

SCHOOL OF LAW
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**AN EXPLORATION OF CORPORATE CRIMINAL LIABILITY IN
INTERNATIONAL LAW FOR AIDING AND ABETTING INTERNATIONAL
CRIMES IN AFRICA**

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2 October 2015

DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree. Where other sources of information have been used, they have been acknowledged.

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ABSTRACT

At present, international law has not succeeded in establishing a way through which multinational corporations (MNCs) can be regulated effectively and compelled to adhere to international human rights standards. This poses a problem for states that rely heavily on the investment of MNCs for economic development. African states in particular compete for investment by reducing their regulatory mechanisms in order to attract MNCs. This allows MNCs to engage in practices that violate human rights and contribute to the commission of international crimes. This thesis seeks to address this problem by exploring how MNCs can be held criminally liable in international law if they are involved in serious human rights abuses and international crimes.

In the twentieth century, two seminal events in international criminal justice illustrate that there was evidence that the notion of holding multinational corporations criminally liable was possible. These include i) the jurisprudence of the Allied Tribunals at Nuremberg after World War II which contemplated the possibility of corporate criminal liability and ii) the negotiations during the establishment of the International Criminal Court (ICC) in the 1990s which considered proposals for the extension of criminal liability to corporations. At the national level, many states provide for corporate criminal liability. This is often derived from the establishment of criminal liability of an official of the corporation. The United Kingdom and Australia, however, have successfully set out how a corporation may itself be found criminally liable without the need to derive its criminal liability from an official. These developments show that the idea of holding MNCs criminally liable, either through a derivative or non-derivative process, is possible and achievable.

In particular, this thesis proposes that MNCs can be found criminally liable for aiding and abetting international crimes under Article 25(3)(c) of the Statute of the ICC. In proposing a way through which this can be achieved, this thesis does two things: i) it extracts principles of non-derivative criminal liability established in the United Kingdom and Australia and ii) it develops a theory of corporate criminal liability for aiding and abetting international crimes that incorporates these principles. This theory underpins the proposed new approach to the establishment of corporate criminal liability for aiding and abetting in the ICC.

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CHAPTER 1: INTRODUCTION

1. What is this thesis about?

This thesis explores the possibility of establishing the criminal liability of multinational corporations (MNCs) in international law for complicity in the commission of international crimes in Africa. Though the focus is on Africa as a region, the arguments set out may well apply globally. The problem this thesis identifies is that though MNCs may be involved in the commission of serious crimes, currently they cannot be held criminally responsible under international law. If not held to account by a domestic court, MNCs may escape all liability. In seeking to address this problem, this thesis examines the jurisprudence of the tribunals at Nuremberg and concludes that this jurisprudence illustrates that corporate criminal liability is possible in international law. Based on this jurisprudence, this study argues that MNCs ought to be recognised as having legal personality in international law and that the jurisdiction of the International Criminal Court (ICC) should be extended to juristic persons. The key proposition in this thesis is that MNCs may be found criminally liable for aiding and abetting international crimes through an omission in terms of Article 25(3)(c) of the Statute of the International Criminal Court (Rome Statute).¹

2. Multinational corporations in Africa

2.1. What is meant by the term 'multinational corporation'?

A multinational corporation (or multinational enterprise or transnational corporation) is a juristic entity that operates for profit or invests in assets that produce wealth in more than one country.² Engagement in investment can either

¹ As it now stands, the Rome Statute does not extend its application to multinational corporations. Thus, for this proposition to be effected, a necessary prior step of extending the scope of the Rome Statute to juristic persons will have to be carried out.

² Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 5. For similar definitions see UN Norms on Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights (2003) at 52; UN Group of Eminent Persons *The Impact of Multinational Corporations on Development and on International Relations* (1974) at 25; Olufemi Amao *Corporate Social Responsibility, Human Rights and*

be direct, in the sense that it gives the MNC both managerial control over and a financial stake in the income-generating assets; or indirect by way of portfolio which gives the investing enterprise a financial stake in the foreign venture but no managerial control.³ The Organisation for Economic Co-operation and Development (OECD) Guidelines for corporations offer a more detailed definition of MNCs by referring to the fact that they 'comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways'.⁴ Peter Muchlinski highlights that the element of control and coordination of corporations in different countries by another corporation or enterprise is the decisive characteristic of MNCs.⁵

2.2. How has international law contributed to the establishment of multinational corporations in Africa?

First, corporations were essentially an extension of the economic and political power of the colonial state.⁶ For example, under British imperialist practice, companies would receive a charter to carry out business activities on behalf of the Crown in yet to be colonised countries.⁷ These companies were established under the national law of colonial states. However, colonial powers – as in the case of the scramble for Africa – legitimised their imperial project in terms of international

the Law: Multinational Corporations in Developing Countries (2011) at 6-7; John Dunning and Sarianna Lundan *Multinational Enterprises and the Global Economy* 2 ed (2008) at 3.

³ Muchlinski *Multinational Enterprises* 5. He distinguishes between these two as direct investment and portfolio investment respectively.

⁴ Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (1976) 2011 ed Concepts and Principles para 4 (available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>).

⁵ Muchlinski *Multinational Enterprises* at 7.

⁶ Raymond Betts *Europe Overseas: Phases of Imperialism* (1968) at 31.

⁷ See Ann M Carlos and Stephen Nicholas "'Giants of an Earlier Capitalism": The Chartered Trading Companies as Modern Multinationals' (1988) 62 *Business History Review* 398 at 402. See also Tony Webster 'British and Dutch Chartered Companies' *Oxford Bibliographies* <http://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0099.xml> (accessed on 30 March 2015).

law.⁸ Therefore, international law facilitated the successful establishment of MNCs in many African states.⁹

Secondly, during the period of colonialism, colonial administrations established political and economic policies that favoured the development of companies that had been incorporated in the home state of the colonial power.¹⁰ The explanation behind this is the protectionist practice of the mercantile system that ran from the sixteenth to the eighteenth century.¹¹ Imperialist governments were keen to ensure that they maintained a positive balance of trade with other nations by promoting monopolies, banning foreign companies from operating within their territory to eliminate competition and permitting the subjection of workers to 'poor conditions of service for the benefit of merchants'.¹² Thus, companies such as the English and Dutch East India Companies and the Royal African Company were, in practice, the outworking of the imperial economic project of colonial governments.¹³ Therefore, whereas international law has contributed to the establishment of MNCs in Africa, it has not been similarly effective in ensuring that MNCs are regulated.

⁸ See Garth Abraham "Lines upon maps": Africa and the sanctity of African boundaries' (2007) 15 *African Journal of International and Comparative Law* 61 at 62-3. The author discusses in detail how colonial powers applied principles of Roman civil law to justify the drawing of boundary lines to determine their constituent geographical territories in Africa.

⁹ According to Antony Anghie, the influence of positivism in international law effectively prepared the ground for the legal, political, economic and social justifications for imperialism. European states were seen as the 'civilised world' while non-European states as 'uncivilised' (Antony Anghie 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1 at 2-5).

¹⁰ B S Chimni 'Capitalism, Imperialism and International law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17.

¹¹ Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (2011) at 8-9. See also Raymond Betts *Europe Overseas: Phases of Imperialism* (1968) at 29-32.

¹² Ibid 9.

¹³ See Robert Gilpin 'The Politics of International Economic Relations' (1971) 25 *International Organization* 398. He argues that transnational economic development and hence the multinational corporation, is necessarily tied to the political and economic policy of leading nations in the world.

2.3. Lack of effective regulation of multinational corporations in Africa

2.3.1. Governance gaps

Many African countries are eager to attract foreign investment for the sake of advancing infrastructural development and a more robust economy.¹⁴ This is heightened by the need to increase domestic income generation through job-creation, exportation of extracted natural resources and the development of human capital.¹⁵ This leads to competition for foreign investment among African states, competition which is intensified further through the reduction of the regulation of human rights and environmental standards in order to attract MNCs.¹⁶ The reduction in regulation ‘...results in so-called “governance gaps” where multinational corporations operate outside the jurisdictional reach of their home state [developed country], in host [African] states which are encouraged to keep their corporate laws and regulations flexible’.¹⁷ When a sustained situation of reduced regulation in the host [African] state develops, this gives rise to ‘a bubble of immunity for offending multinational corporations and a sanction-free zone’.¹⁸ This is a zone where neither the home state nor the host state effectively regulates the activity of an MNC. This results in what commentators have referred to as the ‘race to the bottom’, where there is a decrease in state control over MNCs and a corresponding increase in human rights violations, disregard of environmental standards and a lack of adherence to good governance practices.¹⁹

¹⁴ See generally on this John Ruggie ‘Protect, respect and remedy: A framework for business and human rights’ (2008) A/HRC/8/5 paras 11-16.

¹⁵ Bonita Meyersfeld ‘Institutional Investment and the Protection of Human Rights: A Regional Proposal’ in Laurence Boule (ed) *Globalisation and Governance* (2013) at 175-6 (hereafter ‘Meyersfeld *Institutional Investment*’).

¹⁶ The regulation by host states of MNCs is made more difficult due the nature of the ownership and operating structures designed for investment projects in the extractive industry. Africa Progress Panel *Equity in Extractives: Stewarding Africa’s Natural Resources for All* (2013) at 50.

¹⁷ Laurence Boule *The Law of Globalisation* (2008) at 102.

¹⁸ Meyersfeld *Institutional Investment* at 176. See also Steven Ratner ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2002) 111 *Yale Law Journal* 443 at 460.

¹⁹ *Ibid* 176.

2.3.2. *Why have attempts at regulating multinational corporations been ineffective?*

There are a number of reasons why attempts at regulating multinational corporations have been ineffective.²⁰ These include: (i) the global nature of the operations of MNCs which often makes them impervious to domestic regulatory mechanisms; (ii) the powerful political and economic weight of MNCs which weakens political will of states to subject them to rigorous checks;²¹ (iii) the fact that MNCs are not recognised as legal persons in international law;²² and, (iv) the *forum non conveniens* principle which essentially inhibits civil action against MNCs in the courts of their home states where the harm occurred in the host state.²³ Regulation has thus been reduced to a patchwork of voluntary (non-binding) codes

²⁰ This section discusses the desirability of more rigorous forms of regulating MNCs and is concerned with discussing the efficacy of corporate criminalisation.

²¹ Simon Chesterman 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations – the Case of Norway's Sovereign Wealth Fund' (2008) 23 *American University International Law Review* 577 at 597. See the same at 594 where he states that Texaco (an oil company based in the United States) operated for years in Ecuador 'with annual global earnings four times the size of Ecuador's GNP and [with] the active support of the US government'.

²² See W Kaleck & M Saage-Maasz 'Corporate Accountability for Human Rights Violations amounting to International Crimes' (2010) 8 *Journal of International Criminal Justice* 699 at 718-22. The view that MNCs cannot be treated as subjects in international law and therefore as bearers of obligations under human rights law is much criticised. Some authors argue that MNCs should be held accountable alongside states. See Philip Alston (ed) *Non-State Actors and Human Rights* (2006); Andrew Clapham *Human Rights Obligations of Non-state Actors* (2006) at 25-27. The irony in international law is that individual actors are treated as objects of international law (see the Rome Statute's Article 25) though non-state actors such as MNCs, which wield considerable more power than individuals and thus can do a lot more harm, are not seen as subjects of international law (see Kaleck & Saage-Maasz at 720).

²³ See the *Bhopal Case* (*In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SDNY 1986)). A US federal court found that since Union Carbide – a US registered company – would submit to the jurisdiction of Indian courts, the multimillion dollar suit for compensation in a case involving a gas leak disaster, ought to be adjudicated in India rather than the US. For more information see <http://bhupal.net/legal-issues-and-liabilities/> (accessed on 9 July 2013). For a discussion on *forum non conveniens*, see D Kinley & J Tadaki 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931 at 942-7.

without a comprehensive implementation framework.²⁴ The result is that MNCs that have been complicit in perpetrating human rights violations enjoy immunity.

2.4. What are the ill-effects of unregulated commercial activity of multinational corporations?

In recent times, the extensive commercial operations of MNCs have had an enormous impact on the economic development of African states.²⁵ Most of the business activity carried out is legitimate yet the presence of MNCs and the impact of economic globalisation in Africa leaves much to be desired.²⁶ For example, in the area of agriculture, trade liberalisation has turned many African states into net food importers, susceptible to the price fluctuations of food in the global market.²⁷

²⁴ The most recent document of note in this regard is the United Nations Human Rights Council's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (16 June 2011). It is available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Other significant agreements include the United Nations Global Compact of 1999, 'a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption' (see <http://www.unglobalcompact.org/AboutTheGC/index.html>); the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises (1977), a set of principles regarding labour matters available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf> and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises passed in 1976 available at www.oecd.org.

²⁵ United Nations Economic Commission for Africa *African Economic Outlook 2013: Structural Transformation and Natural Resources* (2013) at 12. By definition, MNCs intervention is normally by way of investment – whether direct or portfolio. It is reported that foreign direct investment (FDI) has nearly tripled from \$20 billion in 2001 to \$56.6 billion in 2013.

²⁶ *Illicit Financial Flows* (2015), Report prepared by the High Level Panel on Illicit Financial Flows from Africa Commissioned by the African Union/ United Nations Economic Commission for Africa Conference of Ministers of Finance, Planning and Economic Development at 27-31.

²⁷ Robert Weissman 'The System Implodes: The 10 Worst Corporations of 2008' (2008) 29 *Multinational Monitor* available at <http://www.multinationalmonitor.org/mm2008/112008/weissman.html> (accessed on 16 June 2014).

