Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg

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This Article addresses the question whether, at this point, there exists sufficient basis to conclude that holding corporations liable for international crimes before a permanent international tribunal is not only legally sound, but also the most suitable response to an impunity gap that has not yet been fully addressed by civil liability mechanisms and domestic jurisdictions. Part II highlights the normative and operational problems that prevent civil remedies from being a sufficiently adequate response to corporate involvement in the perpetration of international crimes. Part III analyzes the current trend towards the recognition of corporate criminal liability in different jurisdictions and how this could arguably be regarded as an early stage in the consolidation of a customary norm. Part IV makes the case for the recognition of corporate criminal liability at the international level in light of the developments that have taken place in the field since the Nuremberg Trials.

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I. INTRODUCTION

On October 2, 2014, the Appeals Panel of the Special Tribunal for Lebanon (Panel) issued a landmark decision on an interlocutory appeal concerning personal jurisdiction in the case *New TV S.A.L. v. Al*

Khayat.[1] After examining "evolving international standards on human rights and corporate accountability as well as trends in national laws,"[2] the Panel found that the Tribunal had personal jurisdiction over legal entities in contempt proceedings.[3] The ruling aroused significant controversy because the majority relied on an interpretation[4] of the Rules of Procedure and Evidence arguably in tension with the foundational principles of *nullum crimen sine lege* and *in dubio pro reo*.[5] What is most noteworthy, however, is that the dissenting Judge formulated his objections merely based on his understanding of the correct application of such principles, and he expressly stated that he did not purport to "stifle a clear trend towards the recognition of corporate criminal liability" likely to crystallize in subsequent State action and/or judicial opinions.[6]

Professor James G. Stewart recently described the recognition of corporate criminal liability for international crimes in national systems as "the next obvious 'discovery' in corporate responsibility."[7] Many objections have been raised nonetheless, ranging from the need to safeguard civil liability as the appropriate framework to address corporate misconduct, to the alleged unsoundness of imposing criminal penalties on legal entities.

This Article purports to react to those challenges. Part I highlights the normative and operational problems that prevent civil remedies from being a sufficiently adequate response to corporate involvement in the commission of international crimes. Part II analyzes the current trend towards the recognition of corporate criminal liability in different domestic jurisdictions and how this could arguably be regarded as an early stage in the consolidation of a customary norm. Part III makes the case for the recognition of corporate criminal liability at the international level in the light of the developments that have taken place in the field since Nuremberg. The ultimate question is whether, at this point, it can

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1. *NEW TV S.A.L. & Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Spec. Trib. for Leb. Oct. 2, 2014).

2. *Id.* at 3.

3. *Id.*

4. The Appeals Panel found that the Contempt Judge had erred in determining that the term "person" in Rule 60 *bis* excluded legal entities and concluded that, "in light of the Tribunal's inherent power to protect the integrity of its proceedings, the need to uphold the rule of law, execute and maintain the administration of justice; and domestic developments and evolving international law standards," it was "in the interests of justice" to interpret the Tribunal's personal jurisdiction under Rule 60 *bis* as encompassing legal persons. *Id.* at 2-3.

5. *Id.* at 2.

6. *Id.*

7. James Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121 (2014).

be said that there exists sufficient basis to conclude that holding corporations liable for international crimes before a permanent international tribunal is not only legally sound, but also the most suitable response to an impunity gap that has not yet been fully addressed by civil liability mechanisms and domestic jurisdictions.

II. INADEQUACY OF CIVIL LIABILITY FOR CORE CRIMES

Civil liability undoubtedly contributes to decreasing the impunity gap that business actors can potentially benefit from. Nevertheless, important questions arise as to whether non-punitive responses are the most adequate means of dealing with core criminality at the international level.

A. The Case for Tort Law Against Corporate Misbehavior

Vikramaditya Khanna argues that corporate civil liability is nearly always going to be preferable to corporate criminal liability as a means of holding corporations accountable and furthering the goal of deterring corporate misconduct.[8] He claims that tort mechanisms—i.e., the imposition of cash fines possibly supplemented by loss of license and equity fines—are better suited to address corporate misbehavior because they provide sanctions at a lower social and administrative cost, avoid procedural safeguards which are not desirable in the corporate context, and convey a more precise message in a way that preserves social condemnation for other types of offences.[9]

Reservations against the imposition of criminal sanctions on corporate entities have been raised at different levels and concern both the concept and its eventual implementation.

1. Objections in Principle to Corporate Criminal Liability

The two main theoretical objections to corporate criminal responsibility are the alleged inability of corporations to act independently and their absence of will, and therefore, of any blameworthiness. As a matter of principle, theorists have expressed concern that the expansion of criminal law is erasing the critical distinction between tort law and criminal law, undermining criminal law's moral authority and thus decreasing respect for and compliance with the

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8. Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1474, 1477 (1996).

9. *Id.* at 1497-98, 1512, 1531.

law.[10] Law and economics scholars have opposed the use of the criminal justice system as a means of responding to corporate misconduct.[11] The supposed lack of clarity as to the purpose corporate criminal liability is designed to achieve,[12] along with the high cost of stigma penalties associated with criminal law,[13] have led some to embrace the idea that it is preferable to exhaust "the socially cheapest sanctions" before resorting to strictly punitive measures.[14] A recurrent concern is that holding companies criminally accountable unjustly punishes the shareholders because their ability to influence corporate conduct is tempered by the difficulty of monitoring the activities of the corporation's managers and employees.[15] In the United States in particular, the application of vicarious liability principles has produced negative reactions in instances where the agent has acted contrary to an express corporate policy, i.e., the company had taken all reasonable steps to detect and discourage criminal conduct.[16]

2. Objections Regarding the Implementation of Corporate Criminal Liability

Other arguments do not question the essence of corporate criminal liability, but rather point at hazards and practical difficulties that (might) ensue from establishing this form of accountability. With regard to its implementation, objections have been formulated about the alleged impossibility of punishing legal entities,[17] the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law,[18] and the challenge of locating and proving the *mens rea* of agents with respect to specific intent crimes, even when overwhelming circumstantial evidence of guilt within the organization exists.[19] In

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10. *See* Sara Sun Beale, *Solutions: Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1511 (2007).

11. *See* Sara Beale & Adam Safwat, *What Developments in Western Europe Tell Us American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 99 (2005).

12. Khanna, *supra* note 8, at 1478.

13. *Id.* at 1533.

14. *Id.* at 1497.

15. *Id.* at 1495.

16. Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1326 (2007).

17. *See* Larissa Van den Herik, *Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 363 (Carsten Stahn & Larissa Van Der Herik eds., 2010).

18. Khanna, *supra* note 8, at 1533.

19. S. Neumann, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 184 COLUM. L. REV. 459, 459 (2004).

addition, scholars have warned about the creation of a risk of making corporations vulnerable to overinclusive criminal penalties[20] and the fact that corporations are unlikely to suffer reputational loss for engaging in activities that harm third parties.[21]

B. Tort Claims Vis-à-Vis International Core Crimes with Corporate Involvement

In spite of their advantages, tort claims face significant problems when it comes to establishing attribution and generating deterrence in instances where the crimes are being committed abroad and the company in question is acting through a subsidiary or a supplier.[22] Wolfgang Kaleck and Miriam Saage-Maaß outline a "market discrepancy" between the number of cases in which corporations have been held accountable for their involvement in international crimes and the considerably higher number of cases reported by civil society organizations and state or U.N. agencies.[23]

Since *Filártiga v. Peña-Irala*,[24] the Alien Tort Statute[25] has increasingly been invoked in the United States to hold multinational corporations accountable for their "violations of the law of nations" abroad.[26] Nevertheless, only two cases can arguably be considered victories over corporate defendants,[27] namely *Bowoto Chevron v. Texaco Corp*[28] and *Doe v. Unocal*.[29] The following cases—brought under the Alien Tort Statute—provide an illustration of some of the main limitations affecting tort liability mechanisms in instances where alleged international crimes grant standing and the defendants are multinational corporations.

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20. *See id.* at 466.
21. Khanna, *supra* note 8, at 1500.
22. Wolfgang Kaleck & Miriam Saage-Maass, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 OXFORD J. INT'L CRIM. JUST. 717 (2010).
23. *Id.* at 701.
24. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
25. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2012) ("Alien's action for tort. The district courts shall have original jurisdiction of 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.").
26. *Id.*
27. Xiuli Han, *The* Wiwa *Cases*, 9 CHINESE J. INT'L L. 433, 434 (2010).
28. Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004).
29. Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002).

