis of the 'international criminal law argument' and its use to dismiss the idea that corporations can be held accountable for violation of international law. The identification of the shortcomings of the argument adopted in *Kiobel* and subsequently embraced by the U.S. Supreme Court in *Jesner* is essential to provide the context upon which this research is based. Indeed, the analysis of each of the components of the 'international criminal law argument' will be further developed in the subsequent chapters of this study.

2. The Road to *Jesner*: The Alien Tort Statute as a Key Instrument to Address Corporate Abuses of Human Rights.

Before addressing the arguments presented by the parties in favour and against the concept of corporate liability and evaluating to what extent the Supreme Court endorsed or rejected them, it is important to provide a contextualisation of the case under consideration.

The *Jenser* case concerned the alleged responsibility of Arab Bank, a Jordan-based bank, for financing terrorist activities carried out in Israel, Gaza and the West Bank between January 1995 and July 2005.[6] The plaintiffs – a group of victims of terrorist attacks – claimed, in particular, that the respondent 'knowingly used its New York branch to collect donations, transfer money, and serve as a "paymaster" for international terrorists'.[7] The lawsuit was filed under the Alien Tort Statute, a *sui generis* federal law which grants federal courts jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[8]

Enacted in 1789 as part of the Judiciary Act, the Alien Tort Statute laid dormant for about two centuries before raising to the attention of the international community,[9] in 1980, when the *Filartiga v Pena-Irala* case was filed.[10] The case concerned the alleged responsibility of a former Inspector General of Police in Asuncion (Paraguay), Americo Norberto Pena-Irala,

[5] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).
[6] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1393 (2018).
[7] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Petition for a Writ of Certiorari, 6 October 2016, 2.
[8] 28 U.S. Code § 1350.
[9] Nadia Bernaz, *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap* (Routledge 2017), 260 et ss. Milena Sterio, Corporate Liability for Human Rights Violations (2018) 50 Case Western Reserve Journal of International Law 127, 129-130, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 252 et ss.
[10] *Filartiga v Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

for the kidnapping, torturing and killing of fellow Paraguayan, Joelito Filariga.[11] Brought by the father and sister of the victim, the lawsuit was initially dismissed by the District Court on jurisdictional grounds. Even though the district judge, Judge Nickerson, acknowledged 'the strength of appellants' argument that official torture violates an emerging norm of customary international law', he still concluded that 'the law of nations' has to be construed in a narrow way to exclude the 'law which governs a state's treatment of its own citizens'.[12]

The decision was appealed by the plaintiffs and subsequently reversed by the Court of Appeals for the Second Circuit. In quashing the District Judge's decision, the Court of Appeals recognised the federal court's jurisdiction over the case by observing that:

> Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history … there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.[13]

Looking in particular to the 'violation of the law of nations' contested in the case, the Court of Appeals stated that:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. […] In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations […] is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.[14]

In commenting on the significance of the case, Antonio Cassese applauded the Second Circuit's decision to '[act] on behalf of the international community at large and [vindicate] rights pertaining to human dignity'.[15] In doing so, the Court of Appeals' decision in *Filartiga* 'effectively resurrected' the Alien Tort Statute,[16] making it a fundamental tool to judicially

[11] Ibid at 878.
[12] Ibid at 880.
[13] Ibid at 887.
[14] Ibid at 890.
[15] Antonio Cassese, *International Criminal Law* (Oxford University Press 2003), 8.
[16] Sterio (n 9).

address international wrongdoings committed by foreign defendants – firstly against individuals and, later on, against multinational corporations.[17]

The first Alien Tort Statute case concerning the involvement of a corporate entity in a violation of the 'law of nations' was lodged in 1996, when a group of villagers from the Tenasserim region in Myanmar filed a lawsuit against Unocal Corporation, a Californian oil company, for human rights violations allegedly perpetrated by the defendant in the context of the construction of a gas pipeline in Myanmar (then Burma).[18] In two separate decisions, a California District court and the Court of Appeals for the Ninth Circuit recognised that corporations could be held liable under the Alien Tort Statute for their involvement in violations of international law.[19] Even though the case was ultimately settled out of court, *Unocal* signalled a pivotal moment in the development of the Alien Tort Statute jurisprudence, opening the door to an ever-growing number of cases involving corporate defendants.[20]

The progressive expansion of the scope of the Alien Tort Statute saw a first setback in the early 2000s. In 2004, the Supreme Court delivered its first opinion in an Alien Tort Statute-based lawsuit in which it set a narrower standard for litigating cases under such statute. The opportunity for such intervention was provided by *Sosa v. Alvarez-Machain*.[21] In *Sosa*, the Supreme Court looked back at the legislative history of the Alien Tort Statute to identify the circumstances under which jurisdiction should be granted under such a peculiar piece of legislation. Based on the analysis conducted, the Court observed that:

> [An] inference to be drawn from the history is that Congress intended the [Alien Tort Statute] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors …; violations of safe conduct were probably understood to be actionable, … and individual actions arising out of prize captures and piracy may well have also been contemplated.[22]

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[17] For a comprehensive overview of the case *see* John Paul George, 'Defining Filartiga: Characterizing International Torture Claims in United States Courts' (1984) 3 Penn State International Law Review 1. See also Bernaz (n 9) 260 et ss., Sterio (n 9) 129-130.
[18] *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).
[19] Bernaz (n 9) 261-2; Robert C Thompson and Anita Ramasastry and Mark B Taylor, 'Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40 George Washington International Law Review 841, 841-842; Clapham, *Human Rights Obligations of Non-State Actors* (n 9) 255-261; Armin Rosencranz and David Louk, 'Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch' (2005) 8 Chapman Law Review 135.
[20] This development was later on acknowledged by the Court of Appeals for the Eleventh Circuit in *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, at 1263 (11th Cir. 2009).
[21] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[22] Ibid at 720.

Recognising that an attempt to limit the Alien Tort Statute scope to the crimes originally envisaged by the Congress would ultimately devoid the statute of any practical effect, the Supreme Court stated that:

> The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time. We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, […]. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.[23]

Consequently, the Court established that, to trigger the jurisdiction under the Alien Tort Statute, a claim based on the 'present-day law of nations' should 'rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms'.[24] According to the Court, a determination of whether a norm can be considered 'sufficiently definite to support a cause of action' must 'involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts'.[25]

The Supreme Court, thus, enunciated a two-step approach to evaluate the legitimacy of a lawsuit under the Alien Tort Statute based, first, on the determination of whether the norm allegedly violated is sufficiently 'specific, universal, and obligatory' to qualify as customary international law, and, second, if such a norm is identified, on the assessment of the practical consequences of allowing the specific case to proceed. In light of these premises, the Supreme Court dismissed the claimants case, concluding that the violation alleged in the lawsuit – arbitrary detention for a day – had not reached the necessary status of customary international law and therefore did fall outside the scope of the Alien Tort Statute.[26]

The decision in *Sosa* significantly narrowed the scope of application of the Alien Tort Statute, setting a specific standard to determine the type of claims allowed under the statute.[27] The decision, however, left many questions unanswered, including the issue of whether

[23] Ibid at 724.
[24] Ibid at 724-725.
[25] Ibid at 732-733.
[26] Ibid at 738.
[27] Bernaz (n 9) 263, Sterio (n 9) 131.

corporations should be held liability under the Alien Tort Statute.[28] In the years following *Unocal*, the applicability of the Alien Tort Statute to corporate defendants had been systematically contested by the corporate defendants, even though the arguments had been generally dismissed by the U.S. federal court.[29] This approach drastically changed in 2010 when the Second Circuit Court of Appeals delivered its famous judgment in *Kiobel v. Royal Dutch Petroleum Co*.[30]

In *Kiobel*, the plaintiffs – a group of Nigerian citizens of the Ogoniland region – alleged the responsibility of the company, Royal Dutch Petroleum, for aiding and abetting the Nigerian government in perpetrating serious human rights abuses such as torture, violation of the right to life, liberty, security and association, and property destruction.[31] On 17 September 2010, the Second Circuit Court of Appeals dismissed the case on the ground that corporate defendants cannot be sued under the Alien Tort Statute as 'the concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance' at the international level.[32] The decision 'sent shock waves through the legal community'[33] as it represented a clear departure from the circuit previous jurisprudence and from that of other circuits courts.[34]

For its importance, the decision has attracted the attention of several scholars who have commented on the case's potential impact on the litigation of business and human rights-related cases.[35] The court's reasoning in *Kiobel* is of particular relevance as it signalled the genesis of

[28] Stephen Satterfield, 'Still Crying Out for Clarification: The Scope of Liability under the Alien Tort Statute after Sosa' (2008) 77 George Washington Law Review 216.
[29] See, *inter alia, Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp*., 473 F.3d 345 (D.C. Cir. 2007); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.,* 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).
[30] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).
[31] Ibid.
[32] Ibid at 149.
[33] Frank Cruz-Alvarez and Laura E Wade, 'The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch' (2011) 65 U Miami L Rev 1109, 1109.
[34] In relation to other circuits courts, see *inter alia Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp*., 473 F.3d 345 (D.C. Cir. 2007). In relation to previous Second Circuit decisions, see *inter alia Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254 (2d Cir. 2007); *Flores v. S. Peru Copper Corp*., 414 F.3d 233 (2d Cir. 2003).
[35] See, *inter alia*, Webster C III Cash, 'Sosa's Silence: Kiobel and the Fallacy of the Supreme Court's Limitation on Alien Tort Liability' (2012) 41 Denver Journal of International Law & Policy 101; Eric Engle, 'Kiobel v. Royal Dutch Petroleum Co.: Corporate Liability under the Alien Torts Statute' (2012) 34 Houston Journal of International Law 499; Tara McGrath, 'Kiobel v. Royal Dutch Petroleum: Delineating the Bounds of the Alien Tort Statute' (2012) 8 Duke Journal of Constitutional Law & Public Policy Sidebar 1; Julian G. Ku, 'The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51 Virginia Journal of International Law 353; Odette Murray and David Kinley and Chip Pitts, 'Exaggerated Rumours of the

the 'international criminal law argument' which would later play a key role in the *Jesner* case. In light of that, the following section provides an overview of the legal arguments used in *Kiobel*, focusing firstly on the reasoning embraced by the majority – represented by Judge Cabranes – and secondly on the separate opinion filed by Judge Leval.

3. A Turning Point*: Kiobel v. Royal Dutch Petroleum Co.* and the Genesis of the International Criminal Law Argument

Written by Judges Cabranes, the majority decision addressed the issue of whether the Alien Tort Statute 'provides jurisdiction over tort actions brought against corporations under customary international law'.[36] To provide an answer to this question, the approach adopted by the court looked 'beyond rules of domestic law – however well-established they may be – to examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another'* (i.e. customary international law).[37] According to Judge Cabranes, indeed:

> [T]he fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the [Alien Tort Statute]). Moreover, the fact that a legal norm is found in most or even all "civilized nations" does not make that norm a part of customary international law.[38]

This approach – which defined the direction followed by the decision – found its justification in the majority's interpretation of a footnote included by the Supreme Court in *Sosa*: Footnote n. 20. Incorporated in the section concerned with the definition of the standard to assess which norms of international law may provide a cause of action under the Alien Tort Statute – 'a norm that is specific, universal, and obligatory'[39] –, footnote n. 20 reads as follows:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. […].[40]

Adopting a decontextualized interpretation of such statement, the majority in *Kiobel* concluded that, to establish the legitimacy of a claim under the Alien Tort Statute, the court

Death of an Alien Tort - Corporations, Human Rights and the Remarkable Case of Kiobel' (2011) 12 Melbourne Journal of International Law 57.

[36] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, at 117 (2d Cir. 2010).

[37] Ibid at 118. (emphasis in original)

[38] Ibid.

[39] *Sosa v. Alvarez-Machain*, 542 U.S. 692, at 732 (2004).

[40] Ibid footnote 20.

needs to consider whether international law (1) recognises the violation alleged in the lawsuit as a violation of customary international law, *and* (2) extends the liability for such a violation to the perpetrator sued by the claimant.[41] According to the majority, such a reading of footnote n. 20 in Sosa was in line with the Circuit's previous holding in *Filartiga* where the court 'looked to international law to determine [its] jurisdiction and to delineate the *type of defendant* who could be sued'.[42]

It is arguable that the majority's interpretation of footnote n. 20 is flawed as it fails to consider the context in which such statement was made.[43] Indeed, nothing in the wording of footnote n. 20 seems to imply a contrast between the position of individuals, on one side, and corporations, on the other, as two separate categories of private defendants under the Alien Tort Statute. Conversely, the reference made by footnote n. 20 to the concept of 'private actors' – which encompasses *both* individuals and corporations – is more likely to allude to the dichotomy *private actors v. state actors*, which assumes a specific relevance in relation to certain international crimes which can be perpetrated only by a state actor (or with their acquiescence or consent).

Such an interpretation is also supported by a more attentive reading of the cases cited in footnote n. 20 as guidelines. In the footnote, the Supreme Court explicitly directed the federal courts to compare *Tel-Oren v. Libyan Arab Republic*, concerning the crime of torture, with *Kadic v. Karadžić*, related to the crime of genocide.[44] While in *Kadic v. Karadžić* it was recognised that a general consensus has emerged that genocide can be perpetrated by private actors,[45] a similar conclusion could not be drawn in relation to the crime of torture addressed in *Tel-Oren v. Libyan Arab Republic*.[46] In *Tel-Oren*, indeed, the Court of Appeals for the District of Columbia Circuit refused to 'stretch Filartiga's reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under colour of state law', so declining to read the Alien Tort Statute 'to cover torture by *non-state actors*'.[47]

[41] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, at 126 (2d Cir. 2010).
[42] Ibid at 112 referring to *Filartiga v Pena-Irala*, 630 F.2d 876, at 889 (2nd Cir. 1980) (emphasis added).
[43] On this regard see Cash (n 35), Geoffrey Pariza, 'Genocide, Inc.: Corporate Immunity to Violations of International Law after Kiobel v. Royal Dutch Petroleum' (2011) 8 Loyola University Chicago International Law Review 229.
[44] *Sosa v. Alvarez-Machain*, 542 U.S. 692, at 732, footnote 20 (2004).
[45] *Kadic v. Karadžić*, 70 F. 3d 232, at 239-241 (CA2 1995).
[46] *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, at 791-795 (CADC 1984) (Edwards, J., concurring).
[47] Ibid at 791 and 795.

This reading of footnote n. 20 seems to be corroborated also by the view expressed by the European Commission in its Brief as *Amicus Curiae* submitted in *Sosa*.[48] In the document, the Commission recalled the distinction, operated at the international level, between violations that may be perpetrated by non-state actors and violations that require the intervention of state officials by observing that:

> [O]nly a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy, while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under colour of law.[49]

Even the majority's reference to *Filartiga* seems to contradict the court's understanding of footnote n. 20. In *Filartiga*, the Court of Appeals for the Second Circuit did not consider whether international law distinguishes between the liability of individuals and that of corporations for violations of international law; instead, it emphasised the role of state actors in the perpetration of certain breaches of international law, like torture.[50] Indeed, in the judgment the Court stated that:

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture *committed by a state official* against one held in detention violates established norms of the international law of human rights, and hence the law of nations.[51]

In *Kiobel*, the majority entirely ignored the dichotomy *private actors v. state actors*, introducing instead a distinction between sub-categories of private actors, i.e. individuals and corporations. In doing so, the court shifted the attention from the question of whether a crime under international law can be perpetrated by non-state actors to the question of whether the liability for a certain type of private defendant has attained the status of customary international law by becoming 'specific, universal, and obligatory'.[52]

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[48] Brief of Amicus Curiae the European Commission in Support of Neither Party (23 January 2004), *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[49] Brief of Amicus Curiae the European Commission in Support of Neither Party (23 January 2004), *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), para 10.
[50] Pariza (n 43) 248.
[51] *Filartiga v Pena-Irala*, 630 F.2d 876, at 880 (2nd Cir. 1980) (emphasis added).
[52] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, at 131 (2d Cir. 2010). See also Pariza (n 35) 248.

This change of perspective heavily influenced the reasoning followed by the majority in the second part of the decision. Based on the conclusion that international law governs the Court's enquiry on whether corporate liability could be imposed under the Alien Tort Statute, Judge Cabranes then proceeded to analyse the sources of international law he deemed relevant in the context of the Court's investigation.[53] It is here that the international criminal law argument began to emerge.

Indeed, in reviewing the international legal framework on corporate liability, Judge Cabranes focused his attention almost exclusively to the analysis of the statutes and decisions of the international *criminal* tribunals established since the end of World War II.[54] Judge Cabranes' investigation began with an overview of the role played by the Nuremberg trials in the development of the international criminal justice system.[55] The examination – considered the 'central focus' of the court's reasoning and 'the only definitive source that the majority relies on'[56] – started by acknowledging the historical value of the Nuremberg experience. According to Judge Cabranes, the London Charter and the Nuremberg trials 'are collectively the single most important source of modern customary international law concerning liability for violations of fundamental human rights'.[57] In the opinion of the Judge, therefore, '[i]t is notable … that the London Charter … granted the Tribunal jurisdiction over natural persons only'.[58]

This lack of inclusion of legal entities within the jurisdiction of the International Military Tribunal of Nuremberg – and, later on, within the jurisdiction of the US Military Tribunals established by Control Council Law No. 10[59] – was seen by the *Kiobel* majority 'not [as] a matter of happenstance or oversight' but as a firm refusal of the concept of corporate liability for international crimes.[60] The *I.G. Farben* case, in particular, was used to reinforce such a conclusion. Perhaps the most notorious of the industrialist trials conducted by the U.S. Military Tribunals in Nuremberg, the *I.G. Farben* case concerned the involvement of the

[53] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, at 131 et ss. (2d Cir. 2010).
[54] Ibid at 131.
[55] Ibid at 132-136.
[56] Pariza (n 35) 250.
[57] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, at 132-133 (2d Cir. 2010)
[58] Ibid at 134.
[59] Ibid.
[60] Ibid.

German company – represented by its board of directors – in the crimes perpetrated by the Nazi regime.[61] According to Judge Cabranes:

> In declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while prosecuting the men who led I.G. Farben, the military tribunals established under Control Council Law No. 10 *expressly* defined liability under the law of nations as liability that could not be divorced from individual moral responsibility.[62]

In the view of Judge Cabranes, the tribunal in *Farben* categorically rejected the concept of corporate criminal liability as incompatible with the founding principles of international criminal law. This interpretation of the *Farben* case was used to support the conclusion that the Nuremberg trials deliberately refused to recognise the liability of corporate entities for any serious breach of international law.[63]

This narrow reading of the Nuremberg jurisprudence, however, does not truly reflect the history of the debate on the criminal liability of corporations that occurred in the context of the Nuremberg trials. As will be explored more in the detail in Chapter II, the Nuremberg era played a significant role in bringing the issue of corporate criminal liability for international crimes to the attention of the international community. Even though it has been correctly pointed out that the greatest achievement of the Nuremberg trials was to bring the individual under the spotlight of international criminal law, it would be incorrect to assume that the liability of legal persons such as corporation was entirely overlooked in the aftermath of the Second World War. Thus, the interpretation proposed by the majority in *Kiobel* appears too simplistic and reductive.

The majority's analysis of the drafting history of the international criminal tribunals established post-Nuremberg can equally be seen as an oversimplification. Indeed, in looking at the statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and of the International Criminal Court (ICC), the court observed that, '[s]ince Nuremberg, international tribunals have continually declined to hold corporations liable for violations of customary international law'.[64] Focusing in particular on the drafting history of the Rome Statute, Judge Cabranes observed that, even though an attempt 'to grant the ICC

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[61] United States Military Tribunal at Nuremberg*, The United States of America vs. Carl Krauch et al.,* 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII.
[62] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, at 134 (2d Cir. 2010) (emphasis added)
[63] Ibid at 135-136.
[64] Ibid at 136.

jurisdiction over corporations' was made by the French delegation, such a proposal ultimately 'was rejected'.[65] Thus, the majority in *Kiobel* considered the lack of recognition of corporate criminal liability in the Rome Statute evidence that international law purposely 'rejected the notion of corporate liability for international crimes'.[66]

It is submitted that the decision fails to appreciate the complexity of the issue under consideration. As will be observed in Chapter IV, during the drafting of the Rome Statute, the question of the international criminal liability of corporations posed several challenges which ultimately hindered the possibility of reaching a compromise within the limited timeframe of the Rome Conference. Far from exhausting the debate on an international corporate criminal liability, the negotiation of the Statute of the International Criminal Court only scraped the surface of the issue providing significant insights on the challenges posed by the concept under consideration.

Finally, the majority made a brief attempt to look at the status of corporate liability under other international treaties, such as the Convention Against Transnational Organized Crime[67], to conclude that the fact that some specialised treaties 'impose obligations on corporations … tells us nothing about whether corporate liability for, say, violations of human rights, which are not a subject of those treaties, is universally recognized as a norm of customary international law'.[68] Similarly, the majority barely considered the work of scholars on the issue at hand, referring almost exclusively to the position of two authors - Professor James Crawford and Professor Christopher Greenwood – who 'forcefully declared … that customary international law does not recognize liability for corporations that violate its norms'. Interestingly, both scholars were expert witnesses for the corporate defendant in the case *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[69], argued before the Second Circuit on the same day as *Kiobel*.[70]

In conclusion, Judge Cabranes so summarised his view on the matter:

> No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions,

[65] Ibid at 137.
[66] Ibid at 120.
[67] *United Nations Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 29 September 2003), 2225 UNTS 209.
[68] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, at 138 (2d Cir. 2010).
[69] *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244 (2d Cir. 2009).
[70] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, at 143 (2d Cir. 2010).

> explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se, and it cannot not, as a result, form the basis of a suit under the [Alien Tort Statute].[71]

The majority's opinion was harshly criticised by Judge Leval, who concurred in the decision to dismiss the case but rejected the majority's take on the question of corporate liability.[72] According to the concurring judge, the majority's reasoning is not just 'illogical, misguided, and based on misunderstandings of precedent' but it also 'deals a substantial blow to international law and its undertaking to protect fundamental human rights'.[73]

In his 25-page long opinion, Judge Leval advanced several counterarguments to highlights the deficiencies in Judge Cabranes' argumentation. The arguments used by the concurring judge touched upon a variety of issues including the objectives of international law,[74] the jurisprudence of other federal courts under the Alien Tort Statute[75] and the interpretation of footnote n. 20 in Sosa[76]. In the view of Judge Leval:

> The argument depends on [the majority's] observation that international *criminal* tribunals have been established without jurisdiction to impose *criminal punishments* on corporations for their violations of international law. From this fact the majority contend an inescapable inference arises that international law does not govern corporations, which are therefore free to engage in conduct prohibited by the rules of international law with impunity. There is no logic to the argument. The reasons why international tribunals have been established without jurisdiction to impose *criminal* liability on corporations have to do solely with the theory and the objectives of *criminal punishment*, and have no bearing on civil compensatory liability.[77]

As observed by the concurring judge, the majority's argument rests on the misguided idea that, according to international law, a norm on the civil liability of corporations can be inferred solely by looking at the status of *corporate criminal liability* under international criminal law. In doing so, the court misinterpreted the attitude of international law towards the principle of civil liability for human rights abuses (general indifference)[78] and ended up

[71] Ibid at 149.
[72] Ibid at 149 et ss.
[73] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, at 149-150 (2d Cir. 2010) (Leval J., concurring).
[74] Ibid at 154-160.
[75] Ibid at 161-163.
[76] Ibid at 163-165.
[77] Ibid at 151. (emphasis in original)
[78] Ibid at 152.

blurring the line between two forms of liability which, in the view of Judge Leval, need to remain separate.[79]

Furthermore, according to the concurrence, nothing in the history of international criminal law prevents the recognition, at the domestic level, of the civil liability of corporations for their involvement in international crimes. In particular, in reviewing the majority's analysis of the Nuremberg experience, Judge Leval forcefully contested the use made by Judge Cabranes of the *I.G. Farben* trial to dismiss the idea that corporations can violate international law. In this regard, the concurring judge pointing out that, even though the *Farben* proceeding was brought solely against the company's executives, the U.S. Military Tribunal also 'found that the Farben corporation [itself] violated the standards of the law of nations' in relation to its slave labour programme.[80] In no way, therefore, the *Farben* tribunal deemed corporations exempt from international law.[81]

Judge Leval's observations on the *Farben* trial unveil the nuance approach adopted by the U.S. Military Tribunal towards German corporations and greatly contrast with the black and white picture draw by the majority. At the same time, however, the argument remains mostly unsubstantiated as Judge Leval failed to properly contextualise the jurisprudence of the subsequent trials in the broader context of the Nuremberg experience (see Chapter II).

Additionally, Judge Leval observed that the decision not to impose criminal liability on corporations (both at Nuremberg and Rome) ultimately rested on the difficulty to reconcile the purposes of criminal punishment with the abstract nature of corporate entities.[82] Indeed, in the view of the concurring judge, '[c]riminal punishment seeks … to inflict, for salutary effect, a measure of suffering on persons who have violated society's rules' and as such is inapplicable to a corporate entity which has 'no body, no soul, and no conscience, [and] is incapable of suffering'.[83] In Judge Leval's opinion, this perceived inappropriateness of imposing criminal liability on corporate entities justified the approach adopted by various international criminal tribunals to exclude corporations from their jurisdiction.

Judge Leval's understanding of criminal punishment and of its applicability to corporate entities may seem quite surprising considering the pioneering role played by the U.S.

[79] Ibid at 151-152.
[80] Ibid at 166 and 180.
[81] Ibid at 168.
[82] Ibid at 168.
[83] Ibid at 167-168.

federal courts in recognising the criminal liability to corporations within their domestic legal system.[84] Leval's opinion, however, is not isolated. It finds its roots in that part of the U.S. doctrine – represented *inter alia* by Vikramaditya S. Khanna – which contests the social desirability of corporate criminal liability, favouring instead the use of civil liability to address corporate wrongdoing.[85] This view has been criticised both at scholar and judicial level, with the several authors commenting on the value of prosecuting corporations in light of the powerful role they play in today globalised world.[86] At the judicial level, in particular, the position of Judge Leval on the applicability of criminal sanctioning to entities has been found at fault by a panel of federal judges in *Flomo v. Firestone Nat. Rubber Co*. which observed that:

> Criminal punishment of corporations that commit crimes is not anomalous merely because a corporation cannot be imprisoned or executed. It can be fined; and so if a crime at least ostensibly in the corporation's financial interest is committed or condoned at the managerial or board of directors' level of the corporation, the corporation itself is criminally liable. […] Civil liability of corporations, even when it allows the award of punitive as well as compensatory damages, is not a perfect substitute for fines because not all business activity that society wants to deter inflicts monetizable harms.[87]

Far from being exempt from criticism,[88] Judge Leval's concurrence nevertheless offered an alternative interpretation of scope of the Alien Tort Statute which was swiftly embraced by other Circuit courts. In July 2011, both the Court of Appeals for the District of Columbia and the Court of Appeals for the Seventh Circuit expressly agreed with Judge Leval

[84] *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).
[85] Vikramaditya S. Khanna, 'Is the Notion of Corporate Fault a Faulty Notion: The Case of Corporate Mens Rea' (1999) 79 Boston University Law Review 355; Vikramaditya S. Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve' (1996) 109 Harvard Law Review 1477. See also Albert W. Alschuler, 'Two Ways to Think about the Punishment of Corporations' (2009) 46 American Criminal Law Review 1359; Andrew Weissman, 'Rethinking Criminal Corporate Liability' (2007) 82 Indiana Law Journal 411.
[86] See, e.g., Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481; Pamela H. Bucy, 'Corporate Criminal Liability: When Does It Make Sense?' (2009) 46 American Criminal Law Review 1437; Sara Sun Beale, 'Is Corporate Criminal Liability Unique Solutions?' (2007) 44 American Criminal Law Review 1503; Pamela H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) Minnesota Law Review 2048; John C Coffee Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 386.
[87] *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, at 1018 (7th Cir. 2011).
[88] Frank Cruz-Alvarez and Laura E Wade, 'The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch' (2011) 65 U Miami L Rev 1109, Pariza (n 43).

– and with the established case law of the Eleventh Circuit[89] – rejecting the majority's reasoning in *Kiobel* as illogical and factually incorrect.[90]

In light of the split in the Circuits' jurisprudence created by *Kiobel*, it is not surprising, therefore, that the case was raised to the attention of the U.S. Supreme Court.

4. Bringing the Issue of Corporate Liability under the Alien Tort Statute to the Attention of the Supreme Court

On 17 October 2011, the U.S. Supreme Court granted writ of certiorari in the *Kiobel* case. The main question submitted by the plaintiffs to the attention of the Court pertained to '[w]hether corporations are immune from tort liability for violations of the law of nations ….., or if corporations may be sued in the same manner as any other private party defendant under the [Alien Tort Statute]'.[91] The arguments submitted by the petitioners against the thesis of corporate immunity touched upon several issues, including the history and purpose of the Alien Tort Statute, the interpretation of footnote n. 20 in *Sosa*, and the relation between domestic law and international law.[92]

Two sets of argument focused specifically on the shortcomings of the Court of Appeals' view of the history of the debate on corporate criminal liability under international criminal law. The first contested the narrow interpretation of the Nuremberg era proposed in *Kiobel* while the second looked at the negotiation of the Statute of the International Criminal Court and addressed issues faced by the drafters during the discussion on the liability of legal persons.

Regarding Nuremberg, the petitioners criticised the decision of the Second Circuit to focus exclusively on the I.G. Farben *trial*, without taking into consideration the broader context in which such a proceeding took place.[93] In particular, the petitioners observed that, even though the Allies did not bestow the power to impose liability on corporate entities upon the Nuremberg tribunals, they nonetheless applied extra-judicial sanctions to address corporate wrongdoing specifically in the case of *Farben*.[94] Thus, the petitioners directed the Supreme Court to look beyond the judicial precedent provided by the Nuremberg tribunals and to

[89] See *Sinaltrainal v Coca-Cola Co.*, 578 F.3d 1252, at 1263 (11th Cir. 2009), *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, at 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, at 1253 (11th Cir. 2009).
[90] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, at 51 (D.C. Cir. 2011) and *Flomo v. Firestone Nat. Rubber Co*., LLC, 643 F.3d 1013, at 1017 (7th Cir. 2011).
[91] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), Plaintiffs for Writ of Certiorari, 6 Jun 2011.
[92] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), Brief for Petitioners, 14 December 2011.
[93] Ibid p. 50.
[94] Ibid.

consider also other initiatives adopted by the Allied Powers to address corporate involvement in Nazi crimes.

The petitioners' arguments found the support of several academics with expertise in the Nuremberg-era jurisprudence.[95] In their *Brief of Amici Curiae in Support of Petitioners*, those 'Nuremberg Scholars' also adopted a broader approach to the Nuremberg experience which encompassed both judicial and extra-judicial strategies implemented by the Allies in post-World War II Germany. The scholars first reiterated that Article 9 of the London Charter did indeed authorise the International Military Tribunal 'to designate any group or organization as criminal'.[96] In addition to this judicial 'condemnation', criminal organisations were also 'subjected to other action by the Control Council'. In particular, the scholars observed that:

> In fact, by the time these organizations were declared to be criminal by the IMT, they had been punished under international law because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.[97]

According to the *Amici*, the combined use of in court and out of court measures demonstrated that the Nuremberg-era jurisprudence 'establishes … that not only states and natural persons can be liable for international violation, but also judicial entities'.[98]

In directing the Supreme Court to look beyond the judicial precedents provided by the Nuremberg tribunals, the argument proposed by the petitioners and by the 'Nuremberg scholars' provides a more comprehensive account of the approach adopted by the Allied Powers to address corporate involvement in Nazi crimes. As such, it deserves further consideration (see Chapter II). At this stage, however, it is possible to observe that, while the argument has the merit of highlighting the great attention paid by the Allied Powers to the role played by the German businesses during the Second World War, it fails to provide a solid counterargument to the thesis supported by the majority in *Kiobel*. The fact that corporations such as Farben were subjected to extra-judicial sanctioning says nothing about whether similar sanctions could have been applied as the result of an international criminal trial. Conversely, the argument under consideration may even be interpreted as evidence *against* corporate criminal liability

[95] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief of Amici Curiae Nuremberg Scholars Omer Bartov, Michael J. Bazyler, Donald Bloxham, Lawrence Douglas, Hilary Earl, Hon. Bruce J. Einhorn, Ret., David Fraser, Sam Garkawe, Stanley A. Goldman, Gregory S. Gordon, Kevin Jon Heller, Michael J. Kelly, Matthew Lippman, Michael Marrus, Fionnuala D. Ní Aoláin, Kim Christian Priemel, Christoph Safferling and Frederick Taylor in Support of Petitioners, 21 December 2011
[96] Ibid p. 16.
[97] Ibid p. 17.
[98] Ibid p. 18.

under international criminal law. Indeed, the decision of the Allied Powers to sanction corporations *out* of the courtroom may be seen as an implicit recognition of the difficulties of addressing corporate wrongdoing *in* the trial setting. The argument, therefore, presents relevant limitations.

A second set of arguments focused on the interpretation provided by the majority in Kiobel of the drafting history of the Statute of the International Criminal Court. The petitioners argued that 'the decision not to extend criminal liability to juridical defendants in the Rome Statute cannot even be construed as a decision to provide corporations with immunity from criminal responsibility, much less civil liability, for violations of international law'.[99] Instead, such a decision 'it is best understood as a recognition that different States have different approaches to corporate criminality'.[100] According to the argument, it was the lack of uniformity in the States' approach to corporate criminal liability that prevented the delegations in Rome from reaching a consensus over the proposal on the liability of corporations.[101]

While this obstacle to the recognition of an international criminal liability of corporations played an important role during the Rome Conference, it has progressively lost cogency over the years. Indeed, as highlighted by the petitioners, since the entry into force of the Statute, 'many States have passed domestic statutes imposing corporate criminal liability in implementing their international obligations under the Rome Statute'.[102] The current trend is thus toward a broader acceptance of corporate liability for international crimes and not, as implied by the Second Circuit, toward a system of corporate impunity.

The argument found the support of Ambassador David J. Scheffer. U.S. Ambassador-at-Large for War Crimes Issues from 1997 to 2001 and member of the U.S. delegation at the Rome Conference in 1998, Scheffer provided an insider's view of the negotiations with led to the adoption of the Rome Statute. In his *Amicus Curiae*, he contested the conclusion reached by the *Kiobel* majority that the lack of inclusion of corporate criminal liability in the Statute was based on the understanding that legal entities cannot be held accountable for human rights violations. Conversely, he pointed out that such an exclusion was mostly due to practical issues linked to operation of the principle of complementarity which gives national courts preference

[99] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), Brief for Petitioners, 14 December 2011, p. 48-49.
[100] Ibid p. 49.
[101] Ibid p. 48.
[102] Ibid p. 49.

to exercise their jurisdiction over the crimes included in the Statute.[103] According to Scheffer, '[t]o read the failure to agree on and resulting omission of criminal liability for juridical persons under the Rome Statute as an "express rejection . . . of a norm of corporate liability in the context of human rights violations," … is incorrect'.[104]

In relying on the domestic developments in the field of corporate criminal liability, Scheffer and the petitioners introduced within the scope of the 'international criminal law argument' what can be seen as the 'comparative law argument'. Over the last twenty years, such argument has assumed a central position within the debate on the feasibility of transposing corporate criminal liability at the international level. Indeed, scholars have often used the development of a trend towards the recognition of corporate criminal liability at the domestic level as an argument in support of the adoption of such a model of liability at the international level.[105] As will be discussed in Chapter VI, the decision of several legal systems of civil law tradition to move away from the principle *societas delinquere non potest* indicates a 'shift' in states' attitude towards the criminal liability of corporations that cannot be ignored.[106] At the same time, it is fundamental to observe that the adoption of a legal concept at the domestic level may not automatically indicate a willingness on the side of a State to transpose such concept at the international level.

Evidence of the limit of the comparative law argument is provided by the position adopted by the U.K. Government and of the Kingdom of the Netherlands in their Brief in support of the respondent.[107] In the *Amici Curiae*, the two governments observed as the Second Circuit correctly relied upon the international criminal law framework to assess the status of corporate liability for international violations.[108] In particular, the two governments dismissed the petitioners' use of recent domestic developments in the field of corporate criminal liability as evidence of a trend towards a broader recognition of corporate accountability by considering that '[t]he fact that some countries … imposed criminal liability on legal persons for the group

[103] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, 12 July 2011, p. 4 et ss.
[104] Ibid p. 8.
[105] Jendrik Adam, *Die Strafbarkeit juristischer Personem im Volkerstrafrecht* (Nomos 2015), 95 et ss., Caroline Kaeb, 'The Shifting Sands of Corporate Liability Under International Criminal Law' (2016) George Washington International Law Review 351, Joanna Kyriakakis, 'Corporate Criminal Liability and the Comparative Law Challenge' (2009) Netherland International Law Review 333, Thompson, Ramasastry and Taylor (n 19).
[106] The term 'shifting sand' as been used by Kaeb (n 105).
[107] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, 3 February 2012.
[108] Ibid p. 17 et ss.

of crimes included in the Rome Statute, viz. genocide, crimes against humanity and war crimes' does not in itself justify a conclusion that such form of liability should also be established at the international level.[109]

The position expressed by these two countries is particularly relevant considering that both have a long history in recognising the criminal liability of legal persons. Both States, indeed, do not distinguish between the position of natural persons and legal persons in criminal law and recognise that corporations may in principle be criminally liable for all crimes under the criminal code.[110] This covers as well international crimes as they have been incorporated in their domestic system.[111] Therefore while the comparative law argument has some merit, an assessment of its overall relevance requires careful consideration.

Despite the central role played by the argument in the Second Circuit decision and the attention payed to it by the parties and various *Amici Curiae*, in 2012, the Supreme Court decided not to express its opinion on the matter. On 5 March 2012, indeed, less than a week after the case was argued, the Court restored the case to the calendar, directing the parties to file supplemental briefs addressing the question of '[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'.[112] The attention so shifted from the question of corporate liability to that of the extraterritorial applicability of the Alien Tort Statute. This change of perspective ultimately determined the approach taken by the Supreme Court in its opinion.

Delivered on 17 April 2013, the Supreme Court's decision in *Kiobel* established that, under the Alien Tort Statute, there is a general presumption against the extraterritorial applicability of U.S. law.[113] In the opinion of the Court, this presumption 'helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches'.[114] The Court also clarified that, in order to rebut such a presumption of extraterritoriality, the petitioners have to prove that the

[109] Ibid p. 20.
[110] Article 51 of the Dutch Criminal Code. On the origin of corporate criminal liability in the United Kingdom, see Celia Wells, Corporations and Criminal Responsibility, 2nd ed. (Oxford University Press 2005) 87.
[111] Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law (FAFO 2006).
[112] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, at 114 (2013).
[113] Ibid at 108. See also Andrew Clapham, 'Human Rights Obligations for Non-State Actors. Where Are We Now?' in Fannie Lafontaine and François Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2019) 24 et ss.
[114] Ibid at 116.

claim 'touch and concern the territory of the United States … with sufficient force'.[115] In light of the conclusion that the Alien Tort Statute is presumed not to apply, the Supreme Court saw no need to address the question of corporate liability initially submitted by the petitioners.

In 2013, thus, the question of the liability of corporations under the Alien Tort Statute – and the legitimacy of the international criminal law argument used to dismiss it – remained unaddressed. It would take about five years for the Supreme Court to express its opinion on the matter.

5. *Jesner v. Arab Bank, PLC*: A Second Chance to Discuss Corporate Liability

In 2016, the case *Jesner v. Arab Bank, PLC* offered another opportunity to the Supreme Court to shed some light on the status of corporations under the Alien Tort Statute. As observed above, the case concerned the alleged liability of Arab Bank for providing financial support, by means of electronic bank transfers, to terrorist groups operating in the Middle East.[116] On 8 December 2015, the Court of Appeals for the Second District dismissed the case by relying on its precedent in *Kiobel* (referred to as *Kiobel I*).[117] In the judgment, however, the Second Circuit recognised the peculiar position occupied by *Kiobel I* following the 2013 Supreme Court's opinion in the same case (referred to as *Kiobel II*). Indeed, the Court of Appeals stated that:

> We conclude that Kiobel I is and remains the law of this Circuit, notwithstanding the Supreme Court's decision in Kiobel II affirming this Court's judgment on other grounds. We affirm the decision of the district court on that basis. We do so despite our view that Kiobel II suggests that the [Alien Tort Statute] may allow for corporate liability and our observation that there is a growing consensus among our sister circuits to that effect. Indeed, on the issue of corporate liability under the [Alien Tort Statute], Kiobel I now appears to swim alone against the tide.[118]

Nonetheless, the Second Circuit felt compelled to adhere to its precedent in *Kiobel I*, considering that only an 'en banc sitting of this Court or an eventual Supreme Court review' could have led to the overruling of the 2010 decision.[119]

Consequently, on 5 October 2016, the plaintiffs filed a petition for a writ of certiorari asking the Supreme Court to resolve the controversy of '[w]hether the Alien Tort Statute, 28

[115] Ibid at 124-25.
[116] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1393 (2018).
[117] *In re Arab Bank*, 808 F.3d 144 (2d Cir. 2015).
[118] Ibid at 151.
[119] Ibid at 157.

U.S.C. § 1350, categorically forecloses corporate liability'.[120] On 3 April 2017, the Supreme Court granted the petitioners' request, inviting the parties and the Amici Curiae to present their observations on the matter at hand.

Except for those arguments directly related to the topic of financing terrorism, the points brought to the attention of the Court greatly resembled those previously discussed in *Kiobel II*. The international criminal law argument was once again played an important part in the submissions of the parties and in the briefs presented by various *Amici*. The focus of the arguments mostly remained on the history of Nuremberg and of the negotiation of the Rome Statute.[121] Like in *Kiobel*, conflicting interpretations of these two 'Groatian moments' of international criminal law were proposed to advance or contest the possibility of holding corporations accountable for human rights abuses under the umbrella provided by the Alien Tort Statute.

In addition to these established arguments, an attempt was made to direct the Supreme Court's attention towards more recent development in the field of international criminal law to demonstrate the evolving nature of the debate on an international criminal liability of corporations. Firstly, a mention was made to the Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceeding adopted by the Special Tribunal for Lebanon in 2014, less than two years after the *Kiobel* decision.[122]

In highlighting the relevance of the decision, the petitioners observed that:

> In 2014, the Special Tribunal for Lebanon held that its criminal contempt jurisdiction extended to legal entities. Explaining in a detailed opinion that "[t]he omission of legal persons from the Rome Statute should not be interpreted as a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law," the Appeals Panel of the Special Tribunal held that "international human rights standards and the positive obligations arising under therein are equally applicable to legal entities."[123]

[120] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Petition for a Writ of Certiorari, 6 October 2016
[121] See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief for Petitioners, 20 June 2017, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of International Law Scholars as Amici Curiae in Support of Petitioners, June 2017, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief for The United States as Amicus Curiae Supporting Neither Party, 27 June 2017, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Professors of International Law, Foreign Relations Law, and Federal Jurisdiction as Amici Curiae in Support of Respondent, 24 August 2017.
[122] *New TV S.A.L. and Ms Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014.
[123] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief for Petitioners, 20 June 2017, p. 51. (In-text citations omitted)

The 2014 ruling was also proposed as evidence of a growing trend towards corporate international accountability by Scheffer in his *Amicus Curiae* submitted on 26 June 2017.[124] In his Brief, Scheffer observed that:

> [S]ince the Court's judgment in Kiobel II the Appeals Panel of the Special Tribunal for Lebanon, an international criminal tribunal located in The Hague and significantly supported in its operations by the United States Government, examined international law and practice and rules, in a contempt case, that corporations as well as natural persons are liable before the tribunal as a general principle of law.[125]

The reference to the decision of the Special Tribunal for Lebanon represents perhaps the most innovative point introduced by the petitioners and by Scheffer as part of their analysis of the status of corporations under international criminal law. As the first decision adopted by an international criminal tribunal on the subject matter, it is understandable why it was mentioned as a key factor for the Court to assess in its determination of the feasibility of holding corporation accountable under the Alien Tort Statute. However, as will be discussed in chapter 5, the reasoning underpinning the decision of the Appeal Panel presents several shortcomings that may limit its overall relevance. Indeed, while the position of the Appeals Panel has the merit of offering a more up to date interpretation of the relevance of corporate criminal liability under international criminal law, it still presents relevant limitations due to the narrow scope of the decision (contempt case) and its reliance on the provisions of the Lebanese legal system. The failure of properly consider these shortcomings in the briefs ultimately ended up reducing the value of the decision in the context of the international criminal law argument.

In addition to the example provided by the Special Tribunal for Lebanon, Scheffer also drew the Court's attention to one more international development concerning the liability of corporations for international crimes: The inclusion of a provision on corporate liability in the International Law Commission's draft Convention on Crimes Against Humanity.[126] Such a provision, initially included in draft article 7 of the Convention[127], provides that 'each State shall take measures … to establish the liability of legal persons' for the crimes against humanity

[124] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017.
[125] Ibid p. 27.
[126] International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity (2019), A/74/10, para 44.
[127] In the final document produced by the International Law Commission, the provision on legal persons is included in draft Article 6(8). See International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity (2019), A/74/10, para 44.

and that such liability 'may be criminal, civil or administrative' depending on the 'legal principles of the State'. In his *Amicus Curiae*, Scheffer focused in particular on a comment made by the Commission in relation to its decision to provide for the liability of corporations in its work on crimes against humanity. Reporting section 47 of the International Law Commission's Commentary on the draft Convention, Scheffer emphasised the sentence related to reasons which led the Commission to word the provision on legal persons as it did:

> The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. *In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.*[128]

According to Scheffer, the Commission's decision to follow the example of other multilateral treaties which include provisions on corporate criminal liability – such as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[129] ratified by 176 States – clearly demonstrated the existence of an international trend in favour of the liability of corporations for violations of international norms.[130]

The reference to the Draft Articles on Crimes Against Humanity is particularly relevant. The project is the most recent attempt to address the question of corporate liability in relation to international crimes. As will be further discussed in chapter 5, the Draft Articles have the potential to effectively innovate the legal framework concerning the prevention and punishment of core international crimes by recognising the role played by corporations in violating international law and the need to ensure accountability.

While the international criminal law argument played an important role in several of the documents submitted by the parties and the Amici Curiae in the months preceding the discussion of the case, it received only marginal attention during the oral argument. Indeed, on 11 October 2017, when the case was discussed, the status of corporations under international

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[128] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017, p. 29, reporting International Law Commission, Report of the International Law Commission, Chapter IV: Crimes against humanity (2019), A/74/10, para 47. (emphasis in original)

[129] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted 25 May 2000, entered into force 18 January 2002), 2171 UNTS 227.

[130] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017, p. 29.

criminal law was briefly mentioned only once by the respondent's attorney, Paul D. Clement. Asked by Justice Ginsburg to provide an example of a 'place in the world [outside of the US] that draws the distinction between individuals and corporations as far as liability for a violation of the Law of Nations' is concerned, Mr. Clement replied by pointing out that, from Nuremberg to Rome, 'all the international criminal tribunals that have been set up … have made a judgment that [only] individuals' are liable for international crimes.[131] Following this statement, Mr Clement's argument quickly took another direction by looking at the difference between enforcement measures and substantial norm under international and domestic law. Even though, the respondent's attorney stated that he would have wanted to clarify further 'why the criminal provisions are highly relevant', he never had the time to do so.[132]

This lack of attention towards the international criminal law argument during the oral discussion of the case, however, did not prevent the Supreme Court from addressing the argument in the context of its opinion. The following section analyses to what extent the status of corporations under international criminal law was considered in the *Jesner* opinion to support or criticise a finding against the liability of entities under the Alien Tort Statute.

6. The Supreme Court stance on the International Criminal Law Argument

On 24 April 2018, the Supreme Court delivered a split opinion in *Jesner* in which it dismissed the thesis supported by the petitioners and held that 'foreign corporations may not be defendants in suits brought under the Alien Tort Statute'.[133] The Supreme Court's opinion rests on foreign policy considerations and on the prerogative of the political branches. Indeed, according to the majority (led by Justice Kennedy), a determination that corporations can be held accountable for violations of international law may be made only by the Congress as it would require an evaluation of the impact it would have on the U.S. foreign policy.[134] The principle of separation of powers, therefore, 'require[s] the Judiciary to refrain from making these kinds of decisions under the ATS' which may disrupt the U.S. 'good relations with foreign governments'.[135]

Even though the case was ultimately decided on different grounds, the international criminal law argument found its way into the Supreme Court's opinion in *Jesner.* Addressed

[131] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Oral Argument – Official Transcript (11 October 2017), p. 49.
[132] Ibid p. 50.
[133] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1407 (2018).
[134] Ibid at 1407-1408.
[135] Ibid at 1408.

more as an *obiter dictum*,[136] the argument was firstly considered in Part II-A of the Supreme Court's opinion.[137] The opinion on the point was written by Justice Kennedy and joined by Chief Justice Roberts and Justice Thomas.[138] Relying on the precedent set by *Sosa*, Justice Kennedy observed that the first step to determine whether a common law action under the Alien Tort Statute can be allow to proceed required the Court to consider 'whether a plaintiff can demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory"'.[139] Such a determination, however, is not considered sufficient in itself to justify a case under the Statute. As stated by the majority:

> [E]ven assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.[140]

According to Justice Kennedy, the two questions – whether the claim concerns a norm that is 'specific, universal, and obligatory' and whether deference to the political branches is required by the nature of the case – are strictly interlinked and need to be jointly addressed, especially when the issue at stake pertains to the liability of corporations. Indeed, it is the plurality's opinion that:

> [T]he fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.[141]

Having stated these premises, the Justice Kennedy then turned to consider the question of 'whether there is an international law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights'.[142]

The starting point of the analysis is, unsurprisingly, the Second Circuit's decision in *Kiobel I* and its interpretation of footnote n. 20 in Sosa. Focusing on Judge Cabranes' reading

[136] Dodge (n 3) 133-134.
[137] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1399 et ss. (2018).
[138] Ibid at 1386.
[139] Ibid at 1399.
[140] Ibid.
[141] Ibid.
[142] Ibid.

of footnote 20, which requires judges to look at international legal framework to evaluate whether international law provided for a specific, universal, and obligatory norm on corporate liability for international wrongdoing, Justice Kennedy found the position articulated by the Judge Cabranes compelling and bearing 'considerable force and weight'.[143] The majority's reasoning on this point is quite superficial. In siding with the Second Circuit majority, Justice Kennedy did not provide any clarification on the reasons which may justify such a reading of footnote n. 20 in *Sosa* nor he consider the arguments *a contrario* raised by Judge Leval and by other Circuit judges in support of an alternative interpretation of the footnote.

Justice Kennedy's favourable attitude towards the reasoning employed by Judge Cabranes in *Kiobel I* extended beyond his interpretation of footnote n. 20 in *Sosa*. Following his conclusion that the Court of Appeals was correct in establishing that 'corporate liability is a question of international law', Justice Kennedy quickly recognised that 'there is an equally strong argument that petitioners cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations'.[144] Citing Judge Cabranes in *Kiobel I*, Justice Kennedy acknowledged that '[t]he singular achievement of international law since the Second World War has come in the area of human rights, where international law now imposes duties on individuals as well as nation-states'.[145] This, however, does mean that 'current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities [as] confirmed by the fact that *the charters of respective international criminal tribunals often exclude corporations* from their jurisdictional reach'.[146]

The approach taken by Justice Kennedy gives legitimacy to the international criminal law argument developed by Judge Cabranes by embracing it in its entirety. Like the Second Circuit in *Kiobel I*, the plurality relied almost exclusively on the position (or lack of thereof) of corporate entities within the statutes of various international criminal tribunals or court to ascertain whether corporations can be held accountable under the Alien Tort Statute. Moving from Nuremberg to Rome, the analysis conducted by Justice Kennedy followed step by step that carried out by Judge Cabranes. The relevant paragraphs of the Supreme Court's opinion, indeed, read as follows:

[143] Ibid at 1400.
[144] Ibid.
[145] Ibid.
[146] Ibid (emphasis added).

> The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. Among other crimes, Farben's employees had operated a slave-labour camp at Auschwitz and "knowingly and intentionally manufactured and provided" the poison gas used in the Nazi death chambers. Although the Military Tribunal "used the term 'Farben' as descriptive of the instrumentality of cohesion in the name of which" the crimes were committed, the Tribunal noted that "corporations act through individuals."
>
> The jurisdictional reach of more recent international tribunals also has been limited to "natural persons." The drafters of the Rome Statute considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations.
>
> The international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.[147]

The analysis conducted by Justice Kennedy entirely dismissed the more nuanced interpretation of the international criminal law framework provided by the petitioners and supported by various *Amici Curiae*. Indeed, the opinion made no reference to the Allies' attitude towards I.G. Farben and other groups and organisations at Nuremberg nor to the complex difficulties faced by the delegations in Rome while discussing the issue of corporate criminal liability. Justice Kennedy also explicitly refused the petitioners' use of recent domestic and international developments as evidence of a trend towards a broader recognition of corporate criminal liability. On this point, he stated that:

> [P]etitioners and their amici cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.[148]

In the end, Justice Kennedy concluded that, even though it is true that 'the enormity of the offenses that can be committed … in violation of international human rights … can be cited to show that corporations should be subject to liability', it is undeniable that 'the international

[147] Ibid at 1400-1 (2018). (In-text citations omitted)
[148] Ibid at 1401. (In-text citations omitted)

community has not yet taken that step, at least in the specific, universal, and obligatory manner required by Sosa'.[149] Indeed, according to the Justice, 'there is precedent to the contrary in the statement during the Nuremberg proceedings that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"'.[150]

Justice Kennedy's use of the international criminal law argument was strongly criticised in the dissenting opinion written by Justice Sotomayor and joined by Justice Ginsburg, Justice Breyer, and Justice Kagan.[151] In expressing her scepticism towards the validity of the approach adopted by the majority, Justice Sotomayor observed that:

> It cannot be persuasive evidence for purposes of ascertaining the availability of corporate civil liability under the Alien Tort Statute … that the jurisdiction of the handful of international criminal tribunals that states have seen fit to create in the last 75 years has not extended to corporate defendants. Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states' collective efforts to enforce various international law norms have, to date, often focused on natural rather than corporate defendants.[152]

The dissenting judge also embraced the more nuanced approach to the history of the international criminal law advanced by the petitioners (and by various *Amici*). In contrast to the plurality, Justice Sotomayor relied on precedents such as the I.G. Farben trial and the 2014 decision of the Special Tribunal for Lebanon to support the idea that international criminal law does recognise that juristic persons can commit international crimes and never rejected the concept of corporate liability for human rights violation as inconceivable.[153]

By adopting an opposite position to that embraced by Justice Kennedy, the dissenting opinion recreated, to a certain extent, the divide previously opened by Judge Leval in *Kiobel I*. Once again a panel of judges suggested two conflicting views on the status of corporate liability for international wrongdoings by relying, *inter alia*, on two alternative interpretations of the history of international criminal law. The balance between these two positions, however, seems to have shifted in favour of Justice Sotomayor's. Indeed, the dissenting analysis of the role of

[149] Ibid at 1402.
[150] Ibid. (In-text citations omitted)
[151] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, at 1419 et ss. (2018), (Sotomayor, J. dissenting).
[152] Ibid at 1423.
[153] Ibid at 1423-4.

corporations under international criminal law found the support of four Supreme Court judges, while Justice Kennedy's opinion won only three votes. Of the two remaining judges, Justices Alito and Gorsuch, only the former briefly remarked on the lack of a clear standard of corporate liability at the international level but then refrained from elaborating further on the point.[154] According to William S. Dodge, Justices Alito and Gorsuch's decision not to join the part of Justice Kennedy's opinion on the international criminal law argument 'makes Justice Kennedy's mistaken approach to international law nothing more than dictum in a plurality opinion', somehow limiting its value.[155]

This conclusion finds further support in the opinion of the U.S. Supreme Court in the case *Nestlé USA, Inc. v. Doe et al*.[156] Decided in December 2021, the case once again brought to the attention of the Court the question of the liability of corporations under the Alien Tort Statute. The case concerned the alleged liability of U.S.-based companies Nestlé USA, Inc., and Cargill, Inc. for aiding and abetting child slavery in the Ivory Coast.[157]

While the international criminal law argument found its way into some *Amici Curiae* submitted in favour of the claimant and of the respondents,[158] this time the Court refrained from engaging with it. Indeed, in the opinion no attention is paid to the question of the status of corporations under international criminal law, in the specific, or under international law, more in general. Conversely, the Justices solely relied on extraterritoriality and foreign policies arguments – previously elaborated in *Kiobel* and *Jesner* – to overturn the decision of the Ninth Circuit.[159] As the Court heavily relied on most of the arguments developed in *Jesner*, the absence of any reference to the international criminal law argument – so central in Justice Kennedy's opinion – is conspicuous. Arguably, it may indicate an implicit recognition of the limitations of such argument and evidence an attempt from the Court to distancing itself from it, so confirming Dodge's view on the matter.