See also Bonita Meyersfeld 'Why Africa? Sixtieth Anniversary of the Universal Declaration of Human Rights' (2008) 64 *The World Today* at 14 who refers to the fact that African farmers cannot find markets to sell their produce readily as it is cheaper for other countries – including other African states – to import their produce cheaply from Europe.

Despite much natural resource wealth endowment, many African countries are mired in poverty and economic growth over the last half century has been slow if not stagnant or retrogressive in alleviating poverty.²⁸ This is contrasted by the significant profits of MNCs in the same countries.²⁹ Hence, it comes as no surprise that MNCs are 'viewed ... as economic agents of their home states, with no particular allegiances to the states in which they choose to invest'.³⁰

While some of this business activity appears to be legitimate, it at times causes harm to human beings and their environment. There is evidence that points to the complicity of big business in the commission of serious human rights abuses and crimes in African states by political and military leaders.³¹ Some of these abuses and crimes constitute international crimes. Deficiencies in basic services such as

Also, the inability to profit from agriculture is largely due to unfair trade practices within the World Trade Organisation (WTO) and to the exportation of agricultural goods from rich countries at a price lower than their normal value – dumping (Meyersfeld *Why Africa?* at 15).

²⁸ See especially, Paul Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2008) at 38-44.

²⁹ See Africa Progress Panel *Equity in Extractives: Stewarding Africa's Natural Resources for All* (2013) at 13-35; Paul Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2008) at 38-44; P Collier & J Gunning 'Why Has Africa Grown Slowly?' (1999) 13 *Journal of Economic Perspectives* 3 at 3-5.

³⁰ Jennifer Zerk *Multinationals and Corporate Social Responsibility* (2006) at 9. Allegiance is much related to the country from which the MNC originates: Ford from United States, NEC from Japan, ICI from Britain, Samsung from South Korea, Siemens from Germany, Nokia from Finland (see John Dunning and Sarianna Lundan *Multinational Enterprises and the Global Economy* 2 ed (2008) at 6. The authors concede, however, that the economic success or failure of MNCs is becoming less tied to the nation whence it originates).

³¹ Complicity in the commission of gross human rights abuses may also be observable in corporate groups where the parent company is complicit in the harm done by its subsidiary. The highly publicised *Kiobel* case is instructive in this regard (*Kiobel v Royal Dutch Shell Petroleum Co*, No. 10-1491 (US 2012)). *Kiobel* 'is a class action suit filed on behalf of Nigerian residents who protested against the environmental impacts of oil exploration in the Ogoni region of the Niger Delta. The complaint alleges that Shell armed, financed, and conspired with Nigerian military forces to suppress the protests. Throughout 1993 and 1994, the military systematically targeted Ogoni villages in terror campaigns of looting, rape, murder and property destruction. This campaign culminated in the summary execution of the Ogoni Nine, a group of environmentalists including the famed playwright Ken Saro-Wiwa. The Ogoni Nine were hanged to death following a conviction by a military tribunal that was roundly condemned as an abuse of justice. The plaintiffs allege that Shell tampered with the trial and helped to railroad the conviction of the activists' (<http://cja.org/article.php?list=type&type=510&printsafe=1>, accessed on 19 August 2014).

infrastructure, health facilities and the lack of accountable governance have exacerbated the severity of the harm caused by these abuses and crimes.

In 1996, the Kano region experienced a devastating outbreak of bacterial meningitis.³² Upon learning of the outbreak, Pfizer, a multinational pharmaceutical corporation, obtained the Nigerian government's approval to carry out a study by conducting experimental tests of a drug called Trovin on 200 children in the region.³³ Pfizer carried out these tests without the parents/guardians' informed consent.³⁴ As a consequence of the study, eleven of the children involved died while others suffered paralysis, blindness, and deafness.³⁵ Subsequent lawsuits against Pfizer in the United States under the Alien Tort Statute were dismissed on grounds of the principle of *forum non conveniens*.³⁶ In July 2009, the United States court of appeals reversed the decisions of the lower courts dismissing the case.³⁷ In February 2011, the parties reached an out of court settlement, the terms of which were stated to be confidential.³⁸ It is indisputable that the failure on the part of Pfizer to adhere to protocol by seeking informed consent, misdirected the parents of the children thus leading to their deaths and other harms suffered.³⁹

Such cases of corporate abuse illustrate that there is thus a need to strengthen regulation in Africa and to explore ways through which corporations may be found criminally responsible for their complicity in serious human rights violations and crimes. This thesis is concerned with the latter objective.

³² See <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria> (accessed on 15 September 2015).

³³ See <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria> (accessed on 15 September 2015).

³⁴ *Abdullahi v Pfizer, Inc* 562 F3d 163, 64 ALR Fed 2d 685 (January 2009) at 166.

³⁵ *Ibid* 169.

³⁶ These cases were: *Abdullahi v Pfizer, Inc*, 2002 US Dist LEXIS 17436 (SDNY September 17, 2002) ("Abdullahi I"); *Abdullahi v Pfizer, Inc*, 77 Fed Appx 48, 2003 US App LEXIS 20704 (2d Cir NY, October 8, 2003) ("Abdullahi II") and *Abdullahi v Pfizer, Inc*, 2005 US Dist LEXIS 16126 (SDNY, August 9, 2005) ("Abdullahi III").

³⁷ See <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria> (accessed on 15 September 2015).

³⁸ See <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria> (accessed on 15 September 2015).

³⁹ See *Abdullahi v Pfizer, Inc* 562 F3d 163, 64 ALR Fed 2d 685 (January 2009) at 191.

3. Central questions and arguments

Four core questions map out the central arguments in this thesis. The first question is whether MNCs should be considered as subjects of international law; the second is whether MNCs can possess criminal intention and thus be held criminally liable for the perpetration of a crime; the third is what method would be suitable to establish corporate criminal liability; and the final question is how this method of establishing criminal liability can be applied to recognised modes of participation in the perpetration of a crime in international criminal law.

3.1. Should multinational corporations be recognised as legal persons in international law?

The limitation of legal personality to states in international law appears only to be a rule of expediency.⁴⁰ As will be argued in chapter 2, this rule is far outweighed by a number of considerations regarding the global role of MNCs. First, MNCs now have power and influence that gives them the capacity to be subjects of international law;⁴¹ second, this capacity enables MNCs to participate meaningfully in international legal processes;⁴² third, MNCs enjoy a wide recognition of their rights in international law and therefore they have concomitant duties as subjects of international law;⁴³ and finally, the applicability of norms of international law to organisations as underlined in Nuremberg illustrates that MNCs are bound to refrain from violating international law norms.⁴⁴

⁴⁰ James Brierly 'The Basis of Obligation in International Law' in H Lauterpacht & CHM Waldock (eds) *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (1958) 1–67 at 51. Discussed in detail in Chapter 2.

⁴¹ Andrew Clapham *Human rights Obligations of Non-State Actors* (2006) at 77.

⁴² Rosalyn Higgins *Problems and Process: International Law and How We Use it* (1994) at 51.

⁴³ A Claire Cutler 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133 (reprinted in Andrea Bianchi (ed) *Non-State Actors and International Law* (2009)).

⁴⁴ Desislava Stoitchkova *Towards Corporate Liability in International Criminal Law* (2010) at 47-9.

3.2. Is corporate criminal intention observable in the failure to observe a duty of care?

Though multinational corporations may not be directly involved in abuses that lead to harm, they may be indirectly involved or complicit in their perpetration.⁴⁵ One of the ways multinational corporations may be complicit in the perpetration of abuses is by failing to ensure that they fulfil their duties of care. In international criminal law, the indirect involvement in the perpetration of a crime can lead to accomplice liability. Aiding and abetting is one of these forms of accomplice liability. Therefore, this thesis explores how criminal liability on the part of a MNC for aiding and abetting an international crime may be established on the basis of an intentional failure to fulfil a duty of care so as to facilitate the commission of a crime.

3.3. Is non-derivative criminal liability an appropriate method of establishing corporate criminal liability?

A corporation may be found criminally liable in one of two ways: by imputing the criminal conduct and guilty state of mind of an employee to the corporation; or by establishing the criminal liability of the corporation in its own right. The first approach establishes the criminal liability of a corporation on the basis of proof of the criminal liability of an employee or official of the corporation. This method of attribution of criminal liability is called derivative liability.⁴⁶ The second approach establishes the criminal liability of a corporation on the basis of 'what the corporation did or did not do, as an organisation; 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'.⁴⁷ This method of attribution of criminal liability is called non-derivative liability.⁴⁸

⁴⁵ Anita Ramasastry 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

⁴⁶ James Gobert & Maurice Punch *Rethinking Corporate Crime* (2003) at 146 – 153.

⁴⁷ Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 2.

⁴⁸ James Gobert & Maurice Punch *Rethinking Corporate Crime* (2003) at 146 – 153.

This thesis focuses on establishing the criminal liability of a corporation through a non-derivative process for a number of reasons

- i) Diffuse company structures make it practically impossible to identify an employee/director whose conduct and mental state can be imputed to the corporation thus establishing the corporation's criminal liability. These diffuse structures also mean that those employees who make decisions for the company (usually senior managers), decisions that determine the way the company is managed, are far removed both tactically and operationally from the conduct that causes harm.⁴⁹
- ii) Non-derivative criminal liability takes into account corporate attitudes, policies, rules and practices ('corporate culture') that permit abuses.⁵⁰ Hence, through a non-derivative process the criminal fault that lies in a pervasive culture or mind-set in a company that leads to the commission of crimes (but that cannot be located in an employee or senior manager) can be established.⁵¹
- iii) The doctrines of separate legal personality and limited liability cumulatively mean that responsibility for the criminal activities of one corporation (such as a subsidiary in a corporate group) cannot be attributed to another corporation (such as its parent corporation) even though the parent corporation benefits from the profits of the subsidiary. Corporate malfeasance permeates the legal structures within corporate groups. However, these two doctrines make it impossible to impute liability for the criminal activities of one corporation to its parent corporation thus enabling the corporate group to escape liability.⁵²

⁴⁹ See discussion in Chapter 4, section 3.4.6.1.

⁵⁰ Brent Fisse and John Braithwaite 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1998) 11 *Sydney Law Review* 468 at 483.

⁵¹ See discussion in Chapter 4, section 3.4.6.2.

⁵² See discussion in Chapter 2, sections 4.3.1 to 4.3.3.

3.4. Can corporations be found criminally liable in international law for aiding and abetting international crimes?

Article 25(3) of the Rome Statute sets out how a person may be held criminally liable for aiding and abetting an international crime. In developing a way through which a corporation may be held criminally liable at an international level, this thesis examines the implementation of non-derivative criminal liability in the United Kingdom and Australia. These two jurisdictions have elaborate schemes of establishing non-derivative criminal liability of corporations. This thesis extracts principles underpinning these schemes of non-derivative criminal liability. It then incorporates these principles into a theory of corporate criminal liability for aiding and abetting international crimes under Article 25(3)(c) of the Rome Statute.

4. Scope and research limitations

This thesis develops a new approach to corporate criminal liability based on non-derivative criminal liability that can be adopted in the ICC. It analyses and extracts principles of non-derivative criminal liability developed in the United Kingdom and Australia, which both have a sophisticated legal regime that sets out how corporations may be held criminally liable through non-derivative models of liability. The limited nature of this selection is intended not to provide authoritative evidence of state practice but rather to propose a methodology for the development of international law principles with reference to these two national jurisdictions. This thesis discusses how this new approach may be implemented such that MNCs can be found criminally liable for aiding and abetting international crimes in the Rome Statute. It is possible that for true international criminal justice, the nature of criminal activity in which corporations are involved may need to be included as crimes in the Rome Statute.

There are two general ways through which a person may participate in the commission of a crime in international law: as a perpetrator/principal or as an accomplice/accessory.⁵³ Accomplices may fall into one of two categories: those

⁵³ Bert Swart 'Modes of International Criminal Liability' in Antonio Cassese (ed) *Oxford Companion to International Criminal Justice* (2009) 82 at 83.

that 'prompt' the perpetration of a crime by inciting, or instigation or soliciting or inducing its commission; and those that 'assist' the perpetration of a crime by aiding or abetting.⁵⁴ This thesis examines how accomplice liability on the part of a corporation can be established for aiding and abetting international crimes. Thus, it limits the application of this accomplice liability to Article 25(3)(c) of the Rome Statute.

5. Thesis structure

This thesis has six chapters.

Chapter 2 discusses some of the key considerations in the debate about whether criminal liability should be extended to corporations in international law. It discusses the notion of legal personality in international law and argues that MNCs ought to be recognised as subjects of international law. This chapter discusses corporate intentionality as the basis of proving criminal intention in prosecution. It also looks at the challenges presented by the complex corporate governance structures of MNCs to the establishment of liability. It proposes that these challenges can be overcome through the notion of 'enterprise analysis' which focuses on the activity of the MNC as an economic unit rather than as disparate legal entities.

Chapter 3 gives an overview of corporate criminal liability in international law from the twentieth century onward. It discusses the prosecutions of corporate defendants at Nuremberg and their impact on corporate criminal liability in international law. It analyses key arguments that were raised against the extension of international criminal law to juristic persons during the Rome Diplomatic Conference for the establishment of the ICC in the 1990s and whether such arguments are still valid as justifiable barriers to the extension of the ICC's jurisdiction to juristic persons.