1. The *'Wiwa'* Cases (1996, 2001, 2004)[30]

Three different lawsuits were brought against the Royal Dutch Petroleum Company, the head of its Nigerian operation, and its Nigerian subsidiary in relation to the so-called *Ogoni Nine massacre*, in which crimes against humanity were allegedly committed against a group of demonstrators who opposed the oil company's activities in the region.[31] According to the plaintiffs, the company and its subsidiary provided financial and logistical support to the Nigerian police to carry out a systematic attack against the demonstrators and bribed witnesses to produce false testimonies regarding the incident.[32] On June 8, 2009, on the eve of the trial, the claims were settled for $15.5 million, and the company avoided further investigations and exposure. The $15.5 million represents exactly the 0.003% of Shell's total revenue from continuing operations only in the previous year.[33] The outcome should not be so much measured against the monetary value of the amount for the plaintiffs, but rather in terms of the total lack of deterrent effect that settlements in tort cases may have on multinational corporations suspected of involvement in such crimes. A 0.003% of one year's revenue in reparations seems like a fairly low value in a hypothetical cost-benefit analysis for serious charges of crimes against humanity and obstruction of justice, especially when the company emphasizes that the payment of the $15.5 million is not an admission of guilt, but 'a humanitarian gesture.'[34]

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30. Complaint, Wiwa v. Shell Petrol. Dev. Co. of Nigeria, Ltd. (*Wiwa III*), No. 04 Civ. 2665 (S.D.N.Y. Apr. 5, 2004); Second Amended Complaint, Wiwa v. Anderson (*Wiwa II*), No. 01 Civ. 1909 (KMW) (S.D.N.Y. Sept. 12, 2003); Complaint, Wiwa v. Royal Dutch Petrol. Co. (*Wiwa I*), No. 96 Civ. 8386 (KMW) (S.D.N.Y. Nov. 8, 1996).

31. The defendants were allegedly complicit in summary executions, acts of torture, inhuman treatment, assault and battery committed against the Ogoni people in Nigeria. *See Wiwa et al v. Royal Dutch Petroleum et al*, CTR. CONSTITUTIONAL RIGHTS (Feb. 21, 2012), http://ccrjustice.org/Wiwa. See the Plaintiffs' Brief in *Wiwa I*, for a detailed argumentation on why the abuses at issue constitute crimes against humanity. Brief for Plaintiff at 37-44, *Wiwa I*, No. 96 Civ. 8386 (KMW) (S.D.N.Y. Nov. 21, 2008).

32. Kaleck & Saage-Maass, *supra* note 22, at 704-05.

33. Royal Dutch Shell plc., Annual Report (Form 20-F) 10 (Mar. 13, 2013). Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Royal Dutch Shell filed its annual report with the SEC. According to the Consolidated Statement of Income and of Comprehensive Income Data, the company's total revenue for 2008 was $458,361 million. *Id.*

34. W. HUISMAN, BUSINESS AS USUAL?: CORPORATE INVOLVEMENT IN INTERNATIONAL CRIMES 7 (2010).

2. *Saleh v. Titan* (2009)[35]

A class action lawsuit was brought against two contractors of the U.S. government—CACI International, Inc., and Titan Corporation—that had been hired to provide interrogation and translation services at the Abu Ghraib prison and other detention facilities during the 2003-2011 war in Iraq.[36] All the claims made under the Alien Tort Statute were dismissed by the Court of Appeals for the District of Columbia on the grounds that they were preempted by the Supreme Court's decision in *Boyle v. United Technologies Corp.*[37] and the Court's other preemption precedents in the national security and foreign policy field.[38] In addition, the Court of Appeals did not consider the holding in *Kadić v. Karadzíc* applicable despite the breadth of its formulation.[39] Interestingly, Judge Garland's dissenting opinion noted that *Boyle* had never been applied "to protect a contractor from liability resulting from the contractor's violation of federal law and policy."[40] At any rate, the case establishes a substantial hindrance to the subjection of private contractors to civil liability when they are regarded as part of the military's chain of command.

3. *Kiobel v. Royal Dutch Petroleum Co.* (2013)[41]

A suit was filed in federal court alleging that the respondents—Dutch, British and Nigerian corporations—had aided and abetted the Nigerian Government in committing violations of the "law of nations" in Nigeria by providing logistical support and compensation to the military,

35. Saleh v. Titan, 580 F.3d 1 (D.C. Cir. 2009).

36. Following the 2003 invasion of Iraq, the United States took over Abu Ghraib prison and used it as a detention facility. According to official Department of Defense (DOD) reports, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib between October and December 2003. ANTONIO TAGUBA, ART. 15-6: INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOA000248.pdf. Those reports noted the participation of contractor personnel in the abuses and specifically identified Titan and Caci employees as being among the perpetrators. *Id.* at 48; GEORGE R. FAY AND ANTHONY R. JONES, ART. 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 72-73, 79, 81-82, 84, 86, 87, 89, 130-34 (2004), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/fay_jones_kern_report.pdf.

37. In *Boyle v. United Technologies Corp.*, the Supreme Court reserved the question whether sovereign immunity could be extended to non-governmental employees even in a case where the contractor provided a discrete product to the military. 487 U.S. 500, 505 (1988).

38. *Id.* at 504.

39. Kadic v. Karadžić, 70 F. 3d 232, 239 (2d Cir. 1995). In *Kadic*, the Second Circuit held that for certain categories of action, including genocide, the scope of the "law of nations" was not confined solely to state action but reached conduct "whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.*

40. *Saleh*, 580 F.3d at 2 (Garland, J. dissenting).

41. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

and even allowing it to use their property as a staging ground for attacks.[42] In a landmark case, the Supreme Court found that a presumption against extraterritoriality applied to claims under the Alien Tort Statute, although it was initially supposed to address the question of corporate responsibility for international crimes based on the laws of nations.[43] The U.S. Court of Appeals for the Eleventh Circuit recently cited the *Kiobel* ruling when it dismissed, for lack of jurisdiction, the case against Chiquita Brands International, Inc.,[44] in which the appellants accused the U.S.-based corporation of "engaging in conceit of action" with Colombian paramilitary forces to commit acts of force.[45] What these decisions seem to be indicating is that, at least in the United States, tort mechanisms fall short not only de facto but now also de jure when it comes to ensuring accountability for crimes in cases with extraterritorial elements.

Several actions have also been brought under the Alien Tort Statute by groups attempting to receive compensation in relation to the forced labor they were bound to perform on behalf of the German and Japanese industries during World War II.[46] All of these cases have been dismissed. And as of today, no action has been brought against arms suppliers for their complicity in the perpetration of international crimes.[47]

Khanna contended in 1997 that civil liability was preferable to criminal liability and that the latter would only be socially desirable "in the rarest circumstances," i.e., "when detection and prosecution are difficult, when sanctions on corporations need to be extremely high to maintain deterrence . . . and when these extremely high sanctions chill desirable behavior."[48] He acknowledged that corporate criminal liability differed from civil mechanisms in that it had stronger procedural safeguards, more powerful enforcement devices, and a greater value in terms of general deterrence.[49] Indeed, it seems that international criminality falls within those "rare circumstances" and that this is precisely what the current gap of impunity is demanding: procedural

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42. *Id.* at 1662-63.
43. Stewart, *supra* note 7, at 168.
44. Cardona v. Chiquita Brands Int'l, 760 F.3d 1185, 1189 (11th Cir. 2014).
45. *Id.* at 2.
46. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431-32 (D.N.J. 1999); *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001); Princz v. Basf Grp., No. 92-0644, 1995 U.S. LEXIS 22104, at 1-2 (D.C. Cir. Sept. 18, 1995).
47. Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for Trading with the Enemy of Mankind*, 5 INT'L CRIM. L. REV. 623, 636 (2005).
48. Khanna, *supra* note 8, at 1532-33.
49. *Id.* at 1492.

safeguards that preserve the perceived legitimacy of the yet-fragile system of international criminal justice, enforcement devices that effectively decrease the "*market discrepancy*" and a strong potential to deter future conduct.