Another point in the *Nestlé* opinion is worth noticing and it concerns Justice Gorsuch and Justice Alito's considerations on the status of corporations under the ATS. In his concurring

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[154] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1410 (2018) (Alito, J. concurring).
[155] Dodge (n 3) 133-134.
[156] *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021).
[157] Ibid p. 1.
[158] *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021), Brief of Amici Curiae Nuremberg Scholars in Support of Respondents (21 October 2020), *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021), Brief of International Law Scholars as Amici Curiae in Support of Respondents (21 October 2020), p. 15 et ss., *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021), Brief of Professors of International Law, Foreign Relations Law, and Federal Jurisdiction as Amici Curiae in Support of Petitioners (8 September 2020), p. 16 et ss.
[159] *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021), p. 3 et ss.

opinion, Justice Gorsuch contested the idea that the ATS may supply 'corporations with special protections against suit' and argued that, in the context of this peculiar piece of legislation, 'distinguishing between individuals and corporations would seem to make little sense'.[160] He rhetorically asked, '[i]f early Americans assaulted or abducted the French Ambassador, what difference would it have made if the culprits acted individually or corporately?'.[161] A similar opinion is shared by Justice Alito, who dismissed the idea that the corporate status may 'justify special immunity' under the ATS.[162] Conversely, he observed that, 'if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation'.[163]

While these observations have only limited relevance in the context of the analysis of the international criminal law argument, as they are grounded on the Judges' reading of the history of the ATS, they are still significant and can be interpreted as a positive development since *Jesner*. They may not be enough to reopen the door to future litigation against corporate actors under the ATS, but they still cast a shadow on the validity of the strict ban on corporate liability proposed in *Jesner*.

7. Conclusion

The position adopted by the Supreme Court in the case of *Jesner v. Arab Bank, PLC* set a fundamental (and controversial) precedent for the future application of the Alien Tort Statute to corporate defendants. By closing the door to future cases concerning the involvement of (foreign) corporations in human rights abuses, the opinion further weakened the already fragile system of corporate accountability for human rights violations. In the context of this study, the split decision in *Jesner* demonstrates the lack of a clear understanding of the role played by corporations in the debate on the scope of international criminal law.

As highlighted in the chapter, the analysis of the history of international criminal law provided by the Second Circuit's majority in *Kiobel* and by Judge Kennedy in Jesner is far from flawless. The narrow approach adopted by the judges in both cases failed to appreciate the complexity of the issue under consideration. By focusing the analysis solely on two specific historical moments – Nuremberg and Rome -, the courts refused to acknowledge the ever-evolving nature of the debate on the corporate criminal liability under international criminal

[160] *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021) (Gorsuch, J., concurring), p. 3.
[161] Ibid.
[162] *Nestlé USA, Inc. v. Doe*, 593 U. S. ____ (2021) (Alito, J., dissenting), p. 1.
[163] Ibid.

law and entirely disregard developments occurred both between these two Grotian moments and after the adoption of the Rome Statute. At the same time, the counterarguments presented in both cases by the petitioners (and by some *Amici Curiae*) also fall short of providing an alternative reading of the development of the debate on corporate criminal liability under international criminal law. In the attempt to disprove the courts' position, the petitioners often inflated their arguments to the detriment of accuracy. This further contribute to the uncertainty surrounding the debate on corporate criminal liability under international criminal law.

Therefore, the divide emerged in the cases of *Kiobel v. Royal Dutch Petroleum Co.* and *Jesner v. Arab Bank, PLC* calls for a comprehensive investigation of the history of international criminal law to fully understand to what extent the concept of corporate criminal liability has been considered as part of the debate on the scope and existing limitations of the international criminal justice system. Until a more objective narrative of the history of international criminal law emerges – a history the goes beyond the two Grotian moments Nuremberg and Rome –, the discussion on the liability of corporations will always rest on uncertain grounds.

Chapter 2 – Corporate Criminal Liability and the Nuremberg Experience

1. Introduction

The analysis of the *Kiobel* and *Jesner* cases demonstrates that there is still great controversy on the interpretation of the history of the debate on corporate criminal liability under international criminal law. This controversy is particularly evident in relation to contribution paid by Nuremberg and the post-World War II trials to the discussion on the liability of corporations under international criminal law. While some scholars argue that Nuremberg and the Allies' programme for occupied Germany laid the foundation for the recognition of corporate criminal liability under international law, others dismiss this suggestion as unfounded.[1]

Therefore, it is of primary importance to shed light on the implication of Nuremberg and the post-World War II trials on the development of an international criminal liability of corporations. For this reason, this chapter looks back on the early years of international criminal law to investigate to what extent the criminal liability of such entities was discussed at that time. It begins by looking at the role played by groups and organisations during the trial conducted by the International Military Tribunal in the aftermath of the Second World War. Starting with an analysis of the drafting of Articles 9 and 10 of the London Charter, the first part of the chapter considers the characteristics of the model of criminal organisation adopted in the Charter to contrast it with the modern concept of corporate criminal liability. Following this investigation, the chapter then looks at the subsequent trials conducted by the US Military Tribunals pursuant Control Council Law No. 10. The analysis focuses in particular on the *I.G. Farben* case as a pivotal example of corporate involvement in international crimes. The aim of the chapter is to provide a better contextualisation of the Nuremberg experience in today's debate on corporate criminal liability for international crimes to avoid future misinterpretations.

[1] On the relevance of Nuremberg in today debate on corporate criminal liability: Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000). See also Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010); T. Giannini and S. Farbstein, 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' (2010) 52 Harvard International Law Journal – Online 119. Contrarily, *see* Florian Jeßberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' (2016) Journal of International Criminal Justice 327; Larissa van den Herik, 'Corporations as Future Subject of the International Criminal Court: An Exploration of the Counterarguments and Consequences' in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, (T.M.C. Asser Press 2010) 350.

2. Criminal Organisations at Trial: the Nuremberg Experience

Established for the purpose of prosecuting crimes committed by the Nazis during World War Two, the International Military Tribunal of Nuremberg (IMT) represents a milestone in the history of international law and marks the origins of the concept of individual criminal responsibility at the international level.[2] The Nuremberg Tribunal departed from the ancient Act of State doctrine[3] and inaugurated a new era of international law by acknowledging that 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.[4]

The Tribunal's most quoted statement, '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced',[5] crystallises the idea that individuals can and should be held accountable for the most serious violations of international law and lays the foundations of contemporary international criminal law.[6] For the first time, individuals were brought to trial before an international tribunal and punished for their involvement in serious violations of international law.[7]

In an article published in 1947, the eminent Austrian jurist and legal philosopher, Hans Kelsen, commented on the value of the London Agreement and of the IMT of Nuremberg by stating that '[i]ts greatest merit is that it puts into force the idea of individual criminal responsibility for violations of international law and thus improves-though not in general but for some particular cases-the primitive technique of general international law with its collective responsibility.[8]

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[2] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 4 et ss.

[3] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford Monographs in International Law 2012) 18. On the 'act of State' doctrine in connection with the Nuremberg Trial see, among other, Stefan Glaser, 'The Charter of the Nuremberg Tribunal and New Principles of International Law', in Guénaël Mettraux (ed), *Prespectives on the Nuremberg Trial* (Oxford University Press 2008) 55, 58 et ss.

[4] *United States et al. v Goering et al.*, Judgment, 30 September-1 October 1946 (1948) 1 IMT 171, 223.

[5] Ibid.

[6] Applying the Principles of Nuremberg in the ICC, Keynote Address at the Conference 'Judgment at Nuremberg' held on the 60th Anniversary of the Nuremberg Judgment, Judge Philippe Kirsch President of the International Criminal Court, Washington University, St. Louis, USA 30 September 2006, para 3.

[7] Elizabeth Borgwardt, 'Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg' (2010) 34(4) Journal of the Society for Historians of American Foreign Relations – Diplomatic Relations 627, 628.

[8] Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 International Law Quarterly 153, 165.

However, even though individuals were the main focus of the Allies in drafting the IMT's Charter, they were not the only one facing prosecution at Nuremberg. A number of groups or organisations were also an important part of the prosecution's case.[9] Six groups or organisations were indicted before the IMT: (i) the Reich Cabinet; (ii) the Leadership Corps of the Nazi Party; (iii) the Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterparte (commonly known as the SS), including the Sicherheitsdienst (commonly known as the SD); (iv) the Gestapo; (v) the Die Sturmabteilungen Der N.S.D.A.P. (commonly known as the SA); and (vi) the General Staff of the High Command of the German Armed Forces.[10] Each of these groups or organisations was charged on all counts listed in Article 6 of the London Charter, namely crimes against peace, war crimes, and crimes against humanity.[11] It would be therefore a mistake to interpret Nuremberg as the triumph of individual criminal liability as the *only* form of liability accepted and acceptable under international law.

The following paragraphs highlight the role of organisations and groups in the prosecution's case and discuss to what extent the concept of criminal organisation employed at Nuremberg might resemble (or might not) the modern notion of corporate criminal liability.

2.1. The Origin of the Prosecution's Case against Organisations

The case against groups and organisations developed as one of the pillars of the American strategy to tackle the unprecedented magnitude of Nazi crimes. Its genesis can be traced back to late 1944. At the time one of the main concerns among U.S. officials was how to deal with the hundreds of thousands of war criminals responsible for the atrocities committed in Europe.[12] On 15 September 1944, Lieutenant Colonel Murray C. Bernays – chief of the Special Projects Office of the Personnel Branch – presented a Memorandum on the 'Trial of European War Criminals' in which he set forth an innovative solution to the problem.[13] The four-page long Memorandum opened with a brief overview of the challenges involved in proceeding against Nazi criminals on an 'individual basis, and by old modes and procedures'

[9] David Fraser, '(De)Constructing the Nazi State: Criminal Organisations and the Constitutional Theory of the International Military Tribunal' (2017) 39 The Loyola of Los Angeles International and Comparative Law Review 117, 120.
[10] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 28.
[11] Ibid 29 et ss.
[12] Bradley F. Smith, *The American Road to Nuremberg: Documentary Record 1944-1945* (Hoover Inst Press, 1982), 5 et ss. See also Jonathan A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109(5) Columbia Law Review 1094, 1140; Richard Arens, 'Nuremberg and Group Prosecution', (1951) 1951(3) Washington University Law Review 329, 345.
[13] Smith (n 12) 33, van Sliedregt (n 3) 22.

and with a criticism of some of the solutions so far proposed.[14] Bernays' criticism focused, in particular, on the proposal made by the Secretary of Treasury, Henry Morgenthau Jr., that involved the execution by firing squads of those Nazi criminals generally recognised as guilty by the United Nations.[15] On this regard, Bernays observed that:

> [T]his suggestion would not solve the problem of punishing the thousands of less outstanding culprits. Furthermore, it would do violence to the very principles for which the United Nations have taken up arms, […]. The suggested procedure would taint an essential act of justice with false color of vindictiveness.[16]

In light of these deficiencies, Berneys proposed an alternative solution structured in two phases. At first, an 'appropriately constituted' international tribunal would proceed against 'the Nazi Government and its Party and State agencies', such as the Gestapo, SS, and SA, for the crimes of 'conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the law of war.'[17] During this first phase, only those individuals 'considered to be representative of the defendant organisations' would be brought to justice.[18] Once the international tribunal established the 'guilt' of the accused organisations, subsequent proceedings would be opened at the national level against individual members on the basis of their adherence to the organisation's aim and methods.[19] Indeed, according to Bernays:

> Behind each Axis war criminal … lays the basic criminal instigation of the Nazi doctrine and policy. It is the guilty nature of this instigation that must be established, for only thus will conviction and punishment of the individuals concerned achieve their true moral and juristic significance. […], *this approach throws light on the nature of the individual's guilt, which is not dependent on the commission of specific criminal acts, but follows inevitably from the mere fact of voluntary membership in organisations devised solely to commit such acts*.[20]

Bernays' plan found the support of the Secretary of War, Henry L. Stimson, who endorsed the proposal on 27 October 1945.[21] In the course of following months, Bernays' Memorandum was closely examined and discussed within the U.S. Administration.[22] Ultimately, a refined version of the initial proposal was incorporated into the Draft Proposal for the Prosecution and Punishment of Certain War Criminals and other Offenders, submitted

[14] Smith (n 12) 33-36.
[15] Ibid 27.
[16] Ibid 35.
[17] Ibid 36.
[18] Ibid.
[19] Ibid.
[20] Ibid 35 (emphasis added).
[21] Ibid 11.
[22] Ibid 11-12.

by the U.S. to the representatives from the United Kingdom, the Provisional Government of France, and the Soviet Union ahead of the San Francisco Conference of 3 May 1945.[23] In the days that followed the Conference, the draft Proposal was further revised following observations made by legal experts of the four Allied Powers.[24] The core of Bernays proposal, however, remained unchanged.

On 26 June 1945, representatives of the four victorious nations met in London to finalise their plan of action regarding the prosecution and punishment of Nazi leaders and organisations. Supreme Court Justice Robert H. Jackson, appointed Chief of Counsel for the Prosecution of Axis Criminality by President Truman on 2 May 1945, led the U.S. delegation throughout the negotiations.[25] During the Conference, participants expressed divergent views on the opportunity to confer the power to declare the criminality of groups and organisations upon the Tribunal, with the Soviet prosecutor – Gen. Nikitchenko – strongly against it.[26]

It was ultimately due to Justice Jackson's perseverance that a compromise was reached and the proposal on criminal organisations was incorporated – with minor adjustments – into the final text of the Charter of the International Military Tribunal (London Charter).[27]

2.2. The London Charter

The London Charter was formally adopted on 8 August 1945 as an Annex to the Agreement for the Prosecution and Punishment of the European Axis.[28] It outlined the law and procedure governing the constitution, jurisdiction and functions of the newly established International Military Tribunal. In particular, the Charter vested the IMT with the power to prosecute and punish individuals 'who, acting in the interests of the European Axis countries,' committed one of the crimes listed in Article 6 of the Charter, namely crimes against peace,

[23] Robert Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (London 1945), Doc. V, 'American Memorandum Presented at San Francisco (April 30, 1945)' 28.
[24] Smith (n 12) 140, Telford Taylor, The Nuremberg War Crimes Trials (1949) 27 International Conciliation 243, 249.
[25] Bradley F. Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (Basic Books 1977) 46 et ss.
[26] Jackson (n 23) 134-135. See also Arens (n 12) 347-349, Taylor (n 23) 253.
[27] UNWCC, Development of the Law Respecting Criminal Groups and Organisations in History of the United Nations War Crimes Commission and the Development of the Laws of War, Ch. XI (H.M. Stationery Office 1948) 303. See also Stoitchkova (n 1) 47-48.
[28] United Nations, *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement')*, 8 August 1945, 82 U.N.T.S. 279.

war crimes and crimes against humanity.[29] Also, as mentioned above, it granted the Tribunal with authority over groups or organisations, alongside individuals.

With specific regard to groups and organisations, the legal framework was provided for by Articles 9 and 10 of the Charter:

> Article 9
>
> At the trial of any individual member of any group or organisation, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.
>
> After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.'[30]
>
> Article 10
>
> In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.'[31]

Overall, these articles represent a *unicum* in the panorama of international criminal law: no similar provisions can be found in the statutes of subsequent international criminal tribunals or courts. Article 9 of the Charter conferred to the Tribunal the power to declare the criminality of a group or organisation on condition that at least one of its individual members is also facing prosecution, while Article 10 provided the basis for subsequent proceedings against individuals for membership in groups and organisations declared criminal at Nuremberg. The language employed in both articles was deliberately vague and left many legal issues unresolved. Neither

[29] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'),* 8 August 1945, 82 U.N.T.S. 279, Article 6.
[30] Ibid Article 9.
[31] Ibid Article 10.

Article 9 nor Article 10 provided for a definition of the terms 'group' or 'organisation'.[32] Left to the interpretation of the Tribunal were also questions concerning the legal nature of a declaration of criminality and the effects of such an 'unquestionable' declaration.[33] As will be observed in the following section, all these questions were discussed at length during the trial and ultimately resolved by the judges in the final Judgment.

2.3. The Nuremberg Trial and Judgment

The Trial of the Major War Criminals before the International Military Tribunal began on 20 November 1945. The proceedings lasted for about nine months, from November 1945 to August 1946. The Judgment was rendered on 30 September - 1 October 1946. Twenty-four individuals and six groups and organisations were named in the Indictments. Out of the twenty-four individual defendants, twelve were sentenced to death, seven jailed, three acquitted, one committed suicide while in custody and another was declared unfit to stand trial. The Tribunal declared the criminality of three groups and organisations, namely the Leadership Corps of the Nazi Party, the Gestapo/SD and the SS, while the Reich Cabinet, the SA, and the General Staff and High Command of the German Forces were acquitted.[34]

Since the beginning, the case against groups and organisations represented a challenge for the Tribunal, first of all for the massive amount of evidence submitted by both sides. Over the course of the proceedings, the Prosecution submitted several thousand documents demonstrating the inherently criminality of the accused groups and organisations.[35] The Tribunal also received 38,000 affidavits on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff, and 2,000 on behalf of the Gestapo.[36] The evidence in defence of the organisations was so extensive that most of it was taken before Commissioners appointed by the Tribunal in accordance with Article 17(e) of the London Charter. Only the most important witnesses were heard by the judges themselves.[37]

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[32] Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (n 25) 61, Stoitchkova (n 1) 48.
[33] UNWCC, 'Development of the law respecting criminal groups and organisations' in The History of the UN War Crimes Commission., Chapter XI, 289, 299; digitalized and available on Human Rights after Hitler: the History of the UNWCC Website. See also Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (n 25) 61; Stoitchkova (n 1) 48.
[34] *United States et al. v Goering et al.*, Judgment, 30 September-1 October 1946 (1948) 1 IMT 171.
[35] Ibid 172.
[36] Ibid.
[37] Ibid.

The trial of groups and organisation challenged the Tribunal also for the complex issues of law it raised.[38] In his book *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged*, American historian Bradley F. Smith so described the Tribunal's troublesome approach to groups and organisations:

> The problem that never seemed to leave [the judges] alone was that of criminal organisations. Some of the Tribunal members had begun to fuss about it long before the trial opened, and all through the trial it kept coming back to present new difficulties to the Court. […] The reasons that the controversies and uncertainties over the organisations had such a long life are not difficult to see. This was the most novel of the prosecutions, with no precedents in international law and a few, if any, in the domestic laws of the major states.[39]

On 14 January 1946, in an attempt to shed some light on scope of the procedure set out by Articles 9 and 10 of the Charter, the Tribunal invited argument from both the Prosecution and the Defence on the criteria the judges should apply in determining the criminal nature of a group or organisation.[40] The Prosecution and the Defence presented their arguments in a series of open sessions held from the 28th of February to the 2nd of March 1946.[41]

The arguments for the Prosecution were presented by Justice Jackson, the main promoter of the case against groups and organisations. The U.S. Chief Prosecutor argued that, for the purpose of Article 9 of the Charter, a group or organisation should be 'an aggregation of persons associated in identifiable relationship with a collective, general purpose'.[42] The general purpose pursued by the group or organisation should have been criminal 'in that it was designed to perform acts denounced as crimes in Article 6 of the Charter' and it should have been of such character 'that its membership in general may properly be charged with knowledge' of it.[43] Justice Jackson also clarified that membership in such a group or organisation must have been 'intentional and voluntary', not due to legal compulsion.[44] During the discussion, Jackson also touched upon the issue of the legal nature of the declaration of criminality and its effects on individual members by stating that a declaration pursuant Article

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[38] Telford Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir* (first published 1992, Skyhorse Pub Co Inc. 2013) 276.
[39] Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (n 25) 156.
[40] *Trial of the Major War Criminals before the International Military Tribunal,* Vol. V - Proceedings (9 January – 21 January 1946), Library of Congress, 238-239.
[41] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 359 et ss.
[42] Ibid 367.
[43] Ibid 367-8.
[44] Ibid 367.

9 of the Charter should be considered as a 'declaratory judgment' concerning only the 'collective criminality of the organisation or group' and not the individual guilt of its members.[45]

On the other side, the Defence strongly contested the legitimacy of the procedure established by Articles 9 and 10 of the Charter. According to the Defence, indeed, by issuing a declaration of criminality binding for subsequent courts, the Tribunal would have acted as a legislator and not as a judicial body, so infringing the principle of separation of powers.[46] Also, even assuming the legitimacy of such a procedure, the defence counsels contested its applicability to the groups and organisations they represented. First of all, they argued that a declaration pursuant to Article 9 could not be issued against the indicted entities considering that all groups and organisations had already been dissolved by the time the trial began.[47] Moreover, they denied the validity of the criteria set forth by the Prosecution, considered too vague and inapplicable to the indicted groups and organisations.[48]

In the end, the thesis of the Prosecution prevailed. In the final judgment, the Tribunal embraced the criteria proposed by Justice Jackson during the course of the trial.[49] The judges started by acknowledging that Articles 9 and 10 of the Charter provided for a 'far-reaching and novel procedure' that may produce 'great injustice' if applied without certain safeguards.[50] Therefore, according to the Tribunal, a declaration of criminality should be made 'in a manner to ensure that innocent persons will not be punished'.[51] To guarantee the respect of the principle of 'personal guilt', the Tribunal provided a clear definition of the 'criminal organisation', stating that:

> A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should

[45] Ibid 358.
[46] Ibid 398 et ss. Interestingly, similar doubts were raised also by the American Judge, Mr. Biddle, and the French Judge, M. de Vabres, see ibid 450-4.
[47] Ibid 391, 427.
[48] Ibid 390 et ss.
[49] UNWCC, 'Development of the law respecting criminal groups and organisations' in The History of the UN War Crimes Commission., Chapter XI, 289, 303; digitalized and available on Human Rights after Hitler: the History of the UNWCC Website, http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history-ch11-pt1.pdf.
[50] *United States et al. v Goering et al.*, Judgment, 30 September-1 October 1946 (1948) 1 IMT 171, 256.
[51] Ibid.

> exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation.[52]

The judges also emphasised that '[m]embership alone is not enough to come within the scope of these declarations', so highlighting the need to evaluate the individual guilt of each member on a case-by-case base.[53] Also, the Tribunal set forth a number of recommendations to be followed by subsequent courts in the trial of individual members of the convicted groups and organisations.[54]

As for the accused groups and organisations, the Tribunal issued a declaration of criminality against three of the indicted organisations: the Leadership Corps of the Nazi Party, the Gestapo/SD and the SS. The basis of the Tribunal's finding was the participation of these organisations 'in War Crimes and Crimes against Humanity connected with the war', in particular in the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war.[55] With regard to the other indicted groups and organisations, namely the Reich Cabinet, the SA, and the General Staff and High Command of the German Forces, the Tribunal refrained from declaring their criminality on various grounds. The SA was acquitted because, after 1934, '[it] was reduced to the status of a group of unimportant Nazi hangers-on' and the Tribunal had no jurisdiction on the criminal actions committed before that date.[56] The Reich Cabinet was considered too small a group of individuals to require a declaration of criminality; all its members could easily be tried individually even without a declaration against the group as a whole.[57] Lastly, the judges acquitted the General Staff and High Command of the German Forces on the basis that it was 'neither an 'organisation' nor a 'group' within the meaning of those terms as used in Article 9 of the Charter'.[58]

2.4. Crimes of membership v Corporate Criminal Liability: Two different legal concepts.

The analysis conducted so far allows drawing a first conclusion concerning the legacy of the Nuremberg Trial and the criminal liability of legal entities under international criminal

[52] Ibid.
[53] Ibid.
[54] Ibid 256-7.
[55] Ibid 257-73.
[56] Ibid 275.
[57] Ibid 276.
[58] Ibid 278.

law. Even though groups and organisations played an important role in the IMT proceedings, the legal basis for their indictment at Nuremberg greatly differs from the rationale underlying the modern concept of corporate criminal liability. Indeed, as observed in the previous sections, the theory of criminal organisations was developed to facilitate the rapid prosecution of the thousands of individual members of these groups and organisations deemed the 'repositories of all power in the Nazi regime'.[59] By bestowing the IMT with the authority to declare a group or an organisation 'criminal', the London Charter laid the foundations for the subsequent prosecution and punishment of individuals for the specific crime of 'membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal'.[60] The purpose was, therefore, the criminalisation of individual membership in organisations whose aim was the performance of criminal activities. The Tribunal's finding in the case against the Reich Cabinet is indicative of this approach. In dismissing the Prosecution's request to declare the criminality of such entity, the judges observed:

> It is estimated that there are forty-eight members of the group, that eight of these are dead and seventeen are now on trial, leaving only twenty-three at the most as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial; but nothing would be done to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organisation. *Where an organisation with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble*. There is no such advantage in the case of a small group like the Reich Cabinet.[61]

Moreover, another aspect differentiates the Nuremberg case against criminal organisations from the modern concept of corporate criminal liability. None of the indicted accused groups and organisations was a private company pursuing economic profit. Indeed, only public entities were indicted during the main trial. As observed by some scholars:

> […] at every step, the term 'organisations' was meant to include government agencies and security and party formations only. The entire goal of the war was to crush the Nazi regime and its institutional levers. […] 'Organisations' were

[59] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 374.
[60] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945 (1946) 3 Official Gazette Control Council for Germany 50-55.
[61] *United States et al. v Goering et al.*, Judgment, 30 September-1 October 1946 (1948) 1 IMT 171, 276 (emphasis added).

> meant to include party, government, and security formations, and not business entities.[62]

The procedure established by Articles 9 and 10 of the Charter, therefore, was never meant to address the involvement of business entities in atrocities committed by the Third Reich.[63]

Understood in these terms, the theory of criminal organisations as developed at Nuremberg could not be considered a valid legal precedent for corporate criminal liability under international criminal law.[64] Indeed, the modern principle of corporate criminal liability aims at addressing the criminality of the corporation in itself, as a separate entity from its individual members. In this context, the criminal liability of corporate officials and the criminal liability of the company in itself, although often interconnected, remain two distinct concepts.

This conclusion on the different nature and aim of the concept of criminal organisation, in contrast to corporate criminal liability, is supported by the work Nina H. B. Jørgensen. In her scholarship, Jorgensen extensively discussed the theoretical underpinning of the concept of criminal organisation and considered its potential applicability to 'criminal' Governments or to situations characterised by mass participation in atrocities, like the case of Rwanda in 1994.[65] In this regard, it is interesting to notice how Jorgensen theorised the applicability of the concept of criminal organisation solely in relation to political organisations or militia – like in the case of the *Interahamwe* militia in Rwanda[66] – and not also business corporations.[67]

Conversely, she looked at corporate criminal liability as a separate legal concept from that of criminal organisation.[68] In particular, she looked at corporate criminal liability as potentially 'relevant as a general principle of law' and argued that its theoretical underpinning may 'be applied to states if the state is viewed as a corporate structure with agents acting on its

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[62] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief Nuremberg Historians and International Law Lawyers in Support of Neither Party, September 2011, pp. 19-20.
[63] Ibid. *Contra*, Stoitchkova (n 1) 48-50.
[64] Jeßberger (n 1) 337.
[65] Regarding criminal Governments, see Nina H. B. Jørgensen, *The Responsibility of States for International Crimes* (OUP 2000), 69-71. On the applicability of criminal organisation to the Rwanda case, see Nina H. B. Jørgensen, 'A reappraisal of the abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (2001) 12 Criminal Law Forum 371, 397.
[66] On the role played by the Interhamwe in the Rwandan genocide of 1994 see United States Bureau of Citizenship and Immigration Services, *Rwanda: Information on the role of the Interhamwe [also Interahamwe] militia and the use of roadblocks during the 1994 Rwandan genocide*, 14 August 2001, RWA01001.OGC.
[67] See Jørgensen (n 65), 'A reappraisal of the abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda', 399 et ss, and Jørgensen (n 65), *The Responsibility of States for International Crimes*, 69-71.
[68] Jørgensen (n 65), *The Responsibility of States for International Crimes*, 79.

behalf, and a large population which may be likened to shareholders who are interested in and affected by the acts of the decision-makers'.[69] In this sense, theories on corporate criminal liability may be used to attribute criminal liability to the state, without extending it to its population.

Accordingly, Jørgensen's scholarship confirms the conclusion that corporate criminal liability and criminal organisation rest on substantially different theoretical grounds. The former theorises a form of criminal liability that applies to the corporation *itself* and that does not cascade on the position of each individual employee, whose liability can be established solely in cases where they are individual perpetrators or accomplices for the same crime. Conversely, as highlighted by Jørgensen, 'the concept of criminal organisation was designed as a method of dealing with mass, organised criminality where there were numerous willing participants' in the criminal conduct.[70] As such, its end goal was to facilitate the trial of the individual members of the organisation and not to impose criminal liability on the organisation *in itself*.[71]

This being said, it is relevant to mention that an attempt to draw a parallel between the theory of criminal organisations and corporate criminal liability was made already during the main Nuremberg Trial. In raising the point of the prior dissolution of the accused groups and organisations, two counsel for the accused groups and organisations – Dr. Egon Kubuschok, for the Reich Cabinet, and Dr. Hans Laternser, for General Staff and High Command – referred to the novel concept of corporate criminal liability, developed in the Anglo-American system, as the notion upon which Article 9 of the Charter was modelled. It is worth including here the pertinent passages of the speeches of both defence counsels:

> DR. KUBUSCHOK:
>
> The six organisations under Indictment are, according to the request of the Prosecution, to be declared criminal organisations in their entirety. A request of that kind and the proceedings pertaining to it would represent something unprecedented in the jurisprudence of all states. As we know, this request is not

[69] Jørgensen (n 65), *The Responsibility of States for International Crimes*, 79.

[70] Jørgensen (n 65), 'A reappraisal of the abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda', 397.

[71] For a more in-depth analysis of the challenges posed by the concept of criminal organisations, especially in relation to the perceived risk of collective criminalisation, see, inter alia, Shane Darcy, Collective Responsibility and Accountability under International Law (BRILL 2007), 257-291, David Fraser, '(De)Constructing the Nazi State: Criminal Organisations and the Constitutional Theory of the International Military Tribunal' (2017) Loyola of Los Angeles International and Comparative Law Review 117, Richard Arens, 'Nuremberg and Group Prosecution' (1951) Washington University Law Review 329.

uninfluenced by the fact that, contrary to other nations, in England and even more so in the United States, even companies and corporations as such can be prosecuted in some cases for reasons of expediency. This is a legal development called for by the dominant position which companies and corporations have acquired, above all, in economic life. This position made their punishment seem desirable in certain cases. They were affected by this punishment, however, only to the extent to which they could be affected in their economic sphere, that is to say, by the imposition of fines. …. the organisations under Indictment have been dissolved by a law of the Military Government, and therefore, no longer exist. What still exists are only the individual former members who, therefore, in reality, are the actual defendants and have simply been brought together under the name of the former organisation as a collective designation.'[72]

DR. LATERNSER:

If in England and America – as exceptions – associations as such can be punished, that can be done only on account of certain groups of offenses and only to the effect that either the dissolution of the corporation may be pronounced or fines imposed. Naturally in such proceedings it is a necessary condition for the Prosecution and the Defense that the corporation as such be represented during the proceedings by its functionaries and representatives and be able to defend itself; whereas in this Trial the groups and organisations as such are summoned before the Court, although they do not exist any longer and although their functionaries are absent.[73]

The Prosecution's rebuttal on this point was left to Sir David Maxwell-Fyfe – Deputy Chief Prosecutor for the United Kingdom – who unequivocally stated that the sole purpose of a declaration under Article 9 was to facilitate subsequent trials against individual members. In particular:

The first point that Dr Kubuschok made was that the procedure of asking for a declaration against the organisations was objectionable for two reasons: First, because it was founded on the limited phenomenon in Anglo-Saxon jurisprudence, that a corporation may be convicted in certain limited spheres; and secondly, that the organisations were in fact dissolved some time ago.

I think it is important to stress that *that is not the legal conception which underlies this portion of the Charter*. It is really based, in my submission, on a doctrine found in most systems of law, either *res adjudicata* or the conception of the judgment in rem as opposed to the judgment *in personam*. That is, that it is in the general and public interest that litigation on a particular point should not be interminable, and that, if the appropriate tribunal has come to a decision on a

[72] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 390-1.
[73] Ibid 435.

> point of general interest and importance, that point should not thereafter be litigated many times.[74]

In light of the above, it is clear that the Prosecution at Nuremberg never that Articles 9 and 10 of the Charter be interpreted as a *sui generis* procedure to apply corporate criminal liability.

This notwithstanding, it would be a mistake to assume that Nuremberg has nothing to teach in regard to the prosecution of corporate entities at the international level. From a procedural perspective, indeed, Nuremberg demonstrates that entities can fit in the context of an international criminal trial. During the trial, the position of the accused groups and organisations was not dissimilar from that of the individual defendants.[75] Even though the procedural rules at Nuremberg were quite rudimentary, attention was paid to the respect of the procedural guarantees of the accused groups and organisations. Indeed, in accordance with Rule 2 of the IMT Rules of Procedure, each of the accused groups or organisations had the right to be represented by a counsel, to submit evidence in support of their defence and to present arguments on legal issues of their concern.[76] Ultimately, although the case against criminal organisations presented a number of challenges, most of them related to the sheer amount of evidence, the Tribunal was nonetheless able to deal with it in an effective way.

3. Post-World War II Trials: The Industrialist Cases

In the wake of the main international trial at Nuremberg, the Allies undertook a series of subsequent trials against representatives of the German public and private sectors for their involvement in crimes perpetrated by the Nazi Regime. The legal framework for these subsequent proceedings was provided by Control Council Law No. 10 (from now on CCL10), enacted on 20 December 1946.[77] CCL10 authorised each of the four Allied powers to proceed against suspected war criminals in their respective zone of occupation.[78] The list of crimes punishable pursuant to CCL10 was mostly modelled on that of the London Agreement, with

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[74] Ibid 455 (emphasis added).
[75] Telford Taylor, 'The Nuremberg War Crimes Trials', (1949) 27 Int'l Conciliation 243, 261. In his speech of 28 February 1946, Justice Robert Jackson expressed a different view stating that '[u]nder the Charter, the groups and organisations named in the Indictment are not on trial in the conventional sense of that term. They are more nearly under investigation as thev might be before a grand jury in Anglo-American practice'. See *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 358. In this regard, see also van den Herik (n 1) 350-368, 352.
[76] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 19-23.
[77] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 (1946) 3 Official Gazette Control Council for Germany 50-55.
[78] Ibid Article 3.

the significant addition of the crime of '(d) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal'.[79]

Out of all the trials carried out under the umbrella of CCL10, the so-called 'industrialist cases' are by far the most relevant in the context of the present study. These proceedings were the first to touch upon the issue of business involvement in international crimes and, to a certain extent, the question of the liability of legal entities for complicity in mass atrocities.[80] These trials were conducted by the US Military authorities against directors and executives of three powerful German concerns, namely Flick, I.G. Farben and Krupp.[81]

The following sections aim at providing an overview of the context in which these trials were conducted and an analysis of their significance in the framework of the present study. In particular, it is investigated to what extent corporate criminal liability was discussed in the months preceding the opening of these trials and how business entities were portrayed in the context of these proceedings. Regarding this latter aspect, particular attention will be paid to the I.G. Farben case (*United States v Carl Krauch et al.*, Case No. 6), 'the biggest and most complicated of the industrialist cases'.[82]

3.1. Business Complicity in International Crimes: from the Failure of the Krupp case at Nuremberg to the U.S. Industrialist Trials

The idea of addressing the complicity between the German business sector and the Third Reich pre-dated the end of the World War II. During the war, the U.S. had looked with concern to the relationship between German industrialists and the Nazi Party.[83] From 1943 to

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[79] Ibid Article 2(1)(d).

[80] Clapham (n 1) 140. See also Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge – 2017) 63; Jernej Letnar Cernic, *Human Rights Law and Business. Corporate Responsibility for Fundamental Human Rights* (Groningen: Europa Law Publishing, 2010) 62-3; Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges' (2010) 8 Journal of International Criminal Justice 699, 702; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility.' (2001) 111 Yale Law Journal 443, 477-8.

[81] United States Military Tribunal at Nuremberg, *The United States of America vs. Alfried Krupp et al.*, 'The Krupp Case', Case No. 10, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. IX , United States Military Tribunal at Nuremberg, *The United States of America vs. Friedrich Flick et al.*, 'The Flick Case', Case No. 5, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VI, United States Military Tribunal at Nuremberg, *The United States of America vs. Carl Krauch et al.*, 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII.

[82] Telford Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10*, (Washington D.C. 1949) 195.

[83] Grietje Baars, 'Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII' in Kevin Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (OUP Oxford 2013) 165.

the end of the conflict, a series of public hearings was held by the U.S. Senate Subcommittee on War Mobilization to discuss the role of German industry in the consolidation of Hitler's power since the mid-1930s.[84] On 13 November 1944, the Subcommittee – chaired by Senator Harley M. Kilgore – presented a Report on Cartel and National Security in which it highlighted the link between international cartels and 'the problem of national defence and the establishment of world peace'.[85] It was in the Subcommittee's opinion that German industrialists had colluded with the Nazi Regime to plan, organise and launch an aggressive war to pursue their own business interests.[86]

In particular, the Subcommittee considered that:

> A study of the evidence which has been accumulated discloses how the cartel system of international economic relations operated in the period between the two world wars and shows by what means our Axis enemies engaged in systematic economic warfare against the United States as a prelude to their military aggressions. These economic aspects of war and peace have received far less public notice than the political and military aspects.[87]

This concern regarding the role played by industrialists before and during the Second World War was shared also by the Soviet Union and France.[88]

For this reason, when the time came to draft a list of individuals to indict in the international trial at Nuremberg, it was suggested to include Gustav Krupp von Bohlen und Halbach, head of the Krupp Industries, among the possible defendants.[89] Unfortunately, the prosecutors failed to consider Krupp's medical conditions. At 75 years old, Gustav Krupp was in no ways fit for trial due to his poor mental and physical state.[90] In light of that, on 4 November 1945, the defence counsel for Krupp presented a motion for the postponement of

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[84] Ibid. Mira Wilkins, *The History of Foreign Investment in the U.S., 1914-1945* (Harvard University Press 2004) 534.

[85] United States, Senate, Committee on Military Affairs, *Cartels and national security: report from the Subcommittee on War Mobilization to the Committee on Military Affairs, United States Senate, pursuant to S. Res. 107, a resolution authorizing a study of the possibilities of better mobilizing the national resources of the United States* (Washington 1944).

[86] Ibid 6-7; see also Baars (n 76) 165-6.

[87] United States, Senate, Committee on Military Affairs, *Cartels and national security: report from the Subcommittee on War Mobilization to the Committee on Military Affairs, United States Senate, pursuant to S. Res. 107, a resolution authorizing a study of the possibilities of better mobilizing the national resources of the United States* (Washington 1944), 2.

[88] Baars (n 76) 169.

[89] Smith, *Reaching Judgment at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (n 25) 68. See also Bush (n 12) 1111; Joseph Borkin, *The Crime and Punishment of I.G. Farben* (Andre Deutsch 1978) 135.

[90] Bernaz (n 73) 67; See also Bush (n 12) 1112.

the trial against the businessman.[91] On 15 November 1945, the Tribunal granted the defence's request of postponement and ordered 'that the charges in the indictment against Gustav Krupp von Bohlen shall be retained upon the docket of the Tribunal for trial hereafter, if the physical and mental condition of the defendant should permit.[92] To no avail the US Chief Prosecutor Jackson requested the bench to replace Gustav Krupp with his son Alfred, formally in charge of the Krupp Industries since 1943.[93] In the end, Gustav Krupp's medical conditions never improved and his trial never took place.

Notwithstanding the failure of the Gustav Krupp case, the Allies did not set aside their resolution to proceed against representatives of the German industry. For months, the Allies debated on the feasibility of conducting a second international trial only against German businessmen.[94] The proposal, raised immediately after the dismissal of the Krupp case by the British and the French delegations,[95] was seriously considered in spring 1946.[96] However, the project was eventually abandoned, mostly due to a lack of political support by the governments of the United States.[97]

After the derailment of the plan for a second international trial, the Allies resolved to address the issue of the complicity of German industrialists with the Nazi regime in a series of subsequent proceedings to be conducted under the umbrella of Control Council Law No. 10 (hereafter CCL10).[98] Overall, four cases against industrialists were conducted in compliance with CCL10: three in the U.S. zone (the 'industrialist cases') and one in the French zone (the *Roechling* case[99]). The U.K. also opened a case against *Bruno Tesch et al.* for complicity in the murder of interned allied civilians by means of poison gas (the so-called Zyklon B case),[100] but

[91] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 124.
[92] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 143.
[93] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 134-138. See also Bernaz (n 73) 67-68; Bush (n 12) 1112.
[94] Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 75) 22 et ss. See also Bush (n 12) 1123 et ss.
[95] '*Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 147.
[96] Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 75) 24-26.
[97] It is beyond the scope of this study to address all the reasons that led to the abandonment of this project. For an in-depth analysis of the issue see Bush (n 12) 1123 et ss.
[98] Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 75) 24-26.
[99] *The Case against Herman Roechling and other,* General Tribunal of the Military Government of the French Zone of Occupation in Germany, 30 June 1948.
[100] *Trial of Bruno Tesch et al.*, British Military Court, Hamburg, Germany, 1-8 May 1946.

the trial was conducted outside the scope of CCL10.[101] There is no evidence that any trial against industrialists has ever been conducted by the Soviet Union in accordance with CCL10.[102]

The following section focuses on the preparation of the subsequent trials carried out by the Americans in their own zone of occupation.

3.2. The Preparatory Phase of the U.S. Industrialist Cases: Pomerantz's Memorandum

In the U.S. controlled zone, the preparation of subsequent proceedings against German war criminals began in the early months of 1946. With the first international trial still underway, on 12 January 1946, Justice Jackson established within the Office, Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC) a 'Subsequent Proceeding Division' tasked to start collecting evidence and material to conduct future trials under CCL10.[103] Immediately after, on 16 January 1946, U.S. President Harry S. Truman signed Executive Order No. 9679, officially authorising Justice Jackson 'to proceed before United States military or occupational tribunals, in proper cases, against other Axis adherents' and, for this purpose, 'to designate a Deputy Chief of Counsel' responsible for 'organizing and planning the prosecution of charges of atrocities and war crimes, other than those … being prosecuted … in the international military tribunal'.[104] At the end of March 1946, the position of Deputy Chief of Counsel was assigned to Brigadier General Telford Taylor, already a member of Jackson's team at Nuremberg.[105]

As Justice Robert Jackson had been the main promoter and strong supporter of the first international trial, Brigadier General Telford Taylor became the driving force behind the subsequent proceedings conducted by the U.S. under CCL10. As Deputy Chief of Counsel, Brig. Gen. Taylor took charge of the Subsequent Proceedings Division, which later on become the Office, Chief of Counsel for War Crimes (OCCWC),[106] and began recruiting new staff members to prepare future cases against German war criminals.[107] The new team of lawyers

[101] The British authorities never implemented Control Council Law No. 10, opting for proceeding against war criminals in strictly military courts pursuant Royal Warrant. See Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 75) 8.
[102] Ibid.
[103] The Division was created by General Memorandum n. 13 of 12 January 1946, as stated in General Memorandum n. 15 of 29 March 1946, published in Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 75) 268.
[104] Ibid 267.
[105] Ibid 268.
[106] Ibid 14.
[107] Ibid 14-15. See also Bush (n 12) 1130.

and legal experts recruited by Brig. Gen. Taylor was organised into five groups, each of them tasked to develop different aspects of the subsequent proceedings programme. Of the five groups or 'trial teams', two were charged with preparing the cases against German industrialists, while the others focused on cases involving military leaders, SS and police officials, diplomats and other high government functionaries.[108]

Under Taylor's direction, the Subsequent Proceedings Division worked on the preparation of the subsequent trials, assembling evidence and developing legal theories for the prosecution. Between June and September 1946, a significant part of the work carried out by the Subsequent Proceedings Division involved the preparation of the industrialist cases.[109] As a distinguished scholar observed:

> In the summer of 1946, the challenge for American prosecutors was … how to start the [subsequent proceedings] program, and the questions were legal more than evidentiary or political. Surrounded by businesses and businessmen whose crimes were immense and numbers far too large to permit more than a handful to be tried, the Americans needed legal theories that might allow the worst of the worst to be tried efficiently and fairly.[110]

It was precisely during that time that a proposal to indict corporations in their own capacity was brought to the attention of Brig. Gen. Taylor.[111] In a Memorandum dated 27 August 1946, Abraham L. Pomerantz, Taylor's senior deputy in charge of economic cases, presented his views on the 'feasibility and propriety to indict I.G. Farben and Krupp as corporate entities'.[112] To date, Pomerantz's Memorandum represents the only available evidence that corporate criminal liability was indeed considered as a possible solution to address the involvement of business entities in international crimes.[113]

In his Memorandum, Pomerantz firstly highlighted a number of reasons in support of the idea of charging I.G. Farben and Krupp for their complicity in Nazi crimes.[114] He argued that, from a tactical point of view, the indictment of these corporations would have increased the prospects of obtaining a conviction also against the individual defendants, '[f]or the much

[108] Ibid 15.
[109] Ibid 63.
[110] Bush (n 12) 1134-5.
[111] Bush (n 12) 1149; Beth Van Schaack, 'Symposium: The lessons of Nuremberg' (SCOTUSblog, 25 July 2017).
[112] Memorandum of 27 August 1946, reprinted as an annex in Bush (n 12) 1247-8.
[113] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief Nuremberg Historians and International Law Lawyers in Support of Neither Party, September 2011, 10.
[114] Memorandum of 27 August 1946, reprinted as an annex in Bush (n 12) 1247.

greater guilt of the entity will tend to enhance the culpability of the individual defendants'.[115] Indeed, according to Pomerantz, a case against these corporations would have stood on more solid grounds than a case against individual defendants. He also observed that a ruling on the criminal liability of these corporate entities for war crimes would have laid 'a legal and moral foundation for the expropriation of all or any part of these properties'. Lastly, he claimed that a decision against these industrial giants would have demonstrated 'to the German people the real powers behind Hitler and the NSDAP'.[116]

In the second half of his Memorandum, Pomerantz took the time to briefly address the issue of whether the legal framework created by the London Agreement, the London Charter and CCL10 'precludes indictment of corporations'.[117] It is worth noting that, in Pomerantz's opinion, neither the London Charter nor CCL10 foreclosed corporate criminal liability.[118] Indeed, he stated that, although '[d]escription of defendants as "individuals" and "persons" would … seem to buttress a contention that only natural persons were envisaged by the Charter and the Law … when the words are read contextually, *it is clear that the draftsmen did not intend to exclude criminal corporations from its scope*'.[119] To support this argument, he observed that:

> Art. 1 of the quadripartite agreement provides for the trial of war criminals, "whether they be accused individually or in their capacity as members of organisations or groups or in both capacities". Here the word "individually" is clearly intended to contradistinguish "representative" liability. Certainly, it is not used to distinguish "individual" from "corporate" liability. The same formulation appears in Art. 6 of the Charter, this time, however, prefaced by a reference to potential defendants as "persons". However (in the absence of law dictionaries and encyclopaedias), I believe the word "person" in statutes has consistently been held to embrace corporations.[120]

Pomerantz's interpretation of the London Agreement and of the Charter was most certainly influenced by his legal background. As a lawyer specialised in U.S. commercial litigations, Pomerantz had in-depth knowledge of the U.S. legal system. His view on the

[115] Ibid.
[116] Ibid.
[117] Ibid 1248.
[118] Ibid.
[119] Ibid (emphasis added).
[120] Ibid.

interpretation of the word 'person' followed the provisions of the recently adopted U.S. Dictionary Act of 30 July 1947,[121] which provided that:

> In determining the meaning of any Act or resolution of Congress … the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense.[122]

Such an interpretation, however, was in direct contrast with Justice Jackson's understanding of the scope of the London Charter. According to Justice Jacksons, indeed, '[t]he power of the Tribunal to try is confined to "persons," and the Charter does not expand that term by definition, as statutes sometimes do, to include other than natural persons'.[123] It is unclear whether Pomerantz deliberately disregarded Jackson's position or, more realistically, was not aware of it.[124] Whichever the case, Pomerantz's view provided an alternative, and interesting, interpretation on the scope of the London Charter that could have opened the door to the prosecution of corporate entities, alongside natural persons.

Unfortunately, it is unclear how this proposal to indict corporate defendants was received by Brig. Gen. Taylor or why it was ultimately dismissed in favour of the prosecution of individual defendants. As observed by Jonathan A. Bush, '[t]he likelihood is that someone noted that since no corporations were charged at the first Nuremberg trial, it might seem odd to introduce a new theory now'.[125] Nothing indicates that the decision not to pursue corporate criminal liability was based on a 'legal determination that it was impermissible under international law'.[126]

In December 1946, Abraham L. Pomerantz resigned from his position in Nuremberg and returned to the States.[127] There is no evidence that his proposal was ever discussed following his departure.

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[121] The Dictionary Act, Ch. 388, 61 Stat 633 (1947)
[122] Ibid § 1.
[123] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 359.
[124] As will be observed *infra*, no record survived on how Pomerantz's proposal was received by Taylor and his staff. It is therefore unclear whether the inconsistency between Pomerantz's and Jackson's approach to the interpretation of the Charter had ever been addressed.
[125] Bush (n 12) 1151.
[126] Ibid 1239. See also Borgwardt (n 7) 632; Van Schaack (n 104).
[127] Bush (n 12) 1171-2.

Having set aside the idea of proceeding against corporate defendants, U.S. officials directed all their efforts to the preparation of the trials against a selected group of businessmen closely linked to Hitler and his circle of allies. By February 1947, when the indictment in the first of the industrialist cases (the Flick case) was being finalised, the proposal to proceed against corporations as separate legal entities had been long forgotten.

3.3. The Industrialist Cases

The three industrialist cases were conducted between April 1947 and July 1948 at the Palace of Justice of Nuremberg. These trials involved the prosecution of a total of forty-two individual defendants from the Flick, Farben and Krupp firms, charged with crimes against peace, war crimes, crimes against humanity, and – to a minor extend – membership in criminal organisations.[128]

The Flick case (*U.S. vs. Friedrich Flick et al.* – Case No. 5) was the first of the industrialist cases.[129] It began on 19 April 1947 and concerned the prosecution of Friedrich Flick and five other leading officials of the Flick Concern.[130] Under the Nazi regime, the Flick Concern rose to be one of the largest coal, steel and manufacturing companies of the Reich and took part in a series of 'aryanisation' projects to consolidate its business position.[131] The prosecution charged the defendants with forced deportation and enslavement for the use in slave labour, plunder and spoliation of property in occupied territories, 'aryanisation' or illegal acquisition of Jewish properties during the pre-war years, and membership in and support of the SS and the 'Circle of Friends of Himmler'.[132] The judgment was rendered on 22 December 1947. The U.S. Military Tribunal found Friedrich Flick guilty of forced deportation and enslavement for use in slave labour of prisoners of war, plunder and spoliation of property and of membership in criminal organisations.[133] The Tribunal also convicted two of his associates,

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[128] Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10* (n 25) 184-202; Bernaz (n 73) 68-69; Kyle R. Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity' (2005) Air Force Law Review 167, 177-191

[129] United States Military Tribunal at Nuremberg, *The United States of America vs. Friedrich Flick et al.*, 'The Flick Case', Case No. 5, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952), Vol. VI, 3

[130] Ibid 11-2.

[131] For an in-depth analysis of Flick's role in the 'aryanisation' of German industry see L. M. Stallbaumer, 'Big Business and the Persecution of the Jews: The Flick Concern and the Aryanization of Jewish Property before the War' (1999) 13 Holocaust and Genocide Studies 1.

[132] United States Military Tribunal at Nuremberg, *The United States of America vs. Friedrich Flick et al.,* 'The Flick Case', Case No. 5, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952), Vol. VI, 3.

[133] Ibid. 1222-1223.

defendant Bernhard Weiss and defendant Otto Steinbrinck, for forced deportation and enslavement for use in slave labour of prisoners of war and membership in criminal organisations, respectively. Accordingly, the convicted were sentenced to terms of imprisonment ranging from seven to three and a half years.[134] The Tribunal acquitted the other defendants on all counts.[135]

The Farben case (*U.S. vs. Carl Krauch et al.* – Case No. 6), the 'biggest and most complicated'[136] of the industrialist cases, opened on 12 August 1947.[137] Twenty-four defendants – twenty members of the 'Vorstand' and four directors and executives – stood trial for planning and waging aggressive war, plunder and spoliation of property in occupied territories, enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates, membership in criminal organisations and conspiracy to commit aggressive war.[138] The judgment was rendered on 30 July 1948.[139] None of the defendants was found guilty of the crimes of planning and waging aggressive war and conspiracy to commit aggressive war.[140] Thirteen defendants were found guilty of one or both of the crimes of plunder and spoliation of property in occupied territories, and enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates.[141] As in the Flick case, the Tribunal sentenced the convicted to terms in prison varying from eight to one and a half years.[142] Ten defendants were acquitted on all counts.[143] One of the defendants, Max Brüggemann, was declared unfitted for trial due to medical reasons and his case discontinued in September 1947.[144]

Third – and last – of the industrialist cases, the Krupp case (*U.S. vs. Alfred Krupp et al.* – Case No. 10) opened on 9 December 1947 and involved the prosecution of Alfred Krupp von

[134] Ibid 1223.
[135] Ibid 1222-3.
[136] Telford Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10*, (n 25) 195.
[137] United States Military Tribunal at Nuremberg*, The United States of America vs. Carl Krauch et al.,* 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII, 3.
[138] Ibid 2.
[139] Ibid 3.
[140] Ibid 1206-1209.
[141] Ibid.
[142] Ibid 1206-1208.
[143] Ibid 1206-1209.
[144] Ibid 1083

Bohlen und Halbach alongside eleven officers of the Krupp concern.[145] The defendants were charged with planning and waging aggressive war, plunder and spoliation of occupied territories, enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates, and conspiracy to commit aggressive war.[146] The judgment, rendered on 31 July 1948, convicted eleven defendants for one or both of the crimes of enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates and spoliation of property in occupied territories.[147] As in the *I.G. Farben* case, all defendants were acquitted for the crimes of planning and waging aggressive war and conspiracy to commit aggressive war.[148] The sentences imposed by the Tribunal ranged from a maximum of twelve to a minimum of two years of imprisonment.[149]

Overall, the outcome of these proceedings was quite disappointing.[150] In all three cases, the judges were particularly lenient towards the defendants and often ruled in their favour. In his personal account on the Farben case, *The Devil's Chemists*, Josiah E. DuBois, Jr. – head of the prosecution team for the Farben case – bitterly observed that '[t]he sentences were light enough to please a chicken thief, or a driver who irresponsibly run down a pedestrian'.[151]

To the disappointment of the prosecution teams, in both the Flick and Farben case the judges accepted the defence of necessity raised by the defendants, recognising that the 'reign of terror' created by Hitler did not allow those businessmen to act contrary to the Reich's policy.[152] The decision to allow such a defence stood in open contrast with CCL10 which explicitly stated that '[t]he fact that any person acted pursuant to the order of his Government

[145] United States Military Tribunal at Nuremberg, *The United States of America vs. Alfried Krupp et al.*, 'The Krupp Case', Case No. 10, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. IX,1
[146] Ibid 2.
[147] Ibid 1373, 1448.
[148] Ibid 390-400.
[149] Ibid 1449-52.
[150] Baars (n 76) 179; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief Nuremberg Historians and International Law Lawyers in Support of Neither Party, September 2011, 12.
[151] Josiah E. DuBois, Jr., *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* (Beacon Press 1952) 339.
[152] United States Military Tribunal at Nuremberg, *The United States of America vs. Friedrich Flick et al.*, 'The Flick Case', Case No. 5, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VI, 1200-1201; United States Military Tribunal at Nuremberg, *The United States of America vs. Carl Krauch et al.*, 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII, 1173-1178.

or of a superior does not free him from responsibility for a crime'.[153] On this regard, the Flick Tribunal clarified:

> In our opinion, it is not intended that these provisions [of Control Council Law 10] are to be employed to deprive a defendant of the defence of necessity under such circumstances as obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defence of necessity here urged in their behalf. … The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always "present," ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.[154]

Perhaps an even bigger disappointment came from the judges' refusal to ascribe any responsibility to the Farben and Krupp defendants for crimes against peace. From the perspective of the prosecution, indeed, the 'aggressive war' charges against both the Farben and Krupp defendants stood on solid grounds.[155] Nonetheless, the Farben and Krupp Tribunals completely dismissed these charges. In this regard, the majority in the Farben case observed that:

> In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their government during its period of rearmament and who continued to serve that government in the waging of war, …The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people.[156]

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[153] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December, 1945 (1946) 3 Official Gazette Control Council for Germany 50-55, Article 2(4)(b).
[154] United States Military Tribunal at Nuremberg, *The United States of America vs. Friedrich Flick et al.*, 'The Flick Case', Case No. 5, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VI, 1200-1.
[155] Telford Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials Under Control Council Law No.10*, (n 25) 196-7.
[156] United States Military Tribunal at Nuremberg, *The United States of America vs. Carl Krauch et al.*, 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII, 1124-5.

Marginally more successful was the prosecution's case on the crimes of slave labour and spoliation of property.[157] In all three cases the prosecution teams were able to achieve the conviction of some of the defendants for one or both charges. However, even in those cases where the judges found the defendants guilty of slave labour or spoliation their criminal liability was always narrowly defined.[158]

As for the significance of these trials in the context of the development of a norm of corporate criminal liability for international crimes, it has already been mentioned above that none of the industrialist cases involved the prosecution of corporate entities. Despite this, the issue of corporate liability for violation of international law was constantly on the judges' mind. Indeed, in each of these cases the U.S. Military Tribunals put strong emphasis on the role played by the company itself in the commission of the crimes charged.[159] As observed by Steven R. Ratner, 'the courts … routinely spoke in terms of corporate responsibilities and obligations'.[160]

An example of this can be found, *inter alia*, in the Krupp judgment. In addressing the role of the Krupp firm in the spoliation of property in occupied France (Count Two of the Indictment), the Krupp Tribunal observed that:

> We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; *that the Krupp firm*, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen, and Eberhardt, *voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property ...*[161]

This systematic allusion to the role and responsibility of the corporation alongside that of its directors and managers was a constant feature in the Farben case. As observed by

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[157] Harmen Van der wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese Journal of International Law 43, 54-5.
[158] Alberto L. Zuppi, 'Slave Labor in Nuremberg 's I.G. Farben Case: The Lonely Voice of Paul M. Hebert' (2006) Louisiana Law Review 510.
[159] Clapham (n 1) 140.
[160] Ratner (n 73) 81.
[161] United States Military Tribunal at Nuremberg, *The United States of America vs. Alfried Krupp et al.*, 'The Krupp Case', Case No. 10, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. IX, 1352-3 (emphasis added).