Chapter 4 discusses approaches to derivative and non-derivative criminal liability of corporations in the United Kingdom and Australia. This chapter argues that non-

⁵⁴ Bert Swart 'Modes of International Criminal Liability' in Antonio Cassese (ed) *Oxford Companion to International Criminal Justice* (2009) 82 at 83.

derivative models of corporate criminal liability are more suitable to the determination of the criminal liability of large companies and multinational corporations. It highlights three reasons for this. The first is that there is a greater likelihood of successful convictions. Second, there is a growing recognition that corporations are not mere legal fictions devoid of liability. This recognition espouses the view that corporations are real actors that ought to be accountable if and when their activities cause harm. Finally, non-derivative models of corporate criminal liability can effectively promote transparency and accountability.

Chapter 5 analyses the essential elements of corporate criminal conduct as established in the United Kingdom and Australia and contemplates the extent to which these elements could apply in the international setting. It argues that elements of accomplice liability under domestic law can be used to extend corporate criminal liability under international law. It discusses how a corporation may be criminally liable in international law by using the principles of non-derivative complicit liability in the form of aiding and abetting.

Chapter 6 concludes this thesis with a summary of the main arguments in each of the chapters.

CHAPTER 2: RATIONALE FOR THE EXTENSION OF CRIMINAL LIABILITY TO CORPORATIONS

1. Introduction

This chapter discusses key considerations in debates about whether criminal liability should be extended to multinational corporations (MNCs). These considerations are threefold. First, that MNCs can and should be recognised as subjects in international law; second, that MNCs do possess a collective intentionality that can be the basis of the element of intention in criminal prosecution; and thirdly, that in view of the complex governance structures of MNCs, attempts at establishing criminal liability of MNCs should be based on developing a form of group liability called 'enterprise liability'. This chapter foregrounds this discussion with an analysis of the relationship between the traditional vision of corporations as simply profit-making agents and the incidence of corporate malfeasance giving rise to serious human rights violations and crimes in Africa. It highlights that there is both need to strengthen regulation in the region and to explore ways through which corporations may be found criminally responsible for their complicity in serious human rights violations.

2. Structure of the chapter

This chapter has two main parts. The first part gives a brief insight into the basis of corporate complicity in serious human rights violations. It discusses the relationship between the libertarian vision of corporations as agents concerned solely with profit-maximisation and corporate malpractices that lead to human rights abuses. It recognises that this vision is changing but underlines that international criminal law can and should play a role in ensuring that MNCs are found criminally liable for the harm that they cause.

The second part has three sections. The first section analyses the notion of legal personality in international law and argues that MNCs ought to be recognised as subjects of international law thus placing MNCs squarely within the application of international criminal law. The second section argues that corporations possess an

intentionality that can be used to prove criminal intention in prosecution. The third section discusses the challenges to establishing liability presented by the complex corporate governance structures of MNCs and doctrines of separate legal personality and limited liability. It proposes that these challenges can be overcome through the notion of 'enterprise analysis' which focuses on the activity of the MNC as an economic unit rather than disparate legal entities.

3. Basis of corporate complicity in serious human rights violations and crimes

3.1. Libertarian vision of corporations

Classical liberal ideology underpins much of Anglo-American law regulating corporations.¹ Imperatives of social justice and demands for the recognition of positive obligations to promote human rights find little or no application in regimes of company law generally.² This libertarian vision of corporations, as argued by David Bilchitz, understands the corporation 'as essentially an expression of the private interests underlying it'.³ In consequence, the function and purpose of corporations is merely to maximise profits while limiting significant harm to society.⁴

Since corporations are the main force behind international commerce, trade and investment, this vision of corporations extends globally. The perception of corporations as simply agents of profit-maximisation is entrenched by the supposition that the global market is the 'natural' order of economic life.⁵

¹ See JT Pretorius et al *Hahlo's South African Company Law through the Cases* 6 ed (1999) at 1–3 referred to in Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 687.

² Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 688.

³ David Bilchitz 'Do corporations have positive fundamental rights obligations?' (2010) 57 *Theoria: A Journal of Social & Political Theory* at 6.

⁴ Ibid.

⁵ Laurence Boulle *The Law of Globalisation* (2008) at 8.

Therefore, this argument concludes, leaving the market to be free as possible of regulatory interference will ensure what is best for economic development.⁶

3.2. Corporate malfeasance as a consequence of weak governance and regulation

The libertarian vision of corporations is problematic when it is prioritised over concerns about the potential negative impact of business in regions where there is weak governance and regulation.⁷ Not surprisingly, instances of corporate malfeasance in African states carried out for the primary purpose of making profit have contributed to serious human rights abuses. In 2006, a multinational trading company – Trafigura, the world's third largest independent oil trader – disposed of hazardous waste at 18 different dump sites in Abidjan, Côte d'Ivoire.⁸ This toxic waste led to a medical emergency in which tens of thousands of people experienced a range of similar health problems, including headaches, skin irritations and breathing problems.⁹ Trafigura chose to dump the toxic waste in Abidjan after a series of unsuccessful attempts in some European countries.¹⁰ These attempts were unsuccessful primarily due to the high cost of treating the waste.¹¹ Trafigura rejected the safe option for disposal and chose instead to dump the waste without treatment in Abidjan as a cheaper method of disposal.¹² Ivoirians have suffered extensive harm to their health and to their environment as a result of Trafigura's unlawful dumping.¹³

Criminal proceedings against Trafigura Beheer BV (registered in the Netherlands) and its directors were partially successful.¹⁴ The company and its directors were

⁶ Ibid 8.

⁷ See Laurence Boulle 'Introduction: Governance in a Globalisation Era' in Laurence Boulle (ed) *Globalisation and Governance* (2013) at 20-1.

⁸ Amnesty International & Greenpeace Netherlands *The Toxic Truth: Côte d'Ivoire Toxic Waste Report* (2012) at 9 and 14 ('Trafigura Report').

⁹ Trafigura Report at 9.

¹⁰ Trafigura Report at 11-2.

¹¹ Trafigura Report at 8.

¹² Trafigura Report at 83.

¹³ Trafigura Report at 51ff.

¹⁴ A €1 million fine was imposed on Trafigura. Appeal decision of the Netherlands Court of Appeal, 23 December 2011 (Trafigura Report at 160). On 17 March 2014, Amnesty International sent a detailed legal brief to the UK's Crown Prosecution Service (CPS) and the Metropolitan Police, calling for a criminal investigation into Trafigura Limited

found guilty and fined only for the legal breaches and offences that took place in the Netherlands and not in Côte d'Ivoire.¹⁵ The Dutch Public Prosecutor excluded potential crimes committed in Côte d'Ivoire in his investigation.¹⁶ He reasoned that it 'appeared impossible' to conduct an investigation in Côte d'Ivoire, despite attempts to do so.¹⁷ A complaint by Greenpeace against the Dutch Public Prosecutor's decision to exclude potential crimes committed in Côte d'Ivoire in investigation was unsuccessful.¹⁸ In rejecting the complaint lodged by Greenpeace, the Dutch Court of Appeal held that the Public Prosecutor had a margin of discretion in deciding which offences are in the public interest to investigate and prosecute, and that he has sole authority to determine which cases to pursue.¹⁹ Hence, the full extent of criminal justice was not achieved as Trafigura and its directors have not been prosecuted for the offences committed in Côte d'Ivoire.²⁰

Therefore, such incidents show that there is a need to strengthen governance and regulation in African states to prevent similar acts of corporate malfeasance. Over and above this, there is an equally urgent need to explore ways through which corporations that have contributed to gross human rights violations and crimes should be held criminally liable in international law. The exploration of criminal liability of corporations in international law can also offer solutions that overcome

(registered in the United Kingdom) for its role in the 2006 catastrophe (<https://www.amnesty.org/en/articles/news/2014/11/uk-threat-high-court-action-spurs-review-corporate-conspiracy-claim/>).

¹⁵ Trafigura Report at 160.

¹⁶ Trafigura Report at 160.

¹⁷ Trafigura Report at 160.

¹⁸ See Complaint concerning failure to prosecute for an offence under Article 12 of the Dutch Code of Criminal Procedure (English translation) available at <http://www.greenpeace.org/international/Global/international/planet-2/binaries/2009/10/trafigura-complaint-toxic.pdf>. See also Trafigura Report at 160.

¹⁹ Judgement of the Court of Appeal of the Hague, Decision given on account of the Complaint under Section 12 of the Dutch Code of Criminal Procedure at 15 (Trafigura Report at 160).

²⁰ In February 2007, Trafigura reached a financial settlement of approximately US \$200 million with the government of Côte d'Ivoire in terms of which all Trafigura employees would be granted immunity against prosecution in Ivorian courts (Protocol of agreement (Protocole d'accord) between the State of Côte d'Ivoire and the Trafigura Parties, 13 February 2007, Trafigura Report at 133).

limitations in national jurisdictions as seen in the prosecution of Trafigura in the courts of the Netherlands.

3.3. Human rights law and the libertarian vision of corporations

The vision of corporations as solely concerned with profit-making is changing.²¹ John Ruggie points out that the conception of the corporation as more than just a profit-making enterprise can be attributed to the growing realisation in international law that corporations can be 'subjects' of law in possession of rights and concomitant duties.²² In addition, the recognition of the immense power and influence of MNCs reinforces the argument that MNCs must bear responsibility for the rights on which they may have an impact.²³

There are instances in Africa that show that the promotion of human rights ideals in company regulation is taking shape. In South Africa, section 8(2) of the Constitution expressly extends the Bill of Rights to juristic persons insofar as it is applicable.²⁴ South Africa's Parliament recently passed the Companies Act, which seeks to reorient the relationship between companies and their obligations under the Bill of Rights of the Constitution.²⁵ Section 7(a) of the Companies Act stipulates that the purpose of the Act is to promote compliance with the Bill of Rights in the application to company law.

Taken together, section 8(2) of South Africa's Constitution and section 7 of South Africa's Companies Act have a twofold effect on MNCs operating in South Africa. First, the pursuit of profit by companies must conform to constitutional requirements that specifically include the respect, protection and fulfilment of

²¹ John Ruggie 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819 at 824.

²² John Ruggie 'Business and Human Rights: The Evolving International Agenda' at 824. I develop this line of argument in detail below.

²³ John Ruggie 'Business and Human Rights: The Evolving International Agenda' at 824. See Economic and Social Council (ECOSOC), Sub-Commission on the Promotion and Protection of Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). These norms have not been adopted and are presently referred to as the 'Draft Norms'.

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ Act 71 of 2008. The Companies Act came into force in 2011.

human rights to the extent that these rights are applicable.²⁶ Second, and in consequence, the nature of the corporation and the duties imposed on directors of companies must now have regard to fundamental human rights in addition to shareholder interests such that the values of the Constitution may be integrated into the core operation of companies.²⁷

Kenya's Constitution expressly extends the application of the Bill of Rights to all persons and State organs.²⁸ Article 260 defines 'person' as including 'a company, association or other body of persons whether incorporated or unincorporated'. Thus, Kenya's Constitution requires corporations to respect and refrain from harming human rights.²⁹

Therefore, while a number of jurisdictions in Africa bind corporations to avoid harming human rights, there is little said about the consequences of harm when it does happen. When corporations harm or are complicit in the harm of human rights, such conduct should be seen not merely as an infraction of a constitutional or legislative obligation but a violation that is prosecutable in the criminal law if the harm is serious.

3.4. Corporate complicity: failure to fulfil a duty of care

Corporations respect human rights primarily by ensuring that they have a process that enables them to comply with national laws and to manage their activities in such a way that the risk of violating human rights is avoided.³⁰ This process ensures

²⁶ David Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125 *SALJ* 754 at 779-783.

²⁷ Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 706.

²⁸ See Article 20(1) Constitution of the Republic of Kenya, 2010.

²⁹ See Kenya National Commission on Human Rights *Promoting business responsibility for human rights at 2* (available at http://www.knchr.org/LinkClick.aspx?fileticket=QZ4yU_b-MzU%3D&tabid=155&portalid=0&mid=582).

³⁰ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) A/HRC/8/5 para 25. See also Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 155.

that corporations fulfil their duty 'to do no harm'.³¹ The Special Representative of the Secretary-General on the issue of human rights and transnational corporations ('Special Representative on human rights') refers to this process as 'due diligence'. This process helps corporations 'to become aware of, prevent and address adverse human rights impacts'.³²

The notion of due diligence in international law, as indicated by the Special Representative on human rights, is useful both as a managerial tool and as a foundation of a general duty of care for compliance with human rights obligations.³³ Importantly, it transcends the narrow aim of ensuring the success of a corporation by managing well the financial and reputational risk that may arise by not complying with human rights obligations.³⁴ International law contemplates a duty of care for human rights abuses that is owed by corporations to persons outside the corporation.³⁵ Thus, when a corporation adopts due diligence in its business activities, failure to fulfil these duties must give rise to legal liability. Criminal liability should follow if the extent of failure to fulfil these duties of care is gross and the harm that results as consequence of this failure is serious. Accordingly, the Dutch Appeal Court found Trafigura criminally liable for the unlawful dumping of hazardous waste on the basis of its failure to formulate a proper plan for disposal of the waste and its failure to check that Abidjan possessed the proper facilities to process the waste before discharging it.³⁶

There are also calls for the extension of international criminal liability to MNCs for serious human rights violations where this is necessary and appropriate. These

³¹ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) A/HRC/8/5 para 24.

³² Ibid para 56.

³³ Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 161.

³⁴ Ibid.

³⁵ Ibid.