III. *SOCIETAS DELINQUERE POTEST*: TOWARDS A CUSTOMARY NORM

The current trend towards the recognition of corporate criminal liability among domestic jurisdictions, coupled with initiatives undertaken at the international level, is gradually undermining the long-held assumption that holding corporations criminally liable is unsound as a matter of law and thereby paving the way for the consolidation of a customary rule eventually recognizing corporate criminal liability. Enforcement has typically taken the form of monetary sanctions, although other avenues have been explored including reputational damage to asset confiscation, license suspension, and even dissolution.

A. Evidence of a General Practice Accepted as Law

The recognition of corporate criminal liability has cut across borders and legal systems. Markus Dubber's comparative study reveals common lines of conceptualization, rather than stark differences, between common law and civil law systems in their acceptance of corporate criminal liability.[50] Two main theories have indistinctively provided a basis for it: (1) the *identification theory*—also known as anthropomorphic or alter ego theory—under which a fiction is created whereby a sufficiently high-ranking officer is deemed to act as an embodiment of the corporation,[51] and (2) the *respondeat superior theory*—also known as vicarious liability theory—under which corporations are liable for acts committed by their members while acting within the scope of their employment and/or on behalf of the corporation.[52] Anca Pop identifies three main approaches to criminali-

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50. Markus D. Dubber, *The Comparative History and Theory of Corporate Criminal Liability*, 16 NEW CRIM. L. REV. 203, 204 (2013).

51. *See* Celia Wells, *Corporate Criminal Responsibility*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 147, 152 (Stephen Tully ed., 2005).

52. Anca Iulia Pop, Criminal Liability of Corporations—Comparative Jurisprudence 31-38 (2006) (unpublished manuscript), http://digitalcommonslaw.msu.edu/king/81. Holistic formulations include the *aggregation theory*—where the aggregation of knowledge possessed by different individual employees suffices for mens rea purposes, e.g., U.S. federal courts; the *systems theory*—where evidence of tacit authorization or toleration of noncompliance or failure to create a culture of compliance is admissible, e.g., Australian Criminal Code Act of 1995; and the *reactive fault theory*—where fault is inferred when a corporation fails to take reasonable

zation among states that thus far have incorporated corporate criminal responsibility into their statutes: (1) the general or plenary liability system—followed inter alia by England, the Netherlands, Belgium, Canada, and Australia—where legal entities may be held accountable for virtually any crime that individuals can commit; (2) the *French system*, in which corporate liability is contingent upon the legislator previously contemplating it for each specific criminal offense; and (3) the *American system*, in which corporations may be held criminally liable for the offences enumerated in the U.S. Sentencing Guidelines.[53] Recognition across the globe reveals an emerging common pattern of generalized practice.

1. Americas

In the United States, corporations can be held criminally liable if an employee has committed a criminal act within the scope of his or her employment and intended, at least in some measure, to benefit the company[54]—although the Supreme Court has yet to address the proper scope of vicarious liability in criminal corporate cases.[55] Under Canada's Criminal Code, corporations can be held accountable as long as evidence shows that their "directing mind"[56] committed the act and had the necessary mens rea. In December 2014,[57] the Mexican Senate passed an amendment to the National Code of Criminal Procedure that will take effect in June 2016 and will enable prosecutions of legal entities "for the actions of an individual who is part of or represents such entity, so long as that individual committed a crime under the legal entity's name or for the benefit of the legal entity."[58] The Central American Security

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remedial measures in response to a harmful act or omission committed by any of its employees. *See* Wells, *supra* note 51, at 152-54.

53. Pop, *supra* note 52, at 23-24.

54. Weissmann, *supra* note 16, at 1330.

55. *Id.* at 1324.

56. According to recent Canadian case law, to be a "directing mind" means that the person's degree of authority allows him or her to be considered the "alter ego" or the "soul" of the corporation, i.e., that he or she has the capacity to set policy and intended—at least in part—to benefit the corporation by the crime. *See* Criminal Code, R.S.C. 1985, c. C-46 (Can.); DEP'T JUSTICE CAN., CRIMINAL LIABILITY OF ORGANIZATIONS: A PLAIN LANGUAGE GUIDE TO BILL C-45, http://www.justice.gc.ca/eng/rp-pr/other-autre/c45/c45.pdf (last visited Nov. 5, 2015).

57. Ivan Arvizo et al., *Senado aprueba responsabilidad penal de personas jurídicas*, EL UNIVERSAL (Dec. 9, 2014), http://www.eluniversal.com.mx/nacion-mexico/2014/ senado-aprueba-responsabilidad-penal-de-personas-juridicas-1060734.html.

58. Kathryn Helling et al., *Changing Landscape of Competition Law Enforcement in Mexico*, 107 Antitrust & Trade Reg. Rep. (BNA) 157 (2014).

Strategy,[59] adopted by the Heads of State and Government of the Central American Integration System, led to the division of a harmonization project and a common legislative framework that provided for the recognition of corporate criminal liability.[60] In the South American context, Brazil has been at the forefront of the trend towards recognition[61] that now prevails in roughly one-third of the states of the region.[62] Argentina, despite not being among these countries, has recently prosecuted businesspeople for their alleged role in aiding and abetting crimes against humanity during military dictatorships.[63]

2. Europe

In 1988, the Council of Europe issued a Recommendation calling on Member States to embrace corporate criminal responsibility in their domestic legislations.[64] Although it did not come into force until 2009, the Second Protocol of the Convention on the protection of the European Communities' financial interests has had a great influence on European legislators since 1997.[65] From 1998 onwards, eight international instruments by the Council of Europe have included provisions on corporate liability that are similar to those of the Second Protocol.[66] Today, a majority of European states recognizes corporate criminal liability,[67]

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59. *Central American Security Strategy*, CENTRAL AM. INTEGRATION SYS. [SICA] (Apr. 8, 2011), http://www.sica.int/consulta/documento.aspx?idn=60861&idm=2.

60. Edgar Solorzano, *Poder Judicial propone reformas al CP y al Procesal Penal*, TRINCHERA DE LA NOTICIA (Feb. 6, 2015), http://www.trincheraonline.com/2015/02/06/poder-judicial-propone-reformas-al-cp-y-al-procesal-penal/.

61. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 173(5) (Braz.) ("The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' monies.").

62. Corporate criminal responsibility has also been provided for in the legislation of Chile, Bolivia, and Columbia. Law No. 20393 art. 3, Noviembre 25, 2001, http://bcn.cl/p70 (Chile); Law No. 004 arts. 1, 28, Marzo 31, 2010, http://www.contraloria.gob.bo/portal/Uploads/PDFportal/20121217_320.pdf (Bol.); L. 491/99, enero 13, 1999, DIARIO OFICIAL [D.O.] (Colom).

63. *Complicidad civil: discuten estrategias para avanzar en las investigaciones que involucran a empresarios*, FISCALES (Mar. 20, 2014), https://www.fiscales.gob.ar/lesa-humanidad/complicidad-civil-discuten-estrategias-para-avanzar-en-las-investigaciones-que-involucran-a-empresarios/.

64. Eur. Consult Ass., *Recommendation n. R(88)18 of the Comm. of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities*, 420th Sess., Rec. No. R(88) 18 (1988).

65. Marc Engelhart, *Corporate Criminal Liability from a Comparative Perspective*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 53, 54 (Dominik Brodowski et al. eds., 2014).

66. *Id.* at 55.

67. Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and the U.K. *See*

although solutions range from a complete equating of legal and physical persons to the adoption of the so-called "principle of specialty," adopted by the French legislator in 1994.[68] Until recently, most domestic prosecutions for international crimes had been brought against individuals and involved corporations only tangentially throughout Europe. In 2005, the Dutch authorities notoriously brought charges against two businessmen for aiding and abetting war crimes through the apparatus provided by their companies.[69] However, in November 2013, Swiss authorities announced the opening of a criminal investigation on one of the world's largest gold refineries—Argor-Heraeus S.A.—on the basis that the company itself had committed the war crime of pillage in the Democratic Republic of the Congo (DRC).[70]

3. Africa

Agreement among African states about corporate criminal responsibility crystallized in the *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*.[71] The Assembly of the Member States of the African Union decided to extend the Court's jurisdiction to encompass the legal person, with the exception of States.[72] Under article 46C, a corporation may be held criminally liable when its acts are part of a policy that can be reasonably attributed to the legal entity.[73] The provision further specifies that corporate criminal responsibility "shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[74]

Country Reports: Countries with Criminal Liability, *in* EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY 207 (James Gobert & Ana-Maria Pascal eds., 2011).