Jonathan Bush, '[u]nlike Krupp and Flick, whose lead defendants were more important than their corporate vehicles … with Farben the gulf between the notorious firm and its large cast of grey managers and directors made it inevitable that the firm itself was always being discussed in court and the press.'[162] Over the course of the trial, both the Prosecution and the Defence devoted a considerable amount of time to the discussion of the 'enormous and intricate industrial complex of I.G. Farben'.[163] The goals pursued by the parties were, of course, opposite. From the perspective of the Prosecution, the arguments concerning the structure and organisation of Farben aimed at demonstrating the instrumentality of the legal entity in the commission of the crimes charged.[164] Contrarily, the Defence used the organisational structure of the company as a shield to deflect the defendants' responsibility for acts not strictly related to their scope of employment.[165]

Testimony of the prominent role of Farben in the proceedings is provided by the Tribunal's decision to allow one of the defence counsel, Dr Silcher, to make a closing statement on behalf of the company itself.[166] In his address to the bench, Dr Silcher stated that:

> In this trial formally only the twenty-three defendants in the dock are indict[ed] and not the firm I.G. Farben. *However this firm from a moral point of view is the invisible defendant who in addition to those twenty three men has been mentioned time and again in this trial*. Your Honors only need to road the indictment in order to gather therefrom this inescapable impression. *Therefore in the world's public opinion as well, this is really a trial against the firm I.G. Farben*. For this reason alone it seems necessary to speak once in the course of the defense of I.G. Farben and to defend this firm. Therefore the defense has deemed it proper to draw in addition to all the other pleadings an overall-picture of I.G. Farben.[167]

The 'invisible defendant' - as referred by Dr Silcher - occupied a central role also in the judgment. Even though the bench conceded that 'the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings',[168]

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[162] Bush (n 12) 1223.
[163] United States Military Tribunal at Nuremberg, *The United States of America vs. Carl Krauch et al.*, 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII, 108.
[164] Ibid 378.
[165] Ibid.
[166] United States Military Tribunal at Nuremberg, *United States of America vs. Carl Krauch et al.* (Case 6), Transcript of Proceedings, National Archives Microfilm Publication M895, Roll 15, Vol. 42, June 7-9, 1948, 15400-15441.
[167] Ibid 15400 (emphasis added).
[168] United States Military Tribunal at Nuremberg, *The United States of America vs. Carl Krauch et al.*, 'The I.G. Farben Case', Case No. 6, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("Green Series") (Washington 1952) Vol. VIII, 1153.

nonetheless it often referred to the liability of the business entity as distinct for that of its managers and directors. This attitude is particularly evident in the judgment's section on Count Two - Plunder and spoliation of property. While discussing the provisions of the Hague Regulations of 1907 pertinent to the charges,[169] the Tribunal preliminarily observed that:

> [T]he Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. … Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. … Similarly where a private individual or *a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.[170]

Applying this reasoning to the case at hand, the judges concluded that:

> With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, … The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.[171]

With regard to the charge of economic spoliation of property, therefore, the Farben Tribunal recognised that the activities of the corporation itself constituted a breach of the Hague Regulations. Not just the individual defendants, but also the corporation in its own capacity was considered responsible for the violation of international norms. However, the same Tribunal acknowledged that one thing is the responsibility of the corporation, other the individual criminal liability of the defendants indicted in the proceedings:

> One cannot condone the activities of Farben in the field of spoliation. If not actually marching with the Wehrmacht, Farben at least was not far behind. But translating the criminal responsibility to personal and individual criminal acts is another matter.[172]

[169] The Tribunal referred, in particular, to Articles 46, 47, 52, 53, and 55 of the Hague Regulations of 1907. See ibid, 1131-2.
[170] Ibid 1131-1132.
[171] Ibid 1139.
[172] Ibid 1153.

Although the judges recognised responsibility on the part of Farben for the commission of the war crimes charged under count two, they refused to consider this circumstance sufficient *per se* to establish the criminal liability of the individuals in the dock.

This dichotomy between the responsibility of the corporation, on one side, and the individual criminal liability of the defendants, on the other, is evident also in the separate concurring opinion filled by Judge Paul Macarius Hebert on counts one and five (crimes against peace and conspiracy to commit crimes against peace). Judge Hebert concurred with the majority in the acquittal of all defendants for the charges on the aggressive war but his reasoning greatly differed from the one adopted by the majority. In one of the passages of his separate opinion, Judge Hebert distinguished between the knowledge attributable to the company and this imputable to the single individuals. In particular, he observed that:

> The record abundantly establishes a substantial participation by certain of the individual defendants who were members of the Vorstand of Farben, in the action of Farben in furthering the armament activities which constituted preparation for the aggressive wars launched by Hitler. The corporate defendant is not under indictment before this Tribunal. *If a single individual had combined the knowledge attributable to the corporate entity and had engaged in the course of action under the same circumstances as that attributable to the corporate entity, it is extremely doubtful that a judgment of acquittal could properly be entered*.[173]

In Judge Hebert's statement echoed the considerations expressed by Pomerantz more than two years prior to the Farben judgment.[174] Had the Prosecution indicted Farben in its corporate capacity, the outcome of the whole proceeding could have been very different. The indictment of the company would have indeed enhanced the prospects of a conviction. From a tactical perspective, the decision not to proceed against Farben probably cost the Prosecution the first historic conviction of a corporation for participation in international crimes.

To conclude, even though all the allusions to the liability of the corporation mentioned above are mere *obiter dicta*, they nonetheless indicate that already at the time of Nuremberg it was to some extent accepted that corporations *themselves* may violate international law and – as a consequence – incur some form of responsibility.

[173] Ibid 1214 (emphasis added).
[174] Memorandum of 27 August 1946, reprinted as an annex in Bush (n 12) 1247-1248.

4. Extra-judicial sanctioning of Farben

In recent years, several scholars have argued that a discussion on the early development of a norm on corporate accountability for international crime should not focus exclusively on the jurisprudence of the IMT and of the Military Tribunals established under CCL10. According to those authors, consideration should be given also to the various measures implemented by the Allies against German corporations 'outside of the courtroom'.[175] This view was expressed, in particular, by a number of Nuremberg scholars in their *Brief of Amici Curiae in Support of Petitioners* submitted to the U.S. Supreme Court in the case *Kiobel et al. vs Royal Dutch Petroleum*.[176] In the Brief, those authors argued that:

> The international criminal trials of Nazi officials and individual industrialists were only one part of Allied efforts to punish those responsible for Nazi-era atrocities. … Control Council Law No. 10, putting individuals on trial - whether German doctors, jurists, industrialists, or various members of the SS - was only a small part of the Allied plan for post-war Germany that also included the dissolution of private corporations, the seizure of industrial facilities, restitution of confiscated properties, and reparations to both the states and natural persons who had suffered harm.[177]

Reference was made, in particular, to Control Council Law No. 9 (from now on CCL9), titled 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof', adopted on 30 November 1945.[178] The objectives pursued through CCL9 were the destruction of Farben's 'monopolistic control over German industry'[179] and the elimination of 'the war potential which it represented'.[180] In light of the prominent role played by Farben in building up and maintaining the German war machine, CCL9 effected the seizure of '[a]ll plants, properties and assets of any nature situated in Germany which were, on or after 8 May,

[175] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief of Amici Curiae Nuremberg Scholars in Support of the Petitioners, September 2011, 3.
[176] *Kiobel v Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013).
[177] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief of Amici Curiae Nuremberg Scholars in Support of the Petitioners, September 2011, 12.
[178] Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof' (30 November 1945), reprinted in Enactments and Approved Papers of the Control Council and Coordinating Committee, 225.
[179] Military Government of Germany, Control of I.G. Farben, Special Report of Military Governor U.S. Zone (1 October 1945), 1.
[180] Ibid.

1945, owned or controlled by I.G Farbenindustrie A.G.' and the transfer of the legal title over those property to Control Council.[181]

The extra-judicial sanction imposed on Farben by CCL9 has been seen as proof that, at the time of Nuremberg, international law provided for the accountability of business entities for international crimes. In particular, it has been observed that:

> This ultimate sanction was as drastic as any that could be imposed on a juristic entity: death through seizure and was as much a pronouncement of international law as Control Council Law No. 10 which was used to prosecute individuals. The extreme sanction of dissolution imposed by Control Council No. 9 is clearly inconsistent with … [the] conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.[182]

Moreover, it has been argued that the dissolution of Farben in late 1945 justified the subsequent decision taken by the U.S. prosecutors not to pursue the corporation itself during the trial against its managers and directors: 'when the international trial of individual Farben defendants took place pursuant to Control Council Law No. 10, there was no need to put I.G. Farben itself on trial, since it had already suffered corporate death pursuant to Control Council Law No. 9'.[183]

Even though such an argument has its allure and can be used in support of the idea that international law could (and should) impose some form of liability to companies for international crimes,[184] nonetheless it has limited relevance in the context of today debate over the development of an international criminal liability of corporations. Indeed, the imposition of a sanction (as severe as the dissolution of the company) outside the courtroom could not justify the conclusion that a similar sanction could be also applied in the context of an international criminal trial. Surely, the relevance of the seizure and dissolution of Farben by an international body such as the Control Council could demonstrate that sanctions can be imposed on legal entities at the international level. However, such conclusion should be tempered by the acknowledgment of the exceptional circumstances of the Farben case. Indeed,

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[181] Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof' (30 November 1945), reprinted in Enactments and Approved Papers of the Control Council and Coordinating Committee, 225.
[182] *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013), Brief of Amici Curiae Nuremberg Scholars in Support of the Petitioners, September 2011, 14.
[183] Ibid 3.
[184] *Contra* see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Brief Nuremberg Historians and International Law Lawyers in Support of Neither Party, September 2011, 26 et ss.

the special treatment reserved to Farben was mostly due to political considerations. As observed above, U.S. authorities contemplated the idea of putting a limit to the monopolistic power of Farben even before the end of the Second World War.[185]

Therefore, even though the seizure and dissolution of Farben represents an interesting and relevant case study in the field of corporate accountability, its relevance with regard to the development of a norm on 'international' corporate criminal liability should not be overstated.

5. Conclusion

The analysis conducted so far has illustrated the extent to which the idea of holding corporations criminally accountable for international crimes was discussed at time of Nuremberg. As observed, even though never directly indicted in any of the trials conducted in the aftermath of the Second World War, corporations nonetheless found their way inside the courtroom – especially in the context of the industrialist cases.

Most of the questions that still plague academics and practitioners debating the feasibility of prosecuting corporations under international criminal law were already in the minds of the Nuremberg judges and prosecutors. The relationship between corporate criminal liability and individual criminal liability, the evidentiary problems related to the investigation and prosecution of complex legal entities, the tactical advantages (and disadvantages) of indicting corporate defendants were only some of the issues addressed at Nuremberg.

It is, therefore, necessary to acknowledge the precedential value of the Nuremberg experience, without overestimating its impact on the development of a norm of international corporate criminal liability for international crimes.

[185] Bush (n 12) 1114.

Chapter 3. The Question of Corporations in the Aftermath of the Nuremberg Trials: The Hidden History of the Debate on the Corporate Criminal Liability

1. Introduction

The Nuremberg judgment brought a wave of great enthusiasm for international justice. Fuelled by the achievements of the IMT, many international lawyers and scholars embarked on a series of initiatives to promote the development and codification of international criminal law as an autonomous branch of international law. Carried out under the aegis of the United Nations, these initiatives addressed some of the questions left unanswered by the Nuremberg judgment, such as the definition of genocide, the concept of international criminal liability, and the possibility of establishing a permanent international criminal tribunal to ensure accountability at the international level.[1]

So far, scholars have generally disregarded the contribution made by these early initiatives to the development of an international norm on corporate criminal liability. As a matter of fact, the vast majority of the existing literature on the international criminal liability of corporate entities focuses on two pivotal moments in the history of international criminal law: the Nuremberg experience and the 1998 Rome Diplomatic Conference for an International Criminal Court.[2] What happened in between remains mostly overlooked. Even the few academic contributions on the topic provide only limited insight into the scope of the 1940s-early 1950s debate on corporations and international criminal accountability in the late.[3]

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[1] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Ed (Oxford University Press 2016) 6-8; Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press 2002) 9.

[2] See, e.g., Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2017), Leora Yedida Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business (Law, Meaning, and Violence)* (The University of Michigan Press 2017), Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010), Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30(1) Leiden Journal of International Law 221, Elizabeth Borgwardt, 'Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg' (2010) 34 Diplomatic History 627, Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56(3) Netherlands International Law Review 333.

[3] In one of his contributions on the liability of corporations under international law, Andrew Clapham briefly touched upon the early debate on the liability of legal entities which take place in the context of the 1951 and 1953 Committees on International Criminal Jurisidction: see Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000). Similarly, in his recent book, Michael J. Kelly addressed the question of whether corporations were considered in the *travaux prèparatoires* of the Genocide Convention: see Michael J. Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016).

The purpose of this chapter is, therefore, to provide a more comprehensive overview of the development of the debate on an international criminal liability of corporations by looking beyond the two Grotian moments of international criminal law to investigate to what extent corporations became part of the discussion on the scope of international criminal law in the immediate aftermath of Nuremberg. In doing so, the chapter fills a gap in the existing literature on the liability of legal persons for international crimes and contributes to the current debate on whether legal entities should be included among the subjects of international criminal law.

2. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide

To fully understand the way in which the issue of the liability of corporations for international crimes was integrated within the broader debate on the scope and limitation of international criminal law, it is fundamental to look at the work conducted by various UN bodies in the immediate aftermath of Nuremberg. Such an analysis should necessarily start by considering one of the most important Conventions adopted in field of human rights and international criminal law: The 1948 Convention of the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention or Convention).[4]

Although over the last 80 years, the Convention has been the subject of an ever-growing body of academic literature,[5] its contribution to the debate on the feasibility of holding corporations criminally accountable at the international level has been largely overlooked. The text of the Convention, indeed, makes no reference to the liability of legal entities for the crime of genocide.[6] This notwithstanding, in recent years, a number of scholars have argued that the

[4] *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 U.N.T.S. 277.

[5] See, *inter alia*, John Quigley, *The Genocide Convention. An International Law Analysis* (Routledge 2016) Christian J Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck Hart Nomos 2014), Paola Gaeta (ed), *The UN Genocide Convention. A Commentary* (Oxford University Press 2009), William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge University Press 2009) Jérémie Gilbert, 'Perspectives on Cultural Genocide. From Criminal Law to Cultural Diversity' in Margaret M. deGuzman and Diane Marie Amann (eds.) *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2018), Leora Bilsky and Rachel Klagsbrun, 'The Return of Cultural Genocide?' (2018) 29(2) European Journal of International Law 373, William A. Schabas, 'Groups Protected by the Genocide Convention: Conflicting Interpretations from The International Criminal Tribunal for Rwanda' (2000) 6(2) ILSA Journal of International & Comparative Law 375, Lawrence J. LeBlanc, 'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?' (1988) 13 Yale Journal of International Law 268.

[6] International Law Commission, Second Report on Crimes Against Humanity by Sean D. Murphy, Special Rapporteur (21 January 2016) A/CN.4/690, para 44.

liability of corporations for genocide, although not expressly provided for in the text, could nonetheless be inferred from the wording of the Convention.[7]

The starting point of their analysis is Article IV of the Genocide Convention which stated:

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article IV does not provide a clear indication of whether the word 'persons' should be interpreted to include only natural persons or could embrace also legal persons. According to some authors, therefore, 'while natural persons are the more relevant category, a proper reading [of Article IV] suggests that the provision does not preclude states from imposing criminal liability for genocide also on corporations.[8] In particular, Michael J. Kelly observed that:

> There is no artificial distinction between natural or legal (juridical) in either the reference to "persons" or "private individuals," whereas such distinction is specifically made in later international criminal treaties. Thus, corporate liability could therein lurk.[9]

To corroborate his view, Kelly referred to the *travaux preparatoires* of the Convention, noting that '[a]n exploration of what the treaty drafters were thinking does not dampen this prospect'.[10] Indeed, he noted a certain ambiguity by the drafters in the use of the terms 'persons' and 'private individuals' that may justify a broad interpretation of Article IV so to include private corporations.[11] He concluded that, while 'any indication of inclusion [of corporations within the scope of the Convention] is merely speculative … there is equally no definitive exclusion apparent in the *travaux'*.[12]

This interpretation of the Genocide Convention is interesting and adds to the growing literature supporting the recognition of corporate criminal liability for international crimes. However, it may prove overly speculative. To evaluate whether such an interpretation may be

[7] See Kelly, *Prosecuting Corporations for Genocide* (n 3), Christian J Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck Hart Nomos 2014) 19, Michael J. Kelly, 'Never Again: German Chemical Corporation Complicity in the Kurdish Genocide' (2103) 31 Berkeley Journal of International Law 348, 380-2, Harold Hongju Koh, 'Separating Myth from Reality about Corporate Responsibility Litigation' (2004) 7 Journal of International Economic Law 263, 266.
[8] Tams, Berster and Schiffbauer (n 7) para 19; Koh (n 7) 266.
[9] Kelly, *Prosecuting Corporations for Genocide* (n 3) 61.
[10] Ibid.
[11] Ibid 62-4.
[12] Ibid 64.

justified under the existing international law framework, it is necessary to start by looking at the rules on treaty interpretation provided by the Vienna Convention on the Law of Treaties (hereafter Vienna Convention).[13]

According to Article 31(1) of the Vienna Convention, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty'.[14] The discussion on Article IV of the Genocide Convention, and its applicability to corporations, therefore, should necessarily start with an investigation of the literal meaning of the term 'person' used in the provision. In its ordinary meaning, a 'person' is defined as a 'human, individual – sometimes used in combination especially by those who prefer to avoid man in compounds applicable to both sexes' or 'one (such as a human being, a partnership, or a *corporation*) that is recognized by law as the subject of rights and duties'.[15] While the former definition adopts an anthropomorphic approach to the term 'person', the latter considers a person from a legal point of view, looking at its status within a legal system. The literal interpretation of the term 'person', thus, does not seem to provide a definitive answer to the question of whether Article IV of the Genocide Convention could be constructed to include corporations, as suggested by Kelly.

A similar conclusion can be reached when looking at the 'grammatical construction of the provision or phrase' within which the term 'person' is located.[16] Article IV establishes that persons committing genocide or any of the acts listed under Article III of the Genocide Convention shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'.[17] In this context, the reference to 'private individuals', in the second part of the provision, cannot be considered decisive evidence in favour of the anthropomorphic definition. Indeed, literally interpreted, the noun 'individual' can indicate either 'a particular being or thing as distinguished from a class, species, or collection such as a single human being or a single organism' or 'an indivisible entity'.[18] An investigation of the whole Convention seems to lead to a similar conclusion. In the whole body of the Convention, the term 'person' is used only three times in the document – in Article IV, as already discussed,

[13] Vienna Convention on the Law of Treaties (adopted 1969, entered into force 1980) 1155 UNTS 331.
[14] Ibid Article 31(1).
[15] Merriam-Webster Online Dictionary, Person, <https://www.merriam-webster.com/dictionary/person> accessed 17 October 2021.
[16] Ibid 199.
[17] *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 U.N.T.S. 277, Article IV.
[18] Merriam-Webster Online Dictionary, Person, <https://www.merriam-webster.com/dictionary/individual> accessed 17 October 2021.

and in Articles V and VI, which do not offer any further clarification on the way in which such term should be constructed.[19]

As the analysis of the text of the Genocide Convention does not provide conclusive evidence on whether legal persons can be included in the scope of Article IV, an investigation of the preparatory work of the treaty, as supplementary means of interpretation, must be conducted to assess the validity of Kelly's thesis. On this regard, a reading of the preparatory work shows that, while Kelly is correct in stating that none of the delegations has ever vetoed the inclusion of private corporations in the list of persons liable under Article IV, an opportunity to express such position never presented itself during the negotiation of the Convention.

Indeed, looking at the drafting history of the Genocide Convention, and in particular of Article IV, it emerges that the liability of legal entities was debated solely in relation to the potential responsibility of States and Governments. The issue of the criminal liability of legal entities was discussed on 5 November 1948, when the Sixth Committee opened the debate on then Article V of the *Ad Hoc* Committee Draft Convention, titled 'Persons liable'.[20] The initial text provided that '[t]hose committing genocide or any of the other acts enumerated in Article IV shall be punished whether they are heads of State, public officials or private individuals'.[21]

Ahead of the discussion, five delegations submitted amendments to the text.[22] In the context of the present analysis, the proposal submitted by the United Kingdom is of particular relevance. The UK delegation proposed a completely new text of Article V which emphasised the role of States and Governments in the commission of acts of genocide.[23] The new version of Article V would have read as follows:

> Criminal responsibility for any act of genocide as specified in Articles II and IV shall extend not only to all private persons or associations, but also to States and Governments, or organs or authorities of the State or Government, by whom

[19] *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 U.N.T.S. 277, Articles IV, V and VI.
[20] A/C.6/SR.92
[21] Ad Hoc Committee on Genocide, Report of the Committee and draft Convention drawn up by the Committee, (24 May 1948), E/ 794, Article V. The text of Article V adopted by the Ad Hoc Committee mostly followed Article IV of the Secretariat Draft which stated: 'Those committing genocide shall be punished, be they rulers, public officials or private individuals.' UN Secretary-General, 'Draft Convention on the Crime of Genocide' (26 June 1947) E/447, Article IV.
[22] Amendments to that text were proposed by the delegations of the USSR (A/C.6/215/Rev.1), Belgium (A/C.6/217), France (A/C.6/224), the United Kingdom (A/C.6/236), Syria (A/C.6/246) and Sweden (A/C.6/247).
[23] A/C.6/236.

> such acts are committed. Such acts committed by or on behalf of States or Governments constitute a breach of the present Convention.[24]

In presenting the amendment, the British delegate explained that 'when a head of State was guilty of genocide, it was in reality the State itself or the Government which committed the crime. In those circumstances, it was useless to say that "heads of State" should be punished. The fact to be established was the penal responsibility of the State or the Government itself.'[25]

The British amendment generated an animate debate on the feasibility of including States and Governments, as legal entities, among those potentially liable for the crime of genocide. The majority of the delegates was very sceptical towards the idea that States and Governments could be held criminally accountable for genocide.[26] The main argument advanced against this idea pertaining to the limited recognition, at the national level, of the applicability of criminal law on entities other than individuals. On this regard, the French delegate opposed the amendment by pointing out that 'French law did not recognize the criminal responsibility of States or Governments, which were legal entities. While such entities could have financial responsibility, they could not be held criminally responsible.'[27] Similar positions were expressed by the delegates of the Dominican Republic and Sweden.[28] The latter, in particular, explained that:

> The United Kingdom amendment raised a … question, that of the provision for criminal sanctions. […] The Swedish delegation was prepared to discuss the inclusion in the convention of a clause regarding the reparations to be paid to victims by a State of which the heads had committed genocide, but it wished to point out that, strictly speaking, a criminal penalty would not be involved. For those reasons and also because the *Swedish criminal code did not recognize the idea of the penal responsibility of legal persons,* the Swedish delegation was of the opinion that it was inappropriate to refer to the penal responsibility of States and Governments and that article V should provide only for the punishment of individuals. [29]

Firmly against the UK proposal was also the delegate from the United States, Maktos. Coming from a State where the liability of legal entities was deeply embedded in the national

[24] Ibid.
[25] A/C.6/SR.92.
[26] See the opinion expressed by Spiropoulos and Pėrez Perozo in A/C.6/SR.95.
[27] Ibid.
[28] A/C.6/SR.92.
[29] Ibid (emphasis added).

legal system, Maktos' argument against the inclusion of the liability of States and Governments in the Convention was more a matter of principle. Indeed, according to him, 'judicial entities such as the State' could not commit genocide because '*in reality genocide was always committed by individuals*'.[30]

In the end, the British amendment was rejected by 24 votes to 22 and the final version of Article V referred exclusively to 'constitutionally responsible rulers, public officials or private individuals' as those potentially liable for genocide.[31]

The brief analysis conducted so far confirms that, during the drafting of the Genocide Convention, the question of the criminal liability of legal entities was addressed essentially from the perspective of the liability of States. Private corporations remained outside the scope of the debate. As observed by Andrew Clapham, the 'opposition to the idea of State crimes seems to have eclipsed discussion of international criminal responsibility of other entities such as corporations'.[32] Therefore, arguing in favour of the applicability of the Convention to private legal entities, and using the Convention as evidence of an early recognition of corporate criminal liability for international crimes, may be hazardous.

The Genocide Convention represents, thus, a missed opportunity to launch a genuine debate on the international criminal liability of corporations as separate from the responsibility of political entities such as the State. As will be demonstrated in the following sections, this lack of consideration towards private legal entities – this inability, or unwillingness, to recognise their distinctiveness – would remain, for decades, a glaring feature of the debate on the international criminal liability of corporate entities.

3. The ILC Draft Code of Offences against Peace and Security of Mankind: an early debate on the criminal liability of legal entities

Another initiative undertaken by the UN General Assembly in the aftermath of Nuremberg concerned the drafting of a Code of Offences against Peace and Security of Mankind. The task of working on an international criminal code was initially assigned to the Committee on the codification of international law by UNGA Resolution 95 (I) of 11 December 1946.[33] The following year, the responsibility of preparing a Draft Code passed to the newly

[30] A/C.6/SR.93 (emphasis added).
[31] A/C.6/256.
[32] Clapham (n 3) 171, footnote 62.
[33] UNGA Res 95 (I) (11 December 1946). See also M. Cherif Bassiouni, 'The History of the Draft Code of Crimes against the Peace and Security of Mankind' (1993) 27 Israel Law Review 247.

established International Law Commission (hereinafter ILC or Commission) by mean of Resolution 177 (II).[34] The Commission's work on the Draft Code then began in 1949 and, although interrupted on several occasions, lasted till 1996.[35]

In the literature on the international criminal liability of corporations the Draft Code is scarcely considered – if not completely ignored. However, it is worth noticing that it was precisely in the context of the Commission's study on the Code's scope *ratione personae* that the issue of the international criminal liability of corporations was first addressed independently from the question over the liability of States.[36]

The question was firstly addressed in the First Report on the Draft Code prepared by Jean Spiropoulos, which addressed the issue of the identification of the 'subjects of criminal responsibility under the draft code'.[37] The Report considered three possible subjects of criminal responsibility: individuals, organisations, and States.[38] The liability of each of these subjects were analysed using the Nuremberg precedent as the point of reference. Consequently, Spiropoulos concluded that only individuals should be subjects of international criminal liability,[39] thus excluding corporations or other organisations. Indeed, according to the Special Rapporteur, only the criminal liability of individuals found recognition within the legal framework provided for by the London Charter and the Nuremberg Judgment.[40] Moreover, for what concerned the liability of organisations, another consideration weighed on the decision to exclude the international criminal liability of these entities: the lack of a general agreement on the possibility of imposing criminal liability to legal persons at the domestic level. Indeed, in his Report, the Special Rapporteur observed that:

> In our opinion the question [of] whether organisations within a State shall be subjects of international penal responsibility ought to be answered negatively. *The grounds for the answer are provided by the fact that the various municipal laws, with rare exceptions, do not establish the penal responsibility of legal persons*, and by the position taken, in this respect, by the Nürnberg Tribunal.[41]

[34] UNGA Res 177 (II) (21 November 1947).
[35] Rosemary Rayfuse, 'The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission' (1997) 8(1) Criminal Law Forum 43, 44-49. See also Bassiouni (n 34); Benjamin B. Ferencz, 'Current Developments. The Draft Code of Offences Against the Peace and Security of Mankind' (1981) 75(3) American Journal of International Law 674.
[36] A/CN.4/39.
[37] A/CN.4/25, paras 46-56.
[38] Ibid.
[39] Ibid paras 46, 51-52 and 56.
[40] Ibid para 46.
[41] Ibid para 51 (emphasis added).

Conversely, a different perspective on the matter was suggested in another document made available to the Commission ahead of its second discussion on the Draft Code. In 1949, the Secretariat presented a *Memorandum Concerning a Draft Code of Offences against the Peace and Security of Mankind* to provide some insights on the possible scope and content of the Draft Code.[42] Written by Vespasian V. Pella, President of the Association Internationale de Droit Penal (AIDP), the Memorandum analysed issues such as the concept of international crime, the general principles related to the punishment of these crimes, and the necessity to adopt an international code as a way to enhance State compliance with international law. More importantly, in one of its sections, the Memorandum considered the question of the 'Responsibility of legal entities other than the State'.[43] Even though the issue was addressed as part of a broader analysis on the 'active subjects of international crimes' – including individuals and States –, the criminal liability of corporations was approached as a separate concept, not overshadowed by considerations on States' liability.[44] As observed above, this ability to distinguish between States and other legal entities was quite uncommon at that time.

The section on legal persons other than the State opened with a brief overview of the role played by corporate entities in the context of the Second World War.[45] On this regard, Pella pointed out how, during the conflict, private corporations often participated in international crimes perpetrated by the Third Reich.[46] In particular, he observed that:

> Some companies facilitated – or organized – monstrous experiments of so-called scientific character made on human beings in concentration camps. Others have provided funds to carry out war propaganda and to prepare aggressive war.[47]

Their complicity in such atrocities was indeed well documented. Pella observed that in such cases, 'in addition to the criminal liability of the individuals who acted as organs of the legal person, *the international criminal responsibility of the latter is perfectly conceivable*'.[48] Pella recalled how, in 1929, the Second Congress of the International Association of Criminal Law had recognised the necessity of imposing criminal liability on business entities in all cases in which their activities 'endanger[ed] the national legal order'.[49] According to Pella, the same

[42] A/CN.4/39.
[43] Ibid para 80.
[44] Ibid paras 68-81.
[45] Ibid para 80.
[46] Ibid.
[47] Ibid. Original in French. Translation provided by the author.
[48] Ibid. Original in French. Translation provided by the author (emphasis added).
[49] Ibid.

considerations which may justify the application of criminal sanctions to corporations at the domestic level, were equally valid at the international level.[50]

In his Memorandum, Pella examined also the criminal sanctions potentially applicable to such entities. On this regard, he observed that:

> It is obvious that, against legal persons, one can apply only those penal sanctions and security measures suitable for their nature; such are warning, fine, prohibition to open branches within a country or abroad, prohibition to carry out activities in certain fields, limitation on the amount of capital invested and/or the number of employees, special surveillance and control measures and, finally, dissolution.[51]

No obstacle to the application of such sanctions at the international level was identified by the Memorandum's author. In lights of the above, Pella invited the Commission to take into serious consideration the possibility of including a provision on the criminal liability of corporate bodies in the context of Draft Code for Offences against the Peace and Security of Mankind.[52]

Unfortunately, Pella's position was mostly ignored by the Commission. Indeed, when the question of the subjects of international criminal liability was discussed on 26 June 1950, none of the members of the Commission even mentioned Pella's considerations.[53] Overall, the discussion on the issue was extremely brief. Even though some members of the Commission supported the idea of including States and organisations within the scope of the Draft Code,[54] the majority accepted the view expressed by the Special Rapporteur that the debate on the Draft Code should be confined to the sole criminal responsibility of individuals.[55] The shared concern was that a discussion on the criminal liability of legal entities, such as States and organisations, would have been time-consuming.[56] As observed by the Special Rapporteur, indeed, by limiting the discussion to the criminal responsibility of individuals, 'the Commission was embarking upon the only path which could ensure reasonably brief discussion'.[57]

[50] Ibid.
[51] Ibid. Original in French. Translation provided by the author.
[52] Ibid para 81.
[53] A/CN.4/SR.54, paras 74-96.
[54] Ibid paras 77 and 85. See, in particular, the position expressed by Françóis and Hudson.
[55] Ibid para 94.
[56] Ibid para 82.
[57] Ibid para 91.

In the end, thus, the Commission decided to proceed with its analysis of the Draft Code focusing only on the liability of natural persons.[58] Such a decision was described in the Final Report as merely 'provisional', seemingly implying a willingness on the side of the Commission to leave the door opens to further considerations on the matter.[59] However, when in 1983 the time did come to reconsider the question of the subjects of international criminal law, it became clear that the liability of corporate entities was not among the Commission's priorities.

Indeed, even though the newly appointed Special Rapporteur, Doudou Thiam, recognised the relevance of the issue of the criminal liability of 'commercial companies', he quickly dismissed it to focus his attention on the sole liability of States.[60] The following extract of the Rapporteur's First Report is explanatory of that:

> The question of the criminal responsibility of legal entities is posed not only in international law, but also in municipal law. Under the laws of some countries today, commercial companies, for example, may be tried for criminal offences, such as economic crimes, and are liable to financial penalties. In its draft articles on State responsibility, the Commission itself has adopted the aforementioned article 19 (see para. 39 above), paragraph 2 of which refers to international crimes. […] The inclusion of article 19 in the draft on State responsibility has reopened the debate. *The question is whether the Commission's position, which was to exclude States from the scope of the 1954 draft code, can still be maintained today. If it cannot, the Commission will have to reshape the 1954 draft substantially, thus putting an end to the long-drawn-out theoretical debate—no doubt extremely interesting, but apparently interminable—between advocates and opponents of the theory of criminal responsibility of States*.[61]

Albeit the Rapporteur initially distinguished between the (highly controversial) criminal liability of States and the (slightly less controversial) criminal liability of business entities, considerations on the former completely overshadowed those on the latter. This approach weighted on the subsequent debate on the matter and resulted, yet again, in the Commission's decision to confine the scope of the Draft Code to natural person.[62]

Once more, the impracticability of conceiving the criminal responsibility of States foreclosed any evaluation on the feasibility of including private companies among the subject

[58] A/CN.4/34, para 151.
[59] A/CN.4/SR.54, paras 94-96.
[60] A/CN.4/364, paras 42-44.
[61] Ibid para 44 (emphasis added).
[62] A/38/10, paras 50-61.

of international criminal law. The Draft Code, thus, constitutes another missed opportunity for the development of a more genuine debate on the international criminal liability of business companies.

4. The Liability of Legal Persons in the Early Stage of the Debate on an International Criminal Court: The Role of the 1951 and 1953 Committees on International Criminal Jurisdiction

As discussed above, the direct relevance of the 1948 Genocide Convention in the development of a norm of international criminal liability of corporations is still controversial. However, its *indirect* influence cannot be questioned. Indeed, by setting into motion the modern debate on the feasibility of establishing an international criminal court, the Genocide Convention has indeed provided the context for further consideration of the question of the international criminal liability of corporate entities.

The question of an international criminal court with jurisdiction over genocide arose repeatedly during the 2-year negotiation of the Genocide Convention. The idea of creating an international institution with the power to investigate and prosecute those responsible for genocide was a matter of great contention among delegations.[63]

Ultimately, after considerable discussion, a reference to an international criminal jurisdiction was incorporate in the final text of the Convention under Article VI which reads:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*.

The adoption of the Genocide Convention did not exhaust the debate on the feasibility of establishing an international criminal court. Acknowledging the necessity to give further consideration to the question, the General Assembly instructed the ILC 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention'.[64]

[63] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n 1) 6.
[64] UNGA Res 260(B)(III) (9 December 1948).

The ILC began its work on the question of an international criminal court in 1949 and proceeded in its evaluation for only two sessions.[65] During this early stage of the debate, the ILC approached the issue of a permanent criminal jurisdiction mostly from a theoretical perspective, refusing to consider the political and diplomatic implications pertaining to the creation of such mechanism.[66] The decision to approach the issue only *in abstracto* limited the value of the Commission's initial consideration of the question of international criminal jurisdiction. When the Commission's Final Report was discussed by the Sixth Committee of the UN General Assembly, the lack of concrete proposals concerning a draft statute for an international criminal court prevented many delegations from expressing a definitive opinion on whether such an institution could have been concretely established.[67]

Conscious of the need to adopt a more practical approach to the issue, the General Assembly decided not to refer the question back to the ILC.[68] Following the Sixth Committee's suggestion, the General Assembly adopted Resolution 489 (V) of 12 December 1950 setting up an *ad hoc* Committee tasked to prepare a draft statute for an international criminal court to be used as base for further discussion on the subject matter.[69] This Committee – known as the 1951 Committee on International Criminal Jurisdiction – was composed of representatives of seventeen Member States and operated throughout August 1951.[70]

The analysis of the 1951 Committee's work – and the work of its successor, the 1953 Committee on International Criminal Jurisdiction – is particularly relevant in the context of this article. Indeed, both Committees' debate on the scope of an international criminal court's jurisdiction *ratio personae* offers valuable insights on States' attitude towards the feasibility of holding legal entities criminally liable at the international level. Even though the outcome of the Committees' work once again excluded corporations from the jurisdiction *ratione personae* of the proposed international criminal court, it is still worth observing how the Committees' discussion on the subject matter presents a deeper level of understanding of the difference between corporate liability and State liability. To a certain extent, the debate carried out within

[65] A/CN.4/13 and Corr. 1-3, paras 1-2.
[66] A/CN.4/SR.43, para 43.
[67] Yuen-Li Liang, 'Notes on Legal Questions Concerning the United Nations' (1951) 45 American Journal of International Law 509, 524-525.
[68] The decision was strongly criticised by Bassiouni who considered it as a 'way of delaying progress on this project'. See Bassiouni (n 34) 252.
[69] UNGA Res 489 (V) (12 December 1950).
[70] Ibid.

the 1951 and 1953 Committees can be considered the first mature analysis of the idea of holding private legal entities accountable at the international level.

4.1. The 1951 Committee on International Criminal Jurisdiction

The 1951 Committee on International Criminal Jurisdiction convened for the first time on the 1st of August, in Geneva.[71] As per Resolution 489 (V) of 12 December 1950, its mandate was to prepare 'one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court'.[72] In pursuance of the task receive, the Committee produced a 55-article draft statute for an international criminal court covering issues such as the appropriate procedures for the establishment of the proposed court, the law it will apply, its internal organisation and functioning and, most importantly, its jurisdiction.[73]

Discussion on the scope of the court's jurisdiction began on 3 August 1951.[74] For the better part of a week, the Committee examined under which conditions the proposed court would have been authorised to exercise its jurisdiction.[75] It was only on 13 August that the focus of the discussion shifted to the issue of the court's jurisdiction *ratione personae*.[76] The basis for the debate was provided by a 'Memorandum on the Creation of an International Criminal Court' submitted by the Secretariat in early July 1951.[77] The memorandum touched upon some of the pivotal issues related to the scope of the court's jurisdiction and suggested some solutions to inform the Committee's discussion. With regard to the categories of subjects upon which the proposed court should be allowed to exercise its jurisdiction, the memorandum adopted a clear – and narrow – position. As stated in the document:

> It is noteworthy that the general opinion is in favour of limiting the jurisdiction of the Court to the trial of natural persons only. […] it could quite well be made optional for juristic persons to be arraigned before the court on the grounds of criminal responsibility.

[71] A/2136, 1.
[72] UNGA Res 489 (V) (12 December 1950), 1.
[73] A/2136, Annex I. See also Quincy Wright, 'Proposal for an International Criminal Court' (1952) 46 American Journal of International Law 60.
[74] A/AC.48/SR.3, para 44 et ss.
[75] A/AC.48/SR.3, A/AC.48/SR.4, A/AC.48/SR.5, A/AC.48/SR.6, A/AC.48/SR.7, A/AC.48/SR.8, A/AC.48/SR.9.
[76] A/AC.48/SR.9.
[77] A/AC.48/1.

> [However] in view of the difficulties in setting up the Court, *there is no point in increasing those difficulties by extending the Court's jurisdiction to a particularly controversial matter when there is no necessity to do so*.[78]

As emerged from the Memorandum, at the time of the discussion, the international criminal liability of corporate bodies was perceived as an issue too complex to be solved within a reasonable amount of time.[79] Hence, expanding the court's jurisdiction beyond natural persons was considered a hazard, a risk too high to be taken.

Notwithstanding the Secretariat's position, some of the Committee's members felt the need to consider adopting a broader approach to the subject matter. The representative from Australia, Wynes, was particularly sceptical towards the idea of excluding legal persons from the scope of the draft statute of the proposed international criminal court.[80] Even though he conceded that, at the time of the discussion, the criminal liability of legal entities was an unknown concept in many domestic legal systems, he prompted the Committee to take into consideration the possibility of including at least *private entities* within the scope of the court's jurisdiction.[81] As emerged from the summary record of the Committee 9th meeting, Wynes pointed out that:

> […] if, as might well be, confiscation of property was one of the penalties prescribed in the statue [of the proposed court], consideration might be given to the possibility of the imposition of such penalty on a *corporation*, the head of which, acting on behalf of that corporation, had committed a crime. [In deciding to exclude legal entities from the statute], the Secretariat has concentrated largely on the responsibility of States, but [Wynes] was thinking more of *private institutions*.[82]

Besides acknowledging the diversity between State liability and corporate liability, it suggested for the first time a specific model of attribution of international criminal liability to corporations. In particular, Wyne proposed to link the company's liability with this of its 'head' – i.e. the managing director –, making the former *dependent* on the latter.[83]

It is unclear whether Wyne's suggestion was grounded in a specific legal theory of corporate criminal liability. It may be possible that, in making his statement, the Australian representative had in mind the common law doctrine of 'identification' according to which the

[78] Ibid p. 25 (emphasis added).
[79] A/CN.4/SR.54, para 82.
[80] A/AC.48/SR.9, para 74.
[81] Ibid.
[82] Ibid (emphasis added).
[83] Ibid.

criminal liability of a company derives from this of the individual who carried out the criminal activity where the natural person is 'of a sufficient standing' that he or she is 'identified' with the entity.[84] Such a doctrine was firstly elaborated in the United Kingdom in the early 1940s and was then adopted – with some adjustments – by many other common law systems, including Australia.[85] Regardless of this, Wyne's proposal represents the first effort to open up a more mature debate on the criminal liability of 'private institutions'.

Unfortunately, this attempt did not find the favour of other members of the Committee. Soon after Wyne's intervention, the focus of the discussion shifted back to the liability of States closing the door to any consideration on his proposal on the international criminal liability of corporations.[86] Overshadowed by the much more pressing issue of State criminality, the liability of corporations was once again excluded from the scope of the draft statute for an international criminal court.[87] In its final Report, the 1951 Committee commented its decision in the following way:

> With respect to other legal entities, it was pointed out that the penal responsibility of private corporations was not unknown in some national systems of penal law. Punishments, such as payment of fines or confiscation of property, might be inflicted upon legal entities found to be responsible for illegal acts. Other national legal system, however, did not recognise such a penal responsibility on the part of legal entities, and it was therefore felt by most members of the Committee that *the introduction of such a responsibility in international law would be a matter of considerable controversy*.[88]

4.2. The 1953 Committee on International Criminal Jurisdiction

The 1951 Committee's decision to limit the proposed court's jurisdiction to 'natural person only'[89] did not foreclose further discussion on the question of the international criminal liability of corporations. Less than two years later, the issue was once again addressed by its successor, the 1953 Committee on International Criminal Jurisdiction. Established by Resolution 687 (VII) of 5 December 1952, the 1953 Committee was tasked to resume the work

[84] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford University Press 2005) 93-99, Celia Wells, 'Corporations Culture, Risk and Criminal Liability' (1993), Criminal Law Review 551, 559, Richard Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) Mountbatten Journal of Legal Studies 31, 39.
[85] Mays (n 85) 39.
[86] A/AC.48/SR.9, paras 77 et ss.
[87] A/2136, para 89.
[88] Ibid para 88.
[89] Ibid, Annex I, Article 1, Article 25.

on a statute for an international criminal court using the 1951 Draft as a base for discussion.[90] During the Committee's sessions, held in New York in the summer of 1953, the issue of the liability of legal entities was addressed in two separate occasions: briefly, in connection with article 1 (Purpose of the court) and, more in the detail, as part of the debate on the scope of Article 25 (Jurisdiction as to persons).[91] Both debates offer some relevant insights into the Committee's position on the question of the accountability of private companies for international crimes.

The discussion on Article 1 (Purpose of the court) began on 5 August 1953.[92] The text under examination read as follows:

> There is established an International Criminal Court to try persons accused of crimes under international law, as may be provided in the conventions or special agreements among States parties to the present Statute.[93]

Among the various proposals submitted to amend Article 1, two concerned specifically the use of the word 'persons' in its initial formulation. According to some members of the Committee, the term 'persons' used in the English text created some confusion as to the exact scope of the court's judicial power.[94] Indeed, broadly interpreted, the English word 'persons' could have indicated not only individuals but also legal entities such as corporations and States. Considering that, the British representative proposed to substitute 'persons' with 'individuals' so to make the English text more in line with the French version, which used the term 'individu'.[95] Alternatively, the Israeli representative suggested adding 'natural' before the word 'persons' so to avoid any misunderstanding.[96]

Both suggestions were briefly considered by the Committee and found the support of those members who were concerned that a lack of clarity in the English text of Article 1 would have affected the level of consistency of the Draft Statute.[97] Conversely, other members expressed some scepticism toward the British and Israeli proposals. The Argentinian and Dutch representatives, in particular, deemed unnecessary to amend the wording of Article 1

[90] UNGA Res 687 (VII) (5 December 1952), 3.
[91] A/AC.65/SR.8 and A/AC.65/SR.11.
[92] A/AC.65/SR.8.
[93] A/2136, Annex I, Article 1.
[94] A/AC.65/SR.8, pp. 7 to 14.
[95] Ibid p. 7.
[96] Ibid p. 13.
[97] See position of the United States representative. Ibid p. 14.

considering that such a provision was only a general statement on the overall purpose of the court.[98] It was therefore correct to formulate it in broader terms.

A different – and more interesting – objection to the rewording of Article 1 was raised by Loomes, the Australian representative. In his intervention, he firmly stated that:

> [I]f the Israeli proposal was put to the vote, he would abstain from voting. The word "persons" included companies and he asked that it should be mentioned in the summary record of the meeting that *he was in favour of that interpretation*.[99]

While other members of the Committee contested the Israeli (and British) proposal on the basis that Article 1 was to be considered as a statement of general principles, Loomes' opposition pertained to the concrete scope of the court's jurisdiction. In stating his support to the idea of extending the court's jurisdiction beyond individuals, Loomes brought the question of the international criminal liability of corporations back to the attention of the Committee, regardless of the fact that such a concept was previously excluded from the 1951 Draft Statute. It is also worth noting that Loomes' statement was clearly formulated so as to separate the liability of private companies from this of other public legal entities, such as the State. Only the former was considered adoptable at the international level.

Acknowledging the complexity of the issue raised by the Australian representative, the Committee felt that the discussion on the wording of Article 1 was not the appropriate context to address the question of the criminal liability of corporate entities.[100] Consequently, the debate was deferred until the Committee re-examined Article 25 (Jurisdiction as to persons).[101]

The time for the discussion on the court's jurisdiction *ratione personae* came two days later, on 7 August. In its original formulation, Article 25 stated that '[t]he Court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government'.[102]

In opening the debate on the scope of the provision, Loomes once again advanced the idea of expanding the proposed court's jurisdiction to include 'private corporations' alongside

[98] Ibid p. 13.
[99] Ibid p. 14 (emphasis added).
[100] Ibid.
[101] Ibid.
[102] A/2136, Annex I, Article 25.

individuals.[103] Immediate was the opposition of the representative for the Philippines, Mendez, who firmly stated that:

> [p]rivate corporations fell strictly within the jurisdiction of domestic courts, which conferred certain privileges upon them. Moreover, should a private corporation engage in criminal activities, the individual responsibility of its officers could easily be determined.[104]

Mendez's refusal to recognise an international criminal liability of corporations stemmed from two different sets of considerations. On one side, he viewed private companies as 'creatures of the State' thus relegated to the domestic legal sphere. Regulation on the nature and scope of their legal personality, and consequently of their liability, was solely a State's prerogative. On the other hand, Mendez considered corporate criminal liability as an unnecessary addition to the individual criminal liability of those individuals acting on behalf of the corporation. In the Philippine representative's opinion, individual criminal liability was enough to cover all the possible forms of corporate involvement in criminal activities. Both sets of arguments had their roots in a general scepticism toward the idea of corporate criminal liability probably due to the unfamiliarity of such a legal concept. Indeed, at the time of the discussion, the Philippines' legal system did not recognise the possibility of holding private companies as subjects of criminal law.[105]

Contrary to the Australian proposal was also Roling, the Dutch representative. His opposition, however, focused more on the 'international' side of the question. Indeed, even though he recognised that 'private corporations were subject to criminal law' at the domestic level, he observed that 'the experience of the Nuremberg and Tokyo trials led him to believe that it was *premature* to extend the jurisdiction of the international criminal court to private corporations'.[106] This opinion was also shared by the Argentinian and French representatives.[107]

In replying to the aforementioned objections, Loomes firstly recalled how 'the criminal responsibility of private corporations was not excluded either by doctrine and jurisprudence'.[108] According to the Australian representative, the liability of corporations was

[103] A/AC.65/SR.11, p. 8.
[104] Ibid p. 8.
[105] Alex Manolito C. Labador, 'Corporate Crime and the Criminal Liability of Corporate Entities in the Philippines' (2008) UNAFEI Resource Material Series No. 76, 73.
[106] A/AC.65/SR.11, p. 9 (emphasis added).
[107] Ibid pp. 7 and 9.
[108] Ibid p. 10.

an autonomous legal concept – distinct from the criminal liability of individuals – which was firmly embedded in a number of common law legal systems. As a matter of principle, therefore, nothing was preventing the Committee from adopting such a concept at the international level.

As for the specific concern raised by the Dutch representative, Loomes considered it 'not convincing'.[109] On this regard, he observed that the mere fact that formal recognition of the international criminal liability of corporations might have been considered *at that time* 'premature' – but not legally unsound – was not a reason enough to oppose the inclusion of such a concept within the statute of the proposed court. Indeed, he stated that:

> The statute of the court would, in fact, remain in force for many years and international criminal law would be developed during that period. A provision relating to the criminal responsibility of private corporations should be included in the statute now.[110]

The consideration made by the Australian representative was particularly forward-looking. It rested on the idea that international criminal law was still in its infancy and thus expected to further develop over the years. In light of that, Loomes considered fundamental to create an international criminal court able to face both present and future challenges, including those deriving from the involvement of private legal entities in international crimes.

Regretfully, the Australian proposal did not meet the favour of the Committee. Put to vote, it was ultimately rejected 11 votes to 1, with 4 abstentions.[111]

The failure of Loomes' proposal marked the end of the debate on the opportunity to include private companies within the scope of the statute of the proposed international criminal court. It would have taken more than forty years for the question to arose again in context of the negotiation of a statute for an international criminal court. This notwithstanding, the value of the 1951 and 1953 Committees' discussion on the issue cannot be ignored. For the first time, the liability of business entities was discussed separately from the responsibility of States and proposals were put forward on how such a concept should have been defined within the framework of a statute for an international court. The overall quality of the debate, the variety of the arguments raised in favour and against corporate criminal liability, demonstrates a more mature understanding of the complexity of the issue under consideration. Understood in these terms, the work of the 1953 Committee represents a fundamental step in the progression of the

[109] Ibid.
[110] Ibid.
[111] Ibid.

discussion on the feasibility of holding corporations criminally accountable at the international level.

5. Conclusion

As emerged from the chapter, the analysis of the efforts made in the aftermath of Nuremberg to recognise the international criminal liability of corporations is a recollection of failed attempts. During these first convulse years, the question of the criminal liability of legal persons was raised and dismissed, over and over again. Sometimes the rejection was due to a failure to distinguish between private corporations and public entities such as the State; sometimes it was motivated by a concern related to the novelty of the concept itself.

This notwithstanding, each one of these (failed) attempts demonstrated that the issue of corporate criminal liability has constantly been a feature of the debate on the scope of international criminal law. The above analysis built a bridge between the Nuremberg experience and the Rome Conference – so far, the only two moments in time considered relevant for the discussion on the liability of corporations – and helped painting a more accurate picture of the historical development of a norm on the international criminal liability of private companies.

Chapter 4 – The Adoption of the Rome Statute: Corporate Criminal Liability's Swan Song?

1. Introduction

By the mid-1950s, after almost a decade of work to promote the concept of international justice, all attempts to establish an international criminal court reached a dead end. Concerns over the precariousness of the international political order ended up straying the attention of the international community away from the project of a permanent criminal jurisdiction, stunting the development of international criminal law for almost 30 years.[1] It was only in the 1980s that the situation started to change.

In 1982, the International Law Commission tentatively resumed its work on the Draft Code of Crimes against the Peace and Security of Mankind with the support of the UN General Assembly.[2] Six years later, on 9 November 1989, the fall of the Berlin Wall signalled the end of the Cold War and inaugurated a new phase in the development of international criminal law in some respect similar to the one occurred in the aftermath of Nuremberg.[3]

However, it was the sudden collapse of previously multi-ethnic societies that acted as a major catalyst in accelerating the debate on the opportunity to establish a permanent international criminal court. The conflicts in the former Yugoslavia and, later on, in Rwanda 'rekindle the sense of outrage felt at the closing stage of the Second World War', forcing the international community to consider new solutions to fight impunity for international crimes.[4] The subsequent establishment of the two *ad hoc* Tribunals accelerated the process which led to the establishment of the first (and only) permanent international criminal court in July 1998.

By retracing the developments that occurred from the 1980s to July 1998, this chapter considers the extent to which the question of the liability of corporate entities was integrated into the discussion on the scope and limitation of an international criminal jurisdiction. This chapter concludes the historical analysis of the debate on an international criminal liability of corporations by covering the final phase that led to its (apparent) dismissal.

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[1] Philippe Kirsch and John T Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' (1998) 36 Canadian Yearbook of International Law 3, 4.
[2] UNGA Res. 36/106 of 10 December 1981.
[3] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed (Oxford University Press 2016) 10 et ss.; Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition (Oxford University Press 2013) 258; M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (M. Cherif Bassiouni ed., 1998), 13.
[4] Schabas (n 1) 17; Cassese (n 1), 259.; Bassiouni (n 1) 19.

2. Resuming the Drafting of the Statute of the International Criminal Court: The ILC's Work (1982-1994)

After almost 30 years of hiatus, the question of the feasibility of establishing a permanent international criminal court came back to the attention of the international community in the 1980s. The context for the discussion was once again provided by the ILC's work on the Draft Code of Crimes against the Peace and Security of Mankind, which resumed in 1982.[5]

Already in 1983, the Commission raised the question of whether its mandate on the Draft Code should have been extended to include 'the preparation of the statute of a competent international criminal jurisdiction for individuals', seeking the opinion of the General Assembly on the matter.[6] Acknowledging the ILC's request, the General Assembly asked the Secretary-General 'to seek the views of Member States and intergovernmental organizations' on the question of an international criminal jurisdiction and to submit them to the Assembly at its thirty-ninth session 'with a view to adopting, at the appropriate time, the necessary decision thereon'.[7]

However, it was not until the late 1980s that the question of an international criminal jurisdiction became, once again, a central topic of discussion within the ILC. In 1987, a reference to the possibility of establishing an international criminal court with jurisdiction over the crimes covered in the Draft Code was included by the Special Rapporteur, Doudou Thiam, in his Fifth Report.[8] The mention was incorporated into draft Article 4 on the principle of *aut dedere aut punier*. According to draft paragraph 2, the State obligation to 'try or extradite' did not 'prejudge the establishment of an international criminal jurisdiction' with the authority to prosecute individuals accused of perpetrating a crime included in the draft code.[9]

In 1988, the provision of draft Article 4 was discussed within the ILC Drafting Committee which adopted it in the following formulation:

> 1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall try or extradite him.

[5] UNGA Res. 36/106 of 10 December 1981.
[6] A/38/10, para 69.
[7] UNGA Res. 38/132 of 19 December 1983, par. 2.
[8] A/CN.4/404, p. 3.
[9] Ibid.

> 2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.
>
> 3. The provisions of paragraphs 1 and 2 of this article shall not prejudge the establishment and the jurisdiction of an international criminal court.[10]

The Commentary to draft Article 4 stated that, even though the initial approach was to consider national courts as the appropriate *fora* for the prosecution of those crimes, the Commission deemed advisable not to rule out other available options – including the creation of an international criminal court.[11]

The discussion on an international criminal jurisdiction was further propelled by the adoption, in December 1989, of UNGA Resolution 44/39 on the 'International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes'.[12] Sponsored by Trinidad and Tobago, Resolution 44/39 explicitly requested the ILC:

> '… to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session.'[13]

In light of these developments, in 1990 the Special Rapporteur presented to the Commission a draft Statute of an International Criminal Court with the aim of offering 'some choices among the various possible solutions and to elicit responses' on key aspects of the functioning of an international criminal jurisdiction.[14]

The Special Rapporteur's draft Statute elicited an extensive debate within the Commission. Opinions expressed covered a wide range of issues such as the procedure for appointing judges, submissions of cases, penalties and financial provisions.[15] It is already at this early stage that the question of whether the proposed Court should be able to assert its jurisdiction over legal entities arose to the attention of the members of the Commission.

[10] A/CN.4/L.422, p. 272 at par. 36; A/43/10, p. 67.
[11] A/43/10, pp. 67-68.
[12] UNGA Resolution 44/39 of 4 December 1989.
[13] UNGA Resolution 44/39 of 4 December 1989, para 1.
[14] A/CN.4/430 and Add.1 para 77 et ss.
[15] A/45/10, para 29.