³⁶ See Amnesty International English translation of verdict on Trafigura Beheer BV, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), paras 13.3.3 - 13.3.4 (Trafigura Report at 157).

calls have given rise to a wide and complex debate. The remainder of this chapter discusses some of the key considerations in this debate.

4. Considerations regarding the extension of criminal liability to multinational corporations in international law

The approach to the discussion on the extension of criminal liability to MNCs follows three threads. The first thread suggests that legal personality in international law has been unnecessarily restricted to a bifurcated inquiry into whether a member of the international community possesses enforceable rights and duties and is therefore a subject or object of international law. In the light of the complex processes and decision-making in the international community – which illustrate that international law's role is far more than the regulation of interstate relations – this limited inquiry ought to be expanded to include participants in international law.

The second thread in this discussion, which is more specific to criminal law, revolves around the notion that in criminal law, legal personhood and moral responsibility are in some sense coterminous. Hence, to speak of the criminal responsibility of MNCs is to speak of the fact that they have moral responsibility or that they are moral agents. The issue here is whether it is necessary to speak of the moral agency of corporations in order to establish that they can be criminally responsible.

The third thread dwells on the specific difficulties that doctrines arising from domestic corporate law present to international corporate criminal liability. This discussion proposes that in view of the complex organisational arrangements particular to MNCs, legal principles that found the liability of corporations in domestic jurisdictions in general, ought to be developed significantly if they are to be used for the establishment of international criminal liability of corporations.

4.1. Considerations from public international law

4.1.1. *Legal personality and legal subjectivity*

The prevailing view in international with regard to MNCs is that they do not have international legal personality;³⁷ thus they cannot be treated as subjects but only as objects of international law.³⁸ However, as one commentator suggests ‘the question of the international personality of transnational corporations remains an open one’.³⁹ International criminal law, as part of public international law, does not apply to MNCs or other juristic persons.⁴⁰ Whether this principle or status quo is sacrosanct and consequently not subject to modification has been cast into doubt.⁴¹ The irony is that individual actors are treated as subjects of international law though non-state actors such as MNCs, which wield considerable more power

³⁷ See *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 *ICJ Reports* at 174, which discusses the distinction between international legal personality and subjects or objects of international law. Only states have full legal international personality in the sense that there can be other subjects of international law that also possess rights and duties but these rights and duties are not the same as those of states. International legal personality (and thus full participation in international law) confers on an entity ‘direct international rights and responsibilities, [the ability]... to bring international claims and [the ability]... to participate in the creation, development and enforcement of international law’. Objects of international law are those members or entities of the international community about whom legal rules are made (territories/rivers) or who are beneficiaries of the international legal system (see Robert McCorquodale ‘The Individual and the International Legal System’ in Malcolm Evans (ed) *International Law* 2 ed (2006) at 309 (reprinted in Andrea Bianchi (ed) *Non-State Actors and International Law* (2009)).

³⁸ Lauterpacht argued that this view is not absolute and that the practice of states has shown that international law has been made applicable to individuals also – especially with regard to the law of war (Hersch Lauterpacht ‘The Subjects of the Law of Nations’ (1947) 63 *Law Quarterly Review* at 136 (reprinted in Andrea Bianchi (ed) *Non-State Actors and International Law* (2009) at 141-2). Some authors argue that MNCs should be held accountable alongside states. See Philip Alston (ed) *Non-State Actors and Human Rights* (2006); Andrew Clapham *Human Rights Obligations of Non-state Actors* (2006) at 25-27.

³⁹ Malcolm Shaw *International Law* 6 ed (2008) at 250.

⁴⁰ See Article 25(1) of the International Criminal Court Statute; Articles 5 and 6(1) of the Statute of the International Criminal Tribunal for Rwanda and articles 6 and 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia and article 6 of the Statute of the Special Court for Sierra Leone.

⁴¹ Robert McCorquodale ‘The Individual and the International Legal System’ in Malcolm Evans (ed) *International Law* 2 ed (2006) at 309.

than individuals and thus can do a lot more harm, are not regarded as subjects of international law.⁴²

4.1.2. *Limiting international legal personality to states is merely a rule of expediency*

In discussing the possible extension of international criminal law beyond individuals, Andrew Clapham refers to two insights from James Brierly that raise doubts about whether possible developments in international law will not envisage juristic persons as subjects of international law.⁴³ Writing in 1928, James Brierly criticised the fact that the principle that limited legal personality to states and did not include individuals was not a principle but merely a rule of expediency and a rule of procedure.⁴⁴ Andrew Clapham takes the view that the exclusion of juristic persons or MNCs from the notion of legal personality in international law is merely a rule that can be changed or adapted. He argues simply that efficiency or expediency in legal principles should not blind us from the reality of MNCs. He adds that in order for international criminal law to be effective, entities or corporations that violate the principles of international should be prohibited from doing so.⁴⁵ To neglect the violations of juristic persons or their complicity in the commission of international crimes is tantamount to reducing the effectiveness of international criminal law.

⁴² Wolfgang Kaleck & Miriam Saage-Maasz 'Corporate Accountability for Human Rights Violations amounting to International Crimes' (2010) 8 *Journal of International Criminal Justice* 699 at 720; also David Kinley & Junko Tadaki 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931 at 937-9.

⁴³ Andrew Clapham 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899 at 901. See also 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 & Saman Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* (2000) 191.

⁴⁴ He refers to James Brierly 'The Basis of Obligation in International Law' in H Lauterpacht and CHM Waldock (eds) *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (1958) 1-67 at 51.

⁴⁵ Andrew Clapham 'Extending International Criminal Law' at 902.

4.1.3. *Capacity should be the basis of international legal personality*

Andrew Clapham suggests that the determination of what entity in international law is recognised as having legal personality based on legal subjectivity (rights and duties) is an unnecessary and formalistic categorisation.⁴⁶ He argues that the focus should be on capacity rather than subjectivity. The capacity of an entity such as a MNC could in many respects provide sufficient grounds for its recognition as a legal person in international law.⁴⁷ In order to avoid the misconception (and fears)⁴⁸ that MNCs as legal persons could be equated to states as the legal person par excellence in international law, Andrew Clapham suggests that the capacity of MNCs could be interpreted as conferring limited legal personality on MNCs. His intended aim is to articulate the argument that MNCs are bound to fulfil the obligations of international human rights law due to their capacity as non-state actors with limited legal personality.⁴⁹

4.1.4. *Legal personality on the basis of participation in international law*

Whereas debate about the recognition of the international legal personality of MNCs ordinarily revolves around the holding of rights and duties and, in consequence, that the actors in international law are either subjects or objects of international law, there are those who propose that this debate ought to include notions of participation.⁵⁰ Rosalyn Higgins put forward the view that the determination of legal personality in international law of non-state actors should

⁴⁶ Andrew Clapham *Human rights Obligations of Non-State Actors* at 77.

⁴⁷ Ibid 78.

⁴⁸ He points out two fears of recognising the international legal personality of MNCs. First is the fear that granting MNCs legal personality would have greater access to interfere with the political and economic matters of sovereign states. Second is the fear that foreign corporations could claim excessive diplomatic protection for national companies of the host states when foreign nationals are the controlling shareholders in those companies (at 78).

⁴⁹ Andrew Clapham *Human rights Obligations of Non-State Actors* at 28. He emphasises the need to challenge the assumption that international law only operates in the relationships between traditional subjects of international law (states) and in international tribunals. There is a space, a network within which international law applies to non-state actors that ought to be recognised.

⁵⁰ Malcolm Shaw *International Law* 6 ed (2008) at 196-7 who states that legal personality in international law 'includes participation plus some form of community acceptance'.

be based on a theory of participation.⁵¹ It is participation rather than subjectivity that should be the basis of the framework that examines involvement in the international legal system.⁵² She argues that the binary of 'subject' and 'object' in international law 'has no credible reality, and, in my view, no functional purpose'.⁵³

The argument that individuals, states, non-governmental organisations, international organisations and multinational corporations should be considered not as subjects or objects of international law but as participants with differing degrees of participation in the international law-making process⁵⁴ is a very persuasive one in light of the fact that international law is no longer simply a body of rules for the regulation of interstate relations.⁵⁵ There is the acknowledgement that the power and influence of MNCs globally must be consonant with their growing responsibility.⁵⁶ It stands to reason that those participants in international law that exercise considerable power and influence also participate to a high degree in the international law-making and other related processes.⁵⁷ Therefore, they ought to be accorded the necessary recognition as participants in international law. As participants of significant pedigree, MNCs ought rightly to have international law (including international criminal law) applicable to them. The essence of this argument is that more power requires more control because the greater the power, the greater the possibility for the causation or contribution to violations of international law.⁵⁸

⁵¹ See Rosalyn Higgins *Problems and Process: International Law and How We Use it* (1994).

⁵² Robert McCorquodale at 125.

⁵³ Higgins at 49. See also Theodor Meron *The Humanization of International law* (2006). For a review of Theodor Meron's book see Jochen Frowein 'Book Review: *The Humanization of International law*' (2007) 101 *American Journal of International law* 680.

⁵⁴ Rosalyn Higgins *Problems and Process: International Law and How We Use it* at 51 and Jennifer Zerk *Multinationals and Corporate Social Responsibility* (2006) at 74.

⁵⁵ Ole Kristian Fauchald & Jo Stigen 'Corporate responsibility before International institutions' (2008) *George Washington International Law Review* 1025 at 1029-30.

⁵⁶ David Weissbrodt & Muria Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human rights' (2003) 97 *American Journal of International law* 901 at 901. Sara Sun Beale & Adam Safwat 'What developments in Western Europe tell us about American Critiques of corporate criminal liability' (2004) 8 *Buffalo Criminal Law Review* 89 at 103.

⁵⁷ See generally, Alan Boyle & Christine Chinkin *The Making of International Law* (2007).

⁵⁸ See Emeka Duruigbo 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2007) 6 *Northwestern*

4.1.5. *Legal personality of multinational corporations based on the recognition of their rights in international law*

Claire Cutler argues forcefully that the current non-recognition in international law of the legal personality of MNCs is leading to a legitimacy crisis where the theory of law and practice are no longer *ad idem*.⁵⁹ This crisis is most clearly manifested in the allocation of rights and duties. Content not to be regarded as legal persons under international law, and therefore not obligated to fulfil duties arising from public international law in general, MNCs are able to vindicate their rights in manifold ways through institutions of international law.⁶⁰ In international forums for dispute settlement such as the International Centre for the Settlement of Investment Disputes (ICSID)⁶¹, corporations can assert their rights against states.⁶² Regionally, investors can seek remedies in trade agreements through multilateral agreements such the North American Free Trade Agreement (NAFTA).⁶³ Multinational corporations are also able to reinforce their investments through investment insurance⁶⁴ and the protection of their intellectual property rights⁶⁵ under the regime of the World Trade Organisation (WTO).⁶⁶ The practice clearly illustrates that MNCs enjoy widespread recognition in diverse areas of

University Journal of International Law 222 at 248; Justine Nolan 'With Power Comes Responsibility: Human Rights and Corporate Accountability' (2005) 28 *University of New South Wales Law Journal* 581 at 581; Kinley & Kindaki at 935; Weissbrodt & Kruger at 901.

⁵⁹ See A Claire Cutler 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133 (reprinted in Andrea Bianchi (ed) *Non-State Actors and International Law* (2009)).

⁶⁰ A Claire Cutler 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133 at 141.

⁶¹ 1965 ICSID Convention 575 UNTS 159.

⁶² This is particularly observable in cases involving expropriation without compensation (Cutler at 29).

⁶³ Entered into between the US, Mexico and Canada in 1972.

⁶⁴ See the Multilateral Investment Guarantee Agency (MIGA) established in 1988 by the World Bank.

⁶⁵ See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) available at www.wto.org.

⁶⁶ See Francesco Francioni 'Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations' in Wolfgang Benedek et al (eds) *Economic Globalisation and Human Rights* (2010) 245 at 254-5.

international law yet the theory of international legal personality has not been developed to take this into account.

4.1.6. Duties of multinational corporations in international law concomitant to their rights

James Stewart argues that the acceptance of the legal fiction that juristic entities are persons, that is, corporations have personhood and are hence capable of exercising rights as natural persons, then this legal fiction ought to be taken to its logical conclusion.⁶⁷ The logical conclusion is that the exercise of rights entails the performance of duties. International law currently recognises only half of this legal fiction and in order to be consistent, James Stewart argues that the fiction should be taken to its logical end by the recognition in international law that corporations have duties just as natural persons do.⁶⁸

4.1.7. Legal personality of multinational corporations based on applicability of norms of international criminal law

Volker Nerlich offers a sophisticated argument against the exclusion of corporations from international criminal law. He observes that though international crimes do not apply to juristic persons, this does not mean that international criminal law is not concerned with MNCs.⁶⁹ He argues that norms of international law criminal law consist of two sub-norms. The first, more elementary, simply prohibits certain conduct such as the prohibition not to kill. The second sub-norm sets out the consequences of violating the first sub-norm such as prosecution.⁷⁰ It is undisputed that the first sub-norm, the prohibition of certain conduct, is applicable to MNCs. An illustration of this is in Nuremberg

⁶⁷ James Stewart 'A Pragmatic Critique of Corporate Criminal Theory: Atrocity, Commerce and Accountability' (2013) 16 *New Criminal Law Review* 261 at 272.

⁶⁸ Ibid 272-3. See also Mordechai Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909 at 913 who speculates that 'if the corporation has enough mind and free will to commit itself to a contract, where do the mind and will disappear when we turn to the penal law?'