68. The French Criminal Code adopts a narrow approach by exempting many categories of legal entities from criminal liability. *See* CODE PÉNAL [C. Pén.] [Penal Code] art. 121(2) (Fr.); *Country Reports: Countries with Criminal Liability*, *supra* note 67.

69. Businessman Frans van Anraat was convicted of aiding and abetting war crimes for supplying the Iraqi government with chemicals needed for the production of mustard gas, which was used in massacres against Kurdish minorities in Iraq. Timber trader Guus Kouwenhoven was indicted with aiding and abetting war crimes committed by Liberian militias which, according to the Prosecution, had been "hired by the former timber companies" belonging to Kouwenhoven. *See* Kaleck & Saage-Maass, *supra* note 22, at 705, 708.

70. *See* Stewart, *supra* note 7.

71. African Union [AU], *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev.7 (May 15, 2012), https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf.

72. *Id.* art. 46C(1) ("For the purposes of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.").

73. *Id.* art. 46C(2).

74. *Id.* art. 46C(6).

4. Asia

With the economic reforms of the late 1980s and early 1990s and the subsequent shifting of private capital into the market, China amended its Criminal Code to extend jurisdiction over legal entities.[75] Corporations in South Korea may be subject to criminal sanctions—independent of the individual offender when it is provided for in an enumerated statute.[76] Other countries in Asia, despite not giving statutory recognition to corporate criminal liability, have taken substantial steps in this direction. In Japan, the *Ryobatsu-Kitei* doctrine allows for the punishment of the natural person and the imposition of a fine on the associated legal person in a manner that has led commentators to suggest that corporate criminal responsibility in Japan amounts to a form of strict liability.[77] A proposed amendment to the Russian Criminal Code introduces measures that can be applied in cases of involvement of a corporation whenever the offense is committed "for the benefit of a legal person" by an individual with *de jure* or *de facto* control over it, and whenever the entity "is being used in order to commit or conceal the crime or the consequences of the crime" by such individual.[78] In *Standard Chartered Bank & Ors v. Directorate of Enforcement*, the Indian Supreme Court overruled prior decisions and held that corporations could be held accountable for criminal offenses through imposing fines.[79]

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75. Yingjun Zhang, *Corporate Criminal Responsibility in China: Legislations and Its Deficiency*, 3 BEIJING L. REV. 103 (2012); *see also* Criminal Law of the People's Republic of China (promulgated by the Standing Nat'l People's Cong. Mar. 14, 1997, effective Oct. 1, 1997) art. 30 (China).

76. Either the Foreign Bribery Prevention in International Business Transactions Act (FBPA), the Unfair Competition Prevention and Trade Secret Protection Act (UCPA), the Financial Investment Services and Capital Markets Act (FSCMA), the Financial Transactions Reporting Act (FTRA), the Proceeds of Crime Act (POCA), the Terrorism Financing Act (FTA), or the Drug Trafficking Act (DTA). *See* Michael Yu et al., *Corporate Crime, Fraud and Investigations in South Korea: Overview*, PRAC. L. (Sept. 1, 2013), http://us.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247981514230&ssbinary=true.

77. ALLENS ARTHUR ROBINSON, 'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS 43-44 (2008), http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf (report prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business).

78. Andrey Kudryavtsev, On the Prospects of Introducing the Institution of Criminal Liability of Legal Persons in Russia: From Theory to Practical Implementation 3 (2012) (unpublished manuscript) (on file with Masaryk University Faculty of Law), https://www.law.muni.cz/sborniky/dny_prava_2012/files/trestnepravnialternativy/KudryavtsevAndrey.pdf.

79. *Standard Chartered Bank v. Directorate of Enforcement*, AIR 2005 SC 2622. (India); Lorandos Joshi, *Corporate Criminal Liability in India*, LORANDOS JOSHI TRIAL LAWYERS,

5. Australia and Oceania

Corporations are liable in Australia for offences 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" where the corporation "expressly, tacitly or impliedly authorised or permitted the commission of the offence"[80]—language that has been imported by the Fijian legislator.[81] New Zealand recognizes corporate criminal responsibility, and only differs from other Commonwealth jurisdictions in that companies have been held incapable of committing homicide.[82]

Initiatives underway at the international level can be regarded as reflective of what Mark Pieth has described as a worldwide trend towards a "due diligence" model of corporate liability, where corporations are not only held liable for the misdeeds of their most senior officers, but also for the offenses committed by more junior employees or agents.[83] In its 1997 Convention on Bribery,[84] the Organization for Economic Cooperation and Development (OECD) acknowledged the fact that "corporate responsibility is crucially important in the context of combatting transnational commercial bribery" and endorsed a model of corporate criminal liability offering a "due diligence defense"—and thereby excluding strict liability.[85] In 2008, the International Commission of Jurists developed a set of helpful criteria to distinguish corporate complicity in international crimes from neutral business activity.[86] The focus of the Panel's analysis was the accountability of business actors—companies and officials—for their participation in human rights abuses that amount to crimes under international law.[87] At its 26th session in June 2014, the U.N. Human Rights Council (Council) adopted a

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http://www.lorandoslaw.com/Publications/Corporate-Criminal-Liability-India.shtml (last visited Nov. 6, 2015).

80. Criminal Code Act 1995 (Cth) divs. 12.2, 12.3(1) (Austl.).

81. Crimes Decree 2009, c. 1, §§ 51-53 (Fiji).

82. Meaghan Wilkinson, *Corporate Criminal Liability: The Move Towards Recognising Genuine Corporate Fault*, 9 CANTERBURY L. REV. 142, 148 (2003).

83. Mark Pieth, *Final Remarks*: *Criminal Liability and Compliance Programs*, *in* CORPORATE CRIMINAL LIABILITY 393 (Mark Pieth & Radha Ivory eds., 2011).

84. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43,37 I.L.M. 1.

85. Mark Pieth, *Art. 2—The Responsibility of Legal Persons*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 173, 175 (Mark Pieth et al. eds., 2006).

86. 1 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES (2008), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf.

87. *Id.* at 2.

resolution "to establish an open-ended intergovernmental working group with the mandate to elaborate an internationally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights."[88] At the same session, the Council unanimously approved a parallel project for which it requested the United Nations High Commissioner for Human Rights "to continue the work on domestic law remedies to address corporate involvement in gross human rights abuses, and to organize consultations with experts, States, and other relevant stakeholders."[89]

B. Enforcement of Criminal Penalties Against Legal Entities

Criminal sanctions against companies are fairly homogeneous in the different countries that recognize corporate criminal responsibility.[90] Devrim Aydin classifies them according to the target of each punishment.[91]

1. Sanctions Targeting the Assets of the Corporation

Fines are the most effective penalty against companies—so long as they do not manage to use them for tax reduction purposes—[92] and are also the most commonly applied in systems that embrace corporate criminal liability.[93] As pecuniary sanctions, fines have the advantages of directly impacting the company, encouraging compliance, and carrying minimum costs.[94] Confiscation of assets as a punishment and not as a security measure may entail the passing of ownership of a property and profit gained in the crime to the public or the taking over of hazardous property kept without permission or obtained by the crime.[95] Other measures aimed at curbing the company's room for manoeuvre include

88. Human Rights Council Draft Res. 26/..., U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

89. Human Rights Council Draft Res. 26/..., U.N. Doc. A/HRC/26/L.1, ¶ 7 (June 23, 2014).

90. Engelhart, *supra* note 65, at 60.

91. Devrim Aydin, *Are There Any Suitable Sanctions for New Forms of Corporate Offences?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY, *supra* note 65, at 315-318.