In a number of meetings held between 9 – 16 May 1990, the issue of the international criminal liability of corporations was addressed by the some of the members of the Commission who questioned the restrictive approach adopted by the Special Rapporteur.[16] Interestingly, one of the first Commissioners to advocate for a broader approach to the question of the Court's jurisdiction was Bernhard Graefrath from the (then) German Democratic Republic, a country historically reluctant to recognise legal entities as subjects of criminal law. In his statement, he observed that:

> While the Special Rapporteur was right to say that the competence of the court should be limited to trying individuals, the Commission should none the less consider whether it might not also be necessary to establish competence to try legal persons or entities other than States, at least in the case of certain crimes.[17]

Professor of international law at the Humboldt University in Berlin from 1963 to 1982, Graefrath clearly differentiated between the State and other legal persons/entities, considering only the latter as subjectable of international criminal prosecution.[18] Unfortunately, it is impossible to determine on the base of which legal theory he claimed the responsibility of legal entities such as corporations could have been constructed. The summary records of the meeting do not provide any clarification on the matter. Similarly, Graefrath's scholarship does not offer a clear insight on his view on corporate criminal liability, as it focuses almost entirely on the controversy over the concept of State responsibility for international wrongdoing.[19]

Graefrath's opinion was echoed by Husain M. Al-Baharna, who expressed some reservations about the use of the term 'natural persons' in the draft statute 'since there was some cogency in the argument that the jurisdiction of the court could properly be extended to "legal entities", some of which should not be exempt from culpability in the case of certain

[16] See A/CN.4/SR.2154, A/CN.4/SR.2155, A/CN.4/SR.2156, A/CN.4/SR.2157 and A/CN.4/SR.2158.
[17] A/CN.4/SR.2154, para 39.
[18] Bernhard Graefrath, 'International Crimes — A Specific Regime of International Responsibility of States and its Legal Consequences' in: JHH Weiler, A Cassese and M Spinedi (eds), International Crimes of States: A Critical Analysis of the ILC's draft Article 19 on State Responsibility (Berlin/New York: Walter de Gruyter, 1988), 162.
[19] See, *inter alia*, Bernhard Graefrath, 'Leave to the Court What Belongs to the Court. The Libyan Case' (1993) 4 European Journal of International Law, 184; Bernhard Graefrath, 'International Crimes — A Specific Regime of International Responsibility of States and its Legal Consequences' in JHH Weiler, A Cassese and M Spinedi (eds.) *International Crimes of States: A Critical Analysis of the ILC's draft Article 19 on State Responsibility* (Berlin/New York: Walter de Gruyter, 1988); Bernhard Graefrath, 'Völkerrechtliche Konsequenzen aus der Anwendung der Aggressionsdefinition durch den UN-Sicherheitsrat', Neue Justize 30 (1976), 732; Bernhard Graefrath, Edith Oeser, Peter Alfons Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977). For a contextualisation of Graefrath's approach to state responsibility see also Theodor Schweisfurth, 'The Science of Public International Law in the German Democratic Republic' (2007) 50 German Yearbook of International Law, 149.

crimes'.[20] These views were shared also by other members such as Motoo Ogiso[21] and Ahmed Mahiou.[22]

More aligned with the position of the Special Rapporteur was the opinion of Jiuyong Shi who praised the Rapporteur's Report by observing that:

> With regard to the jurisdiction of the court, the Special Rapporteur proposed a remarkably concise and precise text […] which dealt with both jurisdiction ratione personae and jurisdiction ratione materiae. According to that text, only natural persons would be subject to the jurisdiction of the court. Having started from the assumption that the code could deal only with the criminal responsibility of individuals, the Commission could hardly extend the jurisdiction of the court to crimes committed by public or private entities—as some members of the Commission had suggested during the debate—before knowing the position of Governments on the question of the criminal responsibility of the State.[23]

In closing the discussion, the Special Rapporteur, Thiam, once again maintained his position on the Court's jurisdiction *ratione personae,* reiterating the need to adopt a more cautious approach while, at the same time, conceding that any final decision on 'the criminal responsibility of States or of legal entities in general, to which some members [of the Commission] attached great importance, could be taken up at a later stage'.[24]

For the overall quality of the views expressed, this first discussion on the liability of legal persons quite resembled the one carried out almost 40 years earlier in the aftermath of the Nuremberg trials. None of the opinions shared by the members of the Commission fully considered the legal implications of holding corporations criminally accountable for international crimes nor proposed a feasible model to establish such liability. Also, some of the comments still seem to blur the line between the responsibility of State, on one side, and that of private entities, on the other.[25] However, this is not entirely surprising considering the early stage of the discussion. It would have taken six more years for the debate to reach a new level of maturity.

In the following days, the question of the international criminal liability of legal entities was further discussed within the Working Group (WG) set up by the Commission on 16 May

[20] A/CN.4/SR.2157, para 68.
[21] A/CN.4/SR.2155, para 10.
[22] A/CN.4/SR.2154, para 61.
[23] A/CN.4/SR.2157, para 50.
[24] A/CN.4/SR.2158, para 62.
[25] See comment made by Jiuyong Shi, A/CN.4/SR.2157, para 50.

1990.[26] Evidence of the discussion is provided in the final Report produced by the Group.[27] Unfortunately, it is unclear to what extent the issue was considered as no record of the WG's sessions is currently available. Similarly, the liability of legal entities was also addressed during the analysis of the *Report of the International Law Commission on the work of its forty-second session* conducted by the UN General Assembly Sixth Committee.[28] During the debate, several members expressed their support or scepticism toward the proposal to include legal persons in the jurisdiction of an international criminal court.[29] Once again, the level of the discussion remained mostly superficial but it still indicated a willingness among the Committee's members to further consider the status of legal entities under international criminal law.

Despite this initial interest, however, the question of the international liability of legal entities was quickly set aside. In its ninth report on the Draft Code, submitted the following year, the Special Rapporteur failed to include any reference to legal persons in its overview of the issue of the Court's jurisdiction *ratione personae,* referring exclusively to individuals.[30] The Rapporteur's 'prudent' approach was swiftly endorsed by the ILC which limited its consideration on the Court's personal jurisdiction to 'private persons', an expression that, even though quite misleading, was understood by the Commission as referring exclusively to individuals.[31]

In the following years, the ILC continued to work on the statute of an international criminal court producing a first comprehensive draft in 1993, which was then revised in 1994.[32] The 1994 Draft Statute was positively received by the UN General Assembly which welcomed the Commission's recommendation to 'convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court'.[33] Consequently, the General Assembly decided not to refer the question back to the Commission and instead proceeded to the establishment of an *ad hoc* Committee tasked to review the draft prepared by the ILC and to 'consider arrangements for

[26] A/45/10, para 7.
[27] A/CN.4/L.454 [and Corr.1], para 129.
[28] The discussion over the relevant part of the ILC Report (Chapter III) started during the Committee's 23rd meeting and lasted until the 39th meeting.
[29] Opinions favourable to the inclusion of legal entities were expressed by representatives of Jamaica (A/C.6/45/SR.31, para 87), Guinea (A/C.6/45/SR.33, para 22), Trinidad and Tobago (A/C.6/45/SR.33, para 26), Algeria (A/C.6/45/SR.34, para 65); Libya (A/C.6/45/SR.37, para 61) and Guatemala (A/C.6/45/SR.36, para 59). More sceptical view was shared by representative of China (A/C.6/45/SR.34, para 11).
[30] A/CN.4/435 & Corr.1 and Add.1 & Corr.1, para 38, p. 41.
[31] This emerges from the analysis of the ILC's Final *Reports* produced from 1992 to 1994. See A/47/10; A/48/10; A/49/10.
[32] For a detailed overview of the legislative history of the ICC see Bassiouni (n 1) 19.
[33] UNGA Res. 49/51 of 17 February 1995, para. 2 and UNGA Res. 49/53 of 17 February 1995.

the convening of an international conference of plenipotentiaries'.[34] This officially concluded the Commission's work on the draft statute of an international criminal court. After years of joint evaluation, the question of an international criminal jurisdiction was separated from the work on the Draft Code of Crimes against the Peace and Security of Mankind and started its 4-year journey towards the Rome Diplomatic Conference for an International Criminal Court.

3. The Establishment of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda

Before proceeding with the analysis of the work of the 1995 ad hoc Committee on the Establishment of an International Criminal Court – and of its successor, the 1996 Preparatory Committee –, it is important to consider another major development occurred in the early 1990s: the establishment of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. Followed one year later by a second *ad hoc* Tribunal – the International Criminal Tribunal for Rwanda (ICTR) –, the ICTY represents the first example of a functioning international criminal jurisdiction of the post-Nuremberg era. Its creation played a fundamental role in the acceleration of the process that led to the adoption of the Rome Statute five years late.[35]

The conflict in the former Yugoslavia began in 1991 when internal tensions in the six republics forming the then Socialist Federal Republic of Yugoslavia irremediably compromised the political stability of the country. Over the first 18 months, the hostilities spread from Slovenia and Croatia to Bosnia, which became the main focus of the conflict.[36] Concerned by the level of brutality which characterised the conflict, the United Nations took action to ensure the prosecution of those responsible for international crimes in the Balkans. On 22 February 1993, the Security Council adopted Resolution 808 in which it was decided that 'an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.[37] Contextually, the Security Council mandated the Secretary-General 'to submit … a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision [to establish an international tribunal]'.[38]

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[34] UNGA Res. 49/53 of 17 February 1995, para. 2.
[35] Schabas (n 1) 17; Cassese (n 1) 259; Bassiouni (n 1) 19
[36] Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 European Journal of International Law 360, 360.
[37] S/RES/808 (1993) 22 February 1993, para. 1.
[38] S/RES/808 (1993) 22 February 1993, para.2.

The Secretary-General presented his Report pursuant to paragraph 2 of Security Council Resolution 808 (1993) on 3 May 1993.[39] The Report incorporated the suggestions put forward by numerous Member States and it was heavily influenced by the documentation produced by the United Nation and by other bodies involved in the drafting of a statute for an international criminal court, including the two Committees on International Criminal Jurisdiction and the International Law Commission.[40] It touched upon a number of pivotal issues related to the creation and functioning of an international criminal tribunal, first and foremost the legal basis upon which such a jurisdiction should have been established.[41] Questions related to the Tribunal's jurisdiction *ratione materiae*, *temporis*, *loci* and *personae* were also addressed by the Secretary-General.[42] With regard to the Tribunal's personal jurisdiction, the Report made immediately clear that a narrow interpretation of the term 'persons' was to be preferred in the context of the statute of the *ad hoc* Tribunal. In particular, it stated that:

> 50. By paragraph 1 of resolution 808 (1993), the Security Council decided that the International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the light of the complex of resolutions leading up to resolution 808 (1993) (see paras. 5-7 above), the ordinary meaning of the term "persons responsible for serious violations of international humanitarian law" would be natural persons *to the exclusion of juridical persons*.[43]

Paragraph 51 then also addressed the question of whether the *ad hoc* Tribunal should have followed the Nuremberg's approach to the concept of criminal organisation as an instrument to trigger the Tribunal's jurisdiction over its members. On this regard, the *Report* stated that:

> 51. The question arises, however, whether a juridical person, such as an association or organisation, may be considered criminal as such and thus its members, for the reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believe that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject

[39] S/25704 of 3 May 1993.
[40] Ibid para. 13-17.
[41] Ibid para. 6-8.
[42] Ibid para. 31-63.
[43] Ibid para. 50 (emphasis added).

> to the jurisdiction of the International Tribunal irrespective of membership in groups.[44]

This interpretation reflected the position of most of the Member States involved in the consultation phase which led to the draft of the ICTY Statute. Indeed, the analysis of the documentation submitted by Member States pursuant to Resolution 808 (1993) reveals that great emphasis was put on the concept of individual criminal responsibility. Letters submitted, *inter alia*, by the Russian Federation, the United States and representatives of the Organisation of the Islamic Conference (IOC) systematically referred to the term 'individuals' when discussing the scope of the Tribunal's jurisdiction.[45] Not even once the term 'legal person' was mentioned in those documents – either with reference to the State or to other private entities.

The only instance in which the question of the liability of entities was addressed – albeit briefly – was in a letter submitted by the Permanent Mission of Canada to the Secretary-General on 1st April 1993.[46] The letter enclosed the *Report of the International Meeting of Experts on the Establishment of an International Criminal Tribunal*. Hosted by the International Centre for Criminal Law Reform and Criminal Justice Policy, the meeting was held in Vancouver in late March 1993 and brought together experts from 28 countries to discuss 'the short-term issue of the creation of an *ad hoc* tribunal … and the longer term aim of the establishment of a permanent court'.[47] With regard to the jurisdiction *ratione personae* of both the *ad hoc* tribunal and a permanent court, the Report observed that:

> There appeared to be consensus that the jurisdiction of the ad hoc tribunal and, *in its first years at least*, of the permanent court would be limited to individuals, including state officials notwithstanding their functions and immunities, as opposed to states.[48]

The *Report* did not completely foreclose the possibility of including legal persons within the jurisdiction of an international criminal tribunal or court but considered the issue of secondary importance in the grand scheme of things.

As emerged from the analysis conducted above, the drafting history of the Statute of the International Criminal Tribunal for the former Yugoslavia scarcely contributed to the debate on the international criminal liability of corporations, if not in a negative way. Indeed, the

[44] Ibid para. 51.
[45] S/25537 of 6 April 1993; S/25575 of 12 April 1993; S/25512 of 5 April 1993.
[46] S/25504 of 1 April 1993.
[47] Ibid p. 3.
[48] Ibid p. 14 (emphasis added).

decision not to address the liability of legal entities as part of the discussion on the Tribunal's jurisdiction *ratione personae* seems to indicate a disregard toward the issue and ignores the numerous references made to question by the two Committees on an international criminal jurisdiction and the ILC. Such an approach has been interpreted by some as a dismissal of the idea that entities can be held criminally accountable at the international level.[49] However, it needs to be acknowledged that, at the time of the creation of the ICTY, the international community was working to a tight deadline. The need to come up with a prompt and strong solution to the mass atrocities committed in the Balkans greatly influenced the work of those involved in the drafting of the ICTY Statute. It is therefore not entirely surprising that a complex and innovative concept such as the international criminal liability of corporations was not considered as a priority.

A similar conclusion can be drawn with regard to the drafting history of the Statute of the International Criminal Tribunal for Rwanda. The Statute of the second *ad hoc* Tribunal – which followed almost verbatim the provisions of the first – also excluded the possibility to prosecute legal entities for their involvement in the crimes committed in Rwanda in 1994.[50] Like the ICTY, the International Criminal Tribunal for Rwanda was established as a matter of urgency to prosecute those responsible for the heinous crimes committed in the African country. Once again, it is possible to conclude that time constraints reduced any chance to discuss alternative solutions to those already implemented in the context of the ICTY.

4. The Negotiation of the Statute of the International Criminal Court (1995-1998)

If the analysis of the drafting history of the ICTY and ICTR's statutes seems to demonstrate a general disregard towards the liability of legal entities, the final stages of the preparatory works of the Statute of the International Criminal Court tell a different story and prove that the question of the criminal liability of corporations was far from settled. The following sections investigate to what extent the international criminal liability of corporations was discussed in the context of the 1995 Ad Hoc Committee and of the 1996 Preparatory Committee. This analysis aims to clarify how the famous French proposal on the liability of legal persons came to be and its journey to the Diplomatic Conference of Mid-1998.

[49] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, p. 15. See also Ole Kristian Fauchald and Jo Stigen, 'Corporate Responsibility before International Institutions' (2009) 40 George Washington International Law Review 1025, 1037; Daniel Thurer, 'Vom Nurnberger Tribunal zum Jugoslawien-Tribunal und Weiter zu Einem Weltstrafgerichtshof' (1993) 3 Swiss Review of International and European Law 491, 498.
[50] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994), Article 5.

4.1. From the 1995 ad hoc Committee to the 1996 Preparatory Committee

Following the conclusion of the ILC's work on the question of an international criminal jurisdiction, the task to develop a draft statute for an international criminal court was assigned to the 1995 *ad hoc* Committee on the Establishment of an International Criminal Court. Directed by the General Assembly 'to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission',[51] the *ad hoc* Committee convened in New York for two sessions, from 3 to 13 April and from 14 to 25 August 1995.[52]

In its 20 days of activity, the *ad hoc* Committee reviewed most of the major substantive and administrative problems linked to the establishment of a permanent international criminal court. As observed by Bassiouni, the work of the Committee 'had the positive effect of allowing states to familiarise themselves with the issues involved in the creation of an international criminal court' but failed to produce a sufficiently agreed-upon draft to be presented to a conference of plenipotentiaries.[53]

Although it is difficult to ascertain to what extent the *ad hoc* Committee considered the question of the liability of legal entities, a reference to the 'criminal liability of corporations' was incorporated into the 'Guidelines for consideration of the question of general principles of criminal law' annexed to the Committee's Final Report.[54] The inclusion of such an item seems to imply that the international criminal liability of corporate entities was indeed addressed by the Committee. Unfortunately, not much can be inferred from the Committee's Final Report as it made no specific reference to corporations or other legal entities in any other sections aside from the *Guidelines*.[55]

The work of the 1995 *ad hoc* Committee provided the basis for the establishment of another body tasked to draft a statute of an international criminal court, the 1996 Preparatory

[51] UNGA Res. 49/53 of 17 February 1995, para. 2.
[52] A/50/22, para. 1-11.
[53] Bassiouni (n 1) 19-20.
[54] A/50/22, p. 58.
[55] The term 'juridical persons' appeared also in an Informal Paper Submitted by the Bureau Substantive Law and Jurisdiction, UD/A/AC-244/IP-1, which reported various provisions of international instruments concerning the definition of crimes potentially falling within the jurisdiction of the Court. In particular, the term was included in (1) Article 1 of the *International Convention against the Taking of Hostage* (adopted 17 December 1979, entered into force 3 June 1983), 1316 UNTS 205, (2) Article 3 of the *Convention for the Suppression of Unlawful Act against the Safety of Maritime Navigation* (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 222, and (3) Article 2 of the *Protocol for the Suppression of Unlawful Act against the Safety of Fixed Platforms Located on the Continental Shelf* (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 222. In those provisions, however, 'juridical persons' are mentioned as third party in the crime, not as perpetrators.

Committee, set up by the U.N. General Assembly with Resolution 50/46 of 11 December 1995.[56] The mandate of the 1996 Preparatory Committee was 'explicit and goal-oriented'[57] and was finalised to the drafting of 'a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries'.[58]

The Preparatory Committee convened for the first in late March 1996 and proceeded in its work on a draft statute for an international criminal court until the spring of 1998. In the context of this study, the work of the Preparatory Committee is of particular interest. Indeed, it is in 1996 that a new attempt was made to include corporate criminal liability within the scope of an international criminal court. On 6 August 1996, ahead of the Preparatory Committee's second session (12-30 August 1996), the French delegation submitted a working paper presenting a detailed 154-article long draft statute for an international criminal court.[59] The French draft included a number of original provisions which had no equivalent in the ILC 1994 draft.[60] Among those stood Article 78 titled 'Physical persons and juridical persons'.[61] This provision represented the first articulate endeavour to define the scope of the liability of legal entities, its underlining principle of attribution, and the key aspect of the relationship between corporate liability – on the one side – and individual liability – on the other. Amended more than once, the French provision on corporate criminal liability remained a controversial matter throughout the two years which separated its original formulation from the adoption of the Statute of the International Criminal Court in 1998.

Over the last two decades, the proposal has played a key role in the narrative on the development (or lack thereof) of an international norm of corporate criminal liability. Similarly to the Nuremberg experience, the French proposal – and the discussion it elicited in the final stage of the negotiation of the Rome Statute – has captured the attention of both those in favour and against the recognition of an international criminal liability of corporations.[62] The vast

[56] UNGA Res. 50/46 of 11 December 1995.
[57] Bassiouni (n 1) 20.
[58] UNGA Res. 50/46 of 11 December 1995, para. 2.
[59] A/AC.249/L.3.
[60] Ibid pp. 7-22.
[61] Ibid p. 59.
[62] For a judicial interpretation of the dismissal of the French proposal see, in particular, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, p. 15 (Opinion of KENNEDY, J.) and p. 8-9 (SOTOMAYOR, J., dissenting). For an academic analysis, see, *inter alia*, Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge – 2017) 107-109; Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 George Washington International Law Review 351, 396 et ss.; Joanna Kyriakakis, Corporations before International Criminal Courts: Implications for the International Criminal Justice Project (2016) Leiden Journal of International Law 1; David Scheffer, 'Corporate Liability under the Rome

majority of the existing literature orbits around the final version of the proposal – as developed in the summer of 1998 in the context of the Working Group on General Principle – devolving only marginal attention to its previous formulations. Such a narrow approach fails to appreciate the complexity linked to the definition of the liability of legal entities and the difficulties faced by promoting its inclusion within the Rome Statute. Contrary to this approach, the following section retraces the provision's journey, from its original formulation in 1996 to its dismissal in 1998, to provide a comprehensive view of the debate surrounding the international criminal liability of corporations.

4.2. The French Proposal on Corporate Criminal Liability: Origin and Early Debate

Included under Title II (Persons Liable to Punishment) of Part 5. (Criminal Law and Criminal Responsibility), Article 78 read as follow:

> 1. The Court shall be competent to take cognizance of the criminal responsibility of:
>
> (a) Physical persons;
>
> (b) Juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.
>
> 2. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of physical persons who are perpetrators of or accomplices in the same crimes.
>
> 3. These provisions shall be without prejudice to the responsibility of States with respect to international law.[63]

Article 78 was complemented by Article 95 which clarified the sanctioning system applicable to juridical persons specifically. In particular, Article 95 listed the following penalties as applicable to legal entities:

> (a) Fines, the amount of which shall be freely set by the Court;

Statute' (2016) 57 Harvard International Law Journal 35; Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese Journal of International Law 43; Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 Netherlands International Law Review 333; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 244-247; Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (Martinus Nijhoff 2000), 139.

[63] A/AC.249/L.3, p. 59.

(b) Dissolution;

(c) Prohibition, in perpetuity or for a period freely determined by the Court, of the direct or indirect exercise of one or more professional or social activities;

(d) Closure, in perpetuity or for a period freely determined by the Court, of the establishments used in the commission of the crimes;

(e) Confiscation of any item used in the commission of the crimes or which is a product of the crimes. […].[64]

In its original formulation, the French proposal replicated almost verbatim the (then) recently adopted Article 121-2 of the 1994 *Code Pénal* which introduced, for the first time, the principle of corporate criminal liability within the French legal system.[65] Indeed, Article 121-2 of the French Penal Code recognised (and still recognises) the criminal liability of 'legal persons, with the exclusion of the state, … for offences committed on their behalf by their organs or by their representatives'.[66]

Like Article 121-2, draft Article 78 of the French draft maintained the separation between States and other legal entities providing that only the latter could be subjected to criminal prosecution at the international level. However, draft Article 78 also clarified that the exclusion of States from the scope of international criminal liability in no way exonerated them from other forms of responsibility under international law.[67]

Similar to Article 121-2, the model of attribution proposed linked the liability of the entities to this of a natural person who materially perpetrated the crime, yet without making the former entirely dependent on the latter. On this point, however, the wording of draft Article 78 slightly deviated from the terminology used in Article 121-2 of the French Penal Code. Indeed, while the national provision indicates the entity's organs and representatives as the only natural persons who can trigger the corporate liability, the formulation of draft Article 78 used the disjunctive 'or' to separate those committing a crime 'on behalf' the juridical person, on one side, from its 'agencies or representatives', on the other.[68] This latter approach seems to expand

[64] Ibid p. 64.
[65] Leonard Orland and Charles Cachera, 'Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) under the New French Criminal Code (Nouveau Code Penal)' (1995) 11 Conn J Int'l L 111, 114. For an analysis of the legislative evolution of corporate criminal liability under French law see also Katrin Deckert, 'Corporate Criminal Liability' in France in Mark Pieth and Radha Ivory (eds.) Corporate Criminal Liability: Emergence, Convergence, and Risk (Springer 2011); Jean-Yves Maréchal, 'Responsabilité pénale des personnes morales' (2009) 80 JurisClasseur Pénal Code 1.
[66] French Criminal Code, Article 121-2.
[67] A/AC.249/L.3, p. 59, Article 78(3).
[68] Ibid p. 59, Article 78(1)(b).

the scope of the provision beyond the limits set by Article 121-2, so as to include all employees acting on behalf of the company among those who can prompt the entity's criminal liability.

This interpretation would put draft Article 78 more in line with the U.S. doctrine of *respondeat superior* than with the narrower approach to corporate criminal liability embraced by France.[69] Developed by the US federal courts since 1909,[70] the doctrine of *respondeat superior* has its roots in the agency model adopted in tort law and established that a corporation may be held criminally liable for the acts of any of its employees, irrespectively of their position within the company's hierarchy.[71] Conversely, the French approach – more in line with the principle of identification embraced in the English legal system – limits the categories of individuals who can trigger the liability of the entity to those in an apical position as only them can embody the will of the legal person.[72]

This broader approach to the liability of the entity would also represent a change from the narrow 'model' of attribution suggested, years before, by Wyne – the Australian representative at the 1951 Committees on International Criminal Jurisdiction – who referred to the 'head' of the corporation – i.e. the managing director(s) – as the only natural person(s) who may trigger the corporate liability.[73] Unfortunately, the documents available do not allow to determine whether this difference in the formulation of draft Article 78 was actually based on a conscious decision to propose a broader model of attribution for an international corporate liability as no commentary or explicatory note was included in the 1996 French draft.

Similarly, the documentation produced by the 1996 Preparatory Committee does not offer any clarification on the matter. The 1996 French proposal was examined by the Informal Group on General Principles of Criminal Law – chaired by Per Saland – which included the provision of Article 78 among those 'examples of … possible texts' to be considered for the Statute of an International Criminal Court.[74] No official records of the debate are available.

[69] For a comparative analysis of models of attribution of corporate criminal liability adopted by U.S. and France see Cristina de Maglie, Models of Corporate Criminal Liability in Comparative Law (2005) 4 Washington University Global Studies Law Review 547, 553-554.
[70] *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).
[71] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford University Press 2005) 134. The *respondeat superior* theory also is adopted, with insignificant variations, by the Australian Criminal Code, the Dutch Penal Code, and the Danish Penal Code. See de Maglie (n 69) 553.
[72] Pascal Beauvais, 'Country Report: France' in James Gobert and Ana-Maria Pascal (eds.), *European Developments in Corporate Criminal Liability* (Routledge 2011), 241.
[73] A/AC.48/SR.9, para. 74.
[74] A/AC.249/CRP.13, p. 1.

The only indication of the quality of the debate on the liability of legal entities is provided by the complementary note to Article 78 which stated:

> Some delegations indicated that the expression "juridical persons" should extend to organizations lacking a legal status.
>
> Some delegations expressed doubts about including the criminal responsibility of juridical persons into the Statute.
>
> It was proposed as an alternative the possibility of referring to the "responsibility" of the juridical persons without including the word "criminal".[75]

Similar observations were expressed in the Preparatory Committee's 1996 Final Report. In summarising the Committee's position on the proposal concerning the 'Criminal liability of corporations', the Report observed that:

> Some delegations held the view that it would be more useful to focus attention on individual responsibility, noting at the same time that corporations were in fact controlled by individuals. Several delegations stated that such liability ran counter to their domestic law.[76]

Nonetheless, the Committee conceded that 'the liability of a corporation could be important in the context of restitution' and therefore may be worthy of further consideration.[77] Interestingly, the 1996 Report also recalled that 'the principle had been applied in the Nürnberg Judgment' to justify additional discussion on the concept of corporate liability.[78] Most probably, this statement had its roots in the misconception over the qualification of the legal regime applicable to 'criminal organisations and groups', as defined in Articles 9 and 10 of the Nuremberg Charter. As previously observed, such a misconception has characterised the debate on the liability of legal entities since its origin in the 1940s and even today it plays an important role in the discussion on an international corporate criminal liability.

In December 1996, the UN General Assembly renewed the Committee's mandate for nine more weeks in 1997-98 with the goal of developing a final draft to be submitted to a diplomatic conference to be held in mid-1998.[79] The prorogation of the Committee's mandate offered further opportunity to consider the implication of extending the new Court's

[75] Ibid p. 4. The compilation produced by the Informal Group on General Principles of Criminal Law was then integrated in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, A/51/22, p. 81.
[76] A/51/22, para. 194, p. 44.
[77] Ibid.
[78] Ibid.
[79] UNGA Resolution 51/207 of 17 December 1996.

jurisdiction to legal entities. In 1997, the original version of the French proposal was discussed – and refined – during the Preparatory Committee's 3rd session, held from 11 to 21 February.[80] In the Report produced by the Working Group on General Principles of Criminal Law and Penalties, the liability of legal persons was incorporated under Article B a., (Individual criminal responsibility), paragraphs 5 and 6.[81] Those provisions – included in brackets – read as follow:

> [5. The Court shall also have jurisdiction over juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.
>
> 6. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][82]

The core of the proposal remained the same with the exclusion of any reference to the international responsibility of States. Once again, the provision was complemented by a footnote which highlighted the conflicting views that emerged during the discussion over the liability of legal entities. In particular, the note stated that:

> There is a deep divergence of views as to the advisability of including criminal responsibility of juridical persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of juridical persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of juridical persons, hold the view that this expression should be extended to organizations lacking legal status. Some prefer the term "legal entities".[83]

In an attempt to bridge the gap between the conflicting views on the liability of legal persons, on 2 April 1998, the French delegation submitted a new proposal which strayed away from the model originally proposed.[84] Abandoning any resemblance to the concept of corporate criminal liability, the new document shifted the focus from the notion of legal entities to this

[80] Preparatory Committee on Establishment of International Criminal Court to Meet at Headquarters, 11 - 21 February, L/2819, 7 February 1997.
[81] A/AC.249/1997/WG.2/CRP.2; A/AC.249/1997/L.5, p. 20-1.
[82] A/AC.249/1997/WG.2/CRP.2; A/AC.249/1997/L.5, p. 20-1. The same provisions were also included in the Zutphen Report, produced in 1998 at the end of an inter-sessional meeting involving the members of the Bureau and working group coordinators; see A/AC.249/1998/L.13, pp. 52-53.
[83] A/AC.249/1997/WG.2/CRP.2; A/AC.249/1997/L.5, p. 20-1.
[84] A/AC.249/1998/DP.14.

of ‘criminal organisations’, suggesting an approach *á la* Nuremberg. Indeed, the new proposal read as follows:

> Par. 5 and 6 (~~legal persons~~ criminal organizations)
>
> [5. When the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.
>
> 6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred in article 69, and the relevant provision of articles 66 and 72 are applicable.
>
> In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State party shall take the necessary measures to ensure that the judgment of the Court shall have binding force and to implement it.][85]

Perhaps due to time constraint, the new French proposal was not discussed during the last session of the Preparatory Committee (held from 16 March to 3 April 1998) and, therefore, not included in the final document prepared by the Informal Group on General Principles of Criminal Law – which retained the 1997 formulation instead.[86] Nonetheless, the revised proposal found its way into the Rome Conference where it was discussed during the first meeting of the Committee of the Whole, opening the door to further consideration on the possibility to create a space for legal entities within the new international criminal justice system.

5. The 1998 Rome Conference for an International Criminal Court

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court led off in Rome, Italy, on 15 June 1998 and lasted until 17 July 1998. Defined by the UN Secretary-General, Kofi Annan, as ‘an opportunity to take a monumental step in the name of human rights and the rule of law’,[87] the Conference brought together delegations from 160 States, alongside representatives from numerous intergovernmental organisations and NGOs.[88] The Conference’s work was mostly carried out

[85] Ibid.
[86] A/AC.249/CRP.13.
[87] A/CONF.183/SR.1, para. 12.
[88] Schabas (n 1) 22.

under the direction of the Committee of the Whole, which coordinated the activities of 'a myriad of thematic working groups' tasked to elaborate different sections of the draft statute.[89]

The issues the delegations in Rome were called to resolve were countless. Interestingly, the first one to be addressed by the Committee of the Whole was the question of the liability of legal entities.[90] On 16 June 1998, on occasion of the Committee's first session, Ms Le Fraper du Hellen took the floor to introduce the debate over the French proposal on the liability of legal persons.[91] Instead of focusing on the draft text of Article 23 paragraphs 5 and 6 – as included in the final document submitted by the Preparatory Committee – the discussion centred on the new French proposal of April 1998.

In presenting the new text, the French delegation started by explaining the reasons for the change in the formulation by referring to the arguments raised by those against the recognition of the responsibility of legal persons. In particular, Ms Le Fraper du Hellen identified two main objections moved against the proposal on legal entities: the lack of recognition of corporate criminal liability at the domestic level, on one side, and the scepticism towards the possibility of applying such forms of liability at the international level, on the other.[92] While the French delegation acknowledged the relevance of such arguments, it nonetheless 'felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of "criminal organizations"'.[93]

The French delegation then proceeded to clarify the 'principles' underlining the new proposal on criminal organisations. All those principles aimed to highlight the similarities between the French proposal and Articles 9 and 10 of the Charter of the International Military Tribunal.[94] As explained by Le Fraper du Hellen, paragraph 5 of the new proposal was formulated in a way to mirror the provision of Article 9(1) of the London Charter which bestowed on the Nuremberg Tribunal the power to declare the criminality of a 'group or organisation' in connection with the conviction of any of its individual members by the Tribunal itself.[95] Like in Article 9(1) of the London Charter, the French proposal considered the

[89] Ibid.
[90] A/CONF.183/C.1/SR.1, para 32 et ss.
[91] Ibid.
[92] A/CONF.183/C.1/SR.1, para 32.
[93] Ibid.
[94] Ibid para 33.
[95] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics*

responsibility of a group or organization as 'consequent on the previous commission by a natural person of a crime falling within the jurisdiction of the Court'.[96] This would have made sure that, under no circumstance, the individual would have been allowed to conceal his or her responsibility 'behind that of an organization'.[97]

If paragraph 5 was modelled over Article 9(1) of the London Charter, the second section of paragraph 6 echoed Article 10 of the London Charter. Both provisions, indeed, affirmed the 'unquestionable' nature of a decision by the Court concerning the criminality of an organisation.[98] On this point, however, the French delegate conceded that such an approach – already criticised at Nuremberg – may have required 'further discussion'.[99]

Probably the most interesting aspect of the French proposal – and the sole point of contrast with the model designed in Articles 9 and 10 of the London Charter – pertained to the first section of paragraph 6 which subjected criminal organisations to a specific sanctioning system. This system was defined by draft Article 69 – also included in the document submitted by France on 3 April 1998 – which read as follow:

> [Article 69 - Penalties applicable to ~~legal persons~~ criminal organisations
>
> A criminal organization shall incur the one or more of the following penalties.
>
> (i) fines,
>
> (ii) deleted.
>
> (iii) deleted.
>
> (iv) deleted.
>
> (v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
>
> [(vi) appropriate forms of reparation].][100]

for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 8 August 1945, 82 U.N.T.S. 279, Article 9(1).

[96] A/CONF.183/C.1/SR.1, para 33.

[97] Ibid.

[98] Ibid. United Nations, *Charter of the International Military Tribunal - Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'),* 8 August 1945, 82 U.N.T.S. 279, Article 10.

[99] A/CONF.183/C.1/SR.1, para 33.

[100] A/AC.249/1998/DP.14, p. 2-3.

Draft Article 69 proposed a revisited version of the provision originally submitted in 1996 (then draft Article 95) with the significant exclusion of some the penalties, namely dissolution, prohibition (in perpetuity or for a period determined by the Court) of the direct or indirect exercise of one or more professional or social activities, and closure (in perpetuity or for a period determined by the Court) of the establishment used in the commission of the crime.[101] The decision to limit the range of penalties applicable to criminal organisations was once again justified by the attempt to 'build a bridge between the countries that accept criminal responsibility for organisations or groups and those that did not'.[102] Still, even if limited in its scope, the sanctioning system referred to in the first section of paragraph 6 of the French proposal represented an interesting deviation from the approach adopted at Nuremberg. Articles 9 and 10 of the London Charter, indeed, did not provide the Tribunal with the power to impose any kind of penalty on the criminal organisation or group – a power that, in itself, would have been useless considering that all organisations and groups indicted at Nuremberg had been disbanded ahead of the trial.[103]

The new proposal received mixed reactions from the delegations sitting in the Committee.[104] A number of delegations – including Egypt, Tunisia, Japan, Argentina, Ukraine, Jordan and Australia – expressed 'interest' towards the new French proposal, considering it an improvement from the original formulation of Article 23 paragraphs 5 and 6. Nonetheless, even among those more open to the responsibility of criminal organisations, a lingering scepticism persisted. The Egyptian delegation, in particular, observed that '[a]lthough the French proposal was an improvement on the existing text of paragraphs 5 and 6, it did not solve the underlying problems' raised by the concept of criminal liability of fictional entities.[105] Similarly, the Australian representative conceded that, even though Australia recognised the criminal liability of organisations, 'that was not the case in all countries, and Australia's doubts about the enforcement of any finding of criminal responsibility in relation to organizations remained'.[106]

[101] A/AC.249/L.3, p. 64.
[102] A/CONF.183/C.1/SR.1, para 33.
[103] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. VIII - Proceedings (20 February 1946 -7 March 1946), Library of Congress, 391, 427.
[104] A/CONF.183/C.1/SR.1, para 34-66. See also Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 147 et ss.
[105] A/CONF.183/C.1/SR.1, para. 59.
[106] Ibid para. 35.

Entirely against the recognition of a liability of legal entities were the delegations from China, Mexico, Sweden, Lebanon, Denmark, Syria, Greece, El Salvador, Yemen and Iran.[107] Specific concerns were raised, among others, by the delegates from Slovenia and Poland who referred, respectively, to time constraints and evidentiary issues as reasons not to proceed to the adoption of the French proposal.[108] The representative from China, Hu Bin, urged caution in providing for an international criminal liability of legal entities in light of 'the sensitive political issues involved'.[109] In referring to the Nuremberg precedent, he drew the attention on 'the specific historical background and the special characteristics' of the Nuremberg Trial and highlighted how '[t]he Court under discussion would be established against the background of a complex international political situation that differed sharply from the situation prevailing in 1945'.[110] Any attempt to draw a parallel between Nuremberg and Rome was, therefore, dangerous and based on an incorrect understanding of the context in which the International Military Tribunal operated.

Sceptical towards the adoption of an approach *á la* Nuremberg were also Yee, from Singapore, who opposed the new French proposal advocating for the return to its original formulation.[111] According to Yee, the adoption of the Nuremberg model raised a number of 'conceptual difficulties', in particular in relation to the 'procedural safeguards' applicable to organisations. Therefore, he stated that his delegation would rather maintain the original formulation of paragraphs 5 and 6, which established the 'criminal responsibility for legal persons in the same way as for individuals', instead of adopting 'the approach of a blanket declaration that an organization was criminal and using that as a basis for the treatment or trial of individuals'.[112] A similar opinion was expressed by Manogi, from the United Republic of Tanzania, who observed that 'paragraphs 5 and 6 should be retained as they stood, rather than the more broadly worded French proposal' and referred to allegations of corporate crimes in Rwanda to justify the adoption of a provision on international corporate criminal liability:

> To take a specific example, one of the allegations concerning the genocide in Rwanda was that there had been companies in whose warehouses arms bought with the profits of those companies had been stored and from which they had been distributed, with the full knowledge of the representatives of those companies. Tanzania believed, therefore, that not only should criminal

[107] Ibid paras. 36, 43, 44, 46, 55, 56, 57, 63, 64 and 65.
[108] Ibid para. 60-61.
[109] Ibid para. 36.
[110] Ibid.
[111] Ibid paras. 45 and 52.
[112] Ibid paras. 45.

> responsibility be attributed to representatives in their individual capacity, but that the entity itself should be held criminally liable, if only by paying fines or by being liquidated.[113]

The position of the Singaporean representative was also partially endorsed by Harris, a member of the US delegation, who shared the opinion that the new French proposal might create more problems than its original version. In his statement, Harris indicated that the US delegations was prepared to 'work towards an acceptable definition of the concepts involved' in the establishment of an international criminal liability of legal persons, but he was sceptic that a consensus could have been reached on the matter.[114] On this regard, he observed that '[f]ailure to reach a consensus must be readily acknowledged in view of the time constraints, and would not in any event seriously undermine the effectiveness of the Court'.[115] Even though the US delegation was open to the idea of an international criminal liability of legal entities, it did not consider the topic in itself essential to the functioning of an international criminal court.

The conflicting views emerged during the debate within the Committee of the Whole, once again, demonstrated the 'substantive difficulties' involved in the definition of a criminal liability of legal persons. In an attempt to bridge the gap between the opposite positions emerged during the discussion, the proposal on the liability of legal entities was referred to the Working Group on General Principles (hereafter WGGP) for further consideration.[116]

For three weeks, the proposal was considered in a number of informal meetings led by the French delegation, with the support of the representatives from the Solomon Islands.[117] During this time, one rolling text and three working papers were circulated among the delegations to facilitate the discussion.[118] While some differences in the terminology can be identified (e.g. the terms 'legal persons and other organisations', adopted in the rolling text and in the first working paper, were replaced with 'juridical persons' in the second and third versions),[119] the core elements covered in these documents mostly remained the same. The following section focuses on the last and more comprehensive text formulated in the context of the Rome Conference to provide an analysis of its key features and elements.

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[113] Ibid para. 52.
[114] Ibid para. 54.
[115] Ibid.
[116] Ibid para. 66.
[117] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 147.
[118] A/CONF.183/C.1/WGGP/L.5; A/CONF.183/C.1/WGGP/L.5/Rev.1; A/CONF.183/C.1/WGGP/L.5/Rev.2.
[119] Ibid.

5.1. The final Working Paper on the Liability of Juridical Persons: The Last Stage of the Debate

The third and final working paper on the criminal liability of juridical persons was presented on 3 July 1998 and read as follow:

> 5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged, if:
>
> (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
>
> (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
>
> (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
>
> (d) The natural person has been convicted of the crime charged.
>
> For the purpose of this Statute, "juridical person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.
>
> 6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried. If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.[120]

The final text of the French proposal is, without a doubt, the most advanced attempt to define a model of corporate criminal liability applicable at the international level and 'demonstrates how far the concept had developed over the three weeks of discussion'.[121]

[120] A/CONF.183/C.1/WGGP/L.5/Rev.2. (footnotes in original omitted).
[121] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 150.

In line with its original formulation, the working paper adopted a derivative approach to the criminal liability of the entity making it contingent upon the conviction of the natural person who materially committed the crime (draft Article 23(5)(d)).[122] This approach differed from the model of criminal organisation embodied in the Charter of the International Military Tribunal of Nuremberg according to which the declaration of the criminality of a group or organisation was instrumental to the establishment of the liability of its members.[123] As observed by Clapham, by reversing the relationship between the individual and the juridical entity, the proposal seemed to consider the juridical person 'as a sort of 'accessory' to the individual's crime'[124], constructing its liability as an addition to the criminal responsibility of the individual.

Draft Article 23(5) also indicated which natural persons can trigger the liability of juridical entity. Departing from the broader model adopted in draft Article 78, draft Article 23(5)(b) established that the Court would have been able to exercise its jurisdiction over an entity only when the crime was committed by a natural person 'in a position of control'.[125] While draft Article 78 related more to the model embraced by the US federal courts, the final version of the French proposal seemed more in line with the approach found in the 1994 French Penal Code and in the legal system of England and Wales.[126] As mentioned above, indeed, under Article 121-2 of the French Penal Code, a corporation can be held liable on for the acts committed by the entity's organs or representatives who are deemed to express the corporation's will.[127] Similarly, in England and Wales, the identification doctrine establishes that only the acts of those individuals 'who [are] really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation' can trigger the liability of the entity.[128] According to the case law developed by the English courts, only 'a person who is in actual control of the operations of a company or of part of them and who is

[122] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[123] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'),* 8 August 1945, 82 U.N.T.S. 279, Articles 9 and 10.
[124] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 153.
[125] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[126] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(3) International and Comparative Law Quarterly 493, 507.
[127] For an analysis of the interpretation of the concepts of corporate 'organ' and 'representative' under French law, see Deckert (n 65) 158-161.
[128] *Lennard's Carrying Co v. Asiatic Petroleum Co.* [1915] A.C. 705, 713. A similar approach has been followed also by Canada. On this regard, see Stessens (n 126) 510.

not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders' can be deemed to be the directing mind of a company.[129]

The provision of draft Article 23(5)(b), thus, would have narrowed the scope of the liability of the entity to those crimes committed by an individual in an apical position, excluding it every time the criminal act was perpetrated by a mere subordinate. At the same time, though, the provision established that the identification of those 'in a position of control' would have been determined based on 'the national law of the State where the juridical person was registered at the time the crime was committed'. In doing so, draft Article 23(5)(b) would have prevented a company from falling under the Court's jurisdiction 'through the actions of someone unauthorised under the relevant national law'.[130]

In addition to the condition set by draft Article 23(5)(b), the working paper also required that, in committing the crime, the natural person was 'acting on behalf of and with the explicit consent of that juridical person and in the course of its activities'.[131] If the element of the 'position of control' was most likely influenced by the legal tradition of England and Wales, the provision of draft Article 23(5)(c) seems to find its roots in the legal approach to corporate criminal liability adopted by the federal courts of the United States.[132] In the US jurisprudence, a corporation may be held accountable for the acts committed by one of its employees when he or she acted 'within the scope of his [or her] employment'.[133] To trigger the liability of the entity, the employee must have the actual or apparent authority to perform the activity resulting in the commission of the crime.[134] As explained in the case *United States v. Cincotta*:

> A corporation may be convicted for the criminal acts of its agents, under a theory of respondent superior. But criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to

[129] *Tesco Supermarkets v. Nattrass* [1971] UKHL 1, 187 (per Viscount Dilhorne). See also Mark Dsouza, 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' (2020) 79 The Cambridge Law Journal 91,96; Stessens (n 126) 508.
[130] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 154.
[131] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[132] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 154.
[133] See, inter alia, *United States v. A & P Trucking Co*., 358 U.S. 121, at 126 (1958); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, at 637 (7th Cir. 2001).
[134] Wells (n 71) 135; Annie Geraghty, 'Corporate Criminal Liability' (2002) 39 Am Crim L Rev 327, 329 et ss.

> perform, and those acts must be motivated – at least in part – by an intent to benefit the corporation.[135]

In the opinion of Clapham, the inclusion of such a requirement would have shielded the juridical entity from prosecution in cases where the natural person was 'acting solely for his or her own benefit'.[136] In these instances, he observed, 'the corporation could be considered the victim of the crime rather than the perpetrator, and the case for corporate liability as such is weak'.[137] Quite surprisingly, however, the working paper did not explicitly refer to the element of the 'intent to benefit the corporation' as one of the requirements to establish the entity's liability. In the absence of a clear indication, it would have been left to the judges' interpretation to determine whether such an element could have been considered implicitly included in the formulation of draft Article 23(5).

In its final paragraph, draft Article 23(5) then provided a definition of the concept of 'juridical person' adopted in the provision. According to the working paper, the term 'juridical persons' covered solely those corporations whose 'concrete, real or dominant objective' was to seek 'private profit or benefit'.[138] In accordance with this narrow interpretation, other legal entities such as the State, public entities 'in the exercise of State authority', public international bodies and non-profit organisations were to be excluded from the jurisdiction of the Court.[139]

While draft Article 23(5) defined the scope of application of the international criminal liability of corporations, draft Article 23(6) was concerned with the procedural implications of establishing such a liability. Less detailed than paragraph 5, draft Article 23(6) provided that the charges against a juridical person could have been filed jointly with these against the natural person accused of perpetrating the crime and that, consequently, the juridical person and the individual could have been 'jointly tried'.[140] The provision, however, did not provide any indication on how such a joint trial could have been managed, in particular with regard to the question of the legal representation at trial of the private company. Lastly, draft Article 23(6) briefly touched upon the issue of sentencing by referring to the provisions of draft Article 76

[135] United States v. Cincotta, 689 F.2d 238, at 242 (1st Cir., 1982).
[136] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 154.
[137] Ibid.
[138] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[139] Ibid.
[140] Ibid.

and draft Article 99 which respectively concerned the determination of the penalties applicable to the legal person – specifically, fines and forfeitures[141] – and their enforcement.[142]

As emerged, the working paper combined elements from different legal systems in an attempt to define a model of international corporate criminal liability able to be accepted by the majority of the delegations. The efforts made, however, were not enough. When the working paper was finally discussed in the WGGP, on 7 July 1998[143], it became clear that the proposal was far from providing an answer to all the questions arising from the definition of such a complex form of criminal liability. With less than two weeks left before the end of the Conference, the French delegation recognised the impossibility of reaching an agreement on the text of the proposal and ultimately decided to withdrawn it.[144]

In his comprehensive account of the last stage of the negotiation of draft Article 25(5) and (6), Clapham so summarises the positions of the various delegations in Rome:

> Many delegations worked to support the various versions of the proposal. … Many delegations felt there simply was no time to elaborate such a provision during the five-week negotiating process. For some delegations the whole notion of corporate criminal responsibility was simply 'alien', raising problem of complementarity. In addition there were perceived procedural problems relating to who would represent the legal person in Court and how assets could be taken without affecting the rights of third persons.[145]

A similar view of the drafting history of draft Article 23(5) and (6) provided by the David J. Scheffer, who attended the Conference as a member of the US delegation. In recalling his experience in Rome, Scheffer observed that:

> [The] exclusion of corporations from International Criminal Court prosecution was inevitable *not because States agreed that corporations are above the law as a matter of right or principle*, but because a fundamental underpinning of the Rome treaty is the preference for and deference to domestic prosecution (the principle of complementarity) and the obligation of states parties to undertake the capacity to prosecute. If a legal system did not hold juridical persons liable under criminal law, then under the Rome Treaty that national system likely would fail the test of complementarity. Given that diversity, it was not possible

[141] A/CONF.183/C.1/L.3, Article 76.
[142] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[143] A/CONF-183/JOURNAL -16.
[144] Bernaz (n 62) 108; Desislava Stoitchkova, Towards Corporate Liability in International Criminal Law (Intersentia 2010), 16; Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 157.
[145] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 157.

> to negotiate a new standard of corporate criminal liability with universal application in the time frame permitted for concluding the Rome Treaty in light of such differences in criminal liability for juridical persons among so many national jurisdictions.[146]

Time constraint, complementarity concerns and procedural difficulties were the main reasons which made the project to include corporations within the scope of the Rome Statute derailed.[147] Nothing in the preparatory works seems to indicate a complete rejection of the concept as a matter of principle. Indeed, even delegations from countries that – at that time of the Conference – did not incorporate corporate criminal liability in their domestic systems seemed to recognise the value of holding private entities accountable for their involvement in international crimes. Italy, for example, voiced in favour of the French proposal on legal persons even though it did not recognise legal persons as subjects of criminal law in its national system.[148]

The analysis conducted so far, thus, demonstrates that the failure of the French proposal did not rest on theoretical grounds but on practical considerations, linked to the specific historical context in which the negotiations took place. As a result, the decision not to include corporations within the scope of the Statute of the International Criminal Court cannot be considered a definitive statement against the recognition of an international corporate criminal liability. Like Nuremberg, Rome provides valuable insights on the complexity of holding corporations accountable under international criminal law but in itself does not exhaust the debate on the issue.

6. Conclusion

The chapter proposed a comprehensive analysis of the way in which corporate criminal liability was addressed in the years that led to the adoption of the Statute of the International Criminal Court. Even though such form of liability was not incorporated in the Statutes of the *ad hoc* Tribunals nor in the Rome Statute, the scope of the debate on corporations gives a sense of the importance of the issue under consideration. The attempt made in Rome to develop a

[146] David Scheffer, 'Keynote Address: Is the Presumption of Corporate Impunity Dead?' (2018) 50 Case Western Reserve Journal of International Law 213, 216-217 (emphasis added). See also Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 Northwestern University Journal of International Human Rights 304, 316.

[147] The same view was expressed also by Per Saland, Chairman of the Working Group on the General Principles of Criminal Law. See Per Saland, 'International Criminal Law Principles' in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Martinus Nijhoff Publishers 1999), 199.

[148] Clapham (n 62) 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' 158.

model of attribution of international criminal liability for legal entities demonstrated a willingness on the side of several States to test the boundaries of international criminal law and to offer a solution to the issue of corporate impunity.

The examination of the arguments presented to support or contest the establishment of an international corporate criminal liability further supports the conclusion that the challenges posed by such concept do not rest on theoretical grounds but relate to political and practical considerations. As such these challenges can be overcome. Thus, the withdrawal of the French proposal only represents a setback in the debate on the feasibility of including corporations within the domain of international criminal law. A setback that was mostly due to the peculiar context in which the discussion on corporate criminal liability took place. An interpretation of Rome as the swan song of an international corporate criminal liability, therefore, cannot be justified.

Chapter 5 – Corporate Criminal Liability after the Rome Conference: International Developments in the Aftermath of the Adoption of the Rome Statute

1. Introduction

The decision not to include corporate criminal liability within the scope of the Statute of the International Criminal Court greatly affected the debate on whether corporations should be held criminally accountable under international law. To those against the recognition of an international criminal liability of business entities, the position adopted in Rome located corporations outside the scope of international criminal law, closing the door to future discussion on the subject matter.[1] As discussed in the previous chapter, however, this view is based on an erroneous interpretation of the negotiation of the Rome Statute and of the circumstances that led to the withdrawal of the French proposal on legal entities. Furthermore, it fails to recognise the dynamic nature of the international legal system and its ability to evolve and adjust to the needs of the international community. An analysis of the status of corporate criminal liability for international crimes, thus, necessarily needs to look beyond the adoption of the Rome Statute and consider the national and international developments that have occurred after 1998.

Over the past twenty years, these developments have become more and more significant in the discussion on the international criminal liability of corporations. Advancements in the field of international criminal law have called for a reconsideration of the role of legal persons within the international criminal justice system and draw the attention to the need for effective mechanisms to hold legal entities accountable for international crimes.

This chapter focuses specifically on the developments that have occurred at the international level in the area of international criminal law. Interestingly, all the events here considered have a common denominator in the year of 2014. Indeed, the chapter begins with an analysis of the decisions adopted by the Special Tribunal for Lebanon at various stages of the proceedings opened, in 2014, against two corporations: New TV S.A.L. and Akhbar Beirut S.A.L.[2] While these decisions present relevant limitations as they were adopted in the context

[1] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).
[2] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014.

of contemptuous offences, they still represent a first attempt from an international criminal tribunal to assert its jurisdiction over corporate entities.

The chapter then looks at the initiative promoted by the African Union to create a regional criminal chamber within the (proposed) African Court of Justice and Human Rights with jurisdiction over international and transnational crimes perpetrated by individuals and corporations alike.[3] The model proposed by the 2014 Malabo Protocol – even though still far from entering into force – provides food for thought regarding a possible approach to impose international criminal liability to corporations.

Lastly, the draft Articles on Crimes Against Humanity occupy an important part in the investigation of the post-1998 developments involving the liability of corporations.[4] Elaborated by the International Law Commission in a span of five years – from 2014 to 2019 –, the Draft Articles represent the first attempt to produce a specialised convention on crimes against humanity to complement the Genocide Convention. In the chapter, particular attention is paid to draft Article 6(8) which proposed the inclusion of the liability of legal entities for their involvement in the crimes listed in the proposed convention.

The investigation of these three key developments is essential to appreciate how the arguments in support of the inclusion of corporations within the framework of international criminal law have evolved over the past twenty years.

2. The Special Tribunal for Lebanon's Jurisdiction over Legal Persons: An Analysis of the 2014 Contempt Cases

In July 2016, the Special Tribunal for Lebanon became the first international tribunal to issue a judgment against a corporate entity. The guilty verdict was entered against the newspaper company Akhbar Beirut S.A.L. and its editor-in-chief and chairman of the board of directors, Mr Ibrahim Mohamed Al-Amin, for interfering with the Tribunal's administration of justice.[5] In particular, the company (and its editor-in-chief) stood accused of breaching the confidentiality of several Prosecution witnesses in the case of *Ayyash, et al*. The conviction of

[3] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.
[4] International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, A/74/10, para 44.
[5] *Akhbar Beirut S.A.L. and Mr Al-Amin*, Public Redacted Version of the Judgment, STL-14-06/T/CJ, Contempt Judge, 15 July 2016.

Akhbar Beirut S.A.L. followed the previous acquittal of another corporate entity, New TV S.A.L., also accused of contemptuous conduct against the administration of justice.[6]

Both cases attracted the attention of scholars in the field of business and human rights for the novelty of the arguments discussed and for the potential impact that such cases could have had in the field of corporate accountability.[7] While the overall relevance of these two cases may be questionable due to their limited scope, their procedural history offers interesting insight on the evolution of the debate on corporate criminal liability at the international level. The following sections look at the decisions that, in 2014, paved the way to the first 'historic' judgment delivered by an international criminal tribunal against a corporation. Specifically, the next sections considered the decisions issued in the *New TV SAL case* by the two contempt judges – Judge Baragwanath and Judge Lettieri –, respectively in January and June 2014, and by the Appeals Panel, in the October of the same year. These decisions provided the legal arguments that were subsequently applied in the twin case against Akhbar Beirut S.A.L. and Al-Amin and laid the foundation for both contempt trials.