⁶⁹ Volker Nerlich 'Core Crimes and Transnational Business Corporations' (2010) 8 *Journal of International Criminal Justice* 895 at 898.

⁷⁰ Ibid.

where business corporations or corporations generally could be declared criminal for their involvement in the commission of international crimes.⁷¹ However, the second sub-norm, that the violation of the prohibition results in prosecution and perhaps punishment, is not at present applicable to juristic persons.⁷² Therefore, though the consequences of violating norms of international criminal law may not at present be applicable to MNCs, this position could arguably change if a suitable legal framework is devised to set out what these consequences would be and how they could be applied to MNCs.

To sum up, the limitation of legal personality to states in international law appears only to be a rule of expediency. As a positivist rule, it is far outweighed by a number of considerations in respect of MNCs. First, MNCs now have power and influence that gives them the capacity to be subjects of international law; second, this capacity enables MNCs to participate meaningfully in international legal processes; third, MNCs enjoy a wide recognition of their rights in international law and therefore they have concomitant duties as subjects of international law; and finally, the applicability of norms of international law to organisations as underlined in Nuremberg illustrates that MNCs are bound to refrain from violating international law norms.

4.2. Considerations from criminal law

4.2.1. *Legal personality and moral responsibility*

A troubling issue arises when a discussion of legal personhood of non-human persons is brought up in criminal law. In civil law, or more specifically, in corporate law, legal personality has no bearing on the notion of fault. Under corporate law, the intention or *animus* of a person to hold property or to be bound to the terms

⁷¹ See Articles 9 of the Nuremberg Charter (1945), which in relevant part states:

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.

For a discussion of this see Desislava Stoitchkova *Towards Corporate Liability in International Criminal Law* (2010) at 47-9 ('Stoitchkova').

⁷² Volker Nerlich 'Core Crimes and Transnational Business Corporations' (2010) 8 *Journal of International Criminal Justice* 895 at 899.

of a contract are equated to that of a juristic person with no apparent conceptual difficulty.⁷³ In criminal law, however, the intention, *dolus* or *culpa*, of a natural person to commit a certain crime cannot easily be equated to that of a corporation. The reason for this appears to lie in criminal law's connection with notions of moral blameworthiness or moral personhood.⁷⁴

Generally, in common-law jurisdictions, legal personality (or capacity) in criminal law entails that the person subjected to criminal law must be shown to have fulfilled all the elements of a crime – including intention or *mens rea* – if accused of committing a crime.⁷⁵ Those opposed to recognising the legal personality of juristic persons in criminal law argue that legal personality in criminal law requires the ability of the person to act as a moral agent and therefore to be morally blameworthy.⁷⁶ Corporations, they argue, cannot be moral agents and they cannot be said to be morally blameworthy. This is particularly the case in some civil law jurisdictions such as Germany, whose criminal law requires proof of a central tenet referred to as *schuldprinzip*, namely personal guilt or blameworthiness.⁷⁷ Thus, in German criminal law, there is no provision for the criminal responsibility of corporations but only that of individual officers.⁷⁸ In view of this, the issue is whether corporations or MNCs can be taken to have moral blameworthiness since they are moral persons or whether this is irrelevant for the purposes of extending international criminal law to MNCs. The crisp consideration is whether it is

⁷³ Celia Wells *Corporations and Criminal Responsibility* (1994) at 90-1.

⁷⁴ Stoitchkova at 35.

⁷⁵ See Richard Card *Card, Cross and Jones Criminal Law* 19 ed (2010) at 76ff; C R Snyman *Criminal Law* 4 ed (2003) at 143ff and David Ormerod *Smith & Hogan Criminal Law* 11 ed (2005) at 90ff.

⁷⁶ Stoitchkova at 35-6.

⁷⁷ Michael Bohlander *Principles of German Criminal law* (2009) at 16. German criminal law is premised on a 'tripartite structure' that includes: (i) *Tatbestand* (*subjektiver Tatbestand* or *mens rea* and *objektiver Tatbestand* or *actus reus*); (ii) *Rechtswidrigkeit* (absence of justification or unlawfulness) and (iii) *Schuld* (element of blameworthiness or guilt).

⁷⁸ Michael Bohlander at 23. Substantive criminal law is inapplicable to legal entities in Germany. However, it is possible to mete out fines or to make forfeitures of property. The author notes that because of lack of dogmatic clarity, German criminal law has not, unlike other European (or civil law) countries, adopted international criminal law principles for the establishment of corporate criminal liability. He suggests that a likely development would be the introduction of corporate-specific offences but not substantive corporate criminal liability.

necessary to require that corporations possess some intentionality that can be equated to the possession of a guilty state of mind that criminal law requires of individuals.

4.2.2. *Corporate intentionality*

Individualists argue that intentionality, as the basis of a crime, can only be individual.⁷⁹ They affirm that only individuals have the capacity to act rationally and autonomously and thus intentionally. Hence, only individuals are moral agents and can be morally blameworthy.⁸⁰ To attribute moral responsibility to a corporation is, under this view, equivalent to attributing moral blameworthiness or guilt on individual agents making up that corporation.⁸¹

Collectivists argue to the contrary. They take the view that corporations can possess a corporate intention that is translated into a corporate desire or policy to carry out certain conduct.⁸² Thus, under this view, corporations, like individuals, can be said to be morally responsible independently of whether they can be considered as moral persons or agents.

The individualist/collectivist dichotomy is mirrored in the nominalist/realist dichotomy in theories of legal personality.⁸³ According to the nominalist theory, the legal personhood of a juristic person is merely a fiction. A juristic person is simply a collection of individuals. The realist view, however, maintains that a corporation is indeed a separate legal person in its own right, distinct from the individuals that run it.⁸⁴ These theoretical views are relevant when a decision on what mode of criminal liability should be applied to juristic persons has to be made. The nominalist view holds that a corporation cannot be said to be criminally liable or culpable unless there is or are individuals that are part of the corporation

⁷⁹ Stoitchkova at 30-1.

⁸⁰ Ibid 31.

⁸¹ Ibid.

⁸² Peter French *Collective and Corporate Responsibility* (1984) chap 3; Brent Fisse and John Braithwaite 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1998) 11 *Sydney Law Review* 468 at 483.

⁸³ Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 1-2.

⁸⁴ Ibid 2-3.

who have been found to be criminally liable.⁸⁵ This mode of liability is referred to as derivative liability. The realist view proposes that the juristic entity itself, because it has a separate legal personality, is indeed capable of possessing criminal culpability. This is referred to as non-derivative liability. A discussion of the consequences of derivative and non-derivative liability on the scope of liability of MNCs is attended to in chapter 4. An examination of the suitability of methods of punishment for liability of MNCs is also reserved for that chapter.

Collective criminal responsibility offers good reasons for extending international criminal law to MNCs in two ways. First, greater harm is more likely to result from collective action than individual action and second, the individual conduct of employees or officials may be insufficient to hold them individually liable or may be impossible to prove.⁸⁶

The thrust of the collectivist view is that corporations can possess intentionality distinct from that of individual employees or officials.⁸⁷ This view finds support in the fact that corporations can be said to possess corporate negligence, a distinct form of *culpa* from that of individual employees. Corporate negligence for human rights violations can be separated from the negligence of individual executives.⁸⁸

Therefore, the argument that legal personality in criminal law should not be extended to juristic persons on the basis of their inability to be moral agents

⁸⁵ Ibid.

⁸⁶ Ronald Slye 'Corporations, Veils, and International Criminal Liability' (2008) 33 *Brooklyn Journal of International Law* 955 at 960. The definitional elements of serious international crimes by and large indicate that it is collective activity that leads to the commission of these crimes. For instance genocide, grave breaches of the Geneva Conventions of 1949, War Crimes, Crimes against Humanity and the Crime of Aggression would ordinarily involve collective acts of criminality on the part of accused persons. Include examples of this from statutes (at 961).

⁸⁷ This, however, should not be construed to mean that in the prosecution of corporations, individual criminal responsibility of officials/directors/employees should be dispensed with. They are distinct avenues for the establishment of liability on the basis of two different kinds of intentionality: individual and corporate.

⁸⁸ *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SDNY 1986)). A US federal court found that since Union Carbide – a US registered company – would submit to the jurisdiction of Indian courts, the multimillion dollar suit for compensation in a case involving a gas leak disaster, ought to be adjudicated in India rather than the US.

cannot hold. Corporations can be held criminally responsible since they are capable of possessing an intentionality distinct from that of individual employees.⁸⁹ The question of moral agency is in this respect a peripheral one.⁹⁰

4.2.3. *Multinational corporations: moral agency and deterrence*

Though stated here to be peripheral, the consideration of whether MNCs are moral agents or not is highly important in the broader field of regulation of MNCs in international human rights law. Obligations contemplated in international human rights law against MNCs are mostly voluntary in nature and hence not susceptible of legal sanction.⁹¹ Writing on corporate social responsibility, Olufemi Amao takes the view that MNCs have duties that are not only legal but also moral in character. He premises this view on the fact 'that the modern corporation has acquired the capacity to enter into the ... social contract by virtue of the status the

⁸⁹ For contrasting views, see Thomas Weigend 'Societas Delinquere non potest? A German Perspective' (2008) 6 *Journal of International Criminal Justice* 927 at 930-1. He echoes the views from German law and jurisprudence expressed by Kant, Savigny and von Gierke. They eschew the notion that criminal responsibility can be predicated of legal persons. At best, the will (or intention) of the legal person can only be the collective will of its representatives and even then this collective will can only lead to civil liability.

⁹⁰ I agree with the argument made by R Ewin that the moral agency of a corporation is limited because it is *exhausted* by its legal personality. This means that 'the moral personality of a corporation [because it is an artificial and not natural person, is] at best a Kantian sort of moral personality, one restricted to the issues of requirement, rights and duties. It could not be the richer moral life of virtues and vices that is lived by the shareholders, the executives, the shop-floor workers, the unemployed and "natural" people in general' (R E Ewin 'The Moral Status of the Corporation' (1991) 10 *Journal of Business Ethics* 749. In addition, according to this author's view, though responsibility has necessarily to be imputed to persons of flesh and blood (Lauterpacht 'Subjects of the Law of Nations law'), it is not unreasonable to extend the consequences of the irresponsible acts of corporate officials to the corporate entity. As argued by Volker Nerlich, the injunction to obey an international law norm can be separated from the consequences of its prohibition. The injunction and hence responsibility for prohibition would ordinarily be fall on individual officials. The consequences, however, can fall on both corporate officials and the corporate entity as a distinct legal person. Discussions on whether corporations have a corporate conscience, whether there is a distinction between moral agency and moral personhood are beyond the scope of this chapter.

⁹¹ Elisa Westfield 'Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century' (2002) 42 *Virginia Journal of International Law* 1075; Christopher McCrudden 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?' (1999) 19 *Oxford Journal of Legal Studies* 167.

law has afforded to it'.⁹² He proposes that, as part of the social contract, businesses have certain obligations to fulfil that come from society and they have as well rights that are accorded to them by their membership in the social contract.⁹³

By suggesting that MNCs have moral obligations, Olufemi Amao essentially argues that law is linked to morality (and rejects the exclusive positivist view that law and morality are completely separate).⁹⁴ He recognises that the law cannot (and perhaps should not) encompass all the duties expected of MNCs. Thus, the notion that responsibility for corrupt practices has moral undertones is linked to the fact that a corrupt act is not only an illegal act but also an immoral one. Though a conviction of infringing copyright laws and a conviction of paying a public official in a poor developing country a bribe to ensure the awarding of a contract may both have similar penal consequences, the moral turpitude of the latter crime is higher than that of the former. This consideration is relevant to a discussion of the extension of criminal liability to MNCs. Holding MNCs criminally liable for actions that are not only illegal but more importantly, gravely immoral, will have a greater deterrent effect on the commission of crime by MNCs.

David Bilchitz has argued that the regulation of corporations needs to consider that the corporate form offers strong social advantages (wealth creation, incentivizing growth) which are often accompanied by grave social harms (complicity in serious human rights abuses).⁹⁵ Therefore, law-makers, being responsible for the creation of the corporate form, ought to bear in mind that they have the responsibility of ensuring that a framework be put in place that can

⁹² Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (2011) at 83. He describes the social contract (at 80) as embodied in circumstances where 'society decides to move from a situation of undefined rights and incessant conflict over resources to a society under a social contract whereby individuals agree to honour the rights of others in return for guarantees that their own rights will be respected and protected'. John Rawls also included corporations in the social contract, *Theory of Justice* (1999) at 126.

⁹³ Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (2011) at 80-3.

⁹⁴ See for example, Herbert Lionel Adolphus Hart 'Positivism and the Separation of Law and Morals' (1958) *Harvard Law Review* 593-629.

⁹⁵ David Bilchitz 'Do corporations have positive fundamental rights obligations?' (2010) 57 *Theoria: A Journal of Social & Political Theory* at 11.

regulate business effectively to avoid human rights violations.⁹⁶ Where these violations are serious, law-makers should consider the possibility of incorporating criminal law into this regulatory framework.

To sum up, criminal law's attribution of guilt considers that the accused is a moral agent that acted intentionally in committing an offence. Therefore, under criminal law, a criminal intention is tied to moral blameworthiness. In respect of corporations, two questions that arise are whether corporations are moral agents and if they are, whether they can possess a criminal intention distinct to that of the natural persons that make up the corporation. Without need to determine whether corporations are moral agents, this section concludes that corporations do indeed possess a form of collective intentionality that is distinct to that of their employees. Therefore, corporations can in their own right be subject to criminal law. The question of moral agency, however, is an important one that plays a significant role in the regulation of MNCs in international human rights law.