92. Kendel Drew & Kyle Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 293 (2005).

93. Aydin, *supra* note 91, at 315.

94. *Id.*

95. *Id.* at 316.

the depletion of the corporate treasury, the withholding of dividends, and the loss of investments.[96]

2. Sanctions Targeting the Activities of the Corporation

The temporary or permanent suspension or retraction of licenses prevent companies from carrying out certain kinds of activities by measures such as prohibitions to operate in a particular area, bans on commercial operations, and the ceasing of broadcasts that incite violence.[97] Suspensions of corporate activities are generally suitable to end crime-related operations when the corporation in question operates in more than one field.[98] By virtue of the exclusion from public contracts, benefits, or aid, companies are forbidden from offering goods and services to the public for a certain period of time.[99] In the case of profit-oriented commercial corporations, only mandatory judicial supervision may be imposed.[100]

3. Sanctions Targeting the Existence of the Corporation

Dissolution is the most extreme form of punishment in the context of corporate liability and therefore only appropriate when the company has engaged in very serious crimes or when it is established that the legal entity was created for the purpose of committing the crimes.[101]

4. Sanctions Targeting the Reputation of the Corporation

Complementary to any of the sanctions outlined above, the publication of the sentence passed against the company itself may equally play a role in deterring future corporate criminal activities.[102] As noted by Judith Van Erp, however, the precondition for reputational damage is that clients, shareholders, financers, and other stakeholders take offence at the negative publicity about the corporation and consequently alter their behavior, e.g., by selling their shares or discounting their investments.[103]

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96. Stephen Kabel, Comment, *Our Business Is People (Even If It Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo*, 12 TUL. J. INT'L & COMP. L. 461, 483 (2004).

97. Aydin, *supra* note 91, at 316-17.

98. *Id.* at 317.

99. *Id.*

100. *Id.*

101. James Gobert, *Controlling Corporate Criminality: Penal Sanctions and Beyond*, WEB J. CURR. LEGAL ISSUES (1998), http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html.

102. *Id.* at 9.

103. HUISMAN, *supra* note 34, at 54.

IV. A CASE FOR RECOGNITION AT THE INTERNATIONAL LEVEL

Domestic attempts to hold corporations criminally liable have often encountered major obstacles when law enforcement agencies have had to investigate situations with an extraterritorial element.[104] The risk of corporate involvement in international crimes is particularly high in certain transnational sectors, i.e., the extractive industries, the private military industry, arms suppliers, the chemical sector, and the financial sector.[105] It is too often the case that crimes in these sectors are committed by subsidiary companies in third-world countries that are either unable or unwilling to prosecute.[106] Inability usually stems from dysfunctional legal systems, undercriminalization, and lack of material means, especially in conflict zones.[107] Unwillingness, on the other hand, has more to do with the choice many countries are confronted with between protecting the human rights of their citizens and increased economic activity through foreign investment.[108] The recognition of corporate criminal liability in international criminal law should be the next logical step considering the historic reluctance of states to prosecute these types of crimes[109] and the developments that have taken place in the field since the Nuremberg Trials.

A. The Trial of the Major War Criminals Before the I.M.T. (1945)

At the end of World War II, the Allied Powers were faced with the prospect of bringing to justice potentially thousands of Nazi war criminals. In an attempt to address this unprecedented challenge, American negotiators at the Nuremberg conference introduced the concept of unlawful criminal organization to capture the sense of collective responsibility in which not only top leaders had engaged.[110]

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104. Kaleck & Saage-Maass, *supra* note 22, at 716.

105. HUISMAN, *supra* note 34, at 13-20.

106. Lynn Verrydt, *Corporate Involvement in International Crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons*, *in* REGULATING CORPORATE CRIMINAL LIABILITY, *supra* note 65, at 283.

107. *Id.*

108. Mordechai Kremnitzer, *Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 OXFORD J. INT'L CRIM. JUST. 909, 916 (2010).

109. "History shows that states are often reticent to prosecute international crime. . . . A highly cynical view might even suggest that both home and host states of multinational corporations may have a vested interest in turning a blind eye to corporate misbehavior." Joanna Kyriakakis, *Prosecuting Corporations for International Crimes*, *in* INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 108, 136 (Larry May & Zachary Hokins eds., 2010).

110. BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 842 (3d ed. 2015).

During the drafting of the Charter of the International Military Tribunal at Nuremberg,[111] a proposal was set forth to include business leaders amongst the defendants for the Trial of the Major War Criminals Before the International Military Tribunal.[112] French and U.S.S.R. representatives persuaded the British and the Americans to name Dr. Gustav Krupp von Bohlen und Halbach head of the corporate board of the Krupp armament and munitions firm.[113] However, Krupp successfully submitted a motion for postponement, arguing unfitness to stand trial due to health reasons.[114] After U.S. proposals to replace him with Alfred Krupp—operational president of the firm—and to include additional industrialists were rejected, Robert H. Jackson warned that "[t]o drop Krupp von Bohlen . . . without substitution . . . defeats any effective judgment against the German armament makers."[115]

B. The 'Subsequent Nuremberg Trials' (1946-1949)

On the basis of Control Council Law No. 10, the Allied Powers carried out a series of trials in the German Occupation Zones after the Trial of the War Criminals.[116] Furthermore, the Control Council went on to confiscate assets of a number of German corporations and also to dissolve and liquidate insurance companies linked to the use of slave labor[117] and companies that had contributed to Germany's war effort.[118]

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111. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

112. Professor Andre Gros of France suggested that "[s]ome business people should be included in the list of major war criminals." *See Minutes of Conference Session of July 16, 1945 (Document XXX)*, *in* REPORT OF ROBERT H. JACKSON, REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 246, 253 (1945).

113. *See* M. Lippman, *War Crimes Trials of German Industrialists: The Other Schindlers*, 9 TEMPLE INT'L & COMP. L.J. 176 (1995).

114. *See* Motion on Behalf of Defendant Gustav Krupp Von Bohlen For Postponement of the Trial as to Him, in I Trial of the Major War Criminals Before the International Military Tribunal 124 (1948).

115. *Id.* at 135.

116. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. 3 (Dec. 20, 1945), *reprinted in* 12 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xix (1949-1953).

117. Control Council Law No. 57: Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front art. 1 (Aug. 30, 1947), *reprinted in* 8 ALLIED CONTROL AUTH. GER., ENACTMENT AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 (1947).

118. Control Council Directive No. 39: Liquidation of German War and Industrial Potential (Oct. 2, 1946), *reprinted in* 5 ALLIED CONTROL AUTH. GER., ENACTMENT AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 (1946); Control Council Directive No. 47: Liquidation of German War Research Establishments (Mar. 27, 1947), *reprinted*

The so-called "Trials of the Industrialists" provided a crucial set of precedents for the development of the modern notion of international corporate liability because the U.S. Military Tribunal found that corporate entities had violated certain laws of war, even though the statute did not permit the prosecution of legal persons.[119] It was acknowledged that the owners and directors of large German corporations had actively supported the Nazi regime and played a key role in the perpetration of its crimes.[120] Although individuals—and not legal entities—were convicted, it has been argued that the knowledge standard applied by the tribunals offered a sufficient degree of elasticity as to envisage its application in the context of corporate liability.[121] In this regard, Volker Nerlich appropriately underscores that "the paradigm shift lay not in the fact that rules of international law were found to apply to *natural* persons, but to subjects that were non-state private actors."[122]

1. The *Zyklon B* Case[123]

Bruno Tesch and Karl Weinbacher were respectively the owner and the general manager of Tesch & Stabenow, a company that supplied Nazi concentration camps with the pesticide Zyklon B, used to exterminate 4.5 million prisoners in Auschwitz/Birkenau alone.[124] Both defendants were convicted by the British Military Tribunal regardless of the fact that neither of them had been physically present at the concentration camps when the gassings occurred.[125] The Tribunal found that "knowledge" was the appropriate mens rea threshold for purposes of establishing of aiding and abetting liability.[126]

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in 6 ALLIED CONTROL AUTH. GER., ENACTMENT AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 95 (1947).

119. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations Stefan A. Riesenfeld Symposium 2001*, 20 BERKELEY J. INT'L L. 91, 152 (2002).

120. Kaleck & Saage-Maass, *supra* note 22, at 701.

121. Michael J. Kelly, *Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities*, 24 EMORY INT'L L. REV. 671, 683 (2010).

122. Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT'L CRIM. JUST. 859, 899 (2010).

123. Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947) (Brit. Mil. Ct. Hamburg 1946).

124. Lippman, *supra* note 113, at 182.

125. *See* Kaleck & Saage-Maass, *supra* note 22, at 701-02.