2.1. The First Contempt Decision: Judge Baragwanath's View on Corporate Criminal Liability

Established in the wake of the terrorist attack that in 2005 killed former Lebanese Prime Minister, Rafiq Hariri, together with twenty-two others, the Special Tribunal for Lebanon is a unique example of a modern hybrid or internationalised criminal tribunal.[8] From its narrow scope, limited to a specific attack and to a restricted number of connected cases, to its 'innovative' Statute, which for the first time covers the crime of terrorism[9] and introduces provisions for trials in absentia[10], the Special Tribunal for Lebanon has proved to be an

[6] *New TV S.A.L. and Khayat*, Public Redacted Version of Judgment on Appeal, STL-14-05/A/AP, Appeals Panel, 8 March 2016.
[7] Osama Alkhawaja, 'In Defense of the Special Tribunal for Lebanon and the Case for International Corporate Accountability' (2020) 20 Chicago Journal of International Law 450, Nadia Bernaz, 'Corporate Criminal Liability under International Law. The New TVS.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' (2015) 13 Journal of International Criminal Justice 313, [7] Ekaterina Kopylova, 'Akhbar Beirut S.A.L. Guilty of Contempt, STL Found: One Small Verdict for a Tribunal, a Giant Leap for International Justice' (Opinio Juris, 4 August 2016), Russell Hopkins, 'Forth, back and forth on corporate criminal liability at the Special Tribunal for Lebanon' (Corporate War Crimes 2015).
[8] For an analysis of the 'peculiar' nature of the Special Tribunal for Lebanon see contributions in Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014).
[9] See Nidal Nabil Jurdi, The Crime of Terrorism in Lebanese and International Law in Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014).
[10] See Caleb H. Wheeler, *The Right to be Present at Trial in International Criminal Law* (Brill | Nijhoff 2019) 133-163, Paola Gaeta, 'Trial *in Absentia* Before the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal

interesting case study in international criminal law. The decision to directly address the question of corporate criminal liability further contributed to increasing the 'uniqueness' of the Tribunal.

The proceeding that led to the first trials against two (business) corporate entities started in 2013 when Judge Baragwanath, then Special Tribunal for Lebanon Contempt Judge, ordered the opening of an investigation on allegations of contempt and interference with the administration of justice in relation to the publication of information relating to the identity of alleged confidential witnesses before the Tribunal.[11] The investigation was conducted by an *amicus curiae*, Stephane Bourgon, appointed by the Tribunal Acting Registrar and resulted in a final report that was presented to Judge Baragwanath on 23 October 2013.[12] The report offered 'sufficient grounds to proceed for contempt' against four persons, two individuals and two corporations.

On 31 January 2014, Judge Baragwanath delivered a Decision in Proceedings for Contempt in which he issued orders in lieu of an indictment against (a) New TV S.A.L., the company operating Al Jadeed TV, and its deputy head of news, Ms Karma Khayat, and (b) the newspaper company Akhbar Beirut S.A.L. and its editor-in-chief and chairman of the board of directors. Mr Ibrahim Mohamed Al-Amin.[13] The decision began with an analysis of the scope of the Tribunal's contempt jurisdiction. As explained by the Judge, such jurisdiction does not derive from the Tribunal's Statute – which remains silent on the subject – but from the Tribunal's 'inherent jurisdiction to protect the integrity of the judicial process and to ensure the proper administration of justice'.[14]

In its jurisprudence, the Special Tribunal for Lebanon has defined its 'inherent jurisdiction' as the power 'to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling

Nabil Jurdi, and David Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014).

[11] *Ayyash et al.*, Public Redacted Version of Decision on Allegations of Contempt, STL-11-01//PT/CJ/R60bis.1, Contempt Judge, 29 April 2013.

[12] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 8. *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 8.

[13] New TV S.A.L. and Ms Khayat, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014; Akhbar Beirut S.A.L. and Mr Al-Amin, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014.

[14] Ibid para. 10.

under its primary jurisdiction'.[15] Such jurisdiction is therefore considered 'ancillary or incidental to the [Tribunal's] primary jurisdiction' and it is deemed pivotal 'to ensure a good and fair administration of justice'.[16]

In instances of contempt, the International Criminal Tribunal for the former Yugoslavia also relied upon the concept of inherent jurisdiction in the case *Prosecutor v Dusko Tadic* where the judges observed that even though the Tribunal's Statute makes no mention to the issue of contempt:

> [t]he Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice.[17]

The Special Tribunal for Lebanon has incorporated such a concept into Rule 60bis of the Rules of Procedure and Evidence which recognises that '[t]he Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal's jurisdiction according to the Statute'.[18] Rule 60bis, thus, provides the legal framework for the exercise of the Tribunal's power in cases of contempt of court.

If the applicability of such a provision to contemptuous conducts of natural persons did not raise specific concerns, more controversial was the question of 'whether the Tribunal's inherent power to prosecute cases of contempt [extended] to legal persons' as well.[19] Judge Baragwanath considered the issue in section I(D) of the Decision, presenting his reasoning in a quite brief way.[20]

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[15] *In the matter of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/201 0/02, Appeals Chamber, 10 November 2010, para 45.
[16] Ibid.
[17] *Prosecutor v. Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, IT-94-1-A-R77, 31 January 2000, para 13. See also *Prosecutor v. Simić et al.*, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, IT-95-9-R77, 30 June 2000, para. 91.
[18] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 60bis (A).
[19] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 18. *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 18.
[20] Hopkins (n 7).

The five-page long section mostly centred on the juxtaposition of the Tribunal's primary jurisdiction – defined by its Statute – and contempt jurisdiction – which regulatory framework was provided by Rule 60bis.[21] According to Judge Baragwanath, while several elements in the Statute of the Special Tribunal for Lebanon impose an interpretation of the Tribunal's primary jurisdiction limited to natural persons only, 'the logic demanding this conclusion does not call for such limitation in the case of contempt'.[22]

Looking at the provisions of the Statute, the Contempt Judge observed that:

> In confining the primary jurisdiction of the Tribunal to persons "individually responsible for crimes" set forth in Article 2, Article 3(1) does not distinguish between natural and legal persons. There is no question that an "individual" person can, by definition, be a distinct legal person. However, Article 3 (2)(3) expressly declares superiors criminally responsible for the crimes of subordinates under "his or her effective authority and control" and provides that the "fact that [a subordinate] acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility". Article 16 also repeatedly refers to natural persons in spelling out the rights of an accused. Moreover, there is no reference to an "it" in the context of an accused anywhere in the Statute.[23]

Lacking proper evidence of the drafters' intention to include legal persons in the primary jurisdiction of the Tribunal, the logical solution – according to Judge Baragwanath – was to presume the applicability of the principle *societas delinquere non potest*.[24] 'Since both the language of the Statute and that principle pull in the same direction', the Contempt Judge felt compelled to conclude that Articles 2 and 3 of the Statute do not apply to legal persons.[25]

As will be discussed *infra*, this gendered interpretation of the Tribunal's Statute was subsequently criticised by the Appeals Panel who proposed a broader reading of the Statute based on the French and Arabic versions of the document.[26] At this stage, however, the question of a potential conflict between the terminology used in the three official languages of the

[21] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, paras 18-28; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, paras 18-28. See also Hopkins (n 7).
[22] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 21; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 21.
[23] Ibid para 22.
[24] Ibid para 23.
[25] Ibid para 23.
[26] *New TV S.A.L. and Ms Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014 paras 37-39.

Tribunal was not taken into consideration by the Contempt Judge. In Judge Baragwanath's view, the provisions of the Statute (as worded in its English version) were simply drafted in a way that did not offer any room for doubt on how they should be interpreted.

However, Rule 60bis of the Rules of Procedure and Evidence allows for a different conclusion. In this regard, the Judge observed that, while Rule 60bis complements the provisions of the Statute of the Special Tribunal, 'it is not necessarily limited by them'.[27] In particular, Judge Baragwanath considered that:

> The Tribunal's inherent power to hold persons in contempt, necessary to ensure the administration of justice, is ancillary to its primary purposes. Whether a legal person can be an accused under Articles 2 and 3 of the Statute is a very different question from whether a legal person can be held in contempt for knowingly and wilfully interfering with the administration of justice. … [I]n order to ensure the administration of justice …, Rule 60bis must be read to cover acts of contempt allegedly undertaken by legal persons. Under the highest procedural standards, corporate entities cannot be any more entitled than natural persons to interfere with the judicial process.[28]

In justifying this conclusion, the Judge recognised the novelty of his position and the lack of precedents at the international criminal justice level.[29] However, he considered that developments at the domestic level justify a change in the perspective on corporate liability, at least concerning contempt cases.[30] Indeed, the Judge pointed out that as corporations 'have assumed ever greater prominence as actors in legal and commercial affairs, domestic jurisdictions have progressively recognized the need to hold them criminally accountable for their conduct'.[31]

This emphasis put on the progressive acceptance of corporate criminal liability at the national level is particularly relevant and evidences a shift in the argumentation used to discuss such a legal construct at the international level. If in 1998 the limited recognition of corporate criminal liability at the domestic level represented one of the main obstacles to the inclusion of corporations within the jurisdiction of the International Criminal Court, in 2014 the

[27] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 24; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 24.
[28] Ibid.
[29] Ibid para 25.
[30] Ibid para 26.
[31] Ibid para 27.

comparative law argument became a major argument *in favour* of the international recognition of such legal construct.

This shift in the use of the comparative law argument certainly did not occur overnight. As will be discussed *infra*, this change of perspective gradually emerged in the late 2000s to become a central feature in nowadays debate on the international criminal liability of corporations.[32] In Judge Baragwanath's decision, the comparative law argument based on the domestic developments on corporate criminal liability was only briefly addressed and was mostly used to provide a context for the analysis of the provision of Article 210 of the Lebanese Criminal Code which recognised such a form of liability in the Lebanese legal system.[33] Modelled on Article 121 of the French Criminal Code, Article 210 establishes that a legal person is criminally liable for the offences committed by its 'directors, management staff, representatives and employees' when such offences are committed 'on behalf of or using the means provided by such legal person'.[34]

In the decision under consideration, Article 210 evidenced Lebanon's openness towards the concept of corporate criminal liability and its rejection of the principles of *societas delinquere non potest*. As such, Judge Baragwanath deemed it would have been 'bizarre for [the] Tribunal to deny protection of its due process against corporate interference because of an ancient maxim that the State it serves has rejected'.[35] The emphasis put on Article 210 of the Lebanese Criminal Code in the Judge's reasoning may find a justification in the provision of Rule 3 of the Rules of Procedure and Evidence which listed the Lebanese Code of Criminal Procedure as one of the elements that judges should consider when interpreting the Rules.[36] While the reference is specifically to the Code of Criminal Procedure, the undeniable link

[32] Jendrik Adam, *Die Strafbarkeit juristischer Personem im Volkerstrafrecht* (Nomos 2015), 95 et ss., Caroline Kaeb, 'The Shifting Sands of Corporate Liability Under International Criminal Law' (2016) George Washington International Law Review 351, Joanna Kyriakakis, 'Corporate Criminal Liability and the Comparative Law Challenge' (2009) Netherland International Law Review 333, Robert Thompson, Anita Ramasastry and Mark Taylor, Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes (2009) 40 George Washington International Law Review 841.
[33] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 26; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 26.
[34] Lebanese Criminal Code, Article 210.
[35] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 26; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 26.
[36] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 3.

between the Code of Criminal Procedure and the Criminal Code of a country justifies a reading of Rule 3 that encompasses both documents as interpretative sources.

Lastly, Judge Baragwanath observed that the applicability of the Tribunal's contempt jurisdiction to legal persons was also justified by the power that corporate entities wield in modern society. According to the Contempt Judges:

> [i]t would not only be naive but dangerous to accept that only natural persons can interfere with the administration of justice. To limit criminal liability for contempt to individual natural persons risks undermining the justice process; for the actual and most powerful culprits of any proved interference with justice would go untried. … I decline to impute to the Plenary an intention to immunize legal persons against liability for interfering with due process.[37]

Undoubtedly, the reasoning followed by Judge Baragwanath presents several of shortcomings as some of the arguments are not sufficiently elaborated. As mentioned above, more consideration should have been paid to the comparative law argument prosed by the Judge. Due to the role it plays in the reasoning, the argument should have been better substantiated with more thought given to the domestic developments under consideration. Additionally, the Judge's application of Rule 3 to determine the scope of Rule 60bis lacks a proper degree of accuracy. Indeed, to support the inclusion of corporations in the contempt jurisdiction of the Tribunal, the Contempt Judge merely relied on Rule 3(A)(iv) which imposes that the Tribunal's Rules 'shall be interpreted in a manner consonant with the spirit of the Statute and, …, as appropriate, [with] (iv) the Lebanese Code of Criminal Procedure'.[38] Conversely, no attention is paid to the other interpretative guidelines provided under Rule 3(A), specifically the 1969 Vienna Convention on the Law of the Treaties (Rule 3(A)(i)), international standards on human rights (Rule 3(A)(ii)) and the general principles of international criminal law and procedure (Rule 3(A)(iii)).[39]

Still, Judge Baragwanath's decision can be considered 'ground-breaking' as it represents the first attempt made by an international judge to offer an innovative reading of the role of corporations under international criminal law. Indeed, even though limited in scope, the decision presents new arguments in favour of the inclusion of corporate actors within the scope

[37] *New TV S.A.L. and Ms Khayat*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-05/1/CJ, Contempt Judge, 31 January 2014, para 28; *Akhbar Beirut S.A.L. and Mr Al-Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06/1/CJ, Contempt Judge, 31 January 2014, para 28.
[38] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 3.
[39] Ibid.

of international criminal law – especially regarding domestic developments – which should not be overlooked.

2.2. Challenging Corporate Criminal Liability: The Point of View of Judge Lettieri

In January 2014, contextually to Judge Baragwanath's decision, the contempt cases against New TV S.A.L. and Ms Karma Khayat, on the one side, and Akhbar Beirut S.A.L. and Mr Ibrahim Mohamed Al-Amin, on the other, were assigned to a new Contempt Judge: Judge Nicola Lettieri.

On 16 June 2014, New TV S.A.L. and Ms Karma Khayat presented a Preliminary Motion Challenging Jurisdiction in which the defence contested the Tribunal's jurisdiction over legal persons and asked the Judge to drop all the charges against the broadcasting company.[40] In particular, the defence criticised Judge Baragwanath's conclusion on corporate criminal liability for contempt as 'fundamentally flawed and illogical'.[41] According to the defence, the argument based on a perceived distinction between 'those who can be charged under Rule 60bis as opposed to Articles 1-3 of the Statute … is wholly unsustainable' as the scope of Rule 60bis should not extend any further than that of Articles 1-3 of the Tribunal's Statute.[42] The defence contested as well the Judge's reference to Article 210 of the Lebanese Code and to the developing trend to recognise corporate criminal liability at the domestic level as entirely irrelevant in the context of the case under consideration.[43]

On 24 July 2014, Judge Lettieri granted the Defence Motion and ordered all charges against New TV S.A.L. to be dismissed.[44] Judge Lettieri's reasoning on the issue of corporate criminal liability is opposite to that of Judge Baragwanath but equally short (once again, five pages).[45]

After reaffirming the Tribunal's inherent jurisdiction over contempt and obstruction of justice,[46] Judge Lettieri started his analysis of Rule 60bis to determine whether the provision may contemplate corporate criminal liability for contempt.[47] The Judge observed that to answer

[40] *New TV S.A.L. and Khayat*, Defence Preliminary Motion Challenging Jurisdiction, STL-14-05/PT/CJ, 16 June 2014.
[41] Ibid para 12.
[42] Ibid.
[43] Ibid paras 43-51 and paras 52-66.
[44] *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014.
[45] Hopkins (n 7).
[46] *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014, para 56.
[47] Ibid paras 57 et ss.

such a question, 'a clear and determinative distinction must be made between jurisdiction *ratione materiae/temporis/loci* and jurisdiction *ratione personarum*'.[48] While the Tribunal's contempt jurisdiction 'certainly broaden the scope of the Tribunal's *authority ratione materiae* (and *ratione temporis/loci*)' by allowing it to address conduct not directly criminalised by the Statute and occurred after 2005, the same cannot be said about the Tribunal's jurisdiction *ratione personae*.[49]

Indeed, according to Judge Lettieri, if the Tribunal's jurisdiction *ratione materiae/temporis/loci* for contempt were limited by the Statute, 'no interference with the administration of the Tribunal's justice could be prosecuted; the inherent power of contempt, and Rule 60bis, would effectively be rendered meaningless'.[50] Conversely, when looking at the jurisdiction *ratione personae*, the Contempt Judge considered that 'the fact that the Tribunal is not allowed to prosecute legal persons does not as such render its contempt power meaningless'.[51] While Judge Lettieri conceded that he 'could even agree with Judge Baragwanath *de lege ferenda*', an interpretation of Rule 60bis on the basis of what the law should be 'does not suffice to solidly ground the Tribunal's jurisdiction *de lege lata*'.[52]

Rule 60bis, recalled the Contempt Judge, does not provide any explicit reference to the Tribunal's authority over legal persons for contemptuous offences.[53] In considering whether such authority may be inferred implicitly, Judge Lettieri took a different approach from that adopted by Judge Baragwanath in the January decision. Per Rule 3 of the Rules of Procedure and Evidence, Judge Lettieri referred in his analysis to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties which states that treaty provisions 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.[54] In this regard, the Judge observed that:

> The spirit of the Statute, given its terms, supports an interpretation limiting personal jurisdiction in contempt cases to natural persons only. In cases where the legislator (in this case, Lebanon and the United Nations, which discussed the terms of the Statute) did not explicitly foresee criminal jurisdiction for legal persons, it is impermissible to proceed by analogy. On the basis of the principle *ubi lex voluit dixit, ubi noluit tacuit*, which requires judges to infer precise

[48] Ibid para 65.
[49] Ibid.
[50] Ibid para 66.
[51] Ibid para 67.
[52] Ibid para 68.
[53] Ibid para 69.
[54] Ibid para 70.

> consequences from the legislator's silence, it would therefore be inappropriate to expand the interpretation of the term "person" to cover legal persons.[55]

By applying 'the basic canons of treaty interpretation', the Contempt Judge considered that the term 'person' used in the Rules of Procedure and Evidence should be interpreted 'in consonance with the Statute's understanding of the same term' therefore reading it as including natural persons only.[56] Judge Lettieri contended as well that this literal interpretation of the term 'person' under Rule 60bis is the most appropriate in the international criminal law as:

> [n]o international criminal court or tribunal has ever been granted explicit authority to or found that it had authority to try legal persons. Further, there is no general principle of international criminal law, international treaty or customary law supporting corporate liability, or an interpretation of "person" that encompasses corporations. At most, one could say that international law does not prohibit the imposition of criminal liability for corporations; but this cannot translate into an expansion of the meaning of the term "person" to include entities beyond natural persons.[57]

This narrow interpretation of the history of international criminal law disregards the Nuremberg experience concerning the trial of criminal organisations. While it is correct to say that no business legal entity has ever been convicted by an international criminal court or tribunal, it is not entirely accurate to affirm that '[n]o international criminal court or tribunal has ever been granted explicit authority to … try legal persons'.[58] As analysed in chapter 2, in 1945, six legal entities stood accused in front of the International Military Tribunal of Nuremberg in the context of the trial of the major Nazi war criminals.[59] The position of these six groups and organisations was of course different from that of the two corporations indicted by the Special Tribunal for Lebanon and the legal framework applied by the International Military Tribunal to criminalise organisations (provided by Articles 9 and 10 of the London Charter) is not comparable to the modern concept of corporate criminal liability.[60] Notwithstanding, the Nuremberg precedent offers evidence of the ability of an international criminal tribunal to exert its authority to try legal persons and, as such, it should have not been so easily dismissed by the Contempt Judge.

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[55] Ibid para 71.
[56] Ibid para 72.
[57] Ibid para 75.
[58] Ibid para 74.
[59] *United States et al. v Goering et al.*, Judgment, 30 September-1 October 1946 (1948) 1 IMT 171.
[60] See Chapter II, section 2.4.

Further, on the contextual interpretation, Judge Lettieri also considered the central argument proposed by Judge Baragwanath: the domestic developments in the field of corporate criminal liability. In this regard, the Judge saw no evidence that a consensus has emerged with respect to corporate liability to justify an interpretation of the term 'person' to include corporations.[61] A mere 'trend' towards a broader recognition of corporate criminal liability in 'most countries' should be deemed as insufficient 'to establish the existence of [a] consensus on a specific principle' as it disregards 'the many important legal systems where corporate liability is not accepted'.[62] In the notes, Judge Lettieri referred in particular to countries such as Germany and Italy where corporate criminal liability remains a contested legal concept – especially in the former.[63]

It is plausible that the focus put by Judge Lettieri on the German and Italian jurisdictions may have been determined by his national background. Judges' viewpoint may consciously or unconsciously be influenced by their own national and professional experience and by how certain legal constructs are interpreted at the domestic level.[64] In the case at hand, Judge Lettieri's opinion may have been moulded by the specific legal approach embraced by the Italian doctrine which rejects the concept of corporate criminal liability on the premise that only individuals can be held criminally accountable.[65] While a system of quasi-criminal liability of legal entities has been implemented in the country since 2001,[66] this model has been seen by a part of the Italian doctrine as distinct from the traditional form of criminal liability.[67] This understanding of corporate criminal liability is directly in contrast with the approach adopted by New Zealand – the home country of Judge Baragwanath – which has recognised

[61] *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014, para 74.
[62] Ibid.
[63] Ibid, footnote 116.
[64] James Meernik, Kimi Lynn King and Geoffrey Dancy, 'Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors' (2005) 86 Social science quarterly 683, 693.
[65] Republic of Italy, Constitution, Article 27. See also Elisa Pavanello, *La Responsabilitá Penale delle Persone Giuridiche di Diritto Pubblico. Societas publica delinquere potest* (Padova University Press 2011) 266 et ss, Vincenzo Militello, 'The Basis for Criminal Responsibility of Collective Entities in Italy', in Albin Eser, Günter Heine, Barbara Huber (eds.), *Criminal Responsibility of Legal and Collective Entities* (Freiburg im Breisgau, edition iuscrim 1999) 181 et ss.
[66] Italian Legislative Decree No. 231 of 8 June 2001 (Decreto Legislativo n. 231/2001 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridiche').
[67] Luigi Foffani, 'Responsabilitá degli Enti da Reato in Italia' in A. Fiorella and A. M. Stile (eds.), *Corporate Criminal Liability and Compliance Programs, First Colloquium* (Jovene Editore 2012) 97; Contrary, Cristina de Maglie, 'Country report: Italy' in James Gobert and Ana-Maria Pascal (eds.), *European Developments in Corporate Criminal Liability* (Routledge 2011) 253.

such a form of liability since 1976.[68] It is plausible, therefore, that the different emphasis put by the two Contempt Judges on domestic laws on corporate criminal liability may have had its roots in the (opposite) legal tradition embraced by their home countries.

Lastly, Judge Lettieri dismissed the argument based on Article 210 of the Lebanese Criminal Code and the recognition of corporate criminal liability within the Lebanese legal system. On this point, Judge Lettieri's reasoning is particularly brief as he deemed it sufficient to recall that, according to Article 2 of the Tribunal's Statute, the provisions of the Lebanese Criminal Code shall be applicable only 'subject to the provisions of this Statute'.[69] Thus, missing any reference in the Statute 'to an "it" with respect to an accused' and considering the 'lack of consensus in the international system and among domestic systems on corporate criminal liability', the concept of corporate criminal liability under Lebanese law remains 'inapplicable' to the case under consideration.[70]

Judge Lettieri's decision entirely overturned the order in lieu of indictment issued by Judge Baragwanath against the New TV SAL by adopting a narrow stance to the question of the Tribunal's contempt jurisdiction. As observed by Alkhawaja, Judge Lettieri 'attempted to follow his mandate as narrowly as possible and not to make a judgment on evolving standards of international corporate liability'.[71] Unsurprisingly, the prosecution promptly challenged the Contempt Judge's decision placing the case into the hands of the Appeals Panel for a final decision on the matter of the Tribunal's jurisdiction over legal persons.

2.3. The Decision of the Appeals Panel in the *New TV SAL* case

On 2 October 2014, the Appeals Panel of the Special Tribunal for Lebanon issued its *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* reversing Judge Lettieri's decision and confirming the Tribunal's contempt jurisdiction over legal entities.[72] The main question examined by the Appeals Panel concerned 'whether the Contempt Judge erred in excluding legal persons when interpreting Rule 60bis pursuant to Rule

[68] *Nordik Industries v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 at 199-201 (SC). See also Rebecca Rose, 'Corporate Criminal Liability: A Paradox of Hope' (2006) 14 Waikato Law Review 52.
[69] Special Tribunal for Lebanon, Statute, Article 2.
[70] *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014, para 78.
[71] Alkhawaja (n 7) 471.
[72] *New TV S.A.L. and Al Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014.

3'.[73] The Panel answered this question in the affirmative, rejecting Judge Lettieri's arguments against the recognition of corporate criminal liability for contempt offences.

To do so, the Appeals Panel started by focusing on the interpretation of the term 'person' included in Rule 60bis. Following the principles set by the Vienna Convention on the Law of Treaties, which require that terms used in a treaty should be given their ordinary meaning, the Panel observed that 'the term "person" in a legal context can include a natural human being or a legal entity (such as a corporation) that is recognized by law as the subject of rights and duties'.[74] In rejecting Judge Lettieri's narrow interpretation of the word 'person', the Appeal Panel focused in particular on the language used in the three official versions of the Statute and Rules of the Tribunal. Recalling that both documents were drafted in three official languages - Arabic, English and French –, the majority pointed out that all three versions of Rule 60bis adopted a gender-neutral terminology which allows concluding that it was not in the drafters' intention to limit the scope of the provision to individuals only.[75] According to the Panel, this conclusion was further supported by the fact that, when the drafters had indeed intended to restrict the scope of a Rule to natural persons, they had done so explicitly 'as exemplified by the definition of a victim under Rule 2 of the Rules'.[76]

Then, the Appeals Panel observed that in their respective decisions both contempt judges – Judge Baragwanath, first, and Judge Lettieri, later – referred to the gendered language contained in the English version of Articles 3(2) and (3) ('his or her/him or her') and Article 16 (he or she) to discuss the Tribunal's jurisdiction *ratione personae*. However, as observed above, while Judge Baragwanath refused to see in the gendered terminology used in the Statute a limitation to the Tribunal's contempt jurisdiction, Judge Lettieri considered the words used by the drafters as indicative of a clear intention to exclude legal persons from the jurisdiction of the Tribunal, including in cases of contempt. In the Appeal Decision, the Panel rejected Judge Lettieri's interpretation as erroneous and contrary to the spirit of the Statute.[77]

In its reasoning, the Appeals Panel noted in particular that the Contempt Judge's interpretation failed to consider the linguistic approach adopted in the Arabic and French versions of the Statute.[78] In this regard, it observed that 'unlike the English version, the Arabic

[73] Ibid paras 33-74.
[74] Ibid para 36.
[75] Ibid para 37.
[76] Ibid.
[77] Ibid para 38.
[78] Ibid para 39.

and French versions of the Statute do not contain gendered language'.[79] To resolve this discrepancy among the texts of the Statute, the judges looked at Article 33(4) of the Vienna Convention on the Law of the Treaties which establishes that 'when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.[80] Following this provision, the Appeals Panel considered that a gender-neutral interpretation of the Statute – in line with the language used in the Arabic and French versions – better served the purpose of the Statute itself.[81] As observed by Bernaz, the Appeals Panel did not provide a clear explanation for its decision to favour the Arabic and French versions over the English version.[82] It is possible to agree with the view expressed by the author according to which:

> […] it seems as though what the judges meant was that in this context, drawing conclusions from the gendered language in the English version, as the Contempt Judge had done, leads to ignoring the neutral, wider language of the other two versions. By contrast, embracing the Arabic and French versions, as the Appeal Panel did, does not lead to ignoring the English version, as natural persons clearly remain included. Thus, a wider interpretation, one that does not rely on the gendered language of English 'best reconcile[s] the texts.[83]

Echoing the opinion expressed by Bernaz, 'more clarity on the part of the Panel would have been welcomed'.[84]

The Appeals Panel also considered the extent to which international and domestic developments may influence a decision to extend the Tribunal's contempt jurisdiction to legal persons. Both developments are discussed under the title 'international standards on human rights'. Preliminarily, the Appeals judges observed that, in recent years, the issue of corporate accountability for human rights abuses has become a central item in the international human rights agenda.[85] The Panel recalled in particular the work conducted by the United Nations in the field of corporate accountability which culminated with the adoption, in 2011, of the UN

[79] Ibid.
[80] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Article 33(4).
[81] *New TV S.A.L. and Al Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 39.
[82] Bernaz (n 7) 323.
[83] Ibid.
[84] Ibid.
[85] *New TV S.A.L. and Al Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 46.

Guiding Principles on Business and Human Rights.[86] To the judges, 'the substance of these efforts is an indicator of the evolving practice in relation to corporations at the global level, in particular with respect to remedies for their transgressions'.[87]

In the decision, the Panel did not further elaborate on the relevance of recent developments in international human rights law in the context of contempt offences that do not qualify as human rights violations *per se*. Once again, the 'audacious' approach adopted by the Appeals Panel appears to lack substance and to rest on precarious grounds. As observed by Bernaz:

> [w]hile there is indeed an international trend towards more corporate accountability in general, this does not necessarily mean that such accountability … should include corporate liability for contempt, a precise offence – at least when this type of responsibility is not explicitly foreseen in writing beforehand.[88]

This argument, thus, raises legitimate concerns as it seems to disregard 'the need for strict legality in the construction of criminal provisions, to the detriment of the rights of the (corporate) accused'.[89]

The Appeals Panel then moved to consider the domestic developments in the field of corporate criminal liability. In the decision, this argument represented the 'one factor … that overwhelmingly supports a broader interpretation of Rule 60bis'.[90] As discussed above, both Contempt Judges looked at domestic developments to justify their (opposite) conclusions on the Tribunal's contempt jurisdiction *ratione personae*. In the view of Judge Lettieri, recent domestic developments in the area of corporate criminal liability did not evidence an emerging consensus on the applicability of criminal law to legal persons as certain countries still reject such a concept. Conversely, Judge Baragwanath saw in the progressive adoption of domestic laws on corporate criminal liability the proof that countries were now ready to move away from the principle of *societas delinquere non potest*.

[86] Ibid para 46.
[87] Ibid para 47.
[88] Bernaz (n 7) 324.
[89] Ibid.
[90] *New TV S.A.L. and AI Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 44.

In the Appeals Decision, the Panel embraced Judge Baragwanath's perspective and provided a more detailed analysis of the argument under consideration.[91] The analysis began with a consideration of the legislation of eighteen European countries that provide for 'genuine corporate criminal liability'.[92] The judges considered as well twenty-four countries from outside the European geographical area, to ensure a wide representation of various legal traditions.[93] For each country, the Panel identified the relevant national law on corporate criminal liability to evidence the evolution of such concept at the domestic level.[94] The effort made by the Panel to ground its analysis in specific domestic laws is certainly a welcomed development compared to the approach adopted by Judge Baragwanath. Indeed, the Panel's extensive comparative analysis offers a solid foundation for the conclusion that a trend has emerged in relation to corporate criminal liability. While acknowledging that state practice may 'varies in national systems', the judges concluded that 'it is apparent that in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal - and not a natural – person'.[95] Thus, this allowed the Panel to 'interpret the term "person" [in Rule 60bis] to include legal entities in the exercise of the Tribunal's inherent power over contempt proceedings'.[96]

The Panel's reliance on domestic developments as a factor informing the interpretation of Rule 60bis has been criticised as contrary to the provision of Rule 3 of the Tribunal's Rules of Procedure and Evidence.[97] Indeed, Rule 3 does not list state practice as one of the interpretation aids the Tribunal should consider in determining the meaning and scope of the Rules. According to McDermott, the Panel failed to provide any 'solid reasoning … as to why the contempt judge should have taken [domestic criminal laws] into account'.[98] While conceding that the Panel could have better justify its decision to rely on domestic laws, it is possible to argue that the development of state practice on corporate criminal liability has significant importance in the wider debate on corporate accountability for human rights abuses. As recalled by Bernaz, state practice in the area of corporate criminal liability has constantly

[91] Andrew Clapham, 'Human Rights Obligations for Non-State Actors. Where Are We Now?' in Fannie Lafontaine and François Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2019) 29; Bernaz (n 7) 324.
[92] *New TV S.A.L. and Al Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 52
[93] Ibid para 55.
[94] Ibid footnotes 97-150.
[95] Ibid para 58.
[96] Ibid paras 59-60.
[97] Yvonne McDermott Rees, 'Criminal Liability for Legal Persons for Contempt returns to the STL' (PhD studies in human rights, 8 October 2014).
[98] Ibid.

featured the work of the former UN Special Representative on Business and Human Rights, John Ruggie, on the drafting of the UN Guiding Principles on Business and Human Rights.[99] As such, the Panel's examination of state practice can be deemed relevant in the context of the decision on the Tribunal's jurisdiction over legal persons.

Following the analysis of domestic developments, the Panel then briefly considered instances where legal entities and international criminal law intersected. The investigation looked specifically to the Nuremberg experience and the negotiation of the Rome Statute to assess the status of legal persons under international criminal law. Firstly, the Panel referred to the provisions on criminal organisations included in Articles 9 and 10 of the Statute of the International Military Tribunal of Nuremberg which bestowed the Tribunal with the power to declare Nazi organisations and groups as criminal. According to the majority, the inclusion of such provisions was 'evidence that legal persons did not escape accountability'.[100] The Panel's brief examination of the Nuremberg experience is laudable if compared to the approach adopted by Judge Lettieri who entirely dismissed it. Nonetheless, the Panel should have attempted to provide a better contextualisation of the system introduced by Articles 9 and 10 of the London Charter to highlight its peculiar characteristics (see Chapter II). While the Nuremberg experience undoubtedly offers relevant insight on the role of corporate actors in international criminal law, the Panel could have elaborated more on the relevance of such a precedent.

The majority's analysis of the Rome Statute is equally brief. In this regard, the Panel simply noted that the Statute of the International Criminal Court 'did not purport to codify existing principles emanating from customary international law or to be applicable outside the confines of the ICC'.[101] As such, the omission of corporate criminal liability from the Statute could not be seen as 'a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law'.[102] Instead, 'it is a reflection of the lack of a *political* (rather than legal) consensus to provide such jurisdiction in the Rome Statute'.[103] As such, the Panel's interpretation on this point supports the analysis previously conducted in chapter 5 and confirms the reading of the drafting history of the Rome Statute

[99] Bernaz (n 7) 325.
[100] *New TV S.A.L. and AI Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 63.
[101] Ibid para 66.
[102] Ibid.
[103] Ibid. (emphasis in original)

proposed by numerous authors, including Clapham and Scheffer (who personally attended the Rome Conference).[104]

Linking together the analysis conducted on the domestic developments and the evaluation of the drafting history of the Rome Statute, the Panel then proceeded to make what is perhaps its boldest statement:

> While it remains true that no post-World War II international criminal court or tribunal has previously found that it had the authority to try legal persons, this singular fact does not convince the Appeals Panel that the term "person" under Rule 60bis excludes legal persons …. Indeed, 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*. … the Appeals Panel considers that, given all the developments outlined above, 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.[105]

The qualification of corporate criminal liability as an emerging general principle of law under international law is used by the Panel to justify its interpretation of the Statute and Rules of Procedure and Evidence to include corporations within the scope of the Tribunal's contempt jurisdiction. However, such a conclusion could have been better supported as it seems to be based solely on the investigation of the status of corporate criminal liability at the domestic level. While the level of recognition at national level is the necessary starting point of any analysis on general principles of law, the Panel should have elaborated more on the reasoning adopted to its conclusion on this point – in particular about the transposition of such form of liability at the international level. As will be further discussed, the argument on corporate criminal liability as a general principle of law has developed as an evolution of the comparative law argument that sees the growing recognition of such a form of liability at the domestic level as evidence of the possibility of its inclusion within the international legal framework. Due to the importance of both these arguments in the current debate on corporate criminal liability, their advantages and limitations will be further discussed in Chapter VI.

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[104] David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 Harvard International Law Journal 35, Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds), Liability of Multinational Corporations under International Law (Kluwer Law International 2000)

[105] *New TV S.A.L. and AI Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 67 (emphasis added)

Lastly, the Panel reaffirmed the relevance of the Lebanese approach to corporate criminal liability in the context of the interpretation of Rule 60bis.[106] According to the Appeals Panel, the circumstance that Article 210(2) of the Lebanese Criminal Code explicitly recognises the criminal liability of legal entities makes it foreseeable under Lebanese law that a company – particularly a journalistic publication or a television station – 'could be criminally liable provided that actual complicity in the crime committed is proven'.[107]

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The decision of the Appeals Panel of the Special Tribunal for Lebanon has elicited mixed reactions. As the first international decision of its kind, it has to be welcomed as it represents a tentative attempt by an international criminal tribunal to promote a broader interpretation of the scope of international criminal law to include corporate entities. Nonetheless, as observed by Bernaz, it is undeniable that 'the New TV SAL case is not the one business and human rights advocates might have dreamed of as they were patiently waiting for an international breakthrough in their field'.[108] The main critique moved against the decision concerns, in particular, its limited applicability due to its focus on contempt crimes and the specific reference to the Lebanese context.

Against these scepticisms, Alkhawaja observed that 'all of the arguments, justifications, and examples' used by the Tribunal to justify an expansion in the definition of 'person' under the Statute 'were not limited to contempt cases'. Rather, the Appeals Panel:

> […] surveyed cases in the Military Tribunals of Nuremberg, the statute of the ICC … and domestic laws that deal with corporate liability more broadly. When the STL declared that corporate liability had become a general principle of law, it did not limit this holding to contempt crimes. It issued a broad principle that could apply to any criminal violation.[109]

While Alkhawaja's view has the merit of recognising the general relevance of the arguments embraced by the Appeals Panel – and thus their potential applicability in other contexts besides contempt cases – it is still undeniable that so far the 2014 decision has had a

[106] Ibid para 69.
[107] Ibid para 71.
[108] Bernaz (n 7), 329, Fé de Jonge, 'International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed' (Peace Palace Library, 8 May 2015), Anne-Marie Verwiel and Karlijn van der Voort, 'Some further thoughts on the STL Appeals Chamber decision on criminal liability for legal entities' (Special Tribunal for Lebanon Blog, 16 October 2014), McDermott Rees (n 97), Dov Jacobs, 'A Molotov Cocktail on the Principle of Legality: STL confirms contempt proceedings against legal persons' (Blog at Spread the Jam, 6 October 2014).
[109] Alkhawaja (n 7) 483-484.

relatively limited impact on the development of a norm on the international criminal liability of corporations. While the case has indeed been cited in several scholarly publications and mentioned in domestic cases, it has yet to be formally accepted as evidence of a shift in the international approach to corporate criminal liability.[110]

3. Corporate Criminal Liability in within the Statute of the (proposed) African Court of Justice and Human Rights

At about the same time of the decision of the Special Tribunal for Lebanon to open the two twin contempt cases against *New TV SAL* and *Akhbar Beirut S.A.L*, the African Union adopted the 2014 *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (better known as the 'Malabo Protocol) which vested the (proposed) African Court of Justice and Human Rights with criminal jurisdiction over international and transnational crimes.[111] As such, the Protocol allows for the creation of the first regional criminal court with jurisdiction over international crimes that would represent a 'novel phenomenon in the landscape of international courts and tribunals'.[112]

The Protocol presented numerous innovative elements that reflect the peculiarity of the African context in which the proposed Court will operate. One of the most relevant novelties introduced by the Protocol concerns the inclusion in the Statute of the African Court of Justice and Human Rights of a provision on corporate criminal liability for international crimes (Article 46C). This element makes the Statute of the proposed Court unique compared to the statutes of other international and hybrid criminal courts and tribunals.[113]

The inclusion of such a provision is not entirely surprising considering the number of allegations made against multinational corporations for their involvement in human rights violations committed in the African continent.[114] Indeed, as observed by Meloni, the fact that

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[110] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).
[111] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 16.
[112] Gerhald Werle and Morits Vornbaum, 'Creating an African Criminal Court' in Gerhald Werle and Morits Vornbaum (eds.), The African Criminal Court, A Commentary on the Malabo Protocol (Springer 2017), 3-9.
[113] Clapham, 'Human Rights Obligations for Non-State Actors. Where Are We Now?' (n 91) 27-29; Chantal Meloni, 'Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Artcile 46B) and Corporate Criminal Liability (Article 46C)' in Gerhald Werle and Morits Vornbaum (eds.), The African Criminal Court, A Commentary on the Malabo Protocol (Springer 2017) 3-9, Andrew Clapham, 'Non-State Actor' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International Human Rights Law*, 3rd ed. (Oxford University Press) 569-570.
[114] Elies van Sliedregt, 'Regional Criminal Justice, Corporate Criminal Liability and the Need for Non-Doctrinal Research' in Marina Aksenova, Elies van Sliedregt and Stephan Parmentier (eds.) *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart Publishing, Oxford, 2019) 224-227, Amissi Melchiade Manirabona, 'The Jurisdiction of the Proposed African Criminal Court over

corporations are often involved in 'massive human rights violations amounting to international crimes is beyond dispute' and as such 'the attempt by the [Malabo Protocol] drafters to hold corporations directly accountable under international criminal law has to be welcomed'.[115]

The provision of Article 46C reads as follows:

> 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.
>
> 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.[116]

The first paragraph of Article 46C addresses the question of which kind of legal persons may fall under the scope of the Court's jurisdiction. Similarly to the approach adopted during the negotiation of the Rome Statute, the provision introduced by the Malabo Protocol excludes States from the competence of the proposed African Court.[117] However, while the draft text of Article 23(5) discussed in Rome offered a clear indication of the scope of the term 'juridical person',[118] Article 46C, paragraph 1, remains entirely vague on this point. Indeed, no specific definition of the concept of 'legal person' is included in the text of the Article. As such, it is unclear whether the African Court will have jurisdiction solely over corporations or whether

Corporations: Proposals to Strengthen a Novel Mechanism' (2017) 55 Canadian Yearbook of International Law 293, 296 and 299 et ss.

[115] Meloni (n 113) 153, Joanna Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in C. Jalloh, K. Clarke, V. Nmehielle (eds) African Court of Justice and Human and People's Rights in Context (Cambridge University Press 2019) 794.

[116] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C.

[117] Ibid paragraph 1.

[118] A/CONF.183/C.1/WGGP/L.5/Rev.2.

additional categories of entities, such as non-governmental organisations, trade unions, and other unincorporated associations, will also fall under the scope of the Court's jurisdiction.[119]

In this study, it is argued that a more restrictive interpretation of Article 46C, paragraph 1, is to be preferred as it better adheres to the principles of interpretation under Article 31(1) and (2) of the Vienna Convention on the Law of Treaties. Indeed, looking at the text of Article 46C – its title and the wording used in its other paragraphs – it is evident how the provision repeatedly uses the word 'corporation' or 'corporate' to define the different aspects of the principle of attribution adopted in the Statute. This can suggest the intention of the drafters to limit the jurisdiction of the Court to incorporated entities only, meaning those legal persons that are granted a separate legal personality from that of their individual members.[120]

This narrow understanding of the concept of legal person, however, does not solve all the doubts raised by the wording of Article 46C, paragraph 1. In particular, it does not address whether state-owned corporations, as public entities, can fall under the scope of the provision. On this point, Article 46C should be read in a manner consistent with the approach suggested by draft Article 23(5) which proposed the exclusion from the jurisdiction of the International Criminal Court of public entities insofar they exercise State authority.[121] This interpretation is in line with the provisions of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts which recognise that certain acts of public entities equate to acts of the State.[122] Draft Article 5, in particular, establishes that the conduct of a public entity 'shall be considered an act of the State under international law' provided that the entity is exercising 'elements of governmental authority'.[123] Consequently, activities of a public entity that fall outside the public sphere may legitimately be included under the scope of the proposed African Court's International Criminal Law Section.

Overall, while the lack of clarity regarding the definition of legal persons leaves many questions unanswered, it has correctly been observed that 'the fact that the Protocol is not restrictive in relation to the entities under its scope bestows on the Court the necessary

[119] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 806-807, Manirabona (n 113) 309.
[120] In support of this interpretation see Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 808.
[121] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[122] Taygeti Michalakea, 'Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours' (2018) 7 International Human Rights Law Review 225, 237.
[123] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10, chp.IV.E.1, Article 5.

flexibility to deal with evolving corporate structure'.[124] This is particularly welcomed as it may offer an effective tool to address modern forms of corporate involvement in violations of international law in the African context.

3.1. Article 46C and the Principle of Attribution: An Organisational Approach to Corporate Criminal Liability

The core provisions of Article 46C define the model of attribution of corporate criminal liability adopted by the Statute of the proposed African Court. In this regard, Article 46C offers an alternative model of attribution to that proposed in 1998 during the negotiation of the Statute of the International Criminal Court. As discussed in chapter 4, draft Article 23(5) of the Rome Statute embraced a narrow identification approach to corporate criminal liability, establishing that the liability of the corporation could have been established solely in cases where the offence was committed by an individual 'in a position of control' who was 'acting on behalf of and with the explicit consent of that juridical person and in the course of its activities'.[125] Conversely, Article 46C departs from this traditional (and restrictive) view to adopt an 'organisational model' to attribute criminal liability to legal entities.

According to the organisational model of corporate criminal liability, the fault of a legal entity does not derive from the conduct of a single individual or organ of the corporation but is the result of the complex interplay of corporate policies, regulations and institutionalised practices.[126] Such an approach has its roots in the 'realist' theories of corporate personality.[127] As observed by Colvin:

> […] "[r]ealist" theories … assert that corporations have an existence that is, to some extent, independent of their members. Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault. […] On the realist approach, the responsibility of the corporation is primary. It is not dependent on the responsibility of any individual. Responsibility is analysed within a realist framework by examining directly questions about what the corporation did or did not do, as an organization; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.[128]

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[124] Michalakea (n 122) 237.
[125] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[126] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 The Journal of Criminal Law 414, 415.
[127] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2001) 4 Buffalo Criminal Law Review 641, 680.
128 Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1, 2.

The Australian Criminal Code Act of 1995 offers a prime example of the organisational approach to corporate criminal liability.[129] Alongside the traditional forms of corporate accountability, the 1995 Criminal Code Act provides that criminal liability can be imputed to the corporation for those 'actions previously described as 'company practice' and [thus] previously considered beyond the reach of criminal law'.[130] Specifically, Section 12.3(1) of the Criminal Code Act establishes that, for offences requiring proof of intention, knowledge or recklessness, criminal liability can be imposed on the corporation where the offence has been 'expressly, tacitly or implicitly authorised or permitted' by the corporate body.[131] Furthermore, Section 12.3(2), letters (c) and (d), clarifies that:

> (2) The means by which such an authorisation or permission may be established include: […]
>
> (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision; or
>
> (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[132]

By referring to the concept of 'corporate culture', the Australian legislator allows the courts to take into consideration all those attitudes, policies, rules and practices developed by the corporation when assessing the criminal liability of the corporate entity.[133]

Similarly to the Australian's approach to the organisational model, Article 46C does not derive corporate criminal liability from the act and state of mind of a single individual (or a group of specific individuals) but 'situate corporate culpability within the corporate policies and corporate knowledge that enabled the offence'.[134]

With regard to the mental element of intent, paragraph 2 of Article 46C establishes that 'corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act that constituted the offence'.[135] As such, the provision refers to the existence of a relevant policy that contemplates the commission of specific offences, not to

[129] Australian Criminal Code Act, 1995 § 12.1-12.6.
[130] Alan Rose, 'Developments in Criminal Law and Criminal Justice, 1995 Australian Criminal Code Act: Corporate Criminal Provisions' (1995) 6 Criminal Law Forum 129, 129.
[131] Australian Criminal Code Act 1995, § 12.3(1).
[132] Ibid § 12.3(2), let. (c) and (d).
[133] Ibid § 12.3(6).
[134] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 816.
[135] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C, paragraph 2.

the conduct of specific natural persons. Furthermore, paragraph 3 clarifies that 'a policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation'.[136]

Scholars have raised some concerns in relation to the wording of paragraph 2 of Article 46C.[137] In particular, the provision under consideration does not offer any indication on whether the term 'policy' has to be interpreted in a formal way – encompassing solely the official policies adopted by the legal person – or, more generally, it should cover also all those uncodified practices followed by the corporation. Kyriakakis argued against a too restrictive approach to the definition of 'policy', observing that 'formal corporate policies may denote one position while corporate attitudes, unwritten rules, or previous practices and courses of conduct, de facto authorise something quite different'.[138] In support of a broader interpretation of Article 46C, Kyriakakis refers to the wording used in paragraph 3 where the Article establishes that policy may be attributed to a legal person where it offers 'the most reasonable explanation' of the corporation's conduct.[139] According to the author, paragraph 3 'is intended to convey that a Court is entitled to infer that corporate members understood something to be 'an implied directive' (and hence a policy of the corporation) in those circumstances where the corporate practices are so flagrantly against the law that 'they made more sense if viewed as embodying a determination to avoid the regulations, rather than as a product of inadvertent negligence or even recklessness.'[140]

Even so, while a broader understanding of the term 'policy' may better reflect the reality of corporate behaviour, elements in the drafting history of Article 46C may evidence the drafters' intention to adopt a more restrictive approach instead. In the original formulation of the provision, the drafters made explicit reference to the concept of 'corporate culture' as provided in the Australian Criminal Code Act.[141] Specifically, draft Article 46C, paragraph 4, recognised that '[c]orporate knowledge of the commission of an offence may be established by

[136] Ibid paragraph 3.
[137] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 817, Taygeti Michalakea (n 122) 238.
[138] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 817.
[139] Ibid.
[140] Ibid citing Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1, 33-34.
[141] African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters 7 to 11 and 14 to 15 May 2012, Addis Ababa, Ethiopia, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7, Article 46C, paragraph 4. Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 817.

proof that the relevant knowledge was possessed within the corporation and that the *culture of the corporation* caused or encouraged the commission of the offence'.[142]

Draft paragraph 7 further clarified that:

> 7. For the purpose of this section:
>
> "Corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.[143]

This mention to the 'culture of the corporation', read together with the provisions of paragraphs 2 and 3 of Article 46C, may have allowed for a more expansive interpretation of the concept of policy as it recognised the existence of a specific culture within a corporation which is only partially determined by the official policies and regulations codified by the entity. As such, it would have confirmed to view supported by Kyriakakis.

However, the final formulation of Article 46C, paragraph 4, makes no mention of the concept of corporate culture. This change in the language may imply the drafters' preference for a 'more formal manifestation of the organisational model' based on the evidence provided by the official policies adopted by the corporation.[144] If this is the case, compliance programmes and human rights due diligence may end up playing a central role in the evaluation of corporate intent. Indeed, national legislations already recognise the significance of due diligence and compliance programmes as elements to exclude or mitigate the criminal liability of the corporation.[145] The proposed African Court will be called to shed some light on this fundamental aspects of the provision.

Paragraph 4 of Article 46C addresses the question of corporate knowledge and its attribution to the legal entity. Specifically, the provision provides that corporate knowledge 'may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation'.[146] Paragraph 5 further clarifies that corporate knowledge can be imputed to the corporation through aggregation in cases where

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[142] African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters 7 to 11 and 14 to 15 May 2012, Addis Ababa, Ethiopia, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7, Article 46C, paragraph 4 (emphasis added).
[143] Ibid paragraph 7.
[144] Michalakea (n 122) 239.
[145] See, e.g., Australian Criminal Code Act 1995 § 12.3(3) and United States Sentencing Commission, Guidelines Manual, §8B2.1. (Nov. 2021).
[146] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C, paragraph 4.

'the relevant information is divided between corporate personnel'.[147] The aggregation model of corporate criminal liability is based on the assumption that corporate knowledge can be inferred 'by linking the thoughts of different agents of the legal body and in thus creating the required mental element'.[148] According to this model, knowledge of an event may be imputed to the corporation even when it is not possible to identify an individual who possesses the same level of knowledge of the specific fact or event.

The adoption of the aggregation model in the Protocol can be seen as a positive attempt to acknowledge the multi-layered structure of modern corporations and their ability to establish information-sharing systems that, collectively examined, determine the corporation knowledge. Nonetheless, the wording of Article 46C raises some questions concerning the scope of application of such a model. Indeed, paragraph 5 of the provision, in conjunction with paragraph 4, establishes that aggregate knowledge can be imputed to the entity in cases where evidence is provided that 'the actual or *constructive* knowledge of the relevant information was possessed within the corporation'.[149] The concept of constructive knowledge refers to situations where knowledge of certain information is presumed on the assumption that the responsible person should have acquired such information by exercising reasonable care.[150]

The decision to 'widen the kind of knowledge that can be attributed to a corporation might [create an incentive for] good corporate management by making the corporation responsible for failures among personnel to inquire where they ought'.[151] Once again, compliance programmes and human rights due diligence process will play a fundamental role in determining the existence of constructive corporate knowledge. Indeed, they will provide evidence of the mechanisms adopted by the corporations to ensure that proper information sharing occurs and that accountability procedures are established to promote good practice and transparency within the corporation.

However, constructive knowledge – based on the 'should have known' standard – may end up lowering the bar to establish the criminal liability of corporations in contrast with the standard usually applied to individual defendants. Generally, international criminal law requires intent and knowledge as the mental elements for attributing individual criminal

[147] Ibid paragraph 5.
[148] Lederman (n 127) 662.
[149] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C, paragraph 4 (emphasis added)
[150] On the concept of constructive knowledge see, e.g., Simon Stern, 'Constructive Knowledge, Probable Cause, and Administrative Decisionmaking' (2007) 82 Notre Dame Law Review 1085.
[151] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 819-820.

liability. Article 30 of the Rome Statue, for example, established that, '[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment only if the material elements [of the crime] are committed with intent and knowledge'.[152] Regarding 'knowledge', the Statute further clarifies that such element is understood as requiring the defendant's 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[153] The standard adopted by Article 30 of the Rome Statute, thus, limits the meaning of the mental element of knowledge to 'actual knowledge' as opposed to the wider concept of 'constructive knowledge' embraced in Article 46C of the Statute of the proposed African Court.[154]

The International Criminal Court's Elements of Crimes contemplate some exceptions to this principle but they remain limited to specific crimes. An example is provided by the war crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'[155] The Elements of Article 8(2)(b)(xxvi) provide that liability can be established when the defendant 'knew or should have known' that child was under the age of 15 years.[156] The 'should have known' standard embrace in the Elements allows the Court to apply a 'constructive knowledge' test when inferring the mental element regarding this specific circumstance of the crimes.[157] This example, however, constitutes a departure from the general approach to the mental element in relation to individual criminal liability.

Conversely, constructive knowledge is commonly recognised in the context of command responsibility.[158] Pursuant Article 28 of the Rome Statute, a military commander is criminally responsible for crimes committed by forces under their effective command or authority where they 'either knew or … *should have known* that the forces were committing or about to commit such crimes'.[159] As observed by various commentators to the Rome Statute, the 'should have known' standard include in the provision of Article 28(1)(a) introduce a test

[152] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 30(1).
[153] Ibid Article 30(3).
[154] Mohamed Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Criminal Law Forum 19 473, 496.
[155] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 8(2)(b)(xxvi).
[156] International Criminal Court, Elements of Crimes (last amended 2011), Article 8(2)(b)(xxvi), para. 3.
[157] See also ibid, Article 6(3), para. 6, Article 8(2)(b)(vii)-1, para. 3, and Article 8(2)(b)(vii)-4, para. 3.
[158] Stuart E. Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century - A Century of Evolution' (2003) 10 Murdoch University Electronic Journal of Law.
[159] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 28(1)(ii).

of negligence as a mental element for the attribution of criminal liability to military commanders.[160] This has been confirmed by the Pre-Trial Chamber II in the Bemba Gombo case where the judges stated that '[t]he 'should have known' standard requires the superior to 'ha[ve] merely been negligent in failing to acquire knowledge' of his or her subordinates' illegal conduct'.[161]

In the context of Article 46C, therefore, the inclusion of constructive knowledge to attribute the *mens rea* of a crime to the corporation introduces an element of negligence not dissimilar to that proper of command responsibility. The corporation might thus be considered criminally liable where it fails to supervise its personnel or to acquire relevant information that may allow it to prevent the commission of a crime. As observed by Kyriakakis, this low standard provided by Article 46C may create a risk of over-criminalisation.[162] To avoid that, the Court should elaborate clear criteria for the evaluation of internal oversight procedure and compliance and due diligence mechanisms to indicate what can be reasonably expected from the corporation in the fulfilment of its 'duty of knowledge'.[163]

Lastly, another question left open by the final formulation of Article 46C concerns the interpretation of the term 'corporate personnel' included in the provision of paragraph 5 relevant for the determination of how aggregate corporate knowledge can be established. In the absence of any indication, it remains unclear whether 'corporate personnel' should include solely the corporate employees or whether it may encompass also corporate agents, contractors and even subsidiaries. In this regard, Kyriakakis observed that:

> The wider the net is cast, the more amenable the model will be to corporate prosecutions, particularly in transnational settings where business is often transacted through local subsidiaries and contract chains and where parent company control can be and is often exercised. But at the same time, and particularly given the permissive grounds for attributing knowledge to the

[160] Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press, 2010) 182-186. See also Antonio Cassese, *International Criminal Law*, 2nd ed., (Oxford University Press, 2008), 74 and 251-252, Kai Ambos, 'Superior Responsibility' in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary,* Volume 1 (Oxford University Press, 2002), 823.
[161] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009, para 432.
[162] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 820.
[163] The expression 'duty of knowledge' is used by Meloni in her analysis of the implications of the 'should have known' standard in the context of command responsibility. Meloni, *Command Responsibility in International Criminal Law* (n 169) 183.

> corporation, the wider the net the further determinations may move from genuine situations of corporate misfeasance.[164]

As there is a lot of scope for discretion in the implementation of the provision of Article 46C, the Court will be called to provide some guidance on the interpretation of key legal concepts in the area of corporate crimes.