4.3. Considerations from corporate law

Whereas corporations are not regarded as legal persons under international law, municipal legal systems have long recognised that corporations are legal persons capable of holding rights and bearing duties.⁹⁷ MNCs – through their various constituent-affiliated corporate bodies – are recognised in a plurality of legal systems. Importantly, MNCs can take a variety of business forms. They may be constituted as contractual forms between home state producers and host state distributors;⁹⁸ alternatively as equity-based corporate groups⁹⁹ or as joint ventures¹⁰⁰ or as publicly owned multinational enterprises found predominantly in developing states.¹⁰¹ In terms of the law, each corporate body that forms part of

⁹⁶ Ibid.

⁹⁷ Philip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) at 21-2.

⁹⁸ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 52.

⁹⁹ Ibid 56.

¹⁰⁰ Ibid 66.

¹⁰¹ Ibid 70.

the broader MNC structure is recognised as a separate legal person.¹⁰² This is the principle of recognition followed under the law. It is not the MNC as a whole that is recognised as the repository of rights and duties but its constituent elements. Therefore, the challenges to establishing criminal liability of the MNC are analogous to those of the simpler company-board of directors structure. These challenges are multiplied due to the complex nature of MNC business structures.¹⁰³

4.3.1. MNC business forms and the unsuitability of current legal forms of recognition

As discussed above, each constituent part of MNCs is ordinarily recognised as a legal person and not the economic enterprise as a whole. It appears that though the arrangements of business structures have metamorphosed to adapt to changing market conditions,¹⁰⁴ the law has not followed a similar trajectory. Whereas the typical form of large corporate activity recognised in law is the hierarchical parent-subsidary form, MNCs have changed considerably and adopted far more diverse and complex organisational structures than the simple parent-subsidary structure.¹⁰⁵ For example, in order to increase the efficiency of operations, large multilocal enterprises have adopted divisionalisation structures in which operating functions of several subsidiaries are carried out by one corporate entity and functions flowing from this central entity are divided among separate divisions. Rather than being separate companies, subsidiaries are essentially divisions.¹⁰⁶

Business forms have also diversified and become 'heterarchical' as opposed to the traditional hierarchical structure.¹⁰⁷ This is observable in the increase of

¹⁰² Peter Muchlinski 'Limited Liability and the Multinational Corporate Enterprise: A case for reform?' (2010) 34 *Cambridge Journal of Economics* 915 at 918.

¹⁰³ Phillip Blumberg 'Accountability of Multinational Corporations: The Barriers Presented by the Concepts of the Corporate Juridical Entity' (1993) 24 *Hastings International & Comparative Law Review* 297 at 300.

¹⁰⁴ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 77-9.

¹⁰⁵ Blumberg 'Accountability of Multinational Corporations' at 300.

¹⁰⁶ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 45.

¹⁰⁷ *Ibid* 46.

decentralisation in decision-making in global corporations.¹⁰⁸ There are two motivations in this regard. First, there is need to balance the international integration of production in the corporation with responsiveness to individual national markets.¹⁰⁹ Thus local managers have a greater input in the policy determination and decision-making process of the corporation. Secondly, decisions are made quicker when organisations are decentralised thus facilitating efficient production. Head offices are then charged with tasks of central coordination and prospecting for more business opportunities.¹¹⁰

The important issue to be determined is the seat of control and organisation in MNCs in the variety of business forms. In the simple parent-subsidiary structure, control lies with the parent company. However, in more complex structures, the degree of control of the parent over affiliate organisations is difficult to ascertain. Rigorous economic and commercial analysis is required to make this kind of determination.¹¹¹ This is relevant to questions of liability as discussed below.¹¹²

4.3.2. *Liability of MNCs*

Liability for corporations can be either direct or indirect.¹¹³ Direct liability refers to the determination of liability of the corporation itself as a distinct entity from its

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 47.

¹¹¹ Ibid 51.

¹¹² The discussion on liability here does not extend to a critical analysis of modes of criminal liability. The purpose of this discussion is to locate the discourse of criminal liability of MNCs within the broader debate of liability.

¹¹³ Philip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) at 8-9. Celia Wells at 94-5 aptly summarises the approaches to corporate criminal liability in Anglo-American jurisdictions. First, corporations can be found liable if their procedures or practices unreasonably fail to prevent criminal violations (this perhaps can be seen as a form of direct liability). Secondly, corporations can be liable through the agency principle when any one of their employees commits a crime. This form of liability – referred to as *respondeat superior* in the United States – has been widely applied in US courts from the earliest parts of the twentieth century. Thirdly, corporations can be liable only if policy-making officials representing the company have committed an offence. This is more restricted version of the agency principle applied more in the United Kingdom primarily through the doctrine of ‘lifting of the corporate veil’. The latter two forms can be seen as indirect ways of establishing liability.

affiliate or subsidiary corporate bodies.¹¹⁴ Direct liability would arise where the parent company has itself engaged in wrongful or criminal conduct.¹¹⁵ Direct liability need not necessarily impute liability to any one of the parent corporation's subsidiaries though this is possible. At the level of national law, indirect liability can be imputed to corporations through equitable doctrines such as vicarious liability or 'piercing or lifting of the corporate veil'.¹¹⁶ The essence of these doctrines of equity is to impute liability for wrongful conduct to the company for unlawful conduct of its employees or to individual directors who are deemed to have abused the corporate vehicle for ill-conceived ends.¹¹⁷

At the international level or in cases involving MNCs, applications of these doctrine of equity could be used to impute liability indirectly to parent companies. An example of this would be where a MNC that may have used a low-level subsidiary company to carry out wrongful or criminal conduct in order to distance the parent company from any liability. It may be necessary to disregard the principle of separate legal personality and hold the parent company liable rather than the subsidiary company irrespective of the fact that the wrongful or criminal conduct was carried out by the subsidiary. This is difficult to prove in view of the complexities involved in establishing the degree of control over subsidiaries in multi-tiered corporate groups.

In respect of indirect liability, an issue that arises is whether the liability – if established – of a constituent part of the MNC can lead to the liability of the MNC itself. More specifically, the issue is whether the individual actions or conduct of constituent elements of the MNC can lead to the criminal liability of the MNC as a whole irrespective of the doctrine of separate legal personality. Notwithstanding the limited availability of doctrines such as piercing the corporate veil or agency to uncover the 'mind' behind a criminal act, these methods of attributing liability to parent corporations or the controlling corporation in an MNC group are largely

¹¹⁴ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 309.

¹¹⁵ Ibid.

¹¹⁶ For detailed discussions of piercing the corporate veil, see Brenda Hannigan *Company Law* 3 ed (2012) at 45.

¹¹⁷ These will be discussed in a chapter 4.

unsatisfactory as most courts in Anglo-American jurisdictions are reluctant to transgress the integrity of both separate legal personality and limited liability save in exceptional circumstances.¹¹⁸ These difficulties are further compounded by a related doctrine in corporate law – that of limited liability.

4.3.3. Limited Liability

The purpose of limited liability in corporate law is to shield a company's investors and/or incorporators from having to bear the entire burden of the company's debts or liabilities beyond the amount invested in the company.¹¹⁹ This made and continues to make economic sense. However, when considered in relation to a parent-subsidary relationship or a joint venture involving large corporations in transnational business activities, then the doctrine becomes problematic for the possible extension of international criminal liability to MNCs or MNC groups. The legal position is that though a parent company may be involved and have considerable influence over the decisions of its subsidiary (or subsidiaries), the law considers them as two separate entities with separate rights and liabilities.

Moreover, even though a parent company may have invested a significant amount in its subsidiary, thus entitling it to participate legitimately in the subsidiary's decision-making processes, the principle of limited liability prevents any automatic attribution of responsibility on the part of the parent-investor from decisions seemingly made by its subsidiary.¹²⁰ Therefore, where a subsidiary engages in criminal conduct such as corrupt practices, responsibility for that conduct may not – under the principle of limited liability – be attributed to the parent-investor which may have had a dominant role in the decision to engage in corrupt

¹¹⁸ See the *Adams v Cape Industries plc* [1991] 1 All ER 929 (CA) where the UK Court of Appeal dismissed a suit for damages against a subsidiary registered in South Africa as the holding company was registered in England. The cause of action arose in South Africa (at 1026). See also Muchlinski (Limited Liability and the Multinational Corporate Enterprise) at 919.

¹¹⁹ Paul Davies *Gower's Principles of Modern Company Law* 8 ed (2008) at 10-11.

¹²⁰ Muchlinski (Limited Liability and the Multinational Corporate Enterprise) at 917. See also Natania Locke 'The Approach of the Supreme Court of Appeal to the Enterprise Reality in Company Groups: Discussion of Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd 2010 3 SA 382 (SCA)' (2012) 3 *Stellenbosch Law Review* 476 at 477.

practices.¹²¹ The upshot is that though the purpose of the limited liability doctrine is to protect legitimate investment, it effectively insulates or shields parent-investors from criminal conduct carried out by their subsidiaries despite the fact of parent-control in the decision-making process of subsidiaries. This makes it difficult to establish the collective liability of MNCs. This problem is compounded further in modern economies where transnational business activity is carried out under the aegis of complex multi-tiered multinational groups where there are more separate layers of limited liability.¹²²

Within the South African context, Judith Katzew argues that the courts can play a decisive role in ensuring that constitutional values are applied to company law.¹²³ A stubborn adherence to traditional company law rules regulating corporate liability in circumstances where human rights have been violated will render section 7 of the Companies Act moot.¹²⁴ She suggests that greater discretion should be given to judges who, in terms of section 39(2) of the Constitution, must promote the spirit, purport and object of the Bill of Rights when interpreting an applying the common law.¹²⁵ This, she argues, 'requires substantive engagement with normative standards: justice, fairness and equality'.¹²⁶ Judges should apply these standards when faced with a matter that raises the question about who 'is more deserving of judicial protection – the sanctity of the form of separate entity, or those harmed by the company'.¹²⁷

¹²¹ Evidence of the existence of a corporate policy or culture promoting corrupt practices would have to be provided.

¹²² Philip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) at 59.

¹²³ Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 698.

¹²⁴ Section 7 of the Companies Act amplifies the injunction in section 8(2) of the Constitution of the Republic of South Africa that extends the Bill of Rights to juristic persons; Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 700.

¹²⁵ Judith Katzew 'Crossing the Divide between the Business of the Corporations and the Imperatives of Human rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 703.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

4.3.4. *The notion of 'enterprise analysis'*

Proponents of international criminal corporate liability suggest that the limitations presented by separate legal personality and limited liability need not necessarily be abolished to pave way for the establishment of the criminal responsibility of MNCs.¹²⁸ They may not even be relevant for a consideration of the criminal liability of MNCs. An alternative approach, the enterprise analysis approach, practical and premised on economic theory, suggests a lens through which the law can analyse corporate liability aside from the separate entity method.¹²⁹

The enterprise analysis approach views the MNC not as a composition of separate corporations within a group enterprise but as one economic unit. This approach underlies the social and economic reality of MNCs perceived by ordinary people. As argued by Blumberg, the enterprise analysis approach goes beyond the doctrine of separate legal personality to arrive at the underlying economic reality of the MNC.¹³⁰ The default, formal legal methodology is to recognise MNCs as collections of separate legal entities governed by complex contractual arrangements. By emphasising economic reality, the enterprise analysis approach seeks to determine the 'legal effects of group behaviour...[not] by the contractual relations of individual corporate actors [or individual corporate investors] with third parties but by the status of the third party in relation to the group as a whole'.¹³¹ It is the perspective of third parties that is the starting point for the determination of obligations between themselves and group enterprises. What this approach seeks to do is to found the legal relationship between MNCs and third parties on the element of control and coordination of economic activities between parent and subsidiaries.¹³² This will thus render the impact of separate personality and limited liability insignificant for the determination of group liability.¹³³

¹²⁸ Stoitchkova at 142

¹²⁹ Blumberg 'Accountability of Multinational Corporations' at 316-9.

¹³⁰ Blumberg 'Accountability of Multinational Corporations' at 316-9.

¹³¹ Muchlinski (Limited Liability and the Multinational Corporate Enterprise) at 919.

¹³² Ibid.

¹³³ Ibid.

Enterprise analysis essentially seeks to broaden the approach of doctrines such as piercing the corporate veil which ordinarily locates the legitimate disregard of separate legal personality and limited liability in circumstances of abuse or fraud or shielding of the true perpetrators of an act.¹³⁴ Though reasonable as an approach to the examination of MNC liability, enterprise analysis faces two complications: first, it seeks to establish legal relations (between MNCs and third parties) on the basis of a factual observation that in all likelihood would be notoriously difficult to determine (extent of control and coordination); and second, it seeks to unseat a primary legal principle (separate legal personality), which though fictitious, is nevertheless integral to the bedrock of corporate law in general. These are fundamental obstacles that may not be overcome easily.

4.3.5. A legal principle of sphere of control

The above examination of the principles of separate legal personality and enterprise analysis approach as well as direct and indirect liability have a common factual element. The disregard of the separate legal personality entails a factual inquiry – in limited circumstances – into the reasons or motivations behind the use of the corporate vehicle for ill-intended aims. The enterprise approach emphasises the existence of the economic reality of the MNC in the perspective of third parties over and above the operation of legal fictions in the determination of rights and duties. It points out that it is the economic enterprise that controls business activity and thus it is the economic enterprise that the law should look to for responsibility. These approaches underline fact over legal principle: the fact of control over the legal principle of separate entities with limited liability.