126. Kelly, *supra* note 121, at 681.

2. The *Roechling* Case[127]

Hermann and Ernst Roechling, directors of the Roechling Company, were indicted for crimes against peace and war crimes by a tribunal set up in the French Occupation Zone.[128] It was established that the plunder and spoliation of factories and machinery in Alsace and Lorraine, as well as the forcible transfer of workers from the Occupied Territories, amounted to war crimes.[129] The Tribunal found that the crimes "could not have been rendered possible, except with the conscious assistance of certain great German industrialists and financiers."[130]

3. The *Flick* Case[131]

The Flick Concern (Concern) was the largest privately owned company in Germany that produced iron, steel products, and armaments.[132] It rapidly transformed into one of Germany's leading manufacturers of munitions, tanks, and planes.[133] The indictment in the trial against Friedrich Flick and five leading officials of the Concern consisted of one count of crimes against humanity (the Aryanization of properties belonging to Jews); three counts of war crimes and crimes against humanity (enslavement and deportation of civilians, plunder of public and private property in territories occupied by the German Armed Forces, and aiding the *Schutzstaffel* (SS)); and one count of membership in a criminal organization.[134] The Tribunal convicted two civilian industrialists for knowingly using their "influence and money" to further the activities of the SS and for increasing their production quotas knowing that slave labor would be needed to meet the new requirements.[135]

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127. Gov't Comm'n of the Gen. Tribunal of the Military Gov't for the French Zone of Occupation in Ger. v. Roechling, Indictment (*The Roechling Case*), *reprinted in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 app. B, at 1061-1062 (1949-1953).

128. *Id.*

129. *See* Lippman, *supra* note 113, at 181-84.

130. The *Roechling* Case, at 1061-62.

131. Trial of Friedrich Flick and Five Others (*The Flick Trial*), 9 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 1 (1949) (U.S. Mil. Trib. Nuremberg 1947).

132. *Id.* at 5.

133. Lippman, *supra* note 113, at 188.

134. *Id.* at 186.

135. *The Flick Trial*, at 29.

4. The *Farben* Case[136]

I.G. Farbenindustrie Aktiengesellschaft (Farben), a conglomerate of chemical firms, was the largest corporation in Europe during World War II.[137] The German explosives industry was entirely dependant on Farben for synthetically produced nitrates.[138] The *Aufsichtsrat* (Supervisory Board of Directors), responsible for the general direction of the firm, was chaired by the main defendant, Karl Krauch, in 1940.[139] The charges against the twenty-four directors included the planning of aggressive war through an alliance with the Nazi Party, war crimes (plunder and spoliation of occupied territories[140]), crimes against humanity (mass murder, enslavement, and medical experiments in Farben plants at the Auschwitz and Monowitz concentration camps), and membership in the SS.[141] Although the corporation itself was not held liable, the U.S. Military Tribunal noted that the action of legal persons had to be scrutinized[142] and concluded that Farben, as a corporate entity, had been directly involved in the commission of international crimes.[143] In addition, the tribunal acknowledged both "the instrumentality of cohesion in the name of which [crimes] were committed" and the risk that one may "utilize the corporate structure to achieve an immunity from criminal responsibility."[144] Control Council Law No. 9 provided for the seizure of and the control over property owned by Farben,[145] and Allied High Commission Law No. 35 regulated the dispersion of its assets.[146]

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136. Trial of Carl Krauch and Twenty Two Others (*The I.G. Farben Trial*), 10 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1949) (U.S. Mil. Trib. Nuremberg 1947).

137. Florian Jessberger, *On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: I.G. Farben on Trial*, 8 J. INT'L CRIM. JUST. 783, 784 (2010).

138. *The I.G. Farben Trial*, at vii.

139. *Id.* at 1.

140. Austria, Czechoslovakia, Poland, Norway, France, and the U.S.S.R. *Id.* at 4.

141. *Id.* at 5; *see also* Lippman, *supra* note 113, at 206.

142. Ramasastry, *supra* note 119, at 106.

143. *Id.* at 107.

144. Decision and Judgment of the Tribunal, Statement by Judge Hebert, and Sentences, *The I.G. Farben Case*, *reprinted in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081, 1153 (1952); *see* Jessberger, *supra* note 137, at 794.

145. Control Council Law No. 9: Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof (Nov. 30, 1945), *reprinted in* 1 ALLIED CONTROL AUTH. GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225, 225-26 (1945).

146. Allied High Commission Law No. 35: Dispersion of Assets of I.G. Farbenindustrie (Aug. 17, 1950), *reprinted in* ROYAL INST. INT'L AFFAIRS, DOCUMENTS ON GERMANY UNDER OCCUPATION 1945-1954, at 503 (1955).

5. The *Krupp* Case[147]

The Krupp firm took a leading role in the illegal rearmament of Nazi Germany in violation of the Treaty of Versailles.[148] Alfred Krupp, eight members of the *Vorstand* (Managing Board of Directors), and three other executives of the Krupp firm were indicted for crimes against peace, war crimes (plunder and spoliation in occupied territories by unlawfully obtaining sponsorships over firms), and crimes against humanity (deportation and deployment of slave labor).[149] As in the *Farben* decision, the U.S. Military Tribunal concluded that the corporation itself had violated the Hague Regulations in its seizure and confiscation of property in the occupied territories,[150] and it repeatedly referred to the collective "initiative" of the firm to actively engage in spoliation and plunder, even though the statute of the tribunal did not permit the prosecution of legal entities.[151]

The idea that corporate liability was rejected on policy grounds and not because it was perceived as legally unsound under international law was advanced by Martti Koskenniemi.[152] In *Between Impunity and Show Trials*, he asserted that the urgency of establishing normal relations with Germany—for fear of communism at the dawn of the Cold War—accounts for the lack of political support for the trials of German industrialists in Nuremberg.[153] This is explored further in Jonathan Bush's exhaustive historical survey entitled *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*.[154] It is the author's contention that the political will shared by the occupational governments "in favor of rebuilding the West German economy and cultivating its support" ultimately explained the fact that theories of corporate liability were never fully adopted.[155]

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147. Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others (*The Krupp Trial*), 10 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949) (U.S. Mil. Trib. Nuremberg 1948).

148. Celia Goetz, *Impressions of Telford Taylor at Nuremberg*, 37 COLUM. J. TRANSNAT'L L. 669, 671 (1998-1999).

149. *The Krupp Trial*, at 69; *see also* Lippman, *supra* note 113, at 229.

150. Ramasastry, *supra* note 119, at 110.

151. *Id.* at 111.

152. Martti Koskenniemi, *Between Show Trials and Impunity*, *in U.N. Yearbook* 1, 9 (Max Planck 6ed. 2002).

153. *Id.*

154. Jonathan A. Bush, *Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, The Essay*, 109 COLUMB. L. REV. 1094 (2009).

155. *Id.* at 1239-40.

C. The Rome Conference (1998)

At the U.N. Diplomatic Conference for the Establishment of the International Criminal Court (ICC), the final draft of the Preparatory Committee granted the ICC jurisdiction over both natural and legal persons.[156] The draft provision, article 23(5), read, "The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives."[157] The following paragraph clarified that "criminal responsibility of legal persons" did not exclude any possible additional responsibility of natural persons for the same crimes.[158]

On the second day of the Conference, the French delegation submitted a proposal to include the legal persons within the jurisdiction of the ICC that was more in line with the Nuremberg precedent in the sense that it empowered the ICC to declare a particular group a criminal organization. The Working Group on General Principles of Criminal Law,[159] wherein the proposal was discussed, introduced a number of restrictions that reflected the reluctance of many delegates to accept corporate criminal liability at that time.[160] Only corporations "whose complete, real, or dominant objective is seeking private profit or benefit"

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156. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, at 49, U.N. Doc. A/CONF.183/2/Add.1 (Vol. 1) (Apr. 14, 1988). Article 23, paragraphs 5 and 6, read:

> The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators.

Id.

157. *Id.*

158. *Id.*

159. *U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal Submitted by France*, U.N. Doc. A/CONF.183/C.1/L.3 (June 16, 1998). The French proposal read:

> 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 to in article 76, and the relevant provisions of articles 73 and 79 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 judgement of the Court shall have binding force and to implement it.

Id.

160. Van den Herik, *supra* note 17, at 353.

would qualify, as opposed to states or "other public bod[ies] 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."[161] It was further decided that it would only be possible to prosecute legal entities in addition to a natural person for the same crime as long as he or she had been "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 "acting on behalf of and with the explicit consent of that juridical person and in the course of its activities."[162] France eventually withdrew the proposal after it proved impossible to agree upon an acceptable formulation in the short time of the Conference.[163] The chairman of the group stated: "[O]n the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion."[164] During the conference, delegates identified a number of hurdles that would foreseeably hinder the extension of the ICC's jurisdiction to encompass the legal person.