Finally, it is relevant to point out another element that makes the provision of Article 46C quite dissimilar from the French proposal on legal persons discussed in Rome i.e. the relationship between corporate criminal liability and individual criminal liability. While draft Article 23(5)(d) adopts a narrow derivative approach, making corporate liability contingent upon the conviction of the individual perpetrator,[165] Article 46C implies a clear separation between the liability of the corporate entity, on one side, and that of the natural person, on the other. Indeed, according to Article 46C, paragraph 6, '[t]he criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes'.[166] As such, unlike draft Article 23(5)(d), the provision introduced by the Malabo Protocol does not subordinate the criminal liability of the corporation to the previous conviction of the individual defendant(s). This is of course in line with the organisational model embraced by the drafters as it recognises corporate liability as distinct from the liability of its personnel.

3.2. Sentencing System

A final aspect of the model of corporate criminal liability embraced in the Statute of the (proposed) African Court concerns the sentencing system defined by Article 43A.[167] According to paragraph 2 of such provision, 'the penalties imposed by the Court shall be limited to prison sentences and/or pecuniary fines'.[168] In addition to that, paragraph 5 further allows the Court to 'order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'.[169] The applicability of Article 43A to both individual and corporate defendants makes it evident that

[164] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 822.
[165] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[166] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C.
[167] Ibid Article 43A.
[168] Ibid para 2.
[169] Ibid para 5.

the drafters of the Statute of the (proposed) African Court did not introduce a separate sanctioning regime for corporations, equating their position to that of natural persons.

The prudent approach adopted in the Statute of the (proposed) African Court differs from the more progressive view that emerged during the negotiation of the Statute of the International Criminal Court. Indeed, in the Draft Statute submitted by the Preparatory Committee on the Establishment of an International Criminal Court, the drafters included a specific provision on the penalties applicable to legal persons (draft Article 76) which, in its original formulation, provided as follows:

> A legal person shall incur one or more of the following penalties:
>
> (i) fines;
>
> [(ii) dissolution;]
>
> [(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]
>
> [(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]
>
> [(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
>
> [(vi) appropriate forms of reparation.][170]

Draft Article 76 would have allowed the Court to impose a wide range of sanctions – including the equivalent of a 'death penalty' for a corporation (i.e. 'dissolution') – to tackle corporate crimes and deter future misbehaviour. Even though the draft Article was subsequently amended and limited to pecuniary sanctions only,[171] the original formulation still offered an interesting example of how a sanctioning regime for corporations can be constructed to include non-pecuniary measures that can affect directly the operation of the company (e.g. temporary prohibition of the exercise of activities of any kind) and, as such, prompt significant change in its organisation and policy.

In the context of the Statute of the (proposed) African Court, the decision to allow pecuniary fines only to be applicable in the case of corporate liability may be justified by pragmatic reasons. Indeed, pecuniary sanctions are generally recognised as the most common

[170] A/CONF.183/2/Add.1, p. 121.
[171] A/CONF.183//C.1/L.3, p. 2.

response to corporate wrongdoing;[172] as such, they may facilitate States' cooperation in the enforcement of a judgment against a corporation. Still, this narrow approach may undermine the Court's ability to effectively condemn corporate wrongdoing. As observed by Michaleka, this limited range of sanctions may be 'inadequate to capture the whole range of operations of modern corporations'.[173] This is particularly true in the African context where multinational corporations operate through a web of subsidiaries scattered around the continent. A more progressive approach – based on a combination of pecuniary fines and interdictions – may have provided a more robust system to address the issue of corporate involvement in international (and transnational) crimes in Africa.

Ultimately, the effectiveness of this model of corporate sanctioning will depend on the guidelines that the (proposed) Court will develop in its Rules of Procedure and Evidence and, most importantly, in its jurisprudence on the subject matter.

***

Overall, Article 46C proposes a new and unique model to address corporate criminal liability at the international level. In comparison with previous proposals, it departs for the traditional approaches to corporate criminal liability based on derivative theories such as *respondeat superior* and the doctrine of identification, to embrace a modern model or corporate accountability grounded on the concept of organisational fault. As such, it must be recognised as a step forward from the proposals discussed in the context of the negotiation of the Statute of the International Criminal Court.

However, the model proposed by Article 46C does display relevant limitations. As observed in the previous sections, the provision often lacks proper clarity and leaves key terms open to the interpretation of the Court. While this is not to be seen as a negative in itself as it is a common trait of many provisions of the statutes of international criminal courts and tribunals, nonetheless it may render the application of Article 46C entirely unpredictable to the detriment of the rights of the corporate defendant. Therefore, it would be pivotal for the (proposed) African Court to include in its Rules of Procedure and Evidence clear definitions regarding fundamental concepts such as 'legal person', 'policy' and 'corporate personnel' to fill the existing gaps in the provision of Article 46C.

[172] Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' (n 115) 824.
[173] Michalakea (n 122) 244.

To date, the Malabo Protocol has been signed by 15 countries but has not been ratified by any of the Member States of the African Union.[174] This, unfortunately, casts a shadow on the impact that such Protocol may have on the development of international criminal law and corporate accountability for international crimes. Nonetheless, it should still be seen as a tentative step toward the recognition of an international criminal liability of corporations and, as such, it cannot be ignored.

4. The International Law Commission's Draft Articles on Crimes against Humanity

The final development addressed in the chapter relates to the work conducted by the International Law Commission on the topic of crimes against humanity. While those core crimes have been recognised since Nuremberg[175] and are ingrained in the statutes of all international criminal tribunals and court established since 1991,[176] they have yet to be codified into a multilateral convention that can provide a uniform definition of such crimes and identify State' obligations regarding national criminalisation and mutual assistance.

In 1994, M. Cherif Bassiouni observed that:

> Almost half a century after the horrors of World War II, the legal precedents of Nuremberg, Tokyo, and the Subsequent Proceedings risk sinking into *désuétude*. This prolonged inactivity reinforces the argument made by some that "Crimes Against Humanity," as this category of international crimes emerged from the post-World War II experience, were of an exceptional nature, representing no more than "victors' vengeance." A specialized convention on "Crimes Against Humanity" is clearly needed – one which cures the defects of earlier formulations and takes into account the many tragic experiences of the last fifty years – before the passage of time validates such arguments.[177]

[174] African Union, List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (last updated on 20 May 2019).
[175] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'),* 8 August 1945, 82 U.N.T.S. 279, Article 6(c).
[176] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993), Article 5; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994), Article 3; UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002), Article 2.
[177] M.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention' (1994) 31 Columbia Journal of Transnational Law 457, 458.

The lack of a specialised convention on crimes against humanity was perceived as a glaring gap in the 'international normative proscriptive scheme' which allowed perpetrators of such atrocities to escape justice and enjoy immunity.[178]

In 2013, the International Law Commission's Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) expressed a similar view by highlighting the existence of 'important [voids] in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed', notably in the area concerning crimes against humanity.[179]

In an attempt to fill this normative gap, on 18 July 2014, the International Law Commission took the decision to include the topic of 'Crimes Against Humanity' in its long-term programme of work to develop an international convention on the subject matter.[180] The topic remained on the agenda for four years and resulted in the adoption, in 2019, of 20 Draft Articles on the Prevention and Punishment of Crimes Against Humanity which are currently being considered by the UN General Assembly.[181]

The document produced by the International Law Commission covers several key points such as the definition of crimes against humanity,[182] States' obligations concerning the prevention and punishment of such crimes,[183] and inter-State cooperation and mutual assistance.[184] Draft Article 6, in particular, sets forth States' obligations concerning the national criminalisation of crimes against humanity and the introduction of 'appropriate penalties commensurate with the grave nature of such crimes'.[185] Among the obligations defined by draft Article 6, of great interest is draft paragraph 8 which specifically addresses the question of the liability of legal persons. Draft Article 6(8) establishes that, subject to the provisions of their domestic law, States 'shall take measures to establish the liability of legal persons for the offences' defined within the Draft Articles.[186] These measures shall be adopted 'where

[178] Ibid 457 and 493.
[179] A/CN.4/L.829, para 20.
[180] A/CN.4/680, para 1.
[181] Draft articles on Prevention and Punishment of Crimes Against Humanity in International Law Commission, Report of the International Law Commission, 71st session (29 April-7 June and 8 July-9 August 2019), A/74/10, para 44.
[182] Ibid Article 2.
[183] Ibid Articles 3 and 4.
[184] Ibid Article 14.
[185] Ibid para 44, Commentary to Article 6.
[186] Ibid Article 6(8).

appropriate' and 'may be criminal, civil or administrative' depending on the 'legal principles' of each State.[187]

Though the wording of the draft paragraph 8 may appear less than satisfying to those who advocate for the recognition of corporate criminal liability at the international level, its inclusion within the framework of the Draft Articles should be seen as 'welcome addition'.[188] Indeed, while the flexible language of the text allows States to provide for the criminal liability of corporations only where it does not conflict with their domestic legal principles, the addition of a provision that contemplates such a form of liability is in itself a development that makes the Draft Articles more innovative than most of the other existing instruments in the field of international criminal law.[189]

The following sections look at the drafting history of draft Article 6(8) and consider the opinions expressed by the various members of the Commission, and States, on the advisability of dealing with the liability of legal persons within the framework of the Draft Articles on Crimes against Humanity. The analysis evidences the great attention given by the Commission to the issue under consideration and highlights that, notwithstanding the ambiguous formulation of draft paragraph 8, most of the debate on legal persons focused on the question of corporate criminal liability.

4.1. The 2016 Debate on the Liability of Legal Persons

The decision to provide for the liability of legal persons in the Draft Articles proved to be controversial for the Commission. The question was firstly contemplated by the Special Rapporteur, Sean D. Murphy, in his Second Report, presented to the Commission in May 2016.[190] The Special Rapporteur appeared to be ambivalent about the possibility of including corporate criminal liability in a draft convention on crimes against humanity. Even though he acknowledged that the recent developments provided by the decision of the Special Tribunal for Lebanon on legal entities and the 2014 Malabo Protocol evidence a shift in the perspective on corporate criminal liability at the international level, the Rapporteur still viewed these developments as mere exceptions to the general rule that sees corporations located outside the

[187] Ibid Article 6(8).
[188] Elies van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law' (2018) 16 Journal of International Criminal Justice 729, 745. See also Clapham, 'Human Rights Obligations for Non-State Actors. Where Are We Now?' (n 91) 30.
[189] Leila Nadya Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity' (2018) 16 Journal of International Criminal Justice 683, 688.
[190] A/CN.4/690, para. 41 et ss.

scope of the international criminal justice system. As a consequence, he opted to exclude such liability from the text of (then) draft Article 5 on the criminalisation of crimes against humanity under national law.[191] He nonetheless invited the members of the Commission to 'express their standpoint on that matter' to prompt further discussion. [192]

During the debate that followed the presentation of the Special Rapporteur's Second Report, the members of the Commission expressed opposite views on the question under consideration. The focus of the 2016 debate centred entirely on the question of corporate criminal liability, with minimal consideration to the issue of alternative forms of liability such as civil or administrative.[193] Therefore, the arguments discussed by the various members of the Commission appear of particular interest to understand the current status of the debate on the position of corporations within the scope of international criminal law.

The main arguments raised against the recognition of corporate criminal liability within the body of a specialised convention riveted on the issues of States' discretion and ratification. Regarding State's discretion, Sir Michael Wood argued that, given the different approaches adopted by domestic legal systems on the issue of corporate criminal liability, it was advisable not to include a specific obligation on the matter in an international convention but to leave up to each State the decision of whether or not to impose such form of liability to address corporate involvement in crimes against humanity.[194] This would have ensured the respect of each State's constitutional principles concerning the definition and scope of domestic criminal law.

Strictly linked to the issue of States' discretion is the one concerning ratification. This argument was formulated, specifically, by the Ernest Petric who observed that:

> In order to avoid delays in ratification or refusals to ratify, the provisions should be clear and should avoid dealing with matters that remained controversial and would best be regulated under national law. Corporate responsibility for crimes against humanity seemed to be one such matter. In trying to regulate it in the draft articles, the Commission might be venturing into extremely controversial territory, at least at the current stage.[195]

[191] Ibid para 84.
[192] Ibid.
[193] The sole mention to the advisability of focusing only on civil and administrative liability was made by Hmoud. See A/CN.4/SR.3297, pp. 5-6.
[194] A/CN.4/SR.3298 p. 16 (Sir Michael Wood). See also A/CN.4/SR.3298, p. 12 (Mr. Kolodkin) and A/CN.4/SR.3299, p. 7 (Mr. Wisnumurti).
[195] A/CN.4/SR.3300, p. 12.

Again, the statement suggested that the decision on whether or not to criminalise corporations in the context of the prevention and punishment of crimes against humanity should have not been a concern of the Commission but of each national jurisdiction.

Both arguments lay on similar pragmatic considerations. While the first looks at the difficulties of finding a compromise to reconcile the different approaches adopted at the domestic level on the question of corporate liability, the second considers the importance of producing a draft convention that can swiftly find the support of a high number of States – support that may be hindered by the inclusion of a complex issue such as the liability of legal persons. None of these concerns, however, seems to imply the impossibility of constructing corporate criminal liability for crimes against humanity but solely considers such a form of liability difficult to be transposed at the international level within a reasonable amount of time. As stated during the debate, 'the main objections to the inclusion of a provision [on corporate criminal liability] which had been put forward during the debates had not been legal … ; rather they had been of a political nature, or had centred on advisability'.[196]

A different argument against the inclusion of the criminal liability of corporations in the Draft Article was advanced by Pavel Šturma. In his comment to the Second Report, Šturma stated that, in his view, 'there was no need for a draft article on the responsibility of legal persons', and supported the Special Rapporteur's decision not to include such a provision in draft Article 5.[197] In particular, he observed that '[m]ost international conventions that made reference to such responsibility dealt with organised crime, financial crime or corruption, in other words fields in which it played an important role, *which was not the case in the context of crimes against humanity*'.[198] Even considering such a form of liability as relevant in relation to the offences covered in the Draft Articles, he considered that the absence of a treaty obligation on the matter would not prevent States 'from introducing provisions on corporate criminal responsibility in their national law more generally'.[199]

The comment seems to negate the role played by corporate entities in the commission of international crimes such as crimes against humanity. It implies that corporate involvement in economic crimes is a form of deviance that is considered more significant and common – due to the economic interest pursued by corporations – than corporate involvement in core

[196] A/CN.4/SR.3301, p. 9.
[197] A/CN.4/SR.3300, p. 4.
[198] Ibid (emphasis added).
[199] Ibid.

crimes, which remains marginal at best. This view entirely ignores the many instances in which corporations have contributed to the commission of international crimes such as slave labour, murder, torture, and other inhuman treatments.[200]

Already at Nuremberg, the prosecution of corporate officials of German corporations such as I.G. Farben, Krupp and Flick evidenced the level of complicity of the business sector in the perpetration of heinous crimes.[201] Furthermore, as recalled by van Sliedregt, recent studies on the activity of multinational corporations – especially in the African continent – have repeatedly evidenced that 'corporations involved in the private security industry, oil industry, mining business, diamond and timber trade commit or are complicit in war crimes and crimes against humanity'.[202] Recalling *inter alia* the case of the Apartheid regime in South Africa and the economic support it received from corporations such as IBM and Ford, the author observed that, '[b]y continuing to do business with dictatorial regimes, business entities [can contribute] to the political legitimisation and economic viability of regimes engaged in [crimes against humanity].'[203]

Thus, it is evident that corporate complicity in core international crimes cannot be ignored. While it may be true – as suggested by Šturma – that the cases of corporate involvement in economic crimes are statistically more common than those concerning crimes against humanity, this cannot justify a decision to turn a blind eye to the role played by corporations in the commission and/or facilitation of serious human rights violations.

Opposite views to those discussed so far were expressed by several members of the Commission who shared favourable opinions on the possibility of including corporate criminal liability within the framework of the Draft Articles. Those commissioners recognised the significance of the issue of corporate involvement in international crimes and called for further examination of the matter.[204] Detailed arguments in favour of corporate criminal liability were presented, in particular, by Marie G. Jacobsson, Marcelo Vázquez-Bermúdez, and Maurice Kamto.

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[200] Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges' (2010) 8 Journal of International Criminal Justice 699, 700 et ss.
[201] Ibid 701-702.
[202] van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law' (n 188) 747-748.
[203] Ibid.
[204] A/CN.4/SR.3296, p. 13 (Mr Murase), A/CN.4/SR.3296, p. 16 (Mr Tladi), A/CN.4/SR.3296, p. 17 (Mr Park), and A/CN.4/SR.3298, p. 5 (Mr Niehaus), A/CN.4/SR.3298, p. 13 (Mr McRea); A/CN.4/SR.3301, p. 10 (Mr Saboia).

In speaking against the decision to leave the issue of corporate liability to the discretion of each State, Jacobsson stated that:

> [A] modern draft convention on one of the most heinous crimes must also reflect the ambitions of the international community to combat such crimes at all levels. It might be difficult to establish clear criminal intent on the part of an executive director while, at the same time, it could be very clear that actions taken by a company could aid or abet the commission of crimes against humanity. […] The Commission could perhaps take inspiration from the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, although it was not yet in force. Even if it was not possible to establish the existence of a rule of customary international law on the matter, it would be overly cautious not to at least attempt to put pressure on States to hold corporations responsible for their part in crimes against humanity, as the role of corporations in the commission of such crimes had already been recognized after the Second World War. The Special Rapporteur had mentioned I.G. Farben, but Krupp was another example.[205]

In her intervention, Jacobsson encouraged the Commission to take a brave stand on the issue of corporate criminal liability and to learn from past and recent examples to take a step forward in the development of international criminal law. This view is particularly welcomed as it recognises the opportunity offered by the drafting of a convention on crimes against humanity to adopt a more progressive approach to international criminal law, acknowledging that the system modelled on the Nuremberg experience – deeply rooted on the principle of individual criminal liability – may no longer be able to respond effectively to the issues faced by the international community, especially in relation to corporate wrongdoing.

The view expressed by Vázquez-Bermúdez relied on similar premises. Indeed, he also considered the 2014 Malabo Protocol as an interesting development that could be used by the Commission as evidence of the importance of providing for the criminal liability of corporations for international crimes.[206] Additionally, he noted that, in recent years, corporate criminal liability has become a feature of many domestic jurisdictions – including in his country, Ecuador – and of various international instruments.[207] Looking at the latter, Vázquez-Bermúdez observed that the approach adopted in many of these instruments 'gave States leeway to establish corporate criminal responsibility in their legislation in accordance with their

[205] A/CN.4/SR.3300, p. 7.
[206] Ibid pp. 13-14.
[207] Ibid p. 14.

domestic legal principles'. [208] This flexible approach can be found, *inter alia*, in the International Convention for the Suppression of the Financing of Terrorism,[209] the UN Convention against Transnational Organized Crime,[210] and the UN Convention against Corruption.[211]

Arguing against those who claimed that the inclusion of corporate criminal liability may hinder ratification of the proposed convention, the Ecuadorian member of the Commission stated that there is no evidence that the establishment of such a form of liability in the aforementioned international instruments had deterred States from becoming parties to them.[212] Thus, '[i]n the light of the development of international law in that area, he was of the view that the draft articles should include a provision on that matter'.[213] As there is evidence of corporate involvement in the commission of crimes against humanity, 'the establishment of their criminal responsibility [within the framework of the Draft Articles] could help to prevent such crimes, punish the perpetrators and make reparations to the victims'.[214]

In concluding his observation, Vázquez-Bermúdez also suggested how such a form of liability should have been incorporate in the Draft Article.[215] He proposed to replicate the approach adopted under Article 26 of the (widely ratified) UN Convention against Corruption. The provision of Article 26 requires State Parties to establish forms of liability both for individual and legal persons to deter them from the commission of the offences covered in the instrument.[216] In particular, the provision compels States 'to take the necessary steps, in accordance with their fundamental legal principles, to provide for corporate liability' leaving to each State the decision of whether such a liability should be 'criminal, civil or administrative'.[217] This way, the Convention accommodates the various legal systems and domestic approaches to the issue under consideration. However, Article 26(4) clarifies that, irrespective of the nature of the liability imposed to legal persons, 'the monetary or other

[208] Ibid.
[209] *International Convention for the Suppression of the Financing of Terrorism* (adopted 9 December 1999, entered into force 10 April 2002), 2178 UNTS 197.
[210] United Nations, *Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 29 September 2003), 2225 UNTS 209.
[211] United Nations, *Convention against Corruption* (adopted 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41.
[212] A/CN.4/SR.3300, p. 14.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] United Nations, *Convention against Corruption* (adopted 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41, Article 26.
[217] Ibid.

sanctions that will be introduced must be effective, proportionate and dissuasive'.[218] In the view of the Ecuadorian commissioner, this approach would have been appropriate also in the context of a convention on crimes against humanity as it will allow balancing the respect of States' domestic legal principles, on one side, with the need to ensure effective protection to victims of such heinous crimes, on the other.[219]

Lastly, detailed arguments in favour of corporate criminal liability were also presented by Kamto. He observed that the inclusion of a provision on corporate criminal liability within the scope of the Draft Articles on Crimes Against Humanity was fundamental '[i]n the interest of producing an effective convention'.[220] His support for such a provision stemmed from the understanding of the prohibition of crimes against humanity as a rule of *jus cogens* that applied to all. In light of that, Kamto considered that:

> It [is] difficult to see why the Commission would hesitate to admit that that rule of jus cogens also applied to corporations. By excluding them, the Commission would be making a political rather than a legal choice, or, more specifically, would be expressing a political preference without any legal justification. Moreover, such a choice would not only ignore the contemporary reality of corporate participation in the commission of certain serious international crimes, but would also run counter to the current evolution of international law.[221]

In particular, he recalled that, at the Rome Conference, 'the States members of the Southern African Development Community had already called for the jurisdiction of the International Criminal Court to be extended *ratione personae* to corporations and other legal persons'.[222] Furthermore, he mentioned the decision of the African Union to amend the statute of the (proposed) African Court of Justice and Human Rights to expand the Court's jurisdiction to corporations as an additional example in support of the inclusion of the liability of legal persons in the Draft Articles.[223]

In his observation on the subject matter, the commissioner also referred to the numerous initiatives adopted since the end of the Second World War to address the involvement of corporate actors, and their representatives, in international crimes. Specifically, Kamto directed the Commission's attention to the Nuremberg trials against representatives of I.G. Farben,

[218] Ibid.
[219] A/CN.4/SR.3300, p. 14.
[220] A/CN.4/SR.3299, p. 8. The position was also endorsed by the Commission's Chairman, Pedro Comissario Afonso, see A/CN.4/SR.3299, p. 8.
[221] A/CN.4/SR.3300, p. 17.
[222] Ibid.
[223] Ibid.

Krupp and Flick, the work of John Ruggie as Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (from 2005 to 2011), the three-volume study produced in 2008 by the International Commission of Jurists on the subject of Corporate Complicity and Legal Accountability, and the extensive use of the US Alien Tort Claims Act to establish the (civil) liability of corporations for human rights violations.[224]

In light of that, and for the reasons 'lucidly explained' by Jacobsson and Vázquez-Bermúdez during the debate, Kamto concluded that 'a set of draft articles whose scope did not extend to corporations would seem sclerotic and would contribute almost nothing new in relation to existing treaty regimes on the most serious international crimes'.[225]

The Chairman of the Commission – Pedro Comissario Afonso – also spoke in favour of the inclusion of corporate criminal liability in the body of the Draft Articles, sharing the view of Kamto.[226] On the matter under consideration, he concluded that:

> The Commission must be guided by the object and purpose of the future convention and ensure that all impunity gaps were completely closed. He saw no reason why a corporation that had engaged in the acts defined in draft article 3 should escape liability under that convention; no corporate veil or indirect immunity should be allowed to cover any company that benefited from conflicts around the world.[227]

While the Special Rapporteur remained of the view that there was no need to incorporate the criminal responsibility of corporations in the Draft Article, he conceded that, in light of opinions discussed in the plenary, the issue warranted further consideration and proposed to refer the question to the Drafting Committee.[228] Consequently, on 19 May 2016, the Commission tasked the Drafting Committee to produce a draft provision on the subject matter to be presented to the plenary on the 21st of July 2016.[229]

4.2. The Drafting Committee's Draft Paragraph on the Liability of Legal Persons

As instructed, the Drafting Committee elaborated an additional paragraph (namely paragraph 7) to draft Article 5 which regulated States' obligations regarding the liability of

[224] Ibid pp. 17-18.
[225] A/CN.4/SR.3300, pp. 17-18.
[226] A/CN.4/SR.3301, p. 3.
[227] Ibid.
[228] Ibid p. 10.
[229] A/71/10, para 81.

corporations for the offences covered in the Draft Articles.[230] It is worth noticing that, contrary to other provisions of the Draft Articles, the version of draft paragraph 7 maintained its original formulation during the 4 years in which it continued to be under the consideration of the Commission and was incorporated, unaltered, in the final text of the Draft Articles on Crimes against Humanity under the provision of draft Article 6(8).

The text presented by the Drafting Committee in 2016 read as follow:

> 7. Subject 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.

Formulated in a way that allowed maximum flexibility, the draft paragraph is modelled on the wording of Article 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 and incorporates the 'core aspects' of Article 26 of the Convention against Corruption.[231] The decision to follow the example provided by the aforementioned conventions was based on an evaluation of the number of ratifications received by both instruments: 177 (173 in 2016) for the Optional Protocol,[232] 187 (181 in 2016) for the Convention against Corruption.[233] Furthermore, so far no reservation or declarations regarding the provision on the liability of legal entities has been made by any of the State Parties to the Optional Protocol, 'not even by those states that say they cannot accommodate legal person liability since their law does not allow for it'.[234] As declared by the Chairman of the Drafting Committee, a key concern of the Committee in the drafting of paragraph 7 was to word such a provision in a language that 'could have been accepted by a large part of the international community of States'.[235]

The provision imposes an obligation on States to 'take measures' to establish the liability of legal entities for crimes against humanity but leaves it to the discretion of each State to decide which kind of measures to adopt in accordance with its national law. As explained in the commentary to the provision, the opening clause – 'Subject to the provisions of its national

[230] A/CN.4/L.873/Add.1.
[231] A/CN.4/SR.3325, p. 3.
[232] UNGA *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted 25 May 2000, entered into force 18 January 2002), 2171 UNTS 227.
[233] United Nations, *Convention against Corruption* (adopted 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41.
[234] van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law' (n 188) 745.
[235] A/CN.4/SR.3325, pp. 3-4.

law' - is intended to provide States with a considerable margin of appreciation in relation to the measures they wish to adopt to fulfil their obligation on the matter.[236] As such, 'the obligation is "subject to" the State's existing approach to liability of legal persons for criminal offences under its national law'.[237]

The inclusion of such a clause is an explicit acknowledgement of the concerns that emerged about the existing differences in the domestic response to corporate wrongdoing. By leaving to the State the final decision on which model of liability to impose to legal persons in relation to crimes against humanity, the Commission avoided the lengthy process of attempting to develop a uniform model that could have satisfied all parties involved.

The provision further watered-down States' obligations regarding legal persons by stating that States should take action only 'where appropriate', leaving them the freedom to decide not to take any measures against legal persons where they deem it inappropriate in the specific context of crimes against humanity. Lastly, where liability is imposed, it is once again left to the State the determination of whether it would be criminal, civil or administrative, depending on the legal principles embraced in each State's domestic system. As explained by the Chairman of the Drafting Committee, this formulation 'was designed to allow maximum flexibility with a view to accommodating different legal traditions' and domestic doctrinal approaches.[238] Under the provision, thus, 'there is no obligation to establish criminal liability if doing so is inconsistent with a State's national legal principles'; forms of civil or administrative liability are deemed suitable alternatives to ensure accountability for crimes against humanity.[239]

The last observation on the wording of (then) draft paragraph 7 concerns the additional margin of discretion allowed concerning the definition of which legal persons to subject to criminal, civil or administrative liability *as per* the Draft Articles. While the provision most certainly does not intend to cover States as a *sui generis* legal persons, it remains to the discretion of each State to determine whether liability should be imposed solely on private persons (mainly corporations) or whether public entities could also be held liable for activities falling outside the public sphere.

[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] A/71/10, paras 36 - 46.

The draft text elaborated by the Drafting Committee, with its flexible language, ended up finding the support of the Commission that approved the text with no objection.[240] The provision was thus included among the draft Articles provisionally adopted by the Commission in its 2016 session and transmitted to the UN General Assembly for further discussion within its Sixth Committee.

4.3. States' Comments on the Draft Provision on the Liability of Legal Persons

In late 2016, the Sixth Committee of the UN General Assembly reviewed the Report of the International Law Commission, including the chapter relating to the topic of crimes against humanity. On this occasion, various States expressed their view on the inclusion of a provision on the liability of legal persons in the context of draft Article 5. States' response was mostly positive even though some opposition remained to the addition of such a provision in the Draft Articles.

Representatives for the Republic of Argentina,[241] Austria,[242] and France[243] voiced their interest in the text of draft Article 5, paragraph 7, and welcomed the flexible formulation adopted by the Commission. Chile and Slovakia also viewed the merit in the decision to address the question of the liability of legal persons in a specialised convention and declared their openness to discuss the issue further.[244] Support was received also from Spain that considered it particularly relevant that draft Article 5 included a specific provision on the liability of legal persons (paragraph 7).[245] On this point, the Spanish representative shared the opinion that, 'even though we find it appropriate to foresee that States must adopt measures to establish the liability of legal persons, we believe that the wording of paragraph 7 could go further than existing national practice'.[246]

Positive comments were also expressed by Czech Republic and Slovenia. In particular, Petr Válek, speaking for the Permanent Mission of the Czech Republic to the United Nations, stated their appreciation for 'the wording of [draft paragraph 7 which] provides States with a considerable flexibility in deciding whether to adopt such a measure and to shape these measures in accordance with their national law'. He also declared that his country '[i]n

[240] A/CN.4/SR.3325, p. 4.
[241] A/C.6/71/SR.29, para. 85.
[242] A/C.6/71/SR.25, para. 81.
[243] A/C.6/71/SR.20, para. 74.
[244] A/C.6/71/SR.25, para. 99 and A/C.6/71/SR.26, para. 140.
[245] A/C.6/71/SR.26, para. 6.
[246] Ibid.

principle, … support[ed] the idea that legal persons should be liable for commission of crimes against humanity' and, due to the complexity of the issue, invited the Commission to study it more in the detail, 'taking into account the specific context of crimes against humanity, including the organizational policy element contained in the definition of these crimes and different interpretations given to it.'[247]

The statement for Slovenia focused more on the contribution that a provision on the liability of legal persons could have offered to the ongoing debate on corporate accountability for international crimes. In particular, the Slovenian representative observed that:

> Slovenia welcomed the progressive approach taken by the Commission in including liability of legal persons for the commission of crimes against humanity in article 5, paragraph 7. As rightly noted by the Special Rapporteur, the criminal liability of legal persons had become a feature of several national jurisdictions. Legal persons could have significant involvement in the suffering of victims of crimes against humanity. While recognizing the need to address that aspect, his delegation supported the inclusion of paragraph 7, which was *progressive in nature* but allowed States considerable flexibility in its implementation. That paragraph could constitute a *notable novelty and an important contribution* to the ongoing work.[248]

Representatives from countries such as Mexico and Portugal, instead, adopted a more cautious view on the topic, emphasising the existing divergences among national responses to corporate liability as an important element to be considered when discussing the provision of draft Article 5(7).[249]

Relatively minimal resistance to the inclusion of a provision on the liability of legal persons was expressed by those countries that do not embrace corporate criminal liability within their domestic laws. Both Greece and Russia highlighted the lack of recognition of such legal construct within their legal systems but seemed to consider the text of draft paragraph 7 flexible enough to accommodate their domestic approach to the question of the liability of legal persons.[250] While accepting the merit of draft Article 5(7), the Hungarian representative raised

[247] A/C.6/71/SR.24, para. 69. Quote from the full speech available on the UN Sixth Committee's website. See Permanent Mission of the Czech Republic to the United Nations, Statement by Mr. Petr Válek, Director of International Law Department, Ministry of Foreign Affairs, available at https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/czech_rep_2.pdf [Accessed on 28 November 2021].
[248] A/C.6/71/SR.26, para. 107 (emphasis added).
[249] Ibid para. 18 and A/C.6/71/SR.25, para 93.
[250] A/C.6/71/SR.25, para. 28, and A/C.6/71/SR.25, para 65.

some concerns regarding the practical impact of such a provision. In particular, the statement submitted by Hungary observed that:

> Regarding the probably most thoroughly discussed part of the draft articles, namely paragraph 7 of article 5 on the responsibility of legal persons, my delegation fully accepts the fact that in order to achieve the object and purpose of the future convention, it is important to deal with the question of the responsibility of legal persons. However, I have to highlight that Hungary, like many other states, does not recognize criminal liability of legal persons. Even though civil or administrative liability of legal persons is also foreseen by the draft articles, subject to national legislation, it remains to be discussed whether the existence of a paragraph on liability of legal persons that, in most national legislation, is not understood as criminal liability, has any effect on the general aim of preventing and punishing crimes against humanity.[251]

The comment from the Hungarian delegation seems to imply the existence of a difference in the effectiveness of civil and administrative forms of liability, on the one side, in comparison with criminal liability, on the other. Since the provision of draft Article 5(7) leaves to the discretion of States any decision concerning the liability regime applicable to legal persons, it is plausible to assume that States will mostly opt for an administrative or civil approach – especially where corporate criminal liability is not recognised at the domestic level, like in Hungary. As observed in the statement, this less coercive solution may not produce 'any effect on the general aim of preventing and punishing crimes against humanity',[252] making the provision entirely superfluous.

While welcoming the formulation of draft Article 5(7), Hungary's statement highlights a clear limitation of the provision – its excessive flexibility – which may end up reducing its impact in the long term.

The comments discussed so far are not dissimilar to those submitted to the International Law Commission, two years later, during the final debate on the Draft Articles on Crimes against Humanity. In 2017, the question of the liability of legal persons was temporarily set aside with the Commission worked on other issues to be incorporated in the Articles, including 'victims, witnesses and other affected persons',[253] 'relationship to competent international

[251] A/C.6/71/SR.24, para 81. Quote from the full speech available on the UN Sixth Committee's website. See Hungary, Intervention by Dr. Réka Varga Head of International Law Department Ministry of Foreign Affairs and Trade Hungary, available at https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/hungary_23.pdf [Accessed on 28 November 2021]
[252] Ibid.
[253] A/CN.4/704, paras 159-196 and A/72/10, pp. 92 et ss.

criminal tribunals',[254] and 'monitoring mechanisms and dispute settlement'.[255] Following the adoption, in first reading, of a full set of Draft Articles at the end of its 69th Session, the Commission invited Governments to expressed their views ahead of its seventy-first session, which took place between 29 April–7 June and 8 July–9 August 2019.[256] 38 States sent their written comments upon this topic of the Draft Articles.[257]

In summarising the States' opinions on the provision on the liability of legal persons – now incorporated under draft Article 6(8) after 2017 - the Special Rapporteur observed that 'several States expressed their support for the liability of legal persons, especially given the flexibility provided for in the draft article'[258] while some considered that the question should be left to the discretion of each State.[259] The complexity of the issue led some States to reiterate the limited scope of the provision on legal persons, maintaining that it should be interpreted as 'obligating States to approach criminal liability for legal persons only in accordance with their existing national laws'.[260]

Notwithstanding the mixed reactions received, the Special Rapporteur decided not to propose any amendment to the provision under consideration and the text was thus deferred to the plenary for a final round of observations. During the debate, the question of the liability of legal persons was only sporadically addressed and the few comments were in general in favour of the Special Rapporteur's decision to maintain the text of draft Article 6(8) unchanged.[261] Ultimately, the provision was adopted in second reading and, together with the other Draft Articles developed by the Commission, it was submitted to the General Assembly with the recommendation to elaborate a convention on the prevention and punishment of crimes against humanity based on such Articles.

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[254] A/CN.4/704, paras 198-207.
[255] A/CN.4/704, paras 212-263 and A/72/10, pp. 116 et ss.
[256] A/72/10, paras 35–46.
[257] A/CN.4/725, paras 5-6. A/CN.4/726, A/CN.4/726/Add.1, A/CN.4/726/Add.2
[258] A/CN.4/725, para 151. Among those speaking in favour of the liability of legal persons see, *inter alia*, Czech Republic, A/CN.4/726, p. 66, France, A/CN.4/726, p. 68, Sierra Leone, A/CN.4/726, p. 76, Swiss, A/CN.4/726, p. 77.
[259] A/CN.4/725, para 155. Among those speaking against the inclusion of the liability of legal persons in the Draft Article see, *inter alia*, China, A/C.6/72/SR.18, para. 120, the Islamic Republic of Iran, A/C.6/72/SR.20, para. 41, and the United Kingdom, A/CN.4/726, p. 78.
[260] A/CN.4/725, para 152.
[261] Mr Murase, A/CN.4/SR.3453, p. 12, Mr Park, A/CN.4/SR.3454, p. 7, Mr Hassouna, A/CN.4/SR.3454, p. 11. Contrary to the inclusion of the provision: Mr Zagaynov, A/CN.4/SR.3457, p. 17.

In the context of the international developments that occurred after the adoption of the Rome Statute, the Draft Articles on Crimes Against Humanity are the most recent attempt to incorporate legal entities – and *in primis* corporations – within international criminal law. Differently from the examples provided by the decisions of the Special Tribunal for Lebanon and the Malabo Protocol, the Draft Articles have the potential to effectively innovate the legal framework concerning the prevention and punishment of core international crimes by recognising the role played by corporations in violating international law and the need to ensure accountability.

Furthermore, the positive opinions and declarations of interest expressed by several States on the opportunity to hold legal persons accountable in the context of crimes against humanity can also be seen as further evidence of a new understanding of the issue under consideration; understanding that may contribute to create the conditions to open up a new debate on the feasibility of including corporations within the scope of international criminal law.

At the same time, certain limitations of Draft Article 6(8) cannot be ignored. As discussed above, the provision on the liability of legal persons is worded rather mildly, reducing the role of corporate criminal liability to one of the options available to States to address corporate wrongdoing in the context of crimes against humanity. On this point, the comment made by the United Kingdom is not entirely without merit:

> In the UK's view, it is unclear what draft Article 6(8) adds to the legal position. Those States that have liability for legal persons as a matter of course will likely allow such liability for crimes against humanity. Those States that do not have such liability are unlikely to change their position because of draft Article 6(8).[262]

However, in response to this scepticism on the practical impacts of Draft Article 6(8), it is enough to observe how the inclusion of similar provisions within numerous instruments adopted by the European Union, the Council of Europe and the OECD has indeed generated significant changes in States' response to corporate misbehaviour, prompting several national jurisdictions to introduce corporate criminal liability within their domestic laws.[263]

[262] A/CN.4/726, p. 78.
[263] See on this regard Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann, Joachim Vogel (eds.), *Regulating Corporate Criminal Liability* (Springer, 2014) 54 et ss.

Documents such as the Second Protocol of the Convention on the protection of the European Communities' financial interests,[264] the Council of Europe Convention on Action against Trafficking in Human Beings,[265] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business[266] – to mention a few – have played an important role in encouraging States to depart from the traditional principle of *societas delinquere non potest*. This, even though all of these instruments adopted an 'open approach concerning the kind of responsibility a member state or party to the treaty should introduce for companies in the national system'.[267]

If incorporated in an international convention, the provision of draft Article 6(8) may as well plays a similar role, encouraging States not only to extend the scope of corporate criminal liability to crimes against humanity – where such a legal construct already exists – but also to consider the value of criminal liability to address the issue of corporate wrongdoing, where such of a form of liability still lack proper recognition. As such, the adoption of draft Article 6(8) by the International Law Commission should be seen as a positive development in the field of corporate criminal liability for international crimes.

5. Conclusion

The analysis conducted in the chapter provides insights on post-1998 developments that occurred at the international level in the field of corporate criminal liability. These developments contribute in different ways to the discussion on the feasibility of holding corporations accountable at the international level. Indeed, considered together, they give a sense of the significance of the topic of corporate criminal liability in today debate on the scope of international criminal law. As such, they cannot be ignored.

At the same time, however, each of these developments should be evaluated by taking into account the specific context in which it has emerged. As observed in the chapter, taken in isolation, these developments may have limited impact on the establishment of an international corporate criminal liability. Nonetheless, when examined together, the 2014 decision of the Appeal Panel of the Special Tribunal for Lebanon, the 2014 Malabo Protocol, and the Draft

[264] European Union, *Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests* - Joint Declaration on Article 13 (2) - Commission Declaration on Article 7, OJ C 221, 19.7.1997, p. 12–22, Article 3.
[265] Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 22.
[266] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: and related documents*, 17 December 1997, S. Treaty Doc. No. 105-43, Article 2.
[267] Engelhart (n 263) 55.

Articles on Crimes against Humanity, all provide evidence of the evolving nature of the debate on the role of corporations under international criminal law. Overall, the examination of these three developments further demonstrated that, even after Rome, the liability of corporate entities has continually raised to the attention of those tasked with promoting the development of international criminal law.

Chapter 6 – National Developments and the Comparative Law Argument in the Debate on Corporate Criminal Liability

1. Introduction

The international developments discussed in the previous chapter demonstrated how the question of the criminal liability of legal persons for international crimes has remained a relevant issue in the debate on the scope of international criminal law. At the same time, the analysis conducted in chapter 5 has highlighted the extensive reference made to domestic advancements in the area of corporate criminal liability to support the decision to consider such a form of liability also in the context of international crimes. The Special Tribunal for Lebanon's reliance on domestic developments to justify its decision to assert its (contempt) jurisdiction over corporations, alongside the numerous references to the growing recognition of corporate criminal liability by national legal systems made during the discussion of the Draft Articles on Crimes against Humanity at the domestic level, are evidence of the significant role currently played by the comparative law argument.

While the argument still attracts some criticisms from those who embrace the more traditional approach to criminal liability,[1] it has nonetheless become a recurring feature in the literature on the international criminal liability of corporations. This chapter, therefore, considers the strengths and weaknesses of this specific argument and how it has been developed to support the idea of corporate criminal liability as a general principle of law.

2. The Comparative Law Argument

In the literature on the criminal liability of corporations, the development of a trend towards the recognition of corporate criminal liability at the domestic level is often used to support the adoption of such a model of liability internationally.[2] The decision of a growing number of legal systems to move away from the strict application of the principle *societas delinquere non potest* has been seen as evidence of a 'shift' in states' attitude towards the

[1] Thomas Weigend, 'Societas delinquere non potest? A German Perspective' (2008) 6 Journal of International Criminal Justice 927. See also Judge Lettieri's interpretation in *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014, para 74.

[2] Jendrik Adam, *Die Strafbarkeit juristischer Personem im Volkerstrafrecht* (Nomos 2015), 95 et ss., Caroline Kaeb, 'The Shifting Sands of Corporate Liability Under International Criminal Law' (2016) George Washington International Law Review 351, Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: the Comparative Law Challenge' (2009) Netherland International Law Review 333, Robert Thompson, Anita Ramasastry and Mark Taylor, 'Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40 George Washington International Law Review 841.

criminal liability of corporations.[3] As observed by the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 'as national criminal laws develop to include this type of liability, so do the argument for an expansion of international courts' jurisdiction over company entities'.[4]

The argument has become central in the debate on the international criminal liability of corporations due to the role played by the 'complementarity objection' in the decision to exclude legal entities from the jurisdiction of the International Criminal Court. As discussed in chapter 4, during the Rome Conference, the lack of a general recognition of corporate criminal liability across states was seen as an insurmountable obstacle to the proper operation of the complementarity scheme adopted in the Statute of the International Criminal Court, ultimately leading to withdraw of the French proposal. As observed by Kyriakakis:

> The concern was that those States Parties that do not provide for corporate criminal liability within their domestic laws might be viewed as unable or unwilling to prosecute corporate defendants in the context of ICC admissibility determinations if corporations were included within the jurisdiction of the ICC.[5]

Nowadays, the obstacle posed by the limited acceptance of the criminal liability of corporations at the national level seems to be progressively losing its relevance.

Already in 2006, a study conducted by Anita Ramasastry and Robert C. Thompson showed how national jurisdictions were progressively including provisions on corporate criminal liability in their legal system.[6] In particular, the study surveyed the legislation of sixteen selected countries and found that eleven jurisdictions – specifically Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States – already made it 'a general practice to recognize no distinction between natural and legal persons' in the area of criminal law.[7] More importantly, the study highlighted that eight of these countries (State Parties to the International Criminal Court) also 'fully incorporate[d]' – or were in the process of incorporating – the Rome Statute's provisions on genocide, crimes against humanity and war crimes into their criminal laws, thus making it

[3] The term 'shifting sand' as been used by Kaeb (n 2).
[4] International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability, Vol II (Geneva, International Commission of Jurists 2008) 57.
[5] Kyriakakis (n 2) 334.
[6] Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law (FAFO 2006). The study's findings are also discussed in Thompson, Ramasastry and Taylor (n 2).
[7] Ramasastry and Thompson (n 6) 13. Thompson, Ramasastry and Taylor (n 2) 871.

possible (potentially) to prosecute legal persons for those international crimes.[8] Even though partially outdated,[9] the study still provides evidence of the rapidity with which the domestic framework on corporate criminal liability has evolved in the years following 1998.

A year later, the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, reached a similar conclusion in his 2007 Report '*Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*' where he stated that:

> This report has identified areas of fluidity in the business and human rights constellation, which in some respects may be seen as hopeful signs. By far the most consequential legal development is the *gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards*. But this trend is largely an unanticipated by-product of states' strengthening the legal regime for individuals [...].[10]

Similarly, in 2014, a study commissioned by the Office of the UN High Commissioner of Human Rights also highlighted the progressive expansion of corporate criminal liability at the domestic level. In her report *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies* (known as the Zerk Report), Jennifer Zerk discussed the existing framework on business and human rights at the domestic level observing that, based on the evidence collected, 'most jurisdictions appear[ed] to recognise the possibility of corporate criminal responsibility (if not as a general concept then at least in relation to specific offences or types of offences)'.[11] The Zerk Report also observed that most of the developments concerning corporate criminal liability occurred only recently, 'over the past twenty years', when numerous countries of civil law tradition began to introduce such a form of liability into their criminal laws.[12]

A comparative analysis of corporate criminal liability legislations was also conducted by Engelhart who observed that, since the 1990s, the number of domestic jurisdictions that allow for corporations to be held criminally accountable has significantly increased.[13] In his

[8] Ramasastry and Thompson (n 6) 15.
[9] The legislation of Spain had changed since the publication of the study.
[10] A/HRC/4/035, para 84 (emphasis added).
[11] Jennifer Zerk, 'Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies' (OHCHR, 2012).
[12] Ibid 32.
[13] Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective in D. Brodowski, M. Espinoza de los Monteros de la Parra, K. Tiedemann, & J. Vogel (eds.), *Regulating Corporate Criminal Liability*, 56-57.

study, he identified several European countries that, between 1991 and 2011, introduced provisions on the criminal liability of legal entities either by amending their Penal code or through the adoption of specific laws.[14] Engelhart reported that, 'in 2013, only Germany, Latvia and Greece [had] not yet introduced some kind of corporate criminal liability in Europe'.[15]

Scholars such as Kaeb and Kyriakakis share the view that this progressive adoption of corporate criminal liability by many civil law countries across Europe, alongside other legal systems worldwide, has given 'new dimensions' to the debate on the international criminal liability of corporate entities[16] and 'will likely function as a catalyst for courts to construe international criminal law so as to apply to corporations as non-state actors'.[17] Studies have also explored developments relating to the domestic implementation of the Statute of the International Criminal Court in countries where corporate criminal liability is recognised under criminal law. Domestic criminal laws of countries such as Norway and Australia, in particular, have offered interesting food for thought on the role played by domestic legislations in 'expanding the effective scope of international criminal law',[18] especially in the area of corporate criminal liability.[19]

More recently, the comparative law argument was presented by David Scheffer in the *Jesner v Arab Bank* case.[20] As observed in chapter 1, indeed, in his submission to the US Supreme Court, Scheffer refers to the developments that occurred at the domestic level to evidence the existence of a trend towards a growing recognition of corporate criminal liability.[21] In particular, the author observes that, since July 1998, 'a number of additional countries have adopted laws providing or expanding corporate liability for a range of international crimes, including atrocity crimes.'[22] Focusing on those states that took part in the Rome Conference, Scheffer proposes a list of 29 States Parties to the Rome Statute which 'provide for corporate criminal liability … for varying types of crimes, often including atrocity

[14] Ibid.
[15] Ibid 57.
[16] Kyriakakis (n 2) 334.
[17] Kaeb (n 2) 354.
[18] Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes. The Potential of the Commonwealth Criminal Code' (2007) 5 Journal of International Criminal Justice 809, 811.
[19] Simon O'Connor, 'Corporations, International Crimes and National Courts: A Norwegian View (2012) 94 International Review of the Red Cross 1007; Kyriakakis, 'Australian Prosecution of Corporations for International Crimes. The Potential of the Commonwealth Criminal Code' (n 18).
[20] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017.
[21] Ibid p. 18 et ss. The argument was ignored by the majority but found the acknowledgement of the dissenting judges. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1425 (2018).
[22] Ibid p. 19-20.

crimes'.[23] Even though positively received by the dissenting judges,[24] the argument ultimately fell on deaf ears and, in the judgment, the majority failed to even consider it in its discussion on the status of corporate liability for human rights abuses.[25]

2.1. Limitations of the Comparative Law Argument

The review conducted so far demonstrates the central role played by the comparative law argument in the literature on corporate criminal liability and international law. As previously mentioned, this attention to the developments that occurred at the domestic level can be seen as a response to the complementarity objection raised during the negotiation of the Rome Statute and aims to prove that the significant changes that have occurred since the creation of the International Criminal Court may deprive such objection of its validity.

As such, the argument has the merit of acknowledging the ever-evolving nature of domestic and international legal systems according to which states' response to a certain legal phenomenon is not static and can therefore develop under the influences of a variety of factors, including social and economic factors. This is particularly true in the area of corporate accountability where the evolution of the role of corporations within modern society has imposed a re-evaluation of the legal response to corporate misbehaviour.

On this point, the emphasis put on the advancements that occurred in Europe over the past 20 years is particularly relevant. Indeed, if in 1998 only a few countries embraced the concept of corporate criminal liability, over the last two decades the number of countries where corporations can be held criminally accountable has grown exponentially. The comparative law argument has thus the merit of evidencing how the gap between common law and civil law countries in the area of corporate criminal liability has slowly but surely narrowed down to a point where the similarities in the domestic approaches may have become more relevant than the lingering differences.

At the same time, however, the argument raises certain quandaries. Firstly, the existence of certain inaccuracies in the analysis of domestic responses to corporate misbehaviour may undermine the validity of the comparative analysis conducted by scholars. The main example

[23] Ibid p. 21.
[24] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) 1424-25
[25] The majority only briefly mentioned the STL decision, and other domestic cases on corporate liability, stating that 'even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability'. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, (2018) 1401

in this regard is provided by the case of Italy. In the literature on corporate criminal liability, Italy is at times presented as yet another example of a country that, in the early 2000s, moved to embrace the concept of corporate criminal liability in its domestic system.[26]

While it is correct to say that legal entities are no longer estranged from the Italian criminal justice system, it would be nonetheless incorrect to equate the model of liability adopted by the Italian legislator to those embraced by the countries discussed so far. Indeed, the current legislation on the liability of legal persons for criminal offences (Decreto Legislativo n. 231/2001) proposes a model of 'administrative liability *ex crimine*' ('responsabilitá amministrativa da reato') that still complies with the principle of '*societas delinquere non potest*' recognised under Article 27 of the Italian Constitution.[27] Such provision establishes the personal nature of criminal liability ('la responsabilità penale è personale') and excludes the possibility of imposing criminal responsibility on abstract entities devoid of human consciousness.[28]

As observed in the Explanatory note (Relazione Ministeriale) to the Decreto Legislativo n. 231/2001, the mode of liability introduced by the legislator creates a '*tertium genus*' which combines the essential features of the criminal and administrative systems in an attempt to reconcile the reasons for preventive effectiveness with a high standard of procedural guarantees for the accused.[29] To further differentiate the system of corporate liability introduced by the Decreto Legislativo n. 231/2001 from the ordinary system criminal liability, the legislator has opted for an *extra codice* approach, separating the provisions on corporate liability for criminal offences from the Criminal Code.[30]

However, the reference to the 'administrative nature' of corporate liability provided in the title of the law has not quashed the doubts concerning the 'real legal nature' of the system introduced in 2001.[31] Those in support of the 'criminal nature' of corporate liability under the

[26] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017, p. 19-20, Chip Pitts, 'Corporate criminal liability' (2014) The Encyclopedia of Criminology and Criminal Justice 3; Cristina de Maglie, 'Country report: Italy' in James Gobert and Ana-Maria Pascal (eds.), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 253-254; Edward B. Diskant, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure' (2008) 118 Yale Law Journal 126, 133; Cristina Chiomenti, 'Corporations and the International Criminal Court' in Olivier De Schutter (ed.) *Transnational corporations and human rights* (Bloomsbury Publishing, 2006) 295.
[27] Constitution of the Republic of Italy, Article 27.
[28] Ibid.
[29] Relazione ministeriale al Decreto Legislativo n. 231/2001, p. 2.
[30] Luigi Foffani, 'Responsabilitá degli Enti da Reato in Italia' in A. Fiorella and A. M. Stile (eds.) Corporate Criminal Liability and Compliance Programs, First Colloquium (Jovene Editore 2012) 97.
[31] de Maglie (n 26) 253.

Decreto Legislativo n. 231/2001 draw their arguments from on a variety of elements such as (i) the commission of a crime as a prerequisite of the entity's liability; (ii) the criminal jurisdiction; (iii) the applicability of criminal sanctions; (iv) the relevance of inchoate offences; and (v) the possibility of waiving amnesty.[32] In 2007, this position found the support of the Italian Supreme Court of Cassation (Criminal Division, Section II) which observed that:

> It is known that the Legislative Decree n. 231 of 2001 … differs from the pre-existing [sanctioning system] applicable to legal entities and, as such, it signalled the death of the dogma of "*societas delinquere non potest*". And this is because, in spite of the "*nomen iuris*", the new responsibility, nominally administrative, conceals its substantially criminal nature; perhaps omitted in order not to open delicate conflicts with the personalistic dogma of criminal liability enshrined in Article 27 of the Constitution.[33]

This interpretation, however, was subsequently reversed by the Court of Cassation itself in its 'Grand Chamber' decision in the *ThyssenKrupp* case.[34] In the Judgment, the Court referred back to the Explanatory note (Relazione Ministeriale) to the Legislative Decree n. 231 of 2001 to reaffirm the '*tertium genus*' quasi-criminal nature of the corporate liability adopted by the Italian legislator. This approach, therefore, differentiates the Italian model from those adopted by other countries where the liability of corporations is substantially criminal in nature. As observed above (see section 5.2.2.), it is in light of this doctrinal interpretation that Judge Lettieri proposed Italy, alongside Germany, as a relevant example of countries that reject the concept of corporate criminal liability.[35] The Italian example, therefore, needs to be considered more carefully to avoid misinterpretation of the law on corporate liability.

However, the main criticism that can be made against the comparative law argument relates to the premise upon which such an argument seems to be base. Specifically, the argument seems to move from the assumption that a growing acceptance towards corporate criminal liability at the domestic level will create – almost certainly – the conditions for the recognition of such a concept within the international legal system, and in particular within the international criminal justice system. Yet, the recognition of a legal concept or principle *in foro domestico* may not be in itself sufficient to demonstrate a state's willingness to support the transposition of the same concept or principle at the international level. Indeed, the decision of

[32] Ibid 253-254. See also Italian Supreme Court of Cassation, Criminal Division, SS.UU. Judgement 18 September 2014, n. 38343.
[33] Italian Supreme Court of Cassation, Criminal Division, Sez. II, Judgement 30 January 2006 n. 3615.
[34] Italian Supreme Court of Cassation, Criminal Division, SS.UU. Judgement 18 September 2014, n. 38343.
[35] *New TV S.A.L. and Khayat,* Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, STL-14-05/PT/CJ, Contempt Judge, 24 July 2014, footnote 116.

a state to champion or not the adoption of a legal construct under international law is influenced by a variety of factors that concur with the determination of its foreign policy. In this context, domestic legislation may have only a relative impact on the determination of a position of a state at the international level.

An example in this regard is provided by the position adopted by states such as Australia, Canada, the United States and the United Kingdom during the debate on the feasibility of including legal persons within the scope of the Rome Statute. Historically, these common law countries were among the first to move away from the principle of *societas delinquere non potest* and to accept the applicability of criminal law to corporations in their domestic legal order.[36]

As observed in chapter 4, the United States recognised corporate criminal liability already in 1909 when the US Supreme Court found 'no valid objection in law and every reason in public policy' to the imposition of criminal liability on a corporation for an act committed by its agents.[37] In the United Kingdom, the recognition of corporate criminal liability also occurred in the first half of the twentieth century when '[t]he industrial revolution and improved transportation resulted in changes in corporations and in the function they played in society'.[38] This change led to a shift in the legal response to corporate wrongdoing and to the development of a model of corporate criminal liability based on the principle that a corporation can be held criminally liable for an offence committed by a person who can be considered its personification (identification principle).[39]

In Canada, a first attempt to recognise the criminal liability of corporations was made in 1909 when an amendment to the Canadian Criminal Code allowed for the applicability of a fine to a corporation found guilty of a criminal offence.[40] Later on, the corporate criminal liability was incorporated into the 1985 Criminal Code, where Section 2 establishes that the terms 'everyone' and 'person' used in the Code must be interpreted to include organisations such as public bodies, bodies corporate, companies, firms, partnerships, trade unions or municipalities.[41] At the judicial level, the Canadian Supreme Court defined the test for corporate criminal liability in its landmark decision in *Canadian Dredge and Duck Co v The*

[36] Guy Stessens, 'Criminal Liability: A Comparative Perspective' (1994) 43 The International and Comparative Law Quarterly 493, 495.
[37] *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) 495.
[38] Celia Wells, Corporations and Criminal Responsibility, 2nd ed. (Oxford University Press 2005) 87.
[39] Kyriakakis (n 2) 'Corporate Criminal Liability and the ICC Statute: the Comparative Law Challenge' 337.
[40] Stessens (n 36) 498.
[41] Canadian Criminal Code, Section 2, 'organisation'.