The problem therefore is that facts do not make law. Both approaches point to the need to carry out a factual analysis of the sphere of control in MNCs in order to determine liability. This methodology, seemingly reasonable, is fraught with serious difficulties. First is the observation, following the principle of rule of law that laws that are to be applicable must be predictable, be of general application

¹³⁴ Ibid.

and not be susceptible to arbitrary interpretation and application.¹³⁵ Factual analyses of spheres of control may likely not meet these requirements. Second is a foundational principle of criminal law: *nullum crimen sine lege*.¹³⁶ This principle requires clear-cut, consistent and formalised rules for the establishment of criminal liability. It is also unlikely that a mere factual analysis of control will satisfy this principle. More needs to be done to develop an applicable principle that reflects the realities of economic activities of MNCs and at the same time does not transgress foundational principles of law.

4.3.6. *A possible solution: presumption of control by parent over subsidiary*

A possible solution to the determination of liability in corporate groups is for the law to adopt a presumption of control by a parent or holding company over its subsidiaries thus allowing for the group as a whole to be liable for a subsidiary's infringements or violations of human rights.¹³⁷ While this would give a parent company advance notice of the risk of liability, it would also require that the parent present evidence of the independence of a subsidiary in circumstances where the subsidiary may have been involved in the commission of a crime.¹³⁸ Essentially, the adoption of this presumption would place the application of the doctrines of separate legal personality and limited liability in abeyance until a parent company can produce conclusive proof that its subsidiary was acting alone.

This was applied in *Ex Parte Gore NO and others NNO*, a civil case though which nonetheless illustrates how this presumption can be applied.¹³⁹ In this case, veil piercing was applied to a group of companies known as the King Group. South Africa's Western Cape High Court made a declaratory order to this effect under

¹³⁵ See Joseph Raz *The Rule of Law and its Virtue* (1977).

¹³⁶ For a discussion of the origins of this principle see Stefan Glaser 'Nullum Crimen Sine Lege' (1942) 24 *Journal of Comparative Legislation and international Law* 29.

¹³⁷ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 322 referring to Clive Schmitthoff 'The Wholly Owned and Controlled Subsidiary' (1978) *Journal of Business Law* 218.

¹³⁸ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 322.

¹³⁹ *Ex parte Gore NO and others NNO (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Limited (in liquidation) and its subsidiaries)* 2013 (2) All SA 437 (WCC). I am indebted to Mohamed Moosa for pointing out this case to me.

section 20(9) of South Africa's Companies Act after it was discovered through forensic investigations that the King Group conducted its business affairs through its holding company, King Financial Holdings Limited, with no regard for the separate legal personality of each subsidiary in the group.¹⁴⁰

An objection to this presumption is that it does not absolve investigators from having to scrutinise forensically the parent-subsidary relationship in order to satisfy the requirement of a causal connection between the fact of control over a subsidiary and the resultant harm for which liability is sought.¹⁴¹ Nevertheless, as Muchlinski argues, 'in the majority of cases of inward direct investment, it is clear from the outset who the parent company is, [and thus] it may not be difficult in practice to identify the company upon which the onus of the presumption falls'.¹⁴² Hence, the operation of this presumption would find suitable application in a fair number of cases. In addition, though the adoption of this presumption will probably not resolve all situations, its application by courts could facilitate the formulation of other methods in an incremental fashion that may be more suitable to the plurality of structures in MNC groupings.

5. Conclusion

The conception of the nature and role of MNCs is shifting from a laissez-faire economic approach to one that seeks to recognise that business activity must take into account fundamental human rights obligations. Recognising that this shift is particularly pressing for Africa as a developing region, this chapter further argues that the political and economic power wielded by MNCs goes largely unregulated and that the current response to MNC activity is inadequate. It highlights that this poses a serious threat to human rights that warrants the exploration of criminal law's applicability to corporations.

This chapter proposes that international law has a role to play in the control of criminal activities carried out in and by corporate groups. This proposition is

¹⁴⁰ *Ex parte Gore NO and others NNO* paras 5-15.

¹⁴¹ Peter Muchlinski *Multinational Enterprises and the Law* (2007) at 324.

¹⁴² *Ibid.*

founded on arguments that point to the need for international law to be developed in order to adapt itself to the reality of MNCs as the dominant drivers of economic globalisation. This entails that MNCs should be recognised as subjects of international law; that MNCs possess collective intentionality that may serve as proof of criminal intent in prosecution; and that elaborate legal frameworks for criminal responsibility for crimes carried out by MNCs need to be developed. It also suggests that a path towards this development could incorporate a rebuttable presumption of control of a parent company over the criminal activities of a subsidiary for the purposes of establishing group liability.

CHAPTER 3: CORPORATE CRIMINAL LIABILITY IN INTERNATIONAL LAW: NUREMBERG AND THE INTERNATIONAL CRIMINAL COURT

1. Introduction

This chapter discusses the development of the concept of corporate criminal liability in international law from the twentieth century onward.¹ Due to the breadth of this history, this chapter focusses only on the development of corporate criminal liability in Nuremberg and in negotiations leading up to the establishment of the International Criminal Court (ICC).² The limited scope of this discussion is acknowledged. However, the main aim in this chapter is not to give a detailed description of the development of corporate criminal liability but to propose, on the basis of historical evidence, that criminal liability can and should be extended to multinational corporations in international law.

While this chapter recognises that there is currently no international criminal jurisdiction in respect of corporations and other types of juristic persons, it underlines three points.³ The first point is that i) the trials conducted at Nuremberg recognised that corporations had an important role in the commission of international crimes. This is observable from an analysis of the trials of German corporate defendants (directors and officials of German businesses involved in the commission of international crimes);⁴ ii) there is evidence that trial judges

¹ International criminal law has taken shape and has undergone much progress primarily in the twentieth century (see Antonio Cassese *International Criminal Law* (2003) at 16.)

² The International Military Tribunal (IMT) at Nuremberg was established under the London Agreement in 1945 for the trial of major war criminals. These included political and military defendants who participated in the atrocities of the German Reich (Robert Cryer et al *An Introduction to International Criminal Law and Procedure* (2010) at 111-20 – hereafter referred to as ‘Cryer’). The International Criminal Court (ICC) is the first permanent international criminal court. The ICC was established in Rome in 1998 by adoption of the Statute of International Criminal Court (Rome Statute).

³ The term ‘juristic person’ as used in this chapter refers also to ‘legal person’ and ‘juridical person’ to denote the types of entities that are deemed to have juristic personality by national laws. The term ‘juristic criminal liability’ in this chapter refers to the criminal liability of corporations unless otherwise specified.

⁴ See the section below on Nuremberg and corporate defendants. The term ‘corporate defendants’ in this chapter refers to the officials of corporations indicted in their personal capacity.

implicitly recognised the possibility of the extension of criminal liability to corporations as juristic persons; and iii) there is a real possibility that corporations as juristic persons will in future be subject to international criminal justice.⁵

2. Structure of the chapter

This chapter has three sections. The first section gives an overview of corporate criminal liability in international law from the twentieth century. The second discusses the prosecutions of corporate defendants at Nuremberg and the impact thereof. Finally, the third section does two things: i) it examines discussions and negotiations on international criminal jurisdiction over juristic persons that took place in the lead up to the establishment of the International Criminal Court;⁶ and ii) it analyses key arguments that were raised against the extension of international criminal law to juristic persons during the Rome Conference and whether such arguments are still valid as being justifiable barriers to the extension of the ICC's jurisdiction to juristic persons.⁷

3. Overview of corporate criminal liability in international law

3.1. Status of corporate criminal liability in international law

Criminal jurisdiction over corporations at the international level is non-existent.⁸ Thus far, the primary principle in international criminal law in respect of liability has been that only natural persons can be found liable criminally. The trials at Nuremberg following World War II implementing international law focussed on the criminal liability of natural persons.⁹ Similarly, the *ad hoc* international criminal

⁵ For the basis of this proposition, see section 5 of this chapter which analyses the negotiations on legislative provisions setting out the criminal liability of juristic persons prior to the establishment of the ICC

⁶ These developments include: (i) proposals for juristic criminal liability in the International Law Commission's drafts for an International Criminal Court in the early 1990s and (ii) negotiations of states during the Diplomatic Conference in Rome in 1998 for the establishment of the ICC (Rome Conference).

⁷ This chapter also highlights that there is a shift towards corporate criminal liability at a transnational level illustrated by a number of international instruments, particularly treaties and conventions regulating corruption.

⁸ Ilias Bantekas *International Criminal Law* (2010) at 76.

⁹ See I Trial of the Major War Criminals Before The International Military Tribunal (1947) 41 *American Journal of International Law* 172 at 223.

tribunals of the former Yugoslavia and Rwanda and the ICC exercise jurisdiction only over natural persons, albeit individuals who worked for corporations and not the state.¹⁰ Hence, the practical application of juristic criminal liability at the international level is still to be achieved.

There have been proposals to extend criminal liability to juristic persons at the international level. The last such attempt took place in discussions and negotiations for the Statute of the International Criminal Court during the Rome Conference in 1998.¹¹ Neither the negotiations nor the drafting process of the Rome Statute led to the inclusion of a provision that extended criminal responsibility to juristic persons. Notwithstanding this, there is ongoing debate about whether subsequent amendments to the Rome Statute ought to extend criminal liability to juristic persons.¹²

Though there is no international criminal jurisdiction over corporations, there are two sources of regional and international law that speak to the existence of corporate criminal liability in international law. The first is the African Court of Justice and Human and Peoples' Rights. The second is the content of a number of multinational treaties that provide for the criminal liability of juristic persons. These are discussed below in turn.

3.2. International criminal jurisdiction of the African Court of Justice and Human and Peoples' Rights

Historically, there are two regional courts in Africa adjudicating human rights issues: the African Court of Human and Peoples' Rights and the African Court of

¹⁰ See Article 5 of the Statute of the International Criminal Tribunal for Rwanda; Article 6 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 25(1) of the Statute of the ICC.

¹¹ See Per Saland 'International criminal law principles' in Roy S Lee (ed) *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189 at 199. See also Kai Ambos 'Article 25' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* 2 ed (2008) at 475.

¹² See for instance Andrew Clapham 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899-926 and 'Discussion (International Trends towards Establishing Some Form of Punishment for Corporations)' (2008) 6 *Journal of International Criminal Justice* 947.

Justice.¹³ In 2008, the African Union adopted a protocol ('merger protocol')¹⁴ to merge these two courts into one court – the African Court of Justice and Human and Peoples' Rights (the African Court) – to be the primary judicial organ of the African Union.¹⁵ The African Court has not come into operation as the merger protocol is yet to be ratified by African states.¹⁶ In 2012, a meeting of Ministers of Justice/Attorney Generals of African states considered a protocol that would establish an additional chamber in the African Court.¹⁷ This ministerial meeting approved and recommended this protocol to the African Union Assembly for adoption.¹⁸ The proposed new chamber of the African Court will have jurisdiction over international crimes and over corporate entities.¹⁹ Through this protocol, it will be possible to prosecute corporate entities in the African region. The same principles of corporate criminal liability are evident in some multinational treaties as discussed in the section below.

The challenges facing the proposed new chamber of the African Court raise a number of questions about its feasibility. First, the most significant challenge is one of financial implication.²⁰ Prosecuting international crimes is a very expensive

¹³ African Court of Human and Peoples' Rights was established in 1998 by the Protocol to the African Charter on Human and Peoples' Rights and the African Court of Justice was established by the Protocol of the Court of Justice of the African Union in 2003 pursuant to Article 18 of the Constitutive Act of the African Union (2000) 2158 UNTS 3.

¹⁴ See Protocol on the Statute of the African Court of Justice and Human Rights available at

http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf. This protocol was drafted pursuant to the AU 'Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union' (Sirte 2005) Assembly/AU.Dec.83 (V).

¹⁵ See Article 2 of the Statute of the African Court of Justice and Human Rights.

¹⁶ At present, only 5 states have ratified the protocol. See <http://www.au.int/en/treaties>.

¹⁷ See African Union Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa, Ethiopia (Executive Council EX.CL/731(XXI); See Max Du Plessis 'Implications of The AU Decision to give the African Court Jurisdiction over International Crimes' (2012) *Institute of Security Studies*.

¹⁸ See African Union Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters para 7. The protocol has been adopted and is yet to receive the requisite number of ratifications. See <http://www.au.int/en/treaties>.

¹⁹ See respectively, Article 3(1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and Article 46C(1) of the Statute of the African Court of Justice and Human and Peoples Rights (annexed to the Protocol).

²⁰ See Ademola Abass 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933 at 944; Max Du Plessis

exercise and the Court may not have the necessary financial ability to carry cases to completion. Secondly, there are legitimate questions about which Court – the African Court or the ICC – would exercise its jurisdiction in international criminal cases. Presumably, both courts would have the same temporal and subject-matter jurisdiction since many African states are already parties to the Rome Statute.²¹ Finally, the drafters of the protocol may have overlooked the practice in international criminal law of prosecuting crimes that are recognised as part of customary international law.²² Prosecutors would therefore face the legitimate challenge that the crime a defendant is accused of, does not satisfy the *nullum crimen sine lege* principle because the crime in question is not beyond any doubt part of customary international law.²³

3.3. Corporate criminal liability and multinational treaties

A number of multinational treaties recognise the criminal liability of juristic persons. Treaties dealing with issues of corruption and bribery routinely set out that states are obligated to provide for the criminal liability of juristic persons (which includes corporations) in their national laws. Examples of this type of treaties are the United Nations Convention against Corruption²⁴ and the Convention against Transnational Organised Crime (Palermo Convention).²⁵ Both conventions specifically state that '[s]ubject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative'²⁶ and that states are to ensure that juristic persons are 'subject to effective,

'Implications of The AU Decision to give the African Court Jurisdiction over International Crimes' at 9.

²¹ See Ademola Abass 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933 at 941; Max Du Plessis 'Implications of The AU Decision to give the African Court Jurisdiction over International Crimes' at 10.

²² Max Du Plessis 'Implications of The AU Decision to give the African Court Jurisdiction over International Crimes' at 7.

²³ Ibid 8.

²⁴ (2003) 2349 UNTS 41.

²⁵ (2000) 2225 UNTS 209.

²⁶ See Articles 26(2) and 10(2) of the respective Conventions.

proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.²⁷

Another example is the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.²⁸ Article 2 of this convention sets out that states that are party to the Convention 'shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of juristic persons for the bribery of a foreign public official.'

The Council of Europe's Criminal Law Convention against Corruption²⁹ provides specifically for the criminal liability of juristic persons for the criminal offences of 'active bribery', 'trading in influence' and 'money laundering'.³⁰ Article 18(1) of the Criminal Law Convention against Corruption states:

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that juristic persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the juristic person, who has a leading position within the juristic person, based on:
 - a power of representation of the juristic person; or
 - an authority to take decisions on behalf of the juristic person; or
 - an authority to exercise control within the juristic person;as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

²⁷ Articles 26(4) and 10(4) of the respective Conventions.

²⁸ (1997) available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

²⁹ 2002 CETS no 173.

³⁰ See Article 18 Council of Europe's Criminal Law Convention against Corruption.

The above is clear evidence of a trend in international law – at least in respect of bribery and corruption – to hold juristic persons (including corporations) criminally liable.³¹

3.4. Transnational/cross-border legislation and corporate criminal liability

The trend towards the recognition of the criminal liability of juristic persons in treaty law manifests in domestic legislation dealing with corruption, bribery and related offences such as money laundering. There is growing recognition that economic crime has become endemic in the global corporate arena.³² Thus, some states have enacted legislation with extraterritorial application that criminalises specific economic crimes such as bribery or money laundering, placing domestic jurisdictions within the international law rubric. Some examples of these include the United States Foreign Corrupt Practices Act,³³ the United Kingdom Bribery Act³⁴ and the South African Prevention and Combatting of Corrupt Activities Act.³⁵ These laws speak to the fact that national prosecutions are the primary vehicle and preferable option for international crimes.³⁶

In summing up, this section has outlined corporate criminal liability as it exists at present in international law. It is clear that the development of corporate criminal liability in international law is still at a nascent stage. If adopted, the Protocol establishing a criminal chamber in the African Court would be the first international instrument to create a court that exercises criminal jurisdiction over

³¹ Other international conventions such as the OECD Convention on Combatting Bribery of Foreign Officials have wide application. The upsurge of such conventions and legislation is indicative of a global shift that focuses only on corruption committed by public officials to corruption committed by juristic persons through their representatives. This shift will contribute substantively to the development of corporate criminal liability in international law.

³² See <http://www.corruptionwatch.org.za/content/corruption-becoming-endemic> (accessed on 21 October 2014).

³³ 1977, 15 USC § 78dd-1, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-91/pdf/STATUTE-91-Pg1494.pdf> (accessed on 3 October 2014).

³⁴ 2010, Chapter 23, available at <http://www.legislation.gov.uk/ukpga/2010/23/contents> (accessed on 3 October 2014).

³⁵ Act 12 of 2004, available at <http://www.justice.gov.za/legislation/acts/2004-012.pdf> (accessed on 3 October 2014).

³⁶ Cryer at 65.

corporations for international crimes. Though there are a number of treaties that recognise corporate criminal liability in respect of specific crimes such as corruption, their implementation is ordinarily at the national level. The section that follows discusses the role played by the prosecution of corporate defendants at Nuremberg as contributing to the foundation of global corporate criminal liability today.

4. Prosecutions of corporate defendants at Nuremberg under Control Council Law 10

At the end of World War II, the Allied Powers, consisting of the United States, United Kingdom, France and the Union of Soviet Socialist Republics concluded the London Agreement in 1945. The London Agreement established the International Military Tribunal (IMT) at Nuremberg ‘for the just and prompt trial and punishment of the major war criminals of the European Axis’.³⁷ The Nuremberg Charter was formulated pursuant to the London Agreement.³⁸ Most of the criminals prosecuted at the IMT in terms of the Nuremberg Charter were leading political and military officials of the German Reich.³⁹

In addition to the IMT trial, the four Allied Powers enacted Control Council Law Number 10.⁴⁰ The aim of this law was to ‘establish a uniform legal basis in Germany for the prosecution of war criminals and *other similar offenders, other than those dealt with* by the IMT’.⁴¹ This latter group of offenders included German industrialists/corporate defendants who, through their business activities, committed or participated in the commission of war crimes and crimes against

³⁷ Article 1 Nuremberg Charter, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed on 20 April 2014). The Nuremberg Charter was annexed to the London Agreement entered into by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.

³⁸ Cryer at 111.

³⁹ Matthew Lippman ‘Nuremberg: Forty-Five Years Later’ (1992) 7 *Connecticut Journal of International Law* 1 at 1.

⁴⁰ Cryer at 119.

⁴¹ Control Council No 10, preamble, available at <http://avalon.law.yale.edu/imt/imt10.asp> (accessed on 20 April 2014).

humanity.⁴² These trials were conducted by the military tribunals and courts of the Allied Powers in their various occupation zones within Germany (Allied Tribunals).⁴³ Prominent among these Allied Tribunals was the United States Military Tribunal (USMT). These tribunals implicated German businesses – including owners or directors of major corporations – in the atrocities committed by the German Reich. Therefore, the Allied Tribunals are relevant to the discussion of the criminal liability of corporations.

4.1. Nuremberg and corporate criminal liability

The Allied Tribunals were constituted to try natural persons and not corporations.⁴⁴ In terms of Control Council Number 10, juristic persons were not part of the mandate of the courts of the Allied Powers.⁴⁵ However, one main question that arises is whether these trials established that it is possible to find corporations criminally liable at the international level. This chapter argues that this is possible on the basis of an analysis of the principles of criminal responsibility applied by the Allied Tribunals. Importantly, the Allied Powers enacted other Control Council Laws that set out sanctions targeted at organisations and corporations.⁴⁶ Though they did not provide for corporate criminal liability, these

⁴² Telford Taylor *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No 10* (1949) at 72 (available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf); Matthew Lippman 'The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany' (1993) *Indiana International & Comparative Law Review* 1 at 9; Cryer at 119.

⁴³ Cryer at 119-20. The authors remark that the trials under Control Council No 10 have had a profound influence on the development of international criminal law. The term Allied Tribunals is used in this thesis solely for the purpose of distinguishing them from the IMT.

⁴⁴ Brief of Amici Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party at 4-5 (*Kiobel v Royal Dutch Shell Petroleum Co* No 10-1491 (US 2012)).

⁴⁵ Robert H Jackson *Report of United States Representative to the International Conference on Military Trials* (1945) at 215-218 (available at http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf).

⁴⁶ Brief of Amici Curiae Nuremberg Scholars Omer Bartov, Michael J Bazylar, 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 at 21ff ((*Kiobel v Royal Dutch Shell Petroleum Co* No 10-1491 (US 2012)). Allied Council laws set out punitive measures such as dissolution and forfeiture orders for corporations that were found to

Control Council Laws suggest that the Allied Powers considered that organisations and corporations were subject to the norms of international law.

A discussion of the principles of criminal responsibility applied by the Allied Tribunals against German corporate defendants is relevant to corporate criminal liability in three respects:

- Prior to and during the prosecution of German corporate defendants in the Allied Tribunals, prosecutors considered using these principles to establish corporate criminal liability.⁴⁷
- The prosecution of corporate defendants individually and in their capacity as directors of business firms showed that corporations had a role in the commission of international crimes.⁴⁸
- Both the IMT and the Allied Tribunals recognised that corporations possessed a distinct form of criminality to that of natural persons.⁴⁹

Before discussing these three points, it is necessary to outline the doctrines underpinning the establishment of criminal liability developed by the IMT and applied in the Allied Tribunals. Proposals for the prosecutions of corporations were based on interpretations of these doctrines.

4.2. Doctrines used to establish criminal liability under the Nuremberg Charter

The IMT developed two approaches to establishing criminal liability: the doctrine of conspiracy and declarations of criminality.⁵⁰ They enabled the IMT to bring to justice officials of organisations that were instrumental in the commission of

have been complicit in the commission of atrocities by the German Reich. This is indicative of the fact that international law applies to corporations or that more specifically customary international law applied to corporations.

⁴⁷ Jonathan A Bush 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094 at 1239 (hereafter referred to as 'Bush').

⁴⁸ This is discussed below in more detail below in section 4.4.

⁴⁹ Robert H Jackson *Report of United States Representative to the International Conference on Military Trials* (1945) at 136.

⁵⁰ Desislava Stoitchkova *Towards Corporate Liability in International Criminal Law* (2010) at 49-50 (hereafter referred to as 'Stoitchkova').

serious crimes.⁵¹ They also imputed responsibility on the organisations to which the indicted and convicted officials belonged.⁵² Thus, these doctrines made it possible to establish both individual and collective criminal liability. Collective liability is at the heart of corporate criminal liability and therefore requires extensive discussion.

4.2.1. The doctrine of conspiracy and its limitation to the crime of aggression

The Charter set out three major crimes that the IMT would try: crimes against the peace (aggression), war crimes and crimes against humanity.⁵³ Article 6 of the Nuremberg Charter provided for the doctrine of conspiracy stating:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

In terms of Article 6, conspiring to commit a crime would appear to be a crime in its own right. However, the IMT interpreted conspiracy under the Charter to mean ‘conspiring to commit the crime of aggression’, and not to war crimes nor to crimes

⁵¹ Stoitchkova at 50.

⁵² Ibid.

⁵³ Article 6(a) Nuremberg Charter provided:

‘Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.’

Article 6(b) Nuremberg Charter provided:

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

Article 6(c) Nuremberg Charter provided:

‘Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.’

against humanity.⁵⁴ Therefore, the doctrine of conspiracy, as interpreted and applied by the IMT, was only useful in convicting those who participated in the planning and/or in the execution of crimes against the peace.

A conviction for crimes against the peace required proof of participation in a common plan or conspiracy to wage a war of aggression.⁵⁵ Conviction also required proof that the accused had knowledge of Hitler's aims to wage aggressive warfare since mere participation in one of the Nazi Party's activities, for instance, was not sufficient to prove knowledge.⁵⁶ Thus, in applying the doctrine of conspiracy, the IMT convicted only those within Hitler's close circle. These were top tier officials who were shown to have had the requisite knowledge of and participation in the common plan to wage war.⁵⁷

4.2.2. Declarations of criminality of organisations

The basis of the concept of a declaration of criminality lay in Articles 9 and 10 of the Nuremberg Charter.

Article 9 stated:

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. ('Tribunal' here refers to the IMT).

Article 10 stated:

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 individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or

⁵⁴ I Trial of The Major War Criminals Before The International Military Tribunal (1947) at 222-3; Matthew Lippman 'The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany' (1992) 3 *Indiana International & Comparative Law Review* 1 at 7. See also Kevin Jon Heller *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) at 275-6.

⁵⁵ I Trial of The Major War Criminals Before The International Military Tribunal at 222.

⁵⁶ I Trial of The Major War Criminals Before The International Military Tribunal at 222-3.

⁵⁷ I Trial of The Major War Criminals Before The International Military Tribunal at 222-3.

organisation is considered proved and shall not be questioned. ('Competent national authority' here refers to the Allied Tribunals).⁵⁸

In terms of Article 9, a declaration of criminality meant that where the prosecution established that individual members of a group *acted as a group* in the commission of crimes, the IMT could declare this group (or organisation) to be a criminal group/organisation. The only organisations that the IMT declared criminal were political, security and military organisations. These were the Leadership Corps of the Nazi Party, the Gestapo or internal political police (*Geheime Staatspolizei*), the SD or intelligence agency of the security police (*Sicherheitsdienst des Reichführer*) and the SS or internal security police (*Schutzstaffeln*).⁵⁹ No corporations were declared to be criminal organisations; through other Control Council laws the Allied Powers imposed a variety of punitive sanctions on corporations that had assisted the aggressive war effort.⁶⁰

In terms of Article 10, the members of such a group or organisation could be prosecuted for the offence of membership in a criminal organisation. In addition, individual members of such organisations could be charged and prosecuted for crimes against humanity, war crimes and crimes against peace if their organisation participated in or promoted these crimes.⁶¹

To sum up, the IMT interpreted the doctrine of conspiracy as applicable only to the crime of aggression. However, this doctrine could well have been applied to crimes against humanity and war crimes. This would have implicated corporations and established a precedent of corporate criminal liability in international law. In respect of declarations of criminality, the IMT only declared criminal a number of political, security and military organisations; corporations were not declared criminal. As the focus of the IMT was to establish individual criminal liability, these doctrines were used to establish individual guilt. Corporations as such were not

⁵⁸