1. Model of Attribution of Criminal Responsibility

One of the most fundamental obstacles to the advancement of the draft was the challenge of providing a workable model of attribution of criminal responsibility to corporations, which was politically acceptable for all states present during the negotiations.[165]

2. Sanctions

The delegations at Rome thought that fines—the only sanction offered at the time by article 77 of the Rome Statute that could apply to corporations—would give rise to important counterarguments, the most important one being their perceived minor deterrent effect.[166]

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161. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 and 6*, U.N. Doc. A/CONF.183/C.1/WGGP/L.5/REV.2 (July 3, 1998).

162. *Id.* at 1; *see also* Van den Herik, *supra* note 17, at 353.

163. Ramasastry, *supra* note 119, at 155-56.

164. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Meetings of the Committee as a Whole*, at 10, U.N. Doc A/CONF.183/C.1/SR.26 (July 8, 1998).

165. Verrydt, *supra* note 106, at 286.

166. Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 20 GEO. WASH. INT'L L. REV. 1025, 1042 (2009).

3. Evidentiary Problems

Delegates were equally concerned about potential evidentiary problems in prosecuting legal entities, such as the difficulties involved in proving the mens rea element of the offences or the existence of a policy that is attributable to the corporation as a separate entity.[167]

4. Complementarity

In accordance with the so-called principle of complementarity, the new court would refrain from intervening where a case is being investigated or prosecuted by a state with jurisdiction over it, unless such state is proven to be unwilling or unable to carry out the investigation or prosecution genuinely.[168] Difficulties for the observance of the principle of complementarity were anticipated given the fact that not all national systems had recognized corporate criminal liability. It was pointed out that states that have not done so would run the risk of being automatically deemed to be "unwilling" or "unable" to investigate or prosecute within the meaning of article 17(1)(a) of the Rome Statute.[169]

5. Two-Thirds Majority

The adoption of an amendment to the Rome Statute on which consensus could not be reached required a two-thirds majority of States Parties.[170] At the time the Rome Conference took place, there was an absence of large-scale studies on the level of recognition of corporate criminal liability and no definite conclusion could be presented as to the likelihood of favorable votes or ratifications of an eventual amendment of the Statute to this effect.[171]

According to Michael J. Kelly, the fact that the proposed provision did not make it into the final statute had much more to do with time constraints affecting the conference rather than "an overt hostility to the notion of holding companies accountable."[172]

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167. Reggio, *supra* note 47, at 651.

168. *See* Rome Statute of the International Criminal Court art. 17(1)(a), July 17, 1998, 218 U.N.T.S. 90 [hereinafter Rome Statute].

169. Verrydt, *supra* note 106, at 285; *see also* Kathryn Haigh, *Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns*, 1 AUSTRALIAN J. HUM. RTS. 204 (2008).

170. Rome Statute, *supra* note 168, art. 121(3).

171. Verrydt, *supra* note 106, at 285.

172. Kelly, *supra* note 121, at 689.

D. The Current Legal and Policy Framework

At this point, it appears to be beyond dispute that corporations enjoy international legal personality and are subject to *jus cogens* or nonderogable prohibitions of international law. In spite of there not being agreement as to the most appropriate theory upon which to construct an accountability system, precedent can be found in a number of recent international treaties that provide for the criminal liability of legal persons.[173] Legal scholars have recently expressed support for extending the jurisdiction of the ICC to include corporations.[174]

1. Corporations as Subjects of International Law

In 1948, the International Court of Justice (ICJ) was asked by the General Assembly inter alia whether the United Nations—as an organization—had "the capacity to bring an international claim against the responsible de jure or de facto Government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him."[175] In its Advisory Opinion, the ICJ concluded that the United Nations, although not a State, was "a subject of international law and capable of possessing international rights and duties."[176] Subsequently, the ICJ recognized that corporations have a separate legal personality for purposes of being accorded diplomatic protection in the *Barcelona Traction Light & Power Co. (Belgium v. Spain): Second Phase* case.[177] The Third U.S. Restatement of Foreign Relations (1987) endorsed this notion of international legal personality by defining the object of international law as the "conduct of states and international organizations . . . and their relations *inter se*, as well as with some of their relations with persons, whether natural or *juridical*."[178] Relying on the ICJ Advisory Opinion in the *Reparations for Injuries Suffered in the Service of the United Nations*

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173. *See, e.g.*, Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41; Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197; Convention on the Protection of the Environment Through Criminal Law, Nov. 4 1998, E.T.S. No. 172.

174. *See* HUISMAN, *supra* note 34, at 57; Kyriakakis, *supra* note 109; Van den Herik, *supra* note 17.

175. G.A. Res. 258/(III) (Dec. 3, 1948).

176. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1947 I.C.J. 174, 179 (Apr. 11, 1949.

177. Barcelona Traction, Light and Power Co. (Belg. v. Spain), Second Phase, 1967 I.C.J. 3, ¶¶ 38-49 (Feb. 5, 1970).

178. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 101 (AM. LAW INST. 1987) (emphasis added).

case, Andrew Clapham recently claimed that the fact that corporations enjoy certain legal rights and privileges led to the inescapable conclusion that they are international legal persons.[179] He noted that their international personhood could be inferred from the fact that "international rights and duties depend on the capacity to enjoy those rights and bear those obligations," and not on positivist considerations of subjectivity.[180] Echoing this debate and the Second Circuit judicial decisions under the Alien Tort Statute, José Alvarez concludes that corporations are indisputably subject to—at least—*jus cogens*, for acts such as war crimes and crimes against humanity.[181]

2. Doctrinal Basis

The question regarding the most appropriate theoretical underpinning for international recognition of corporate criminal responsibility remains unsettled. In September 2008, the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict was signed under the auspices of the International Committee of the Red Cross (ICRC) and the Swiss Government.[182] Today, endorsed by more than fifty countries (including the United States, the United Kingdom, China, and South Africa), the document acknowledges that the international criminal law concept of *superior responsibility* has a potential role in holding company directors and those contracting private military companies liable for international crimes.[183] On the contrary, L. Verrydt argues that the *identification theory* provides the best basis to hold corporations criminally liable at the international level on the grounds that it is the most suitable for *mens rea* offences and that it finds alignment with the modes of liability contained in article 25 of the Rome Statute.[184]

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179. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 79 (2006).

180. *Id.* at 68-69; *cf.* Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 VA. J. INT'L L. DIG. 79, 80 (2012) ("Large global corporations should be considered actors under international law because large global corporations and states share similar characteristics empowering both to the status of actor.").

181. José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 33 (2011).

182. Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, in letter dated Oct. 2, 2008 from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).

183. Stewart, *supra* note 7, at 24.

184. Verrydt, *supra* note 106, at 286.

3. The International Criminal Court

Acknowledging that companies have often proven more capable of committing crimes than individuals, Caspar Plomp has made the case for the establishment of corporate liability before the ICC. He argues that this would curtail the ability of business leaders to hide behind corporate structures and that, by targeting the entity itself, the adoption of better standards would be stimulated and corporate misconduct would be deterred more effectively.[185]

Joanna Kyriakakis has suggested that the inclusion of corporations within the jurisdiction of the ICC would reinforce the Court's role in the struggle against the most serious of human rights abuses in a "decentralized, state-based, international criminal order."[186] She contends that the complementary nature of the ICC will encourage the implementation of national legislation and that extending the ICC's jurisdiction will have a legitimizing effect over domestic prosecution of corporations for international crimes.[187] As Larissa Van den Herick notes, viewing state sovereignty as a responsibility-oriented concept may in fact entail support rather than rejection for corporate criminal accountability before the ICC.[188]

4. The Rome Statute

Article 25(3) of the Rome Statute provides for different modes of liability, some of which can be extrapolated to the context of legal entities.[189] Corporations could be held liable as direct perpetrators[190] whenever it is established beyond a reasonable doubt that a sufficiently high-ranking officer—identification theory—or an officer acting within the scope of his or her employment and/or on behalf of the corporation—respondeat superior theory— committed the crimes.[191] Norman Farrell has convincingly argued that joint criminal enterprise could apply to the corporate context in those instances where corporations have engaged with governmental authorities with the common purpose of perpetrating

185. Caspar Plomp, *Aiding and Abetting: The Responsibility of Business Leaders Under the Rome Statute of the International Criminal Court*, 4 UTRECHT J. INT'L & EUR. L. 4, 22 (2014).