Queen where it embraced the identification principle developed in the United Kingdom, albeit with some corrective.[42]

Australia also has a long history of recognising corporate criminal liability in its domestic system. Influenced by the United Kingdom's model, Australia initially relied on the identification doctrine proposed by the UK House of Lords in the landmark decision *Tesco Supermarket Ltd. v Nattrass*.[43] Then, in 1995, the Australian legislator adopted the Australian Criminal Code Act and introduced one of the most progressive approaches to corporate criminal liability. As mentioned in chapter 5, the new model embraced by Australia combines elements from the traditional identification theory and *respondeat superior* doctrine with the novel concept of 'corporate culture' as one of the criteria for ascribing criminal liability to the corporation.[44]

Therefore, in 1998, these common law countries already had a long history of dealing with criminal prosecution of corporate entities. Nonetheless, this 'familiarity' with corporate criminal liability was not enough to influence positively their views on the possibility of adopting the same concept (adequately adjusted) at the international level. Indeed, as observed in chapter 4, when the opportunity came to support the inclusion of legal entities within the jurisdiction of the International Criminal Court, the position of these countries remained mostly ambiguous. In his account of the final discussion on draft Article 23(5) and (6), Clapham observed that while the United Kingdom took an interest in the proposal and 'made serious attempts to find a workable solution', countries such as the United States and Australia were more sceptical, with the former ultimately joining those delegations which considered the issue too complex to be resolved in a three-week time.[45] Also Canada, which otherwise adopted a proactive role during the negotiation of the Rome Statute,[46] refrained from openly supporting the inclusion of legal entities within the jurisdiction of the International Criminal Court.[47]

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[42] *Canadian Dredge & Dock Co. v. The Queen* [1985] 1 S.C.R. 662. See also Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (n 2) 338.
[43] *Tesco Supermarkets v Nattrass* [1972] A.C. 153, 170. See Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (n 2) 338.
[44] Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (n 2) 339; Kyriakakis, 'Australian Prosecution of Corporations for International Crimes. The Potential of the Commonwealth Criminal Code' (n 18).
[45] Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (Martinus Nijhoff 2000), 158.
[46] Valerie Oosterveld, Canada and the Development of International Criminal Law: What Role for the Future? Canada in International Law at 150 and Beyond | Paper No. 16 — March 2018
[47] Clapham (n 45) 158.

A similar example is provided by two Nordic countries: Norway and Denmark. Norwegian criminal law firstly recognised the criminal liability of corporations (Straffansvar for foretak) in 1991 when the Act on Amendments to the Penal Code introduced Chapter 3a - Criminal liability of enterprises – within the 1902 Norwegian Penal Code.[48] In particular, Section 48a of Chapter 3a established that '[w]hen a criminal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty'.[49] The liability of the enterprise was recognised irrespectively of whether a natural person can be punished for the specific offence.[50] The criminal liability of corporations was later reaffirmed within the 2005 Norwegian Penal Code under section 27 which recognises the possibility of imposing criminal liability and criminal penalties to a company in instances where an offence has been committed by a natural person acting on behalf of the company itself.[51] In 1998, thus, the concept of corporate criminal liability was already ingrained in the criminal law of Norway – even though its application at the time remained almost non-existent.[52] Nonetheless, the Norwegian delegation opposed the inclusion of the provision of draft Article 23(5) and (6) into the Statute of the International Criminal Code.[53]

Likewise, Denmark introduced a corporate criminal liability within its domestic legal system already during the 20th century through the adoption of a multitude of special statutes that criminalised legal persons for specific offences.[54] In 1996, the Danish legislator amended the Criminal code to include a general provision of corporate criminal liability to define a uniformed model for this specific form of liability.[55] In particular, Section 25 and 27(1) of Chapter 5 of the Danish Criminal Code state as follows:

> § 25.
>
> A legal person may be punished by a fine, if such punishment is authorized by law or by rules pursuant thereto.[56]
>
> § 27

[48] O'Connor (n 19) 1012.
[49] Norwegian Criminal Code, Chapter 3a, Section 48a (1902).
[50] Ibid.
[51] Norwegian Criminal Code, Chapter 4, Section 27 (2005).
[52] O'Connor (n 19) 1025.
[53] Clapham (n 45) 157.
[54] Thomas Elhom, 'Criminal Liability of Legal Persons in Denmark' in in A. Fiorella and A. M. Stile (eds.) *Corporate Criminal Liability and Compliance Programs, First Colloquium* (Jovene Editore 2012), 317.
[55] Ibid.
[56] Danish Criminal Code, Chapter 5, Section 25.

> (1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person at the fault of one or more persons connected to this legal person or at the fault of the legal person himself. […][57]

Notwithstanding the inclusion of such provisions within the domestic Criminal Code, the Danish delegation expressed scepticism towards the possibility of including the legal persons within the jurisdiction *ratione personae* of the International Criminal Court.

Specifically, during the initial discussion on the French proposal on criminal organisations – in the formulation of 2 April 1998 (see chapter 4, section 4.2 and 5 above) –, the delegate from Denmark stated that:

> [Denmark] shared Sweden's scepticism about the inclusion in the Statute of the criminal responsibility of legal persons. Denmark's view in principle was that the emphasis in the Statute should be on individual responsibility and that the extension of such responsibility to legal persons would *complicate matters unduly*, especially with regard to national implementation.[58]

Once again, domestic recognition of the criminal liability of corporations did not prevent a delegation from adopting a more sceptical approach when a proposal to translate such a concept at the international level was advanced.

In the case of Denmark, however, an additional observation must be made. The Danish delegation expressed its initial opposition to the inclusion of legal persons within the Statute of the International Criminal Court when the model under consideration was still heavily based on the concept of criminal organisations *á la* Nuremberg.[59] This may have played a role in Denmark's decision not to side with the French proposal at the beginning of the Rome Conference. Evidence of that may be provided by the account presented by Clapham on the final stage of the negotiation of draft Article 23(5) and (6) where the author did not include Denmark in the list of countries that ultimately spoke against the proposal.[60]

The observations proposed so far demonstrate that the question of countries' willingness to transpose a domestic concept to the international legal system cannot be ignored when evaluating the relevance of the comparative law argument in the debate on corporate criminal liability. In the case at hand, a possible explanation of the ambiguous positions adopted

[57] Ibid Section 27(1).
[58] A/CONF.183/C.1/SR.1, para. 55 (emphasis added).
[59] A/AC.249/1998/DP.14.
[60] Clapham (n 45) 157.

by the aforementioned States regarding the transposition of corporate criminal liability at the international level may be found in the peculiar context in which the negotiation of the Rome Statute took place. The limited time that was allocated to the delegations to reach an agreement on the Statute of the International Criminal Court surely had a strong impact on their agenda. As supported by Clapham and Scheffer, when it became clear that the adoption of a model of corporate criminal liability at the international level would have required extensive discussion, the delegations considered it more pragmatic to set aside a too controversial proposal to increase the chances of developing a final draft adoptable by the highest number of States.[61] Had the circumstances been different, it is possible to speculate that these countries would have been more open to the idea of including corporate criminal liability in the Statute of the International Criminal Court.

3. A Step further: Corporate criminal liability as a general principle of law

Recently, the comparative law argument has also been used to support the idea that corporate criminal liability has attained (or is in process of attaining) the status of a general principle of law. As observed in the previous chapter, in its *Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings*,[62] the Appeals Panel of the Special Tribunal for Lebanon observed that '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'.[63] While the Panel recognised the existence of some differences in the model adopted at the domestic level, it still considered that '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.[64]

This approach has been further developed by Jendrik Adam, who argues in favour of the inclusion of corporate criminal liability within the international criminal justice system by observing, *inter alia*, that recent developments at the domestic level are evidence of the existence of a general principle of law on the criminal liability of corporations. In doing so, Adam refers to Article 38(1)(c) of the Statute of the International Court of Justice which listed

[61] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, 26 June 2017, pp. 22-23, Clapham (n 45) 158.
[62] *New TV S.A.L. and Ms Khayat*, Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, STL-14-05/PT/AP/ARI26.1, 2 October 2014.
[63] Ibid para. 67.
[64] Ibid 67.

'general principles of law recognized by civilized nations' as one of the sources of international law that the Court shall apply to solve disputes falling under its jurisdiction.[65]

Looking at the role of general principles of law in the context of international criminal law, Adam points out how a reference to such a source of law can also be found in Article 21(1)(c) of the Statute of the International Criminal Court, albeit in a slightly different formulation.[66] Embracing the interpretation proposed *inter alia* by Antonio Cassese,[67] Adam views Article 21(1)(c) of the Rome Statute as equivalent to Article 38(1)(c) of the Statute of the International Court of Justice, to evidence the 'enormous importance of general principles of law in a rudimentary legal system, such as international criminal law'.[68]

To support his conclusion on the status of corporate criminal liability as a general principle of law, Adam examines 47 national legal systems from all around the world, 40 of which recognises the applicability of criminal law to legal entities within their domestic legislation.[69] Despite the existing differences between states' approach, the author considers that the findings demonstrate that the principles of corporate criminal liability, in its abstract form, has attained general recognition at the domestic level.[70] In particular, according to the author:

> The differences between individual legal systems are irrelevant for a general principle of law. Differences are due to the legal dogmatic of each national legal system and also exist in relation to other general principles of law …. The individual criminal liability of natural persons also differs from one legal system to the other. The basic principle behind the different models, however, is crucial for the question of the existence of a general principle of law: A legal person can be accused of engaging in behaviour disapproved by the state and, as a consequence, it can be subject to sanctions.[71]

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[65] Adam (n 2) 85 et ss.

[66] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 21(1)(c).

[67] Antonio Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations' in Wang Tieya and Sienho Yee (eds.) *International Law in the Post-Cold War World. Essays in Memory of Li Haopei* (Routledge 2001) 43, 47-49. The interpretation was also embraced by the ILC Special rapporteur, Marcelo Vázquez-Bermúdez, in its First Report on General Principles of Law, A/CN.4/732, 5 April 2019, para 120. *Contra* see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford, Oxford University Press, 2016) 525.

[68] Adam (n 2) 109. Original in German: '… da gerade in einem rudimentaren Rechtsystem, wie es das Volkerstrafrecht immer noch ist, allgemeine Rechtsprinzipien eine enorme Bedeuntung haben'. Translation by the author.

[69] Ibid 142-152.

[70] Ibid 155. Translation provided by the author.

[71] Ibid 155. Translation provided by the author.

The use of the comparative law argument in both Adam's study and in the decision of the Special Tribunal for Lebanon is particularly interesting as it draws the attention to the growing recognition of corporate criminal liability at the domestic level not solely as proof of a progressive change in states' attitude towards this peculiar form of liability but as evidence of a development of a norm on corporate criminal liability applicable at the international level. As such, the argument deserves to be considered more in the detail to evaluate its accuracy and to assess the impact that the recognition of the existence of a general principle of law on corporate criminal liability may have on the international criminal justice system.

3.1. General Principles of Law: Practical Implications

General principles of law are recognised as essential to the growth of international law as they lay the foundation for the development of 'new norms of conventional and customary international law'.[72] As observed *inter alia* by Jain, general principles of law are better understood as a mechanism for filling existing legal gaps in 'areas where the law is insufficient, obscure, or imperfect'.[73] This interpretation follows the position adopted in the late 1950s by Lauterpacht who considered general principles of law as an essential tool for international judges to ensure the 'completeness' of international law.[74]

Understanding general principles of law as a 'subsidiary' source of international law, however, does not imply their subordinate nature. As observed by Bassiouni, such a conclusion would contrast with the general interpretation of Article 38 of the Statute of the International Court of Justice according to which no hierarchical order exists among the different sources listed in the article.[75] Therefore, the 'subsidiary nature' of general principles of law does not affect the relationship between the sources of international law *ex* Article 38 but solely defines the main functions of general principles of law which are identified by Raimondo in the following: '(i) to fill legal gaps, (ii) to interpret legal rules, and (iii) to confirm decision based on other legal rules, as to reinforce the legal reasoning'.[76]

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[72] M. C. Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Michigan Journal of International Law 768, 775-776.
[73] Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 Harvard International Law Journal 111, 113.
[74] Hersch Lauterpacht, The Development of International Law by the International Court (Stevens & Sons Limited, London, 1958) 166.
[75] Bassiouni (n 72) 781-3.
[76] Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribuna*ls (BRILL, 2008) 48. See also Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*. 3rd ed. (OUP 2019), 921-931.

General principles of law originating *in foro domestico* are defined as substantial or procedural legal principles which are the expression of a sufficiently large number of domestic legal systems and are determined by legal comparison.[77] It is widely accepted that the process of extraction of principles from domestic jurisdictions should follow a two-step approach.[78] The first step requires a comparative assessment of domestic laws to determine the existence of a legal principle common to the community of nations, whilst the second involves an evaluation of whether such a legal principle can be transposed to the international legal system.[79]

The first stage of the analysis can be further divided into two sub-steps involving (i) the comparative analysis of national jurisdictions to investigate the commonality of a legal principle among a variety of states, and (ii) the identification of a common denominator through a process of abstraction or 'distillation'.[80] Looking at the first sub-step, Special Rapporteur Marcelo Vázquez-Bermúdez observed that 'this first step … translates into a requirement to cover as many national legal systems as possible to ensure that a principle has effectively been recognised by the community of nations'.[81] It is generally accepted that a comprehensive evaluation of all legal systems of the world is beyond the capacity of any international judge or scholar.[82] As a result, international courts and tribunals – alongside scholars – have opted to focus their attention on a limited number of domestic systems deemed representative of the community of nations.[83]

In his contribution on the role of general principles in the jurisprudence of international criminal tribunals, Raimondo suggested a new comparative test based on more equitable geographic distribution.[84] According to the author, this approach would allow scholars and judges to identify general principles representative of 'the community of nations rather than of an oligarchic international society' thus enhancing the legitimacy of this source of law.[85] Indeed, while such an approach may pose some practical difficulties linked to information

Edited by A critique to the use of general principles of law as a gap-filling mechanism in international criminal law has been presented by Jain (n 73) 113.
[77] Bassiouni (n 72) 768. Adam (n 2) 109. A/CN.4/732, para 167.
[78] A/CN.4/741, paras 19-22.
[79] Ibid para 19.
[80] Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 European Journal of International Law 949, 954.
[81] A/CN.4/741, para 26.
[82] Ellis (n 80) 957.
[83] Ibid. A/CN.4/741, paras 27 et ss.
[84] Raimondo (n 76) 59.
[85] Ibid.

accessibility and language barriers, it undeniably allows for a higher degree of accuracy than a test solely based on the study of western legal traditions. A similar view was expressed as well by Special Rapporteur Vázquez-Bermúdez who observed that 'the comparative analysis for purpose of determining the existence of a general principle of law must be wide and representative, covering different legal families and various regions of the world'.[86]

Applying this first step to the concept of corporate criminal liability, it is evident that, over the past twenty years, this specific legal construct has gained recognition in a relevant number of jurisdictions around the world. As evidenced in the academic studies reviewed in section 6.2, and in the analysis conducted by the Special Tribunal for Lebanon's Appeals Panel and by Adam, countries in Europe, Africa, Asia and South America have progressively moved away from the principle of *societas delinquere non potest* to accept the possibility of imposing criminal liability to corporate entities. This demonstrates the increasing level of recognition that the concept of corporate criminal liability has recently received worldwide. While exceptions still exist – e.g., the case of Italy (discussed above), Germany and Russia – they are not in themselves sufficient to invalidate the conclusion that corporate criminal liability has become 'common' to the majority of the countries of the world.

A further step in the identification of a general principle common to the community of nations requires scholars and judges to undergo a process of 'distillation of the municipal principle to its essential elements'.[87] As observed by the judges of the International Criminal Tribunal for the former Yugoslavia in the *Kunarac* case:

> In considering [a broad spectrum of] national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles … in those legal systems which embody the principles which must be adopted in the international context.[88]

This process of abstraction aims at reconciling the existing differences among states' response to a legal phenomenon to identify a 'common denominator'[89] to be then translated at the international level. For leading comparatists Konrad Zweigert and Hein Kötz, in conducting such process of abstraction, scholars and judges should 'follow the principle of functionality'

[86] A/CN.4/741, para 50.
[87] Ellis (n 80) 958.
[88] *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Judgment, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para 439.
[89] *Prosecutor v. Anto Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 178.

according to which 'solutions [found] in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need'.[90] According to Kolb, as a result of this process of abstraction, general principles of law derived from domestic legal systems 'have that just degree of abstraction and concreteness, to be able to be dynamic and filled with some specific legal meaning at once'.[91]

In this regard, both Adam and the Appeals Panel have recognised the necessity to look beyond the existing differences among states' approaches to corporate criminal liability to identify the core elements underlining this form of liability. Adam, in particular, observed that divergences 'are due to the legal dogmatic of each national legal system and also exist in relation to other general principles of law'.[92] In his study, the author used the example of individual criminal liability to demonstrate that differences in the domestic approach to a legal construct do not invalidate the possibility to recognise its status as general principle of law under international law.[93]

This view on the limited relevance of existing divergences among the domestic models of corporate criminal liability is meritorious. Indeed, it is possible to argue that, despite certain dissimilarities, the core elements of corporate criminal liability remain unchanged in every domestic system which embraces such a form of liability. These core elements can be identified in (a) the idea that a legal person – either through the actions of its employees and/or managers or through its own policies – can violate norms dictated by the state under criminal law; (b) that, as a consequence of such violation, criminal liability can be imposed to the legal person itself and, ultimately, (c) it can be subject to criminal sanctions.

These elements represent the 'common denominator' among the different models of corporate criminal liability and, as such, may be viewed as the core content of an emerging general principle of law on the criminal liability of legal persons.

As mentioned above, the process of identification of a general principle of law originating *in foro domestico* is not exclusively based on a comparative assessment of domestic legal systems. An additional step is required to evaluate the possibility of transposing such a

[90] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford University Press 1998) 34.
[91] Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53 Netherlands International Law Review 1, 9.
[92] Adam (n 2) 155. Translation provided by the author.
[93] Ibid. Translation provided by the author.

principle to the international legal system. The need for this further step is due to the 'uniqueness' of the international legal system which does not allow for the automatic transposition of domestic principles into its legal framework.[94] As observed by Judge Sir Gerald Fitzmaurice in his Separate Opinion in the *Barcelona Traction* case, the 'conditions in the international field are sometimes very different from what they are in the domestic [field], and … rules which this latter's conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level'.[95]

Thus, the test to ascertain the possibility of transposing a domestic principle into the international system requires the assessment of whether the principle can be deemed 'compatible with the fundamental principles of international law' and that conditions must exist to allow 'the adequate application of the principle in the international legal system'.[96]

In Adam's work and in the decision of the STL Appeals Panel no attention has been paid to the question of whether corporate criminal liability, as an alleged general principle of law, could adequately be transposed into the international criminal justice system. Indeed, it is at this stage of the analysis that the argument loses it practical significance. While there is scope to support the idea that corporate criminal liability can fit within the international criminal justice system, the transposition of such concept necessarily requires certain adjustments the demand a positive intervention from States.

Looking first at the possibility to transpose corporate criminal liability under international criminal law, the analysis of the Nuremberg trial against groups and organisations (see chapter 2) indicates that specific procedures can be put in place to allow for the prosecution of legal entities without altering the structure of an international trial. Indeed, the rudimentary procedural measures adopted by the International Military Tribunal recognised the groups or organisations' right to be represented by a counsel, to submit evidence in support of their defence and to present arguments on legal issues of their concern.[97] As observed above, notwithstanding the significant challenges posed by the case against criminal groups and organisations – especially in relation to the submission of evidence –, the Tribunal was still able to deal with them in an effective way. Additional support to the idea that trials against corporate defendants can be carried out at the international criminal level is provided by the

[94] A/CN.4/741, para. 73.
[95] *Barcelona Traction Case* (Belgium v. Spain) (Judgment, Sep. Op. Fitzmaurice) [1970] ICJ Rep 64, 67, para. 5.
[96] A/CN.4/741, para, 74.
[97] *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I – Official Documents (14 November 1945 – 1 October 1946), Library of Congress, 19-23.

two contempt cases at the Special Tribunal for Lebanon where proceedings where successfully conducted to ascertain the liability of the two corporations accused of interfering with the administration of justice. The prosecution of legal entities, therefore, is not incompatible with the structure of international criminal law.

However, it is essential to clarify that this compatibility does not allow for an automatic transposition as the recognition of the corporations as subjects of international criminal law call for an amendment of the current legal framework of international criminal law. Currently, the statutes of international criminal courts and tribunals expressively limit their personal jurisdiction to individuals with the exclusion of other non-human beings.[98] Consequently, there is no gap in the provisions that may justify the inclusion of corporate criminal liability on the ground that such form of liability may or may not have reached the status of general principle of law.

In the case of the Special Tribunal for Lebanon, the Appeals Panel was able to justify its expansive interpretation of the Tribunal's jurisdiction by relying on the gender-neutral language used specifically in Rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence.[99] However, this gender-neutral approach is not common to all provisions under the founding documents of the Tribunal. Article 3 of the STL Statute, for example, provides for the *individual* criminal responsibility of those 'individually responsible for crimes within the jurisdiction of the Special Tribunal'.[100] In this case, the language does not leave any room for an expansive interpretation as that proposed for Rule 60 *bis*. A similar conclusion can be reached in relation to the interpretation of the founding documents of other international criminal jurisdiction. Article 23(1) of the Rome Statute specifically states that '[t]he Court shall have jurisdiction over *natural* persons pursuant to this Statute'.[101] Likewise, the Statutes of the International

[98] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 23, UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Articles 6 and 7, UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Articles 5 and 6, UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Article 6, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 29.

[99] *New TV S.A.L. and Al Khayat,* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05/PT/AP/ARI26.1, Appeals Panel, 2 October 2014, para 37.

[100] Statute of the Special Tribunal for Lebanon, 10 June 2007 (UN Doc S/Res/1757(2007), Annex), Article 3.

[101] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 23(1).

Criminal Tribunals for the former Yugoslavia and Rwanda include specific provisions that limit that Tribunal's personal jurisdiction to natural persons only.[102]

Therefore, the legal framework provided by the Statutes of all international criminal tribunals and court leaves no room for the operation of a general principle of law on corporate criminal liability. Only an intervention by States by mean of an amendment to the statute of one or all these tribunals and courts may create the conditions to transpose corporate criminal liability at the international criminal level. Without such an intervention, the international legal system cannot be bended to incorporate corporate defendants within its scope of applications.

Whether States may be willing to take a step in that direction is still a matter of contention. As discussed in section 6.2.1. above, while the growing recognition of corporate criminal liability at the domestic level may work in favour of a decision to amend the current framework on international criminal liability, additional factors may play a role in States' decision to support a project to enhance corporate criminal liability at the international level. In conclusion, therefore, the argument proposed by Adams and by the Appeal Panel of the STL is devoid of any practical value at the present moment.

4. Conclusion

The chapter has considered the use of domestic developments in the field of corporate criminal liability as an argument to support the transposition of such concept at the international level. The literature on corporate criminal liability and international criminal law has seen in these developments evidence of a change in the attitude of State towards the possibility of imposing criminal liability to non-human entities. However, a change in the domestic response to corporate wrongdoing may not be sufficient to demonstrate States' willingness to embrace such form of liability also at the international level.

Nonetheless this growing acceptance of corporate criminal liability at the domestic level may have a positive impact on the debate on the possibility of holding corporations criminally accountable at the international level. Indeed, it may offer a valid counterargument to the complementarity objection raised during the negotiation of the Rome Statue. As more and more States has now adopted models of corporate criminal liability, the inclusion of such form of liability may pose less challenges than in the past.

[102] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Article 6, UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Article 5.

The chapter also examined whether the argument based on domestic developments can be used to support the idea that corporate criminal liability is on the verge of becoming a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. On this point, the analysis demonstrated that, even though there may be grounds to support such a conclusion, the recognition of corporate criminal liability as a general principle of law would have no practical implication. Indeed, currently there is not gap in international criminal law that may justify the application of such principle. Only an amendment to the legal framework will allow for the establishment of an international criminal liability of corporations.

Chapter 7: The Incorporation of Corporate Criminal Liability into the International Criminal Justice System: Amending the Statute of the International Criminal Court

1. Introduction

The analysis conducted in the previous chapters highlighted how the international criminal liability of corporations has been a recurring feature of the broader debate on the scope of international criminal law since the 1940s. Even though the concept has yet to be formally adopted, the numerous attempts made to incorporate corporate criminal liability within the international criminal justice system demonstrate the significance of the issue under consideration. Far from being a 'settled matter', the criminal liability of corporations for international crimes remains a topic open to debate.

Building on the considerations expressed so far in this study, this final chapter offers some food for thought regarding potential issues arising from the transposition of corporate criminal liability into the international criminal justice system. As corporate involvement in international crimes is becoming more and more relevant globally, the time has come for the international criminal justice system to evolve to address such phenomenon.

The Statute of the International Criminal Court is adopted as the relevant frame for the discussion on the assumption that, as the key institution within the international criminal justice system, the Court could be the most appropriate forum to establish the international criminal liability of corporations. In the following sections particular attention is paid to the issues arising from the definition of a model of attribution of criminal liability to legal persons, to the applicability of fundamental procedural rights such as the presumption of innocence and the right to be present at trial to the case of corporate defendants, and to the question of corporate sanctioning.

Relying on the analysis already conducted on the models of corporate criminal liability proposed in Rome and in the Malabo Protocol, and on the precedents offered by the Nuremberg Trial against groups and organisations and the Special Tribunal for Lebanon's contempt cases, this final chapter attempts to highlight some issues that negotiators of an amendment to the Rome Statute should consider to develop an effective framework to hold corporations accountable under international criminal law.

2. The Applicability of the Rome Statute to Corporations: Some Considerations on the Mode of Attribution

From a substantive law perspective, the transposition of corporate criminal liability within the domain of international criminal law requires a determination of a suitable model of attribution to impute criminal liability to the corporate entity. Over the years, two potential models of attribution have been proposed to establish the liability of legal persons for international crimes, one developed in the context of the negotiation of the Rome Statute and the other adopted in the Malabo Protocol.

As seen in chapter 4, the model proposed during the negotiation of the Statute of the International Criminal Court embraced a narrow approach to corporate criminal liability. The final working paper on the liability of legal persons of 3 July 1998 adopted a strict derivative approach to the criminal liability of corporations by subordinating it to the conviction of the individual(s) who physically perpetrated the offence (draft Article 23(5)(d)).[1] The theoretical underpinning of the final text relied primarily on the identification theory developed under English law according to which the liability of the corporation derives solely from the acts of those individuals who are 'in a position of control' within the entity. Indeed, draft Article 23(5)(b) provided that 'charges may be filled by the Prosecutor against a juridical person' only where the natural person charged with the same crime was 'in a position of control within the juridical person under the national law of the State where the person was registered at the time the crime was committed'.[2] Additionally, draft Article 23(5)(c) required that, in committing the crime, the individual was 'acting on behalf of and with the explicit consent of that juridical person and in the course of its activities'.[3] This further requirement ensured that, at the time the crime was committed, the individual perpetrator(s) had actual authority to act on behalf of the entity and that such act was authorised by the entity itself.

Conversely, the model adopted in the Malabo Protocol finds its theoretical underpinning in a combination of the 'organisational theory' of attribution of corporate criminal intent, on one side, and the aggregation model of corporate knowledge, on the other. Specifically, Article 46C of the Malabo Protocol provides that '[c]orporate 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' and that such policy 'may be attributed to a corporation where

[1] A/CONF.183/C.1/WGGP/L.5/Rev.2.
[2] Ibid.
[3] Ibid.

it provides the most reasonable explanation of the conduct' of the entity.[4] As discussed in chapter 5, Article 46C does not derive the corporate intent from the act (and state of mind) of one or more individuals but infers it from those company policies that, evaluated in relation to the committed crime, are deemed to have enabled the perpetration of such crime. Furthermore, the Malabo Protocol relies on the doctrine of collective corporate knowledge (or aggregation model) by attributing knowledge to the corporation through the aggregation of individual states of mind that, singularly considered, may not cover all the aspects of the mental element of the alleged crime (Article 46C, paragraphs 4 and 5).[5]

Both approaches present several advantages and limitations that should be taken into consideration when assessing the feasibility of either of these models to provide an effective tool to address corporate involvement in international crimes.

The 'Rome model' has the practical advantage of having been the result of a lengthy drafting process which involved several delegations from countries all around the world. Consequently, the model already incorporates several compromises reached during the negotiation of the Statute of the International Criminal Court. As such, the text may appear an appealing working document to the negotiators of a potential amendment to the Court's Statute. Additionally, the traditional and narrow approach embraced by the 'Rome model' may also be seen as a strength as it set stringent requirements for the attribution of criminal liability to corporations. Indeed, the adoption of the identification theory can ensure that the International Criminal Court's jurisdiction over legal persons may be triggered solely in those cases where a crime is committed by the company's management, with the exclusion of all those situations where an offence is committed by corporate personnel sitting at the bottom of the entity's hierarchy. Such a limitation will allow the Court to focus solely on these crimes where corporate culpability is most significant as they require the involvement of the corporation's 'brain'.

Furthermore, the wording of the 'Rome model' presents a high degree of accuracy in relation to the definition of which legal persons can fall under the scope of the Court's jurisdiction, i.e. corporations 'whose concrete, real or dominant objective is seeking private profit or benefit'.[6] The 'Rome model' explicitly excluded from the Court's jurisdiction the State

[4] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 46C (emphasis added)
[5] Ibid.
[6] A/CONF.183/C.1/WGGP/L.5/Rev.2.

and other public entities 'in the exercise of State authority, a public international body or organisation registered, and acting under the national law of a State as a non-profit organisation'.[7] Once again, the narrow stance embraced in the 'Rome model' may be deemed as more appropriate to set clear boundaries for the establishment of corporate criminal liability for international crimes.

The fact that other international instruments on economic crimes also direct States to adopt forms of corporate liability based on the identification theory may add additional value to the Rome model.[8] A significant example is provided by Article 3(1) of the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests.[9] According to the provision, Member States of the European Union shall adopt all 'necessary measures' to hold legal persons liable for crimes affecting the financial interests of the Union – i.e., fraud, active corruption and money laundering – where such crime have been committed for the benefit of the legal person by any individual in a '*leading position*' within the organisation.[10] In 2017, the Convention and the Protocols thereto were replaced by the EU Directive on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law which further emphasises the importance of employing criminal law to address economic crimes of transnational nature.[11] The provision of Article 3(1) of the Second Protocol was transposed, almost verbatim, into Article 6 which once again reinforces the idea that liability should be attributed to the corporation when the crime has been committed by a leading member of the organisation – e.g., a manager or a director.[12]

The impact that provisions such as Article 3 of the Second Protocol and Article 6 of the Directive on the Fight Against Fraud have had on the domestic legislations of EU Member States plays in favour of the adoption of the Rome model as a working document for a future amendment to the Rome Statute. As observed by Mark Pieth and Radha Ivory, countries such as 'Austria, Hungary, Italy, Luxembourg, Poland, and Switzerland were motivated by these

[7] Ibid.
[8] Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector [2003] OJ L 192/54, Article 5(1), Council of Europe, *Criminal Law Convention on Corruption*. Council of Europe Treaty Series 173 (adopted on 27 January 1999, entered into force on 1 July 2002), Article 18, Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C 221/ 0011, Article 3.
[9] Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C 221/ 0011, Article 3.
[10] Ibid (emphasis added).
[11] European Parliament and of the Council Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law EU [2017] OJ L 198/29.
[12] Ibid Article 6(1).

[instruments] to enact new corporate liability statutes' which 'closely reflect' the content of the EU rules.[13] Thus, European countries – historically more reluctant to accept the applicability of criminal law to abstract entities – may look with favour on a model of international corporate criminal liability based on a principle of attribution already familiar to their domestic laws.

However, criticisms of the effectiveness of the identification theory may cast a shadow on the validity of the 'Rome model'. Over the years, several scholars have highlighted significant deficiencies of the identification theory.[14] At a theoretical level, the model developed under English law has been seen as 'constructed upon a highly anthropomorphic and outmoded model of the corporation' and as such inadequate to address the complex structure of modern corporations.[15] This consideration has relevant practical implications. Indeed, it has been observed how the identification theory is 'ill-fitted to diffuse operations', where day-to-day functions are delegated to middle and low management level.[16] Indeed, in situations where the responsibility for an operation is distributed among several layers of the company's hierarchy – from the director formally in charge of the operation, to the middle-level managers tasked to oversee the implementation of relevant corporate policies, to the low level employees who physically perform each task – the identification theory is perceived as inadequate to 'capture the complexity of the modem company'.[17]

As observed by James Gobert, '[p]olicies may be misconceived, supervision may be lax, and execution may be faulty' to the point that '[b]lame cannot be neatly tied to a single individual'.[18] This is particularly true in cases involving large corporations. Large (national or multinational) corporations employ complex organisational structures which include several hierarchical levels. In this context, the identification of an individual who 'impersonate' the entity, as required by the identification theory, becomes almost impossible. The theory, thus, creates a significant imbalance between the position of small businesses, which adopt a simple organisational structure, and large corporations. As stated by Gobert, '[o]ne of the prime

[13] Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds.), *Corporate Criminal Liability, Emergence, Convergence, and Risk* (Springer 2011), 11 and 30 et ss.
[14] James Gobert, 'Corporate Criminal Liability: Four Models of Fault' (1994) 14 Legal Studies 393, Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' (1991) Criminal Law Review 156, 159, Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 Journal of Criminal Law 414, 417 et ss.
[15] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) Journal of Business Law 1, 12.
[16] Ibid 11-12.
[17] Gobert (n 14) 395.
[18] Ibid.

ironies' of the identification theory developed under English law 'is that it propounds a theory of corporate criminal liability which works best in cases where it is needed least and works least in cases where it is needed most'.[19]

For years, scholars have advocated a 'fundamental reconceptualisation of the nature of corporate criminality', moving away from the derivative approach to corporate criminal liability in favour of an organisational approach where the company's liability is based 'on its own blameworthiness'.[20] In the UK, the criticisms of the identification theory have led the Law Commission – the main domestic statutory body tasked to review English law and to propose reform to modernise it – to launch a project 'on whether, and how, the laws relating to corporate criminal liability can be improved so that they appropriately capture and punish criminal offences committed by corporations, and their directors or senior management'.[21] While the process is still in its consultation stage, it offers a clear indicator of the current limitation of the identification theory upon which the 'Rome model' is mostly based. The proposal discussed during the negotiation of the Rome Statute, thus, may be perceived as outdated and unable to address in an effective way the phenomenon of corporate crime.

In this regard, the Malabo Protocol may offer a more progressive alternative to the Rome model. Indeed, the approach adopted in Article 46C of the Malabo Protocol acknowledges the limitation of locating corporate fault solely in the mind and conduct of a specific individual within the company's structure by shifting the focus from individual behaviour to the company's ethos and policies. In doing so, the model reflects the position expressed by scholars such as Peter A. French who recognised corporations as moral agents which intention can be found in their internal decision-making process.[22]

Moving away from the more traditional forms of corporate criminal liability, the Malabo Protocol incorporates a more modern approach to impose criminal liability on legal entities which seems to better address the compartmentalised structure of large corporations and allow the tackling of issues arising from diffuse operations.[23] If adopted within the Statute of the International Criminal Court, this model may provide the Court with a more effective tool to deal with corporate involvement in international crimes. It may also present a significant

[19] Gobert (n 15) 401 See also Mark W. H. Hsiao, 'Abandonment of the Doctrine of Attribution for Gross Negligent Test on the Corporate Manslaughter and Corporate Homicide Act 2007' (2009) 30(4) Company Lawyer 110, 111.
[20] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 81.
[21] Law Commission, 'Corporate Criminal Liability A discussion paper' (UK Law Commission, 09 June 2021).
[22] Peter A. French, 'The Corporation as a Moral Person' (1979) 16 American Philosophical Quarterly 207.
[23] See, e.g., Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4 Buffalo Criminal Law Review 641.

evidentiary advantage as it partially avoids the problem of tracing the elements of criminal liability to a single individual which, in cases involving large corporations and diffuse operations, presents relevant obstacles.

Lastly, as it shifts the blame from the individual to the corporate entity itself, the model adopted in the Malabo Protocol can significantly reduce the risk of corporate scapegoating. By focusing the attention on dysfunctional internal decision-making mechanisms, the Malabo Protocol recognises the limitation of identifying the root of corporate misbehaviour in those individuals in a managerial position which are often exchangeable. As observed by Eli Lederman, 'if the legal body, including its tradition and organizational culture, is the fixed and stable element, while people are the changing, dependent, and replaceable element', a model of corporate criminal liability that focuses on managerial figures 'will seldom lead to real changes in the organisation's behaviour and work processes'.[24]

However, the model adopted in the Malabo Protocol also presents certain limitations. As previously observed (chapter 5), Article 46C leaves many issues open to interpretation, including the definition of 'legal person' and 'corporate policy', and the scope of application of the aggregation model of corporate knowledge. Lack of precision on these points affects the quality of the provision on corporate criminal liability and is to be avoided.

Therefore, the adoption of Article 46C as a working paper will require negotiators to address the gaps in the provision of the Malabo Protocol in order to properly construct a model of corporate accountability based on the organisational theory and on the aggregation model. Regarding the former, the drafters of an amendment should be guided by the legal scholarship on corporate culpability which has identified a range of factors to assess corporate liability.[25] In particular, de Maglie suggests that:

> The best approach would find corporate culpability in any of the following circumstances: by having a policy that expressly or implicitly compelled, encouraged, authorized, or in any way tolerated the commission of the offense; by having a culture that directed, encouraged or tolerated the commission of the offense; by failing to implement a compliance program or exercise due diligence

[24] Ibid 688.
[25] See, e.g., Cristina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) Washington University Global Studies Law Review 547, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1.

> preventing the commission of the offense; or by failing to take preventive measures in response to the commission of an offense.[26]

Those factors should be incorporated into a provision on corporate criminal liability or, at least, in a specific Rule of the Rules of Procedure and Evidence.

Regarding corporate knowledge, the need for legal certainty is linked to the risk of over-criminalisation of the corporation. As pointed out by Lederman:

> […] claiming that all the information possessed by the various corporate organs is collected and concentrated in the "company's brain" entails, according to this approach, an artificial form of over-personification. The result is that criminal liability is imposed on the corporation for a clear offense of criminal intent when, in fact, no one has the knowledge required by the definition of this offense. In practice, this is equivalent to renouncing the demand of criminal intent in the circumstances of the case and turning the offense in question into one of strict or even absolute liability.[27]

Thus, if a decision is taken to rely on the aggregation model as developed in the Malabo Protocol, the drafters of an amendment to the Rome Statute should provide more detailed guidelines on whose knowledge could be aggregated and whether such a process of aggregation should focus solely on those individuals in a position of control (often seen as the 'brain' of the entity) or whether it should consider all employees and agents of the company, irrespectively of their status. Lack of clarity on this point may infringe upon the principle of legality and legal certainty. On this point, the jurisprudence of the European Court of Human Rights is indicative of the importance of ensuring precision and clarity in the wording of criminal provisions.[28] While absolute legal certainty is considered unattainable and ultimately detrimental as it may led to 'excessive rigidity',[29] the Strasbourg Court still observed that:

> […] a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[30]

[26] Ibid 560.
[27] Lederman (n 23) 674.
[28] Damien Scalia, 'A few thoughts on guaranties inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes' (2008) 90 International Review of the Red Cross Volume 343.
[29] ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para 49.
[30] Ibid.

Again, a decision to integrate an aggregation model within a provision on corporate criminal liability should be carefully considered and supported by specific guidelines for the Court to ensure proper interpretation of the law.

Finally, the progressive model of corporate criminal liability adopted in the Malabo Protocol may face opposition due to its scant recognition at the domestic level. While the organisational theory has been widely supported in legal literature for decades now,[31] it has yet to achieve a prominent position at the legislative and judicial level. The organisational theory based on the concept of corporate culture is currently a key feature of the Australian approach to corporate criminal liability and it is under consideration by the UK Law Commission.[32] However, it may still be perceived as a novel model but those jurisdictions that currently rely on a more traditional approach to corporate criminal liability. This can ultimately hinder the chances of an amendment based on this approach to receive enough support to be adopted in accordance with Article 121 of the Rome Statute.[33]

Notwithstanding the potential opposition that a model based on the organisational theory may receive, it is undeniable that it ultimately offers a progressive framework to address the criminal liability of corporate entities. Sharing the view expressed by Neil Cavanagh, a model of corporate criminal liability based on organisational fault (or corporate culture) can offer an effective tool to capture the reality of modern corporate decision-making and represents 'the most suitable model for imposing liability upon a large complex corporation'.[34] Indeed, by shifting the attention from the individual culprit to the policies and ethos of the company itself, the model allows for a proper evaluation of the internal organisation and management of the legal entity and acknowledges the existence of a distinctive corporate culture which may 'transcend individuals and even generations'.[35]

As rightfully observed by authors such as Pamela H. Bucy and Wally Olins, organizations greatly differ from each other as they develop unique personality and ethos

[31] See, e.g., Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 Journal of Criminal Law 414, Meaghan Wilkinson, 'Corporate Criminal Liability. The Move Towards Recognising Genuine Corporate Fault' (2003) Canterbury Law Review 142, Mays, Richard, 'Towards corporate fault as the basis of criminal liability of corporations' (1998) 2 Mountbatten Journal of Legal Studies 31, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1,

[32] Australian Criminal Code Act 1995, § 12.3; Law Commission, 'Corporate Criminal Liability A discussion paper' (UK Law Commission, 09 June 2021).

[33] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 121.

[34] Cavanagh (n 31) 432-433.

[35] Pamela H. Bucy,, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) Minnesota Law Review 1095, 1123.

'which is so ingrained, so much a part of them, that the corporate identity expresses itself in their every action'.[36] By addressing this distinctive dimension of the corporation, a model of corporate criminal liability based on organisational fault allows for the tackling of potential deficiencies in the corporate management which may have encouraged the commission of the crime. In doing so, it can prompt the legal entity to amend its internal policies. As such, future negotiators of an amendment to the Rome Statute should not dismiss the advantages offered by this model of attribution of corporate criminal liability.

Considering the strengths and weaknesses of the two models, a sensible solution may be to combine them to design a more effective system to attribute criminal liability to corporate entities. In this regard, the Australian Criminal Code Act 1995 offers a remarkable example.

Sections 12.2 and 12.3 of the Australian Criminal Code Act define the mode of attribution of *actus reus* and *mens rea* in the context of corporate crimes. Under section 12.2, re you the physical elements of a crime can be imputed to the corporation when an offence is committed 'by an employee, agent or officer … acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority'.[37] As for the *mens rea*, section 12.3 recognises that the mental element of a crime can be attributed to a corporation when the company has 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.[38] The provision then clarifies the 'means by which such an authorisation or permission may be established'.[39] Those include:

> a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
>
> b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
>
> c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
>
> d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[40]

[36] Wally Olins, *The Corporate Personality*, 1st ed. (Mayflower Books 1978) 82, and ibid p. 1123.
[37] Australian Criminal Code Act 1995, § 12.2.
[38] Ibid § 12.3(1).
[39] Ibid § 12.3(2).
[40] Ibid.

On one side, the Australian model embraces a vicarious approach in relation to the *actus reus* attributable to a corporation; on the other, it combines elements of the identification theory (letters a) and b)) and of the organisational theory (letters c) and d)) to define a comprehensive approach to the determination of corporate fault.

If adopted as a working document, the Australian model allows for a joined evaluation of the two main models discussed above – the Rome model and the Malabo Protocol – demonstrating the possibility of merging elements from different theories of corporate criminal liability to elaborate a multi-layered approach to tackle corporate wrongdoing. This may be particularly useful when attempting to create a model of accountability able to address corporate involvement in international crimes.

If adequately developed, a model based on the Australian Criminal Code can effectively merge elements from different theories of corporate criminal liability to elaborate a multi-layered approach to tackle corporate wrongdoing. The following draft is proposed as a starting point for discussions on the scope of a possible Article 25*bis* of the Rome Statute on Corporate Criminal Liability:

> 1. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a legal person for a crime under this Statute. Charges may be filed by the Prosecutor against a legal person, and the Court may render a judgment over a legal person for the crime charged, when:
>
> (a) The physical element of the offence is committed by an employee, agent or officer of the legal person acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority;
> (b) The legal person has expressly, tacitly or impliedly authorised or permitted the commission of the offence.
> (c) For the purpose of subparagraph (b), the means by which such an authorisation or permission may be established include:
>
> (i) proving that the legal person's board of directors intentionally or knowingly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
> (ii) proving that an employee, agent or officer of the legal person intentionally or knowingly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
> (iii) proving that a corporate culture existed within the legal person that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
>
> For the purpose of this Statute:
> "legal person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an

organization registered, and acting under the national law of a State as a non-profit organization;
"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate;
"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.[41]

2. The criteria of attribution of corporate criminal liability defined under paragraph 1 of this provision apply to all forms of perpetration and participation in commission of a crime under the jurisdiction of the Court in accordance with the provision of Article 25(3).

3. No provision in this Statute relating to individual criminal responsibility [and corporate criminal liability] shall affect the responsibility of States under international law.

So constructed, a provision on corporate criminal liability will be able to complement the existing framework on individual criminal liability. By identifying specific criteria of attribution of criminal liability to legal persons, the proposed draft provision can equally apply to forms of direct perpetration and participations in the commission of international crimes, filling a gap in the existing international accountability framework.

3. Corporate Criminal Liability arising from a Lack of Due Supervision

In developing an effective model of international corporate criminal liability, a question that requires in-depth consideration relates to whether the lack of due supervision or control within a company (also referred to as organisational or structural fault) may be considered as a ground to establish corporate criminal liability.

The question of the criminal relevance of the lack of due supervision or control with a corporation finds its justification in the unique structure of corporate entities. Indeed, corporate bodies operate through complex organisational structures where the power is diffused through the various levels of the company's hierarchy. To ensure the proper functioning of this structure, corporations implement several control systems to monitor the level of performance within the organisation and to identify significant areas of concern and to assess the risk related to corporate operations. A failure of this system of control is seen as an indicator of a dysfunctional corporate organisation.

[41] This draft proposal has been developed by the author, taking into account the provision of the Australian Criminal Code Act 1995, § 12.2, the final working paper on the liability of legal persons discussed in Rome in 1998, A/CONF.183/C.1/WGGP/L.5/Rev.2, and the current text of Article 25 of the Statute of the International Criminal Court.

At the European level, the relevance of due supervision and control has been established in *Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law*.[42] Article 6(2) states that 'Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person [in a position of control] has made possible the commission' of an offence listed in the Directive.[43] Article 6(2) introduces a form of recklessness or negligence as a standard to impose corporate criminal liability. In the model proposed by the Directive, the liability of the entity can be established only when the commission of a crime has been made possible by the lack of proper supervision or control by a person high up in the company hierarchy, meaning a person authorised to act on behalf of the company or bestowed with the power to exercise control within the entity.[44] This limitation derives from the theoretical approach adopted in the Directive which relies on the identification theory of corporate criminal liability (as observed in section 7.2).

At the domestic level, Italy provides a prime example of a model of corporate liability based on the lack of due diligence and control within the corporate entity. The Italian legislative decree (Decreto Legislativo) No. 231 of 2001 introduced the concept of structural negligence to impute a quasi-criminal liability to corporations for offences committed by their senior managers and directors (Article 6) or by personnel subjected to direction and control of those senior managers or directors (Article 7).[45] In particular, Article 6 provides that, where an offence is committed by individuals in a position of control, the corporation is liable unless it is able to prove that:

> a) the senior executive organ adopted and efficiently enacted, prior to commission of the act, organisational and management models which are capable of preventing offences of the type occurring,
>
> b) the task of overseeing such operations, compliance with the models and seeing to updating of same has been delegated to an organisation within the body vested with powers to act on its own initiative and conduct monitoring,
>
> c) the persons committed the offence by fraudulently circumventing the organisational and management models,

[42] European Parliament and of the Council Directive (EU) 2017/1371 of the of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.
[43] Ibid Article 6(2).
[44] Ibid Article 6(1).
[45] Italian Legislative Decree No. 231 of 8 June 2001 (Decreto Legislativo 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridiche').

d) there has been no omission or insufficient oversight on the part of the organisation referred to in subparagraph b).[46]

Similarly, Article 7 ruled out the liability of the entities for offences perpetrated by its personnel when, 'prior to commission of the offence, [the corporation has] adopted and efficiently implemented an organisational, management and control model which is capable of preventing offences of the type occurring'.[47]

The provisions of the legislative decree No. 231 of 2001, thus, impose upon the corporation two positive obligations: first, to adopt specific organisational and management models ('*modelli di organizzazione e gestione aziendale*'), and second, to oversee that such models are properly followed within the organisation. Even though the model still partially relies on a derivative approach to impose corporate liability and qualifies the nature of such liability as 'administrative' or quasi-criminal, it has the merit of acknowledging the complex reality of corporate decision-making and of adopting an organisational approach to corporate fault.[48] As such, it has been praised for its ability to provide a 'conceptually sound model' for imposing (criminal) liability upon a corporate entity.[49]

The failure to supervise or implement compliance programmes is an element to establish corporate criminal liability also in countries such as Switzerland and Australia. Article 102(1) of the Swiss Criminal Code establishes that companies are criminally liable for an offence committed in the 'exercise of commercial activities … and if it is not possible to attribute this act to any specific natural person', when the offence was committed 'due to the *inadequate organisation* of the undertaking'.[50] Additionally, Article 102(2) provides that, for a limited list of specific crimes, a corporation 'is penalised irrespective of the criminal liability of any natural persons, provided the [it] has *failed to take all the reasonable organisational measures* that are required in order to prevent such an offence'.[51] Both provisions put great emphasis on the lack of adequate organisational measures as a condition to impose criminal liability on the legal entity. Therefore, compliance programmes and control and prevention mechanisms are at the core of the model of corporate criminal liability embraced by the Swiss legal system.

[46] Ibid Article 6(1).
[47] Ibid Article 7(1).
[48] Cavanagh (n 31) 437-438.
[49] Gobert and Punch (n 20) 108-114.
[50] Swiss Criminal Code, Article 102(1).
[51] Ibid Article 102(2) (emphasis added)

Similarly, in the Australian Criminal Code Act, the lack of proper supervision becomes relevant both in the context of negligence offences and in that of offences that require intent, knowledge, or recklessness. When negligence is the fault element of an offence, Section 12.4 of the Australian Criminal Code Act provides that corporate negligence:

> […] may be evidenced by the fact that the prohibited conduct was substantially attributable to:
>
> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.[52]

In the context of offences that require intent, knowledge, or recklessness, the Australian Criminal Code Act provides that corporate criminal liability can be established where a 'body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision'.[53] This provision can be read to include all those situations where a corporation fails to create and enforce proper control systems or mechanisms to ensure due diligence in corporate operation.

Under international criminal law, the question of whether legal persons should be held criminally accountable for their failure to exercise supervision or control over their employees and agents, or for their failure to create specific mechanisms to ensure due diligence, has never been properly addressed, either during the negotiation of the Rome Statute or in Article 46C of the Malabo Protocol. This, however, should not prevent the negotiators of an amendment to the Rome Statute from considering the issue.

Consideration of this matter, however, requires careful evaluation of how a provision linking corporate criminal liability to a failure to supervise can fit within the international criminal justice system. In particular, attention should be paid to the legal framework related to the mental element of international crimes as a provision on lack of supervision carries with it concerns relating to the possibility of introducing an element of negligence-based liability.

Under international criminal law, it is generally accepted that individual criminal liability requires intent and knowledge. This principle is established in the Rome Statute by Article 30(1) which provides that '[u]nless otherwise provided, a person shall be criminally

[52] Australian Criminal Code Act 1995, § 12.4.
[53] Ibid § 12.3.

responsible and liable for punishment for a crime … only if the material elements are committed with intent and knowledge'.[54] Nonetheless, negligence – and specifically gross negligence (or *culpa gravis*) – has been admitted as a mental element for international crimes, in particular in the context of command responsibility.[55] Article 28 of the Rome Statute recognises the possibility of imposing criminal liability to military commanders who 'either knew or … should have known' that forces under their 'effective command and control' were committing or about to commit crimes under the jurisdiction of the Court and they 'failed to take all necessary and reasonable measures' to prevent or repress the perpetration of such crimes.[56]

Article 28 also covers the criminal liability of civilian commanders who 'failed to take all necessary and reasonable measures' within their power 'to prevent or repress' the commission of a crime by their subordinates or failed 'to submit the matter to a competent authority for investigation and prosecution'.[57] However, in the Rome Statute, the *mens rea* standard applicable to civilian commanders slightly differs from that required in the context of military commanders. Indeed, Article 28(b)(i) establishes that the liability of a civilian commanders can arise in situations where they 'either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit' a crime.[58]

Thus, in the case of civilian commanders the Rome Statute requires a more demanding standard than that applicable to military commanders. As observed by Schabas, the standard of 'consciously disregarding information' is better read as a form of recklessness that still falls

[54] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 30(1). 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544

[55] Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (OUP 2009), 433 et ss. Alejandro Kiss, 'Command Responsibility under Article 28 of the Rome Statute' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 641-647, Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?' (2009) 12(3) New Criminal Law Review: An International and Interdisciplinary Journal 420. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009, 429, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008, 251-252, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, 358-359. Against the recognition of negligence in the context of command responsibility see *Prosecutor v Bagilishema,* Judgment, Case No. ICTR-95-1A-A, 3 July 2002, para 35, *Prosecutor v Blaškić,* Judgment, Case No. IT-95-14-A, 29 July 2004, para 63.

[56] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 28(a).

[57] Ibid Article 28(b).

[58] Ibid Article 28(b)(i).

under the umbrella of the provision of Article 30 – '[u]nless otherwise provided' –, even though it does not depart too much from the general requirements concerning the mental elements of international crimes (intent and knowledge).[59]

In drafting a provision on lack of supervision and proper due diligence, therefore, specific attention should be paid to the *mens rea* standard upon which such provision will be based. As discussed above, in the corporate context, the lack of supervision as a ground for corporate criminal liability is often constructed as a form of negligence where the corporation (or its directors and managers) fails to enact effective compliance programmes to oversee and control the conduct of its employees. If transposed at the international criminal level, a provision on negligence may create a parallel between the position of corporations, on one side, and that of military commanders, on the other.

This however may raise some controversy as corporations are *private* entities, established under national laws, and as such more akin to civilian commanders than to military commanders. While the introduction of a negligence standard as part of a model of corporate criminal liability may be justified by the peculiar characteristics of corporations, consistency within the international criminal justice system should be ensured. Consequently, it may be advisable to apply a recklessness standard in line with that defined under Article 28(b) of the Rome Statute to assimilate the position of corporations to that of civilian commanders.

By linking the company's liability to its 'conscious disregard' of its duty to adopt and implement due diligence programmes and control measures, the provision on corporate criminal liability would still be able to capture the complexity of corporate decision-making and day-to-day operation. In doing so, it would provide the Court with an effective tool to promote corporate accountability for international crimes.

4. Reverse Onus, the Presumption of Innocence and Corporate Defendants

The adoption of a provision on organisational fault raises an additional question regarding the relevance of a defence of due diligence and the impact it may have on the burden of proof and the presumption of innocence. Where liability is based on an organisational failure on the side of the corporation, the entity should be able to raise the defence that it operated with due diligence.[60] As due diligence is the antithesis of fault, a corporation that had adopted all

[59] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute,* 2nd ed. (OUP Oxford 2016), 617.
[60] Gobert and Punch (n 20) 100.

reasonable measures to prevent and avoid the commission of a crime should be able to avoid criminal liability.[61] This, however, poses the practical question of who should carry the burden of proving that the corporation had indeed conducted its business activities with due diligence.

In criminal law, it is generally recognised that the burden of proof falls on the prosecutor who must prove the defendant's guilt beyond reasonable doubt. Consequently, where a defence is raised, the defendant will only bear the evidential burden of proof – i.e., the burden of producing sufficient evidence to raise the issue to the attention of the court – while it will remain for the prosecutor to disprove beyond reasonable doubt that the defence applies to the case. At the domestic level, however, derogations to this rule are considered admissible in relation to affirmative defences which switch the legal burden of proof to the defendant. In the area of corporate criminal liability, the defence of due diligence is often constructed as an affirmative defence.[62] It is therefore essential to consider whether such a defence can be introduced within the legal framework of the Statute of the International Criminal Court.

Article 67(1)(i) of the Rome Statute lists, among the fundamental rights of the accused, the right 'not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'.[63] The prohibition of any shift of the burden of proof on the defendant is a necessary corollary to the presumption of innocence that represents one of the cardinal principles of criminal law.[64]

The presumption of innocence allows for a redistribution of the risk within criminal trials 'by helping redress the imbalance of power between the government and the accused'.[65] As a fundamental human right, the presumption of innocence is enshrined in the text of core international human rights documents such as the Universal Declaration of Human Rights,[66] the International Covenant on Civil and Political Rights,[67] the European Convention on Human

[61] Ibid.
[62] Ibid 100-102 and 204-213. See also, Jordi Gimeno Beviá, 'Compliance Programs as Evidence in Criminal Cases' in D. Brodowski et al. (eds.), Regulating Corporate Criminal Liability (Springer 2014) 227
[63] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 67(1)(i).
[64] Michelle Coleman, *The Presumption of Innocence in International Human Rights and Criminal Law* (Routledge 2021) 29.
[65] Ibid 29.
[66] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 11.
[67] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 14(2).