186. Kyriakakis, *supra* note 109, at 137.

187. *Id.* at 136-37.

188. Van den Herik, *supra* note 17, at 359.

189. Rome Statute, *supra* note 168, art. 25(3).

190. *Id.* art. 25(3)(a) ("Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.").

191. *Id.*

crimes and provided them with means.[192] Otherwise, corporations could be prosecuted for complicity as aiders and abettors on the basis of their facilitating the commission or attempted commission of the crimes,[193] e.g., by providing the financial or logistic means, or for their intentional contribution to it in any other way.[194] Under the statute, the mens rea requirement for complicity seems to be the intention since the aider or abettor must have proceeded "[f]or the *purpose* of facilitating the commission of such a crime."[195] However, this threshold stands in sharp contrast with the jurisprudence developed by the tribunals acting under Control Council Law No. 10 regarding the doctrine of aiding and abetting and its connection with economic actors, which uses knowledge as sufficient basis for establishing accomplice liability.[196] Stewart notes that the future of corporate responsibility for international crimes may correct this, given that knowledge has frequently diluted into recklessness when ad hoc tribunals have applied the mens rea standard in this context.[197] Because corporate liability would not *per se* exclude responsibility of natural persons for the same crimes, individuals with control over the organization in question could be held accountable on the basis of indirect co-perpetration[198] and the doctrine established in the *German Katanga et al.* case.[199] In terms of penalties, article 77 of the statute, read in the light of Rules 146 to 148 of the Rules of Procedure and Evidence, provides sanctions applicable (with minor adaptations) to the context of corporate liability—although formally subordinated to a sentence of imprisonment in the current text (i.e., fines)[200] and the "forfeiture of proceeds, property, and assets."[201]

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192. Norman Farrell, *Attributing Criminal Liability to Corporate Actors Special Issue: Transnational Business and International Criminal Law*, 8 J. INT'L CRIM. JUST. 873, 879 (2010).

193. Rome Statute, *supra* note 168, art. 25(3)(c).

194. *Id.* art. 25(3)(d).

195. *Id.* art. 25(3)(c) (emphasis added). The ICC "purpose" standard was borrowed from the U.S. Model Penal Code. See Stewart, supra note 7, at 29-30.

196. *See supra* Parts IV.B, IV.B.1, IV.B.3.

197. "As I have argued at length elsewhere, the numerous applications of this [knowledge] standard in practice corroborate the thesis that recklessness is the most common test for complicity internationally." *See* Stewart, *supra* note 7, at 30.

198. Rome Statute, *supra* note 168, art. 25(3)(a).

199. An accused may be held liable as an indirect co-perpetrator as long as (1) the organization was hierarchical and composed of sufficient subordinates to guarantee that the superiors' orders would be carried out, (2) he or she "exercised authority and [manifest] control over the apparatus," and (3) he or she used his or her control over the apparatus to execute crimes. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision, ¶¶ 512-514 (Sept. 30, 2008).

200. Rome Statute, *supra* note 168, art. 77(2)(a).

201. *Id.* art. 77(2)(b). The current text requires that the proceeds, property, and assets be "derived directly or indirectly from [the] crime." This requirement would have to be rendered

V. CONCLUSION

The desire to control economic resources—more than hatred caused by ethnic or religious grounds—has been widely regarded as the main cause of contemporary conflicts and massive human rights violations.[202] In 2000, the U.N. Security Council commissioned a panel of experts as an independent fact-finding body "to follow up on reports and collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo"[203] and to analyze the connections between the continuation of the conflict and the exploitation of its natural resources.[204] The panel of experts' final report indicates that the DRC government actively supported its own war effort through the "direct and indirect uptake of money from parastatals and other private companies."[205]

Corporate actors have far too often engaged in the perpetration of mass atrocities and even more often proven to be de facto or de jure exempt from liability. International crime, by its very nature, demands a framework for accountability that civil mechanisms are theoretically and empirically unable to provide. Objections raised against corporate criminal liability have been progressively rebutted by general state practice and jurisprudential developments. Domestic legislatures are increasingly embracing corporate criminal liability and thereby undermining the assertion that, as a matter of law, legal entities cannot be deemed to act independently and hence are not blameworthy. The alleged unfair punishment this would entail for the shareholders is counteracted by the increasingly available mechanisms of checks and balances and the very fact that they are engaging in conduct that in itself arouses censure: profiting from crime. Tort claims have so far largely failed in securing accountability and a deterrent effect on companies that have been involved in the perpetration of international crimes. The per se inadequacy of civil mechanisms, coupled with the ridiculously low amount of damages often awarded and settlements reached, cheapens

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inapplicable for the purposes of imposing a punishment in the form of sanction meant to affect the assets of the corporation irrespective of their origin.

202. Reggio, *supra* note 47, at 623.

203. Kabel, *supra* note 94, at 462; *see* Rep. of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, transmitted by Letter Dated 12 April 2001 from the Secretary-General to the President of the Security Council, ¶ 1, U.N. Doc. S/2001/357 (Apr. 12, 2001) [hereinafter Report on Illegal Exploitation of the Democratic Republic of the Congo].

204. Kabel, *supra* note 96, at 462.

205. Report on Illegal Explotation of the Democratic Republic of the Congo, *supra* note 194, ¶ 153.

fundamental notions of fairness and just retribution. Reliance on a punitive model is the only response capable of adequately capturing social condemnation in a manner that is proportionate to the degree of blameworthiness inherent in the most serious crimes of concern to the international community, as well as the most effective means of accomplishing meaningful deterrence.

The current trend towards the recognition of corporate criminal liability among jurisdictions from all continents and legal traditions, reinforced by initiatives undertaken at the international level, arguably provides evidence of the emergence of "a general practice accepted as law."[206] Moreover, state practices demonstrate that a wide array of criminal sanctions can be enforced against companies and that the distinction between natural and legal persons is becoming less and less relevant for punitive purposes. Should this trend towards recognition continue in the future, it appears reasonable to expect that this generalized pattern will at some point evolve into a fully fledged customary norm. The main implication is that all states would eventually be bound to embrace corporate criminal liability unless they have publicly expressed their opposition—persistent objection.

However, domestic attempts to hold corporations criminally liable have encountered major obstacles in dealing with extraterritoriality when the countries involved have proven unable or unwilling to genuinely carry out investigations and prosecutions. Against the backdrop of this impunity gap, leading scholars have recently set forth proposals to introduce the concept of corporate accountability into international criminal law. In the aftermath of World War II, the Nuremberg Trials of the industrialists provided solid grounds for the development of the notion of international corporate liability. Despite not being held legally accountable, companies were found to have been instrumental in the commission of atrocities and some degree of de facto corporate responsibility was established. German companies were found to have violated certain laws of war and saw their assets confiscated under Control Council laws. At the Rome Conference, the possibility of extending the jurisdiction of the ICC over legal persons was featured in the negotiations but was eventually abandoned due to the impossibility of reaching consensus on a workable model of attribution of criminal responsibility in the short time of the conference. Today, what the delegates identified as impediments to formal recognition have virtually

206. Statute on the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

vanished. The current worldwide trend towards a model of corporate liability, along with the general practice carried out by a majority of States Parties to the Rome Statute, has eliminated concerns around evidentiary matters and difficulties in the observance of the principle of complementarity.

Policy—and not legal—considerations have so far prevented corporate liability theories from being embraced by international institutions. The ICC offers an unparalleled binding framework for recognition and implementation. Neither conceptions of international legal personality nor the lack of agreement as to the most appropriate theory upon which to construct an accountability system for corporations present insurmountable legal obstacles. As Van den Herik points out, confronting the challenge of constructing a viable model of corporate criminal accountability for international crimes is "a question of political will and of acknowledgement that at the international level there are less alternatives to deal with corporate crime."[207] This Article has purported to show that the recognition of corporate criminal liability at the international level is not only desirable and feasible, but that it should be the next logical step considering the developments that have taken place in the field since the Nuremberg Trials.

207. Van den Herik, *supra* note 17, at 367.