Rights,[68] and the American Convention on Human Rights.[69] In the jurisprudence of the European Court of Human Rights, the presumption of innocence has been deemed to require, *inter alia*, that 'when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused'.[70]

Within the Rome Statute, the presumption of innocence is recognised under Article 66 which provides that:

> 1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
>
> 2. The onus is on the Prosecutor to prove the guilt of the accused.[71]

The Court noted that Article 66 entails that all 'elements of the crime and the mode of liability alleged against the accused, as well as the facts which are "indispensable for entering a conviction" must be established beyond reasonable doubt by the Prosecution'.[72] When asked to consider the burden and standard of proof applicable to Articles 31 of the Rome Statute (Grounds for excluding criminal responsibility), Trial Chamber IX noted that, a reading of Article 66 in conjunction with Article 67(1)(i) of the Statute, justifies the conclusion that 'an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused'. The defendant should only bear an 'evidential obligation to raise the grounds for excluding criminal responsibility under Articles 31 of the Statute'.[73]

Therefore, the Rome Statute forecloses the possibility of constructing a defence as an affirmative defence in application of the presumption of innocence and the corollary duty of the prosecutor to prove the guilty of the accused beyond reasonable doubt. While such a strict interpretation of the presumption of innocence is fully justified in the context of individual

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[68] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 6.
[69] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 8(2).
[70] ECtHR, *Barbera, Messegue and Jabardo v Spain*, Application no. 10588/83; 10589/83; 10590/83, 13 June 1994, para 77.
[71] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 66.
[72] *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1494, Trial Chamber IX, 5 April 2019, para 14.
[73] Ibid para 15.

defendants, it remains open to debate whether the presumption of innocence and its procedural corollary should apply in the same way to corporate defendants.

The position of the European Union on the matter is particularly illustrative. On 9 March 2016, the European Parliament and the Council of the European Union jointly adopted the *Directive on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (commonly known as the Presumption of Innocence Directive).[74] Adopted as part of the 'Roadmap' designed by the Council in 2009 to enhance the protection of procedural rights in criminal proceedings across the Union,[75] the Presumption of Innocence Directive aims to reinforce the 'right to a fair trial through the adoption of common minimum rules on certain points of the presumption of innocence and the right to be present at trial'.[76] Together with the Translation and Interpretation Directive, the Right to Information Directive, and the Access to a Lawyer Directive, the Presumption of Innocence Directive seeks to increase 'trust between the Member States in the field of criminal justice' and, in doing so, facilitate the judicial cooperation in criminal matters.[77]

The provision of Article 2 of the Presumption of Innocence Directive defines its (narrow) scope of application. Indeed, conversely from the three Directives that preceded its adoption, Article 2 of the Directive explicitly states that the provisions enshrined in the document apply 'to *natural persons* who are suspects or accused persons in criminal proceedings',[78] with the consequent exclusion of legal persons.

In the Explanatory Memorandum presented by European Commission in 2013 on the (then) proposed Directive on the presumption of innocence, the Commission specifically suggested to limit the scope of application of the proposed legislative act to natural persons.[79] In particular, the Commission observed that the presumption of innocence 'encompasses

[74] European Parliament and of the Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1.
[75] Council Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.
[76] Anita Nagy, 'The Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings in Directive (EU) 2016/343' (2016) 12 European Integration Studies 5, 5.
[77] Ibid.
[78] European Parliament and of the Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1, Article 2.
[79] European Commission, Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings, Explanatory Memorandum, COM(2013) 821, 27 November 2013.

different needs and degrees of protection regarding natural persons and legal persons'.[80] As such, a Directive on this specific subject matter should 'only appl[y] to natural persons'.[81]

Even though during the discussion of the text of the proposed Directive a number of amendments were proposed to extend the applicability of its provisions to legal persons,[82] the Commission's proposal to limit the scope of the Directive to individuals prevailed. The justification for this approach is included in the final text of the Presumption of Innocence Directive, under points 13 to 15 and reads as follows:

> (13) This Directive acknowledges the different needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons. As regards natural persons, such protection is reflected in well-established case-law of the European Court of Human Rights. The Court of Justice has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons.
>
> (14) At the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. […]
>
> (15) The presumption of innocence with regard to legal persons should be ensured by the existing legislative safeguards and case-law, the evolution of which is to determine whether there is a need for Union action.[83]

Thus, the Directive positions natural persons and legal persons on two different levels on the assumption that the presumption of innocence operates differently in relation to these two categories of defendants.

This idea that the presumption of innocence may be constructed in a narrower way when applied to legal persons has also been supported by Roger A. Shiner.[84] According to the author, 'when it comes to criminal defence protections for corporations, there is something morally unintuitive about treating corporate legal persons exactly the same way as natural

[80] Ibid para 26.
[81] Ibid.
[82] Report on the proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013)0821 – C7-0427/2013 – 2013/0407(COD)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Nathalie Griesbeck.
[83] European Parliament and of the Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1, points 13-15.
[84] Roger A. Shiner, 'Corporations and the Presumption of Innocence' (2014) 8(2) Criminal Law and Philosophy 485.

persons'.[85] In Shiner's view, the presumption of innocence has its roots in a 'form of deontological morality' which is based on principles such as the respect of human dignity, a person's autonomy and liberty and the fundamental right not to be subject to coercive measures unless strictly required under the law.[86] However, the moral justifications which require a strict applicability of the presumption of innocence to the case of individuals may not apply in the case of corporations. In this regard, Shiner observed that:

> [corporations] have no original autonomy rights, rights rooted in the ethical primacy of autonomy that belong to them *natura sua* …. On the face of it, therefore, the standard reasons why it would be unacceptable from the point of view of criminal justice to treat natural persons merely as means to social welfare do not apply to treating corporations merely as means to social welfare. In fact, … frankly it looks like a good idea to do that.[87]

The peculiar nature of corporations as non-human beings and the consideration that, in the context of criminal trials, corporate entities are in a 'significantly less disadvantageous position' than individuals as they do not face a potential deprivation of their liberty (imprisonment), may justify the introduction of a different standard in the application of the presumption of innocence.[88] While the onus of proving the elements of the crime must remain on the prosecutor, it may be possible to introduce a derogation to the provision of Article 67(1)(a) in the case of a defence of due diligence. Another practical consideration weights in favour of the admissibility of an affirmative defence of due diligence for corporate defendants. As observed by Gobert and Punch:

> It will generally be easier for a company to show what it has done to advert illegality than for the prosecutor to prove what it has not done. The relevant documents and memoranda will lie within the company's file, and its directors, executive officers and senior managers will be able to testify as to what steps the company has taken to prevent the commission of the crime.[89]

While the relative easiness in proving a defence cannot be considered sufficient to justify a shift in the burden of proof, it may be seen as a relevant factor in the evaluation of whether the inclusion of an affirmative defence of due diligence severely affects the position of a corporate defendant.

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[85] Ibid 490.
[86] Ibid 487-8.
[87] Ibid 488.
[88] Gobert and Punch (n 20) 203.
[89] Ibid 100.

At the domestic level, the possibility of shifting the burden of proof on the corporate defendant in a case of organisational fault is accepted in several countries such as Australia, the United Kingdom, Italy and the United States.[90] In Australia, section 12.3(3) of the Criminal Code provides that, when 'a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence', the liability of the corporation is excluded 'if the body corporate *proves* that it exercised due diligence to prevent the conduct, or the authorisation or permission'.[91] Similarly, the Italian legislative decree no. 231 of 2001 allows a shift in the burden of proof in relation to corporate due diligence. Under Article 6 of the decree, when an offence is committed by a senior officer, corporate liability will be excluded if the corporation is able to demonstrate that it has efficiently implemented 'organisational and management models capable of preventing offences of the type occurring'.[92]

The possibility of reversing the burden of proof in the case of corporate criminal liability was considered reasonable by the OECD examiners in their *Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on Switzerland. In evaluating the position of the Swiss authorities on the defence of due diligence, the OECD examiners observed that:

> … in the Examiners' opinion it seems inappropriate to place the burden of proof on the prosecutor (or magistrate). The enterprise is much more familiar than the judiciary with the nature of its own internal organisation, its qualities and its defects. The justice system will probably find it difficult to prove defective organisation, especially when an enterprise is part of a complex group, and this could deter prosecutions.[93]

As suggested by Allens Arthur Robinson, 'it is arguable that considerations such as those articulated by the OECD Examiners could justify a reverse burden of proof' in the case

[90] Ibid 204 et ss., Allens Arthur Robinson, ''Corporate Culture' as a Basis for the Criminal Liability of Corporations' (*Business & Human Rights Resource Centre*, 1 February 2008).
[91] Australian Criminal Code Act 1995, § 12.3 (emphasis added)
[92] Italian Legislative Decree No. 231 of 8 June 2001 (Decreto Legislativo 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridiche'), Article 6.
[93] OECD, 'Switzerland: Phase 2 Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions' (*OECD* 2004) https://www.oecd.org/corruption/switzerland-oecdanti-briberyconvention.htm para 112.

of corporate prosecutions without infringing upon the presumption of innocence as stated under Article 6 of the European Convention on Human Rights.[94]

Considering the above, the introduction of a derogation to the provisions of Articles 66 and 67 of the Rome Statute may not affect the overall perception of fairness of international criminal proceedings as the application of a less stringent standard of protection to corporate defendants may be seen as proportionate and reasonable.

Even if a reverse onus is not introduced, the relevance of due diligence programmes and control measures can still be emphasised as part of the sentencing system applicable to corporate defendants. According to Rule 145(1)(b) of the RPE, in determining the appropriate sentence applicable postconviction, 'the Court shall … [b]alance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime'.[95] The rule offers limited guidance regarding what may constitute a mitigating circumstance for the determination of the sentence. It solely refers to those 'circumstances falling short of constituting grounds for exclusion of criminal responsibility' (Rule 145(2)(a)(i)) and to the conduct of the convicted person 'after the act, including any efforts by the person to compensate the victims and any cooperation with the Court' (Rule 145(2)(a)(ii)).[96]

In drafting an amendment on corporate criminal liability, an alternative option to the inclusion of a provision on a defence of due diligence could be to list the adoption of appropriate due diligence measures as one of the factors to evaluate for the determination of the appropriate penalty to impose upon the corporation. This approach is not dissimilar to that adopted by the United States in the U.S. Sentencing Commission's Guidelines Manual which provides that the 'two factors that mitigate the ultimate punishment of an organisation are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility'.[97] The Manual also offers a detailed overview of the factors to consider in evaluating the effectiveness of corporate compliance and ethics programmes.[98]

[94] Robinson (n 86).
[95] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 145.
[96] Ibid.
[97] United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2021), 509.
[98] Ibid 517 et ss.

An amendment of the Rules of Procedure and Evidence may provide a more practical solution to the issue under consideration as it does not require a re-interpretation of the scope of the presumption of innocence within the Rome Statute to make room for corporate defendants. At the same time, relegating the relevance of due diligence programmes to the postconviction stage may render the provision of corporate criminal liability for organisational failure mostly ineffective as the prosecution will face relevant obstacles in proving that a company did not fulfil is due diligence obligations. Aside from those cases where a corporation neglects to adopt any control measure or compliance programme – the absence of which may be used by the prosecutor as evidence of systemic failure –, where such measures and programmes are in place only the company will have access to the relevant documentations concerning their implementation and may not be compelled to submit them to the prosecution. In these cases, the corporate defendant may justify a refusal to provide incriminating evidence by relying on the Article 67(1)(g) of the Rome Statute which recognises the defendant's right against self-incrimination and the right to silence.[99] As a consequence, the prosecution may be unable to discharge its burden of proof in the case of corporate prosecutions, rendering the provision of corporate criminal liability void of any practical value.

5. Corporations and Procedural Guarantees

The discussion on whether the presumption of innocence should apply to legal persons in the same way in which it applies to natural persons is part of a broader debate on whether non-human beings such as corporations enjoy fundamental human rights and procedural guarantees to the same extent as human beings.

Several scholars have investigated whether corporations enjoy the fundamental rights and freedoms enshrined into international human rights documents that are often viewed as 'intrinsically human in nature'.[100] Referring in particular to the position of corporations under the European Convention on Human Rights, Amanda Pinto and Martin Evans observed that 'it is beyond doubt that [legal persons] do enjoy Convention rights'.[101]

This interpretation is supported by the wording of Article 1 of the Convention which requires each Contracting Party to 'secure to *everyone* within their jurisdiction the rights and

[99] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 67(1)(g).
[100] Amanda Pinto, QC, and Martin Evans, QC, *Corporate Criminal Liability*, 3rd ed. (Sweet &Maxwell, 2013) 179.
[101] Ibid.

freedoms defined in Section 1 of this Convention'.[102] The use of the term 'everyone' allows a broader interpretation of the scope of the Convention *ratione personae* that can include legal persons alongside individuals. Similar language is used in Article 34 of the Convention recognising the right to submit an application to the Court to 'any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.[103]

As per the Convention's jurisdiction *ratione materiae*, only Article 1 of Protocol 1 on the protection of property mentions legal persons alongside natural persons among the subjects entitled to protection under the Convention.[104] This, however, does not imply the inapplicability of other provisions of the Convention to legal persons.

The jurisprudence of the European Court of Human Rights has often recognised the possibility of extending the protection provided by the Convention to corporations even in the absence of a specific reference to 'legal persons' in the text of the provisions. Regarding in particular the rights enshrined in Article 6 of the Convention – Right to a fair trial –, the jurisprudence of the European Court of Human Rights has recognised its applicability to legal persons, at least in relation to civil cases. Indeed, in *Comingersoll S. A v. Portugal*, the Court confirmed the possibility for a company to receive just compensation, under Article 41 of the Convention, for non-pecuniary loss sustained due to the violation of the right to trial within reasonable time enshrined under Article 6(1).[105]

Unlike civil proceedings, the applicability of Article 6 to legal persons in the context of criminal trials has yet to be addressed by Court. However, the development of the Court's jurisprudence on the conventional rights of legal persons may suggest the applicability of the procedural rights under Article 6 to corporate defendants in criminal trials.[106]

However, according to Piet Hein Van Kempen, the fact that corporations 'do have standing under the European Convention' does not automatically mean that 'corporations …

[102] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 1 (emphasis added)
[103] Ibid Article 34. For an analysis on the protection of corporations under the European Convention on Human Rights see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006).
[104] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Protocol 1, Article 1.
[105] ECtHR, *Comingersoll S.A. v. Portugal*, Judgment of 6 April 2000, para 35.
[106] Zlata Đurđević, 'Pravna osoba kao okrivljenik: temeljna prava i predstavljanje' (2005) 12 Croatian Annual of Criminal Law and Practice 739, 744.

enjoy exactly the same protection under the rights as are applicable to them as individuals'.[107] Examples of this are provided by the provisions of the Convention on the 'prohibitions of torture and of slavery, the right to marry and to equality between spouses'.[108]

Even though corporations may not enjoy the same level of protection as natural persons, procedural guarantees still need to be applied to ensure the fairness of criminal proceedings against corporate defendants. Otherwise, the legitimacy of the criminal justice system may inevitably be affected. As remarkably stated by Antonio Cassese:

> … the rights of the accused are central to the concept of justice. For [an international criminal tribunal or court], its moral authority – as opposed to its legal authority – to try accused persons derives in large part from the fact that the accused is guaranteed a fair trial …, and all that that entails.[109]

Similarly, Roberts observed that, while '[a] court that enforces an unjust law might still be regarded as a properly constituted criminal tribunal', a court – whether international or domestic – 'which fails to secure fair trials with due process is a self-parody'.[110]

Therefore, even if a lower standard of protection for corporate defendants may be considered admissible, it is still essential to ensure that certain guarantees apply to legal persons as well. A key example of a procedural right that should apply to corporate defendants at the international level is the right to be present at trial. The application of such right to corporate defendants is discussed in the following section.

5.1. Representation and the Right to Be Present at Trial: Article 63 ICC St.

A key issue related to the introduction of corporate defendants within the scope of the international criminal justice system pertains to the participation of legal entities in the criminal trial. Specific procedural arrangements need to be made to ensure that corporations can effectively take part in the proceedings.

It is generally accepted that an individual defendant has the right to be present at trial under international criminal law. Indeed, such a right represents '[o]ne of the defining

[107] Piet Hein Van Kampen, 'Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR' (2010) 14(3) Electronic Journal of Comparative Law, 3.
[108] Ibid 13.
[109] Antonio Cassese, Lecture at the British Institute of Human Rights, 1 May 1997. Quote cited in Amnesty International, The International Criminal Court: Drafting effective Rules of Procedure and Evidence for the Trial, Appeal and Revision, 1999.
[110] Paul Roberts, 'The Priority of Procedure and the Neglect of Evidence and Proof: Facing Facts in International Criminal Law' (2015) 13 Journal of International Criminal Justice 479, 488.

components of the right to a fair trial'.[111] Article 63(1) of the Rome Statute establishes the right of the accused to be present at trial. While trials *in absentia* are not entirely inadmissible under international criminal law, the approach adopted by the negotiators of the Statute of the International Criminal Court explicitly ruled out the possibility of conducting a trial in the absence of the accused. The provision of Article 63 is reinforced by Article 67 which provides, under section (d), that the accused has the right:

> To be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.[112]

Article 63(2) recognises certain limitations to the right to be present at trial in circumstances where the accused 'continues to disrupt the trial', allowing the Court to remove the person from the courtroom and to make provision for them 'to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required'.[113] These measures can be adopted only exceptionally and only for the time they are strictly required.[114]

Corporations, as abstract entities with 'no body to be kicked',[115] cannot physically be present at trial in the same way of individuals but require the mediation of a natural person who can represent them and act on their behalf. The legal framework concerning the protection of the defendant's right to be present at trial does not explicitly consider the position of corporate defendants. No jurisprudence has yet emerged on the applicability of Article 6 of the European Convention on Human Rights on whether the right to be present at trial apply to corporate entities and, if so, to what extent.

Nonetheless, domestic laws generally recognised the rights of corporate defendants to be present at trial in the form of the person of their legal representative or of any individual to whom the corporations has granted a power of attorney for this purpose by the law, company's

[111] Caleb H. Wheeler, *The Right to Be Present at Trial in International Criminal Law* (Brill | Nijhoff 2019), 9.
[112] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 67.
[113] Ibid Article 63(2).
[114] For an in-depth analysis of the right to be present see Wheeler (n 107).
[115] Quote from Edward, First Baron Thurlow (1731-1806) as cited in John C. Coffee Jr., 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' 79 (1981) Michigan Law Review 386, 386.

statute or articles of association.[116] The approach is not dissimilar to that adopted in civil and administrative cases where the legal person is represented in court by an individual who has been granted decision-making and management power by the corporation and who has the right to represent and act on behalf of the entity.

Due to the lack of proper recognition of corporate criminal liability, there are limited examples of legal entities' representation in international criminal proceedings. One of these is provided by the trial of criminal organisations and groups at the International Military Tribunal of Nuremberg. As observed in chapter 2, even though the model of criminal organisation embraced in the London Charter cannot be equated to the modern concept of corporate criminal liability, the Nuremberg trial still offers significant insight on the possibility of prosecuting legal entities.

Regarding the specific issue of representation, the approach adopted by the International Military Tribunal is quite peculiar. The Tribunal's Rules of Procedure did not expressly address the right to be present at trial in relation to the accused legal entities. Rule 2 of the Rules of Procedure, which recognised the right of the accused groups or organisations to be represented by a defence counsel, made no mention to the right of each group or organisation to be present at trial in the form of a legal representative. This, however, may be justified by the fact that all legal entities that stood trial before the International Military Tribunal were political organisations which had already been disbanded by the time the proceeding began and not business corporations still in operation.

It may be arguable that a form of representation was still allowed under Article 9(1) of the London Charter.[117] The provision linked the possibility for the Tribunal to declare the criminal nature of a group or organization to the trial and conviction of any of the individual members who stood trial before the Tribunal. Indeed, the declaration could have only been made '[a]t the trial of any individual member of any group or organization' and 'in connection with any act of which the individual may be convicted'.[118] Those individuals who stood trial

[116] See, e.g. French Code of Criminal Procedure, Article 706-43; Republic of Italy, D.Lgs. 231/2001, Article 39(1), Spanish Code of Criminal Procedure, Article 786 a, Republic of Slovenia, Liability of Legal Entities for Criminal Offenses Act, 59/1999, 12/2000, Article 31(1) and (4), Swiss Criminal Code, Art. 100quinquies, para 1., Criminal Justice Act 1925, section 33(6).
[117] United Nations, *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement')*, 8 August 1945, 82 U.N.T.S. 279
[118] Ibid.

before the International Military Tribunal operated at the highest level of each entity, shaping their policies and managing their operations, and – to a certain extent – may be seen as 'representatives' of the groups and organisations.

However, while this approach may have been justified by the peculiar nature of the trial of criminal organisations and groups at Nuremberg, it is unlikely to be applicable in the context of modern corporate prosecutions as it is generally recognised that the role of legal representative of the accused corporation is incompatible with that of co-accused. The French Code of Criminal Procedure, for example, provides that, where the legal representative of a legal person is subject to criminal prosecution for the same actions allegedly imputed to the company, or for connected offences, a request may be submitted to the president of the competent tribunal for the purposes of appointing a judicial proxy ('*un mandataire de justice*') to represent the legal person.[119] A similar approach is adopted in the Italian systems where Article 39 of the D.Lgs. 231/2001 established that the legal person participates in the criminal proceedings by its legal representative, 'unless the representative is charged with the crime upon which the administrative offense depends'.[120]

In this regard, the trial of Al Jadeed/ NewTV Sal before the Special Tribunal for Lebanon offers a more pertinent example regarding the presence of a corporate defendant at trial. Even in the absence of a specific provision on the matter, the Tribunal recognised the importance of ensuring the presence a trial of the legal person through the figure of the legal representative who can put a human face on the corporation. Indeed, the legal representative was invited to attend the first hearing against the corporation and informed that initial appearance may have been made by video-conference pursuant to Rule 105 of the Tribunal's Rules of Procedure and Evidence.[121]

Consequently, on 13 May 2014, the corporate defendant firstly appeared in front of the Contempt Judge in the person of its general manager, Mr. Dimitri Khodr, who was given power of attorney by Al Jadeed/NewTV Sal.[122] While Ms Karma Khayat, co-defendant in the trial, could have reasonably acted as the legal representative of the corporation, the Tribunal

[119] French Code of Criminal Procedure, Article 706-43.
[120] Italian Legislative Decree No. 231 of 8 June 2001 (Decreto Legislativo 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridiche'), Article 39(1). See also Italian Court of Cassation, III Sez. Criminal, *Judgment n. 56427 of 19 December 2017*.
[121] *New TV S.A.L. and Khayat,* Summons to Appear (Ms Karma Khayat), STL-14-05/PT/CJ, Contempt Judge, 18 March 2014, p. 2.
[122] *New TV S.A.L. and Khayat,* Public Transcript of the first hearing held on 13 May 2014 in the Case against NEW TV S.A.L. & Karma Khayat, STL-14-05/PT/CJ), Contempt Judge, 13 May 2014.

distinguished between her position and that of the corporation, tacitly acknowledging the incompatibility of the role of co-accused with that of legal representative.

This approach is more in line with the modern construct of corporate criminal liability and can be used as an example for future trials against corporate defendants at the international criminal level. It also allows to apply a similar standard to individual defendants and corporate defendants, preventing the arising of questions concerning the existence of a double standard in relation to the protection of the right to be present at trial.

The drafters of an amendment to the Rome Statute to incorporate corporate criminal liability should thus consider either adding a new paragraph under Article 63 or including a new Article 63-*bis* in the Statute to provide specific guidelines regarding the appointment of legal representative and the identification of situations of incompatibility. In this regard, the provision of *Model Codes of Criminal Procedure for Post-Conflict Criminal Justice* (MCCP) may offer a suitable starting point for a discussion on the matter.[123]

Designed to provide model provisions to national and international actors involved in peacebuilding operations in post-conflict societies, the MCCP was the result of the combined effort of the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime. The Model Code was drafted to serve several practical goals. Among those, it was envisaged as valuable tool for any post-conflict state that may decide to become party to the Statute of the International Criminal Court as it provides guidelines on how to incorporate elements from the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence into domestic legislation.[124] In addition to that, it also offers suggestions on matters not yet addressed under international criminal law, including the criminal liability of legal persons.[125] As such, the document could form the basis of a working paper on the procedural measures required to prosecute corporate defendants.

Regarding the issue under consideration, Article 81 of the MCCP – Representative for a Legal Person in Criminal Proceedings – provides that:

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[123] Vivienne O'Connor et al. (eds.), Model Codes for Post-Conflict Criminal Justice. Vol. 2 (Washington: United States Institute of Peace Press 2008).
[124] Vivienne O'Connor et al. (eds.), Model Codes for Post-Conflict Criminal Justice. Vol. 1 (Washington: United States Institute of Peace Press 2007), 14 and 17-18.
[125] Vivienne O'Connor et al. (eds.), Model Codes for Post-Conflict Criminal Justice. Vol. 2 (Washington: United States Institute of Peace Press 2008), 138 et ss, Vivienne O'Connor et al. (eds.), Model Codes for Post-Conflict Criminal Justice. Vol. 1 (Washington: United States Institute of Peace Press 2007), 72 et ss.

1. Where a legal person is being prosecuted for a criminal offence or offences, one representative of the legal person must be present at all proceedings.

2. A representative of a legal person is a person who is authorised to represent the legal person under the applicable law.

3. A person may not act as a representative of the legal person where:

a. The person is a witness at the trail of the legal person; or

b. The person has been prosecuted for the same criminal offence, unless he or she is the only representative of the legal person.

4. Where a person is not eligible to be a representative of the legal person under paragraph 3, the competent trial court must request the competent body of the legal person to appoint another representative within a specific period and notify the court of the appointment in writing. If this is not done within the specified period, the court may appoint a representative of the legal person.

5. The registry of the competent trial court must notify the [insert name of body responsible for registering legal persons in the state] that the legal person is subject to legal proceedings and cannot be dissolved during proceeding against the legal person.[126]

The use of this provision as a working paper will give the drafters the opportunity to define the way in which the right to be present at trial can be applied to corporate defendants. It will also provide for a solution to those situations where the position of the legal representative as co-defendant in the trial against the corporation may lead to a conflict of interest.

Another point that deserves specific attention relates to the question of how the Court should deal with the decision of the legal person not to send a legal representative to attend the trial. If such a decision is communicated to the Court alongside the request to be represented solely by counsel, the provision of Rule 134-ter of the Court's Rules of Procedure and Evidence should apply provided that the conditions of paragraph 2 of such provision are met. Specifically, a request to be excused from attending the trial can be granted only if the Court is satisfied that:

(a) exceptional circumstances exist to justify such an absence;

[126] Vivienne O'Connor et al. (eds.), Model Codes for Post-Conflict Criminal Justice. Vol. 2 (Washington: United States Institute of Peace Press 2008), 139-140.

(b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;

(c) the accused has explicitly waived his or her right to be present at the trial; and

(d) the rights of the accused will be fully ensured in his or her absence.[127]

However, if such a declaration is not submitted and the corporation refuses to cooperate by not sending a legal representative, the trial may not proceed as it would otherwise breach the prohibition of conducting trial in absentia.

In addressing this issue in the context of the Malabo Protocol, Kyriakakis suggested the possibility of introducing a derogation to the right to be tried in person in the case of a corporation. According to the author:

> Proceeding against an accused in absentia, even for serious crimes, is allowed in some jurisdiction in such circumstances, although the challenge of enforcing the verdict against the person and their assets beyond the territory of states parties remains. To further protect defence rights, protections may be built into any such trial in absentia scheme, for example allowing for retrial should a corporate representative be subsequently appointed.[128]

While this option may be explored as part of the negotiation of an amendment to the Rome Statute, it may still raise relevant concerns in relation to the fairness of in absentia trials. Alternatively, it may be possible to bestow the Court with the power of appointing an *ad hoc* legal representative to represent the corporation during the trial. This solution has been adopted in the French system where Article 706-43, paragraph 5, establishes that:

> In the absence of any person authorised to represent the legal person under the conditions provided for in this article, the president of the tribunal appoints, at the request of the public prosecutor, the investigating judge or the civil party, a legal representative to represent it.[129]

The adoption of a similar solution within the Rome Statute may not be enough to mitigate all the concerns relating to protection of the defendant's right to a fair trial. The drafters of an amendment, therefore, should still consider the possibility of allowing for retrial

[127] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 134-*ter*.
[128] Joanna Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in C. Jalloh, K. Clarke, V. Nmehielle (eds) *African Court of Justice and Human and People's Rights in Context* (Cambridge University Press 2019), 834.
[129] French Code of Criminal Procedure, Article 706-43. [Translated by the author]

should the corporation decide, at a later stage, to cooperate with the Court by appointing a representative for the trial.

The issues addressed in this section give a sense of the peculiar procedural challenges posed by the inclusion of corporate defendants within the international criminal justice system. While these challenges may slow the process for the adoption of a provision on corporate criminal liability, they are not without solution. As demonstrated in this section, there are several alternatives that may be explored to ensure that the inclusion of corporations as a new category of defendant will not adversely impact on the legitimacy of the whole international justice system.

6. A Sentencing System for Corporate Defendants

A final point that requires attention in drafting a model of corporate criminal liability at the international level concerns the determination of a sentencing system applicable to corporate defendants. This section considers, in particular, three issues relating to corporate sentencing: (a) pecuniary sanctions, (b) non-pecuniary sanctions, and (c) the corporate death penalty.

The legal framework on sentencing at the International Criminal Court is provided by Articles 76 to 78 of the Rome Statute, complemented by the provisions of Rules 145 to 148 of the Rules of Procedure and Evidence.[130] Article 76 of the Statute states that, in case of a conviction, the Court 'shall consider the appropriate sentence to be imposed' taking into account all 'evidence presented, and submissions made during the trial that are relevant to the sentence'.[131] Additional evidence can also be heard by the Court in a separate hearing whenever relevant to the determine the most appropriate sentence.[132] Article 77 then defines the range of penalties available to the Court by establishing that:

> 1. […] the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

[130] For an analysis of sentencing in international criminal law see Alice Riccardi, *Sentencing at the International Criminal Court. From Nuremberg to the Hague* (Giappichelli Editore and Eleven International Publishing 2016). See also Michelle Coleman, 'Culture and Sentencing at the ICC' in Julie Fraser and Brianne McGonigle Leyh (eds.) *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar 2020) 268-287.
[131] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90, Article 76(1).
[132] Ibid Article 76(2).

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.[133]

As per Article 78, in determining the most appropriate sentence to be imposed in each case, the Court is required to take into consideration 'such factors as the gravity of the crime and the individual circumstances of the convicted person'.[134] Rule 145 of the RPE directs the Court to consider additional factors such as the extent of the harm caused to the victims, the nature of the crime and the means employed to execute it, the degree of participation and of intent, the circumstances, time and location of the crime, and the personal characteristics of the convicted person.[135] The rule also provides that 'the totality of any sentence of imprisonment and fine' imposed by the Court 'must reflect the culpability of the convicted person'.[136]

When considering the range of penalties applicable to corporate defendants, a central role is played by pecuniary sanctions. As artificial actors – devoid of a physical body –, corporations cannot be subjected to imprisonment. Consequently, fines are generally deemed the primary form of punishment applicable in the context of corporate proceedings. An overview of the proposal submitted in Rome and of the approach adopted in the Malabo Protocol indicates a convergence on the feasibility of imposing monetary sanctions on corporations under international criminal law. During the negotiation of the Rome Statute, the French delegation submitted a draft provision (draft Article 69) on the penalties applicable to legal entities which included fines, forfeiture of instrumentalities of crime and proceeds, property and assets obtained by criminal conduct, and appropriate forms of reparation.[137] As discussed in chapter 4, the decision to limit the discussion on penalties applicable to legal persons to monetary sanctions was justified by the attempt to 'build a bridge between the countries that accept criminal responsibility for organisations or groups and those that did not'.[138] A similar approach was adopted also in the Malabo Protocol where pecuniary fines are

[133] Ibid Article 77.
[134] Ibid Article 78.
[135] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 145(1)(c).
[136] Ibid Rule 145(1)(a).
[137] A/AC.249/1998/DP.14, pp. 2-3.
[138] A/CONF.183/C.1/SR.1, para 33.

the only penalties applicable to corporations alongside the 'forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct'.[139]

As for pecuniary sanctions, the introduction of a regime of corporate criminal liability within the Statute of the International Criminal Court does not raise significant issues. Indeed, Article 77(2) can be deemed applicable to the case of corporate defendants without any specific adjustments. Likewise, the criteria listed under Rule 146 for the determination of a fine under Article 77 remains applicable, especially those referring to the financial capacity of the convicted person and to the motive of 'personal' financial gain.[140]

It remains questionable, however, whether the sanctioning system applicable to corporate defendants should provide for non-monetary penalties, such as injunction measures and reputation-oriented sanctions.

A proposal to include injunction measures in the list of penalties potentially applicable to legal persons was presented in the early stage of the drafting of the Statute of the International Criminal Court. Submitted in 1996 as part of a draft Statute proposed by the French delegation, draft Article 95 listed under letters (c) and (d) the following penalties applicable to legal persons:

> (c) Prohibition, in perpetuity or for a period freely determined by the Court, of the direct or indirect exercise of one or more professional or social activities;
>
> (d) Closure, in perpetuity or for a period freely determined by the Court, of the establishments used in the commission of the crimes.[141]

The decision to exclude such penalties from the final proposal on the criminal liability of legal persons was motivated by the necessity to present a working document that could have won the approval of the highest number of delegations.[142] Concerns related to differences in States' approach to corporate punishment, while still relevant, may not be as pressing as they were in 1998. As discussed at length in chapter 6, national developments that occurred over the past twenty years demonstrate that more and more legal jurisdictions recognise the applicability of criminal sanctions on corporations – including prohibitory (or negative) injunctions.[143] Thus,

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[139] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Annex, Article 43A.
[140] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 146(1).
[141] A/AC.249/L.3, p. 64.
[142] A/CONF.183/C.1/SR.1, para 33.
[143] See, e.g., French Criminal Code, Article 131-39, Spanish Criminal Code, Article 33(7), United States Sentencing Commission, Federal Sentencing Guidelines, Chapter 8, Italian Legislative Decree no. 231 of 8 June

objections to the inclusion of injunctions measures within the Rome Statute based on the assumption that they would hinder States' cooperation in the enforcement of a judgment against corporate defendants may have now lost their cogency. Consequently, nothing is preventing the negotiators of an amendment on corporate criminal liability to take a more progressive view on the subject matter.

As for reputation-oriented sanctions, such as the publication of the sentence, there is merit in suggesting the inclusion of such penalties within the Rome Statute. Indeed, like individuals, corporations can suffer the stigma and damage to their reputation that derive from a criminal conviction. As observed by Gobert and Punch, 'reputation may be an even *more* valuable commodity to a company than it is to an individual'.[144] As such, the possibility for the International Criminal Court to impose reputation-oriented sanctions can enhance the deterrent and retributive effect of an international judgment against a corporation.

The suggestion to adopt a more inclusive package of penalties for corporations is in line with position adopted by the Council of Europe in its Recommendation No. R (88) 18 on the *Liability of Enterprises for Offences* of 20 October 1988.[145] In the Recommendation, the Council suggested that, in providing an appropriate sanctioning system for corporate entities, States should consider the following range of penalties, which may be imposed alone or in combination:

- warning, reprimand, recognisance;
- a decision declaratory of responsibility, but no sanction;
- fine or other pecuniary sanction ;
- confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
- prohibition of certain activities, in particular exclusion from doing business with public authorities;
- exclusion from fiscal advantages and subsidies;
- prohibition upon advertising goods or services;
- annulment of licences;
- removal of managers;
- appointment of a provisional caretaker management by the judicial authority;

2001, Article 9 et ss. See also Clifford Chance, Corporate Criminal Liability (*Clifford Chance*, 26 April 2016) < https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/corporate-criminal-liability.pdf> Accessed on 1 November 2021.

[144] Gobert and Punch (n 20) 203 (emphasis added)

[145] Council of Europe, Committee of Ministers, Recommendation No. R (88) 18 on the Liability of Enterprises for Offences, 20 October 1988, Appendix, para. 6 et ss.

- closure of the enterprise;
- winding-up of the enterprise;
- compensation and/or restitution to the victim ;
- restoration of the former state;
- publication of the decision imposing a sanction or measure.[146]

The list includes several non-pecuniary measures that qualify as injunctions or reputation-oriented sanctions. According to the Council of Europe, the adoption of a wide range of penalties would allow States to pursue 'objectives other than punishment such as the prevention of further offences and the reparation of damage suffered by victims of the offence'.[147] As prevention (or deterrence) and victims' reparation are fundamental goals at the international criminal justice level, there are grounds to support the idea that the International Criminal Court should be able to rely on a more inclusive package of sanctions for corporate defendants. Considering that one of the main criticisms to the Malabo Protocol specifically refers to its narrow approach to corporate sanctioning,[148] the adoption of a more comprehensive system of corporate punishment may be seen as a step forward on the path of corporate accountability.

A final point concerns the issue of judicial dissolution of the corporation or corporate death penalty. In 2001, Diane Marie Amann raised the following point on the question of corporate punishment for international crimes:

> What, short of closing the business, would give a corporation its just deserts? Today, human defendants convicted of war crimes, crimes against humanity and genocide routinely receive sentences ranging from twenty years to life in prison. Can a money-based penalty, such as a fine or disgorgement of assets, approximate prolonged incarceration?[149]

Corporate death penalty is not a foreign concept at the international level. The *I.G. Farben* case provides a significant precedent in relation to the possibility of dissolving a business entity as a punishment for its involvement in gross violations of international law.

As discussed in previous chapters, the German company was the largest industrial supporter of the Hitlerian regime, and it actively cooperated with the regime by supplying Zyklon B gas – used for the systematic extermination of millions in the Nazi concentration

[146] Ibid para. 7.
[147] Ibid para. 6.
[148] Taygeti Michalakea, 'Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours' (2018) 7 International Human Rights Law Review 225, 244.
[149] Diane Marie Amann, Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights (2001) 24 Hastings Int'l & Comp. L. Rev. 327, 335.

camps – and by profiting from the slave labour of inmates in its rubber factory built on the edge of Auschwitz III-Monowitz. The scale of Farben's involvement with the German regime led the Allied Powers to enact Control Council Law No. 9 which provided for the seizure of property owned by the company and its dissolution.[150]

The dissolution of I.G. Farben was not the consequence of a judgment of an international criminal court or tribunal, but the result of a decision adopted by an international body – the Allied Control Council – which represented the four Allied Powers and was tasked to governed occupied Germany in the aftermath of the Second World War. The special treatment reserved to Farben was mostly a political decision which the Allied Powers were able to carry out due the peculiar circumstances of the case. Indeed, they did not require any collaboration from the state to enforce the extra-judicial sanction against I.G. Farben as Germany was under the control of the Allied Control Council. Thus, the *I.G. Farben* case falls short of offering a relevant precedent to justify the possibility of imposing the *judicial* dissolution of a corporations through criminal proceedings.

At a conceptual level, there is no compelling moral reason to exclude the corporate death penalty from the range of sanctions for corporate defendants. The judicial dissolution of a corporate entity does not carry with it the same moral quandaries related to the death penalty for individuals which is excluded under the Rome Statute. As observed by Van Kempen, while corporations do enjoy certain fundamental human rights, their position cannot be equated to that of natural persons.[151] This is particularly true in relation to the right to life.[152] While the dissolution of a corporation may be compared to a death penalty for the legal person, in no way it is arguable that such a measure is an infringement of a company's rights.[153]

The corporate death penalty, therefore, is perceived as morally neutral and is recognised – at the domestic level – as one of the penalties applicable to corporations as the result of a judicial determination of corporate criminal liability.[154] Judicial dissolution is also listed in the

[150] Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof' (30 November 1945), reprinted in Enactments and Approved Papers of the Control Council and Coordinating Committee, 225.
[151] Van Kampen (n 103) 3.
[152] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 2.
[153] Van Kampen (n 103) 13.
[154] See, e.g., French Criminal Code, Article 131-39, Spanish Criminal Code, Article 33(7).

Council of Europe's Recommendation No. R (88) 18 which includes the closure or the winding-up of the enterprise among the potential penalties applicable to corporations.[155]

Nonetheless, the inclusion of such measure within the Rome Statute may carry with it a range of practical issues related to state cooperation and enforcement of judicial decisions. Indeed, it is undeniable that the imposition of a corporate death penalty can adversely affect many individuals, *in primis* the company's employees, to the point that it can generate opposition by not only the corporate world but also by labour unions and by communities.[156] More generally, the dissolution of a corporation can send unwanted shockwaves through a whole country's economy (if not a whole geographical area). While the dissolution of a corporation may be deemed as the only appropriate response in case of involvement in mass atrocities, such sanction may have devastating consequences on the financial situation of a country that may ultimately hinder its economic development with vast repercussions on the whole society. Therefore, states may be less open to supporting a model of corporate criminal liability which allows for the judicial dissolution of a company, or they may end up refusing to cooperate with the Court in the enforcement of a judgment in all cases in which the corporate death penalty is imposed.

A final consideration that may weigh against the corporate death penalty concerns its incompatibility with the aim of rehabilitation. While rehabilitation plays a peripheral role in the sentencing system of the International Criminal Court,[157] it is still relevant to observe that the corporate death penalty entirely negates the possibility to rehabilitate the corporate offender and to promote compliance in future business operations. In the context of corporate involvement in international crimes, the goal of rehabilitation should be kept in great consideration due to the impact that companies can have on the economic development of a country or region. Adopting a sanctioning system that reprimands deviant behaviours without permanently banning the corporate offender from society can provide a fundamental tool to enhance corporate compliance with human rights standards as it will provide the company with the opportunity to change its internal mechanisms to continue to operate within a community

[155] Council of Europe, Committee of Ministers, Recommendation No. R (88) 18 on the Liability of Enterprises for Offences, 20 October 1988, Appendix, para. 7.
[156] John F. Hulpke, 'If All Else Fails, A Corporate Death Penalty?' (2017) Journal of Management Inquiry 1, 3.
[157] *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08, Trial Chamber III, (21 June 2016) para 11. See also Coleman, 'Culture and Sentencing at the ICC' (n 126); Edith Riegler, 'Rehabilitating Enemies of Mankind: An Exploration of the Concept of Rehabilitation as a Sentencing Aim at the ICTY and the ICC' (2020) 20(4) International Criminal Law Review 701. In support of a more central role of rehabilitation at the ICC see Riccardi (n 126).

more sustainably. Furthermore, even though the corporate death penalty appears to rest on less ambiguous moral grounds, its exclusion from the Rome Statute may also be seen as consistent with the decision to reject capital punishment for individual defendants.[158]

Overall, the creation of an effective sanctioning system applicable to corporate defendants is instrumental to the development of an effective model of corporate criminal liability. The attribution of international criminal liability can only promote greater accountability if followed by the imposition of appropriate and proportionate sanctions to reprimand the corporations, promote organisational changes, and deter future violation of international criminal law. Therefore, the drafters of an amendment to the Rome Statute need to approach the question of sentencing with an open mind to develop an inclusive package of penalties for corporate entities.

7. Conclusion

The analysis conducted in this chapter sheds some light on complexity of designing a suitable model of international corporate criminal liability. As discussed, the determination of an appropriate model of attribution for corporations poses several challenges in relation to both substantive and procedural law. It requires states to reconcile different views on the scope and limit of corporate criminal liability in the development of a model capable of effectively capturing the multifaceted reality of modern companies.

While a conservative approach may facilitate the diplomatic discussion of the subject under consideration, it presents the risk of devoiding the model of any practical value. A too narrow model, even if adopted, may remain dead letter in the Rome Statute and ultimately hinder the prospect of promoting a stronger system of corporate accountability. On the opposite, a too progressive and innovative approach may be ostracised by states who may see it as incompatible with domestic legal principles. Once again, the result would be the perpetuation of the idea of corporate impunity as embraced by the U.S. Supreme Court in the *Jesner* case.

Negotiators of an amendment, therefore, should attempt to strike a careful balance that allows for the creation of an effective mechanism of corporate criminal liability. The task will not be simple, but this should not deter countries from embarking in such project. The

[158] William A Schabas, 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute' (2000) 2(3) Punishment and Society 263.

implementation of a strong system of corporate accountability could only take the international community a step further in its fight against impunity.

Conclusion

This study has examined the international criminal liability of corporations with the purpose of providing a comprehensive analysis of the way in which the concept has been discussed at the international level. The study has offered unique insight into the history of international criminal law and on the role played by corporations. Since the 1940s, the issue of corporate involvement in international crimes has posed significant challenges to those involved in the development of an effective international criminal justice system. As highlighted in the analysis, several attempts have been made to incorporate corporate criminal liability under international criminal law to strengthen the framework on international accountability. The failure of these attempts has not been determined by the rejection of the concept as incompatible with the principles of international criminal law. Conversely, the obstacles that so far have prevented the recognition of corporate criminal liability appear to rest on practical and political grounds. As such, they are not without solution.

The study has begun with an examination of the position adopted by the U.S. Supreme Court in the case of *Jesner v. Arab Bank, PLC*. This served to identify the arguments presented to debate the intersections between corporate criminal liability and international criminal law. The analysis has highlighted the shortcomings in the Court's understanding of the role played by corporations in the debate on the scope of international criminal law. It has been argued that the decision to focus solely on Nuremberg and Rome has limited the Supreme Court's ability to appreciate the complexity of the issue under consideration. Indeed, the black-and-white picture proposed by the plurality in *Jesner* does not reflect the extent to which corporate criminal liability has been addressed under international criminal law and offered only a partial evaluation of the scope of the debate on the feasibility of holding corporations accountable at the international level.

At the same time, even the arguments presented to support corporate criminal liability under international criminal law are far from flawless. Inaccuracies in the interpretation of the history of Nuremberg, the overreliance on domestic developments, and the decontextualised analysis of recent international initiatives in the field of corporate criminal liability affect the overall quality of the petitioners' arguments. This has further contributed to the uncertainty surrounding the debate on corporate criminal liability under international criminal law. The analysis of the *Jesner* case indicates the need for a more in-depth examination of the history of

international criminal law to provide an objective narrative of the way in which the international criminal liability of corporations has been discussed at the international level.

Chapter II has started this investigation by looking at the Nuremberg experience. It has first considered the case against groups and organisations to compare the legal basis for prosecution under Articles 9 and 10 of the London Charter with the rationale underlying the modern concept of corporate criminal liability. While the former had the purpose of facilitating the prosecution of the individual members of each group or organisation, the latter concerns the criminal liability of the entity as separate to that of its agents and employees. Therefore, it has been argued that the use of the Nuremberg trial against groups and organisation as a legal precedent to support corporate criminal liability can be misleading.

Nonetheless, the chapter did not negate the relevance of Nuremberg in the context of the debate on the feasibility of prosecuting legal entities at the international level. Indeed, the analysis has shown that, from a procedural standpoint, the Nuremberg trial demonstrated that entities can fit in the context of an international criminal trial. Although the case against criminal groups and organisations presented several procedural challenges, the International Military Tribunal was still able to deal with them in an effective way. The analysis therefore calls for a re-evaluation of the way in which the Nuremberg trial can be used as an argument in favour of the inclusion of corporations within international criminal law.

The chapter has also evaluated the relevance of the industrialist cases conducted by the United States under Control Council Law No. 10. The analysis of the preparatory phase of these trials has demonstrated that it is at this stage that a first significant attempt was made to indict corporate entities for their involvement in the perpetration of international crimes.[1] Even though the attempt ultimately failed, it still demonstrated the attention paid to the question of corporate criminal liability in the aftermath of the Second World War. Furthermore, the lack of recognition of corporate criminal liability in the industrialist cases did not prevent the judges from considering at length the position of the corporation in the context of the proceedings. In the case of I.G. Farben, specifically, the liability of the entity was a central part of the trial to the point that Farben became the 'invisible defendant in the case'.[2] Overall, the chapter has aspired to offer an objective narrative of the Nuremberg experience, shedding light on its

[1] Memorandum of 27 August 1946, reprinted as an annex in Jonathan A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109(5) Columbia Law Review 1094, 1247-8.
[2] *United States of America vs. Carl Krauch et al.* (Case 6), Transcript of Proceedings, National Archives Microfilm Publication M895, Roll 15, Vol. 42, June 7-9, 1948, 15400 (emphasis added).

precedential value. In doing so, it has endeavoured to provide a more nuanced reading of its impact on the debate on the international criminal liability of corporations.

Chapter III has then investigated the extent to which the question of corporate criminal liability for international crimes was addressed in the late 1940s-early 1950s. This analysis has offered unique insights into the ongoing nature of the debate on the possibility of including corporations within the scope of international criminal law. Indeed, the chapter has shown that proposals on corporate criminal liability emerged both in the context of the drafting of a Code of Offences against Peace and Security of Mankind and during the work of the 1951 and 1953 Committees on International Criminal Jurisdiction. These proposals specifically focused on the criminal liability of private corporations and demonstrated the attention paid to the issue of corporate accountability. As emerged from the analysis conducted in the chapter, the rejection of these proposals was never based on theoretical considerations. Indeed, the international criminal liability of corporations was set aside either because of a failure to distinguish between private corporations and the State or due to the novelty of the concept itself. This demonstrates that the obstacles to the recognition of corporate criminal liability can be overcome.

Continuing with the historical analysis, Chapter IV has scrutinised the negotiation of the Rome Statute of the International Criminal Court as a fundamental moment in the history of international criminal law and corporate criminal liability. In the years preceding the adoption of the Rome Statute, the question of whether corporations should have been included among the subjects of international criminal liability was discussed at length. The preparatory works of the Rome Statute indicates that a detailed model of corporate criminal liability was first proposed by France in 1996.[3] In the following two years, the proposal was frequently amended to win the approval of other delegations. It regressed to a model of criminal organisation *à la* Nuremberg,[4] and subsequently developed into a model based on the identification doctrine.[5] The evolution of the proposal demonstrates the complexity of the task of defining a provision on corporate criminal liability. It also evidences a willingness on the side of several States to test the boundaries of international criminal law and to offer a solution to the issue of corporate impunity.

Even though the proposal was ultimately withdrawn, the attempt made in Rome gives a sense of the importance of the issue under consideration. Additionally, the examination of the

[3] A/AC.249/L.3, p. 64.
[4] A/AC.249/1998/DP.14.
[5] A/CONF.183/C.1/WGGP/L.5/Rev.2 (footnotes in original omitted).

preparatory works of the Statute of the International Criminal Court has once again confirmed the conclusion that the exclusion of corporate criminal liability from the Statute did not rest on theoretical grounds or on an incompatibility between the concept and international criminal law. Conversely, the withdrawal of the proposal was due to practical considerations such as the lack of sufficient time to properly discuss the issue and to solve the challenges posed by the (then) limited recognition of corporate criminal liability at the domestic level. Accordingly, it is submitted that the failure of the French proposal should be interpreted in this context without overestimating its impact for future discussion on the subject matter.

According to the interpretation provided by the U.S. Supreme Court, the adoption of the Rome Statute is to be read as the swan song of corporate criminal liability. Far from being the case, the analysis conducted in Chapter V has illustrated how the debate on international corporate criminal liability has continued to evolve in the years following the adoption and entry into force of the Statute of the International Criminal Court. The examination has aspired to contextualise the developments discussed in the chapter – the decision of the Appeal Panel of the Special Tribunal for Lebanon, the 2014 Malabo Protocol, and the draft Articles on Crimes Against Humanity – to offer insights on the contribution provided by each of them to the debate on international corporate criminal liability. Indeed, while these developments give a sense of the centrality of the issue of corporate accountability, they also highlight relevant limitations. A discussion on their impact on the development of the international criminal liability of corporations must acknowledge such limitations and use them to propose new solutions in the fight against corporate impunity.

Chapter VI has shifted the focus from the international domain to the domestic domain. In particular, it has looked at the way in which domestic developments in the field of corporate criminal liability has been used as an argument in support of the recognition of such concept at the international level. The emphasis put on domestic developments should be interpreted in light of the main argument historically used to dismiss the idea of an international criminal liability of corporate entities, meaning the limited recognition of such form of liability at the national level. Indeed, the relative novelty of the concept under consideration has posed significant challenges to the establishment of an international model of corporate criminal liability. It is therefore significant to observe that several national jurisdictions have now moved away from the principle of *societas delinquere non potest* to recognise corporations as subjects of criminal liability. Understood in this sense, the comparative law argument has merit and demonstrates the evolving nature of the legal framework on corporate criminal liability. At the

same time, its value cannot be overinflated. The analysis conducted in Chapter VI, indeed, has illustrated that a change in States' domestic approach to corporate criminal liability may not be sufficient to demonstrate States' willingness to transpose such concept at the international level. The review of the positions of several States during the negotiation of the Rome Statute has shown an apparent lack of correlation between domestic recognition of corporate criminal liability and State's decision to support the French proposal. Therefore, the practical implications of the comparative law argument must be carefully considered.

Even more speculative is the argument that sees in the domestic recognition of corporate criminal liability evidence that such concept is on the verge of becoming a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. The argument has been notoriously used by the Special Tribunal for Lebanon to justify the decision to extend the Tribunal's contempt jurisdiction to corporate actors. Even recognising the possibility of considering corporate criminal liability as a general principle of law, this interpretation would have no practical relevance in the context of the international criminal justice system. As observed, general principles of law operate as mechanisms to fill existing gaps in 'areas where the law is insufficient, obscure, or imperfect'.[6] While it may be open to debate whether the international criminal law framework could be considered 'imperfect', it is undeniable that, at the present stage, it leaves no gap for the operation of a general principle of law on corporate criminal liability. As the statues of all the main international or internationalised criminal courts and tribunals explicitly refer to individual criminal liability, only an amendment to their texts may allow for the incorporation of the international criminal liability of corporations.

As an amendment to the Statute of the International Criminal Court seems to be the only viable path forward on corporate criminal liability, the final chapter of this study has offered some suggestions for the development of an effective mechanism to hold corporations accountable under international criminal law. The debate on corporate criminal liability under international criminal law can no longer approach the question solely from a theoretical perspective but must offer practical solutions to the challenges posed by the incorporation of corporate defendants within the scope of the international criminal justice system. In light of that, Chapter VII has offered unique insights that would be relevant to the drafters of a future amendment to the Rome Statute in defining a framework for the incorporation of legal persons

[6] Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 Harvard International Law Journal 111, 113.

in international criminal law. The analysis has focused, in particular, on the model of attribution of corporate criminal liability, on the procedural guarantees applicable to corporate defendants and on the issue of corporate sanctioning. All these aspects have been examined taking into account the complex structure of modern corporations and their ability to operate on a large scale.

Overall, this study aimed to contribute to a more open debate on the potential role that international criminal law can play in the fight against corporate impunity. In today's globalised world, multinational corporations pose significant regulatory challenges that have so far prevented the creation of a system of accountability. As the number of allegations of corporate involvement in gross violation of human rights continues to grow, the international community is slowly starting to explore different paths to reduce the negative impact of corporate operations.

Outside the scope of international criminal law, initiatives to hold corporations accountable for their adverse impact on human rights are gaining traction. The most recent example is the ongoing attempt to draft a binding international treaty on business and human rights.[7] Under negotiation since 2014, the project has yet to reach a sufficient level of maturity to allow for a proper assessment of its relevance and impact on the development of a framework of corporate accountability. With specific regard to its ability to influence the development of international corporate criminal liability, at the current stage it seems unlikely that the proposed treaty will add significantly to the debate on corporations under international criminal law. The scope of the treaty is still too vague, and the proposed model of legal accountability is still too undefined.[8]

Nonetheless, the inclusion of a specific provision that compels States Parties to provide for 'the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offenses under international human rights law … or customary international law' bodes well.[9] If such a provision will emerge unscathed from the negotiation,

[7] A/HRC/RES/26/9. On the treaty see, e.g., Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017), Nadia Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 Human Rights Review 45, Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41.

[8] David Birchall, 'Between Apology and Utopia: The Indeterminacies of the Zero Draft Treaty on Business and Human Rights' (2019) 42 Suffolk Transnat'l L Rev 289, 290.

[9] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), Third Revised Draft Legally Binding Instrument to Regulate, in

it may encourage States to re-evaluate their position on the applicability of criminal liability to corporations for serious human rights abuses and international crimes.

As the framework on corporate accountability is slowly evolving, the time has come to re-assess the role that international criminal law can play in providing a forum to hold corporations criminally liable for international crimes. The study has demonstrated that the international criminal justice system can be amended to incorporate corporate criminal liability in its legal framework. Corporations can – and should – be subjects of international criminal law.

As observed by William Schabas, even though 'commercial corporations present a special challenge to international regulation, … the technical issues involved in efforts to control their operations are all capable of solution'.[10] This study has confirmed this conclusion and offered practical suggestions on how to overcome the challenges arising from the creation of a feasible model of international corporate criminal liability.

International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 17 August 2021, Draft Article 8.

[10] William A. Schabas, 'War Economies, Economic Actors, and International Criminal Law' in Karen Ballentine and Heiko Nitzschke (eds.), *Profiting from Peace. Managing the Resource Dimensions of Civil War* (Lynne Reinner Publishers 2005) 438.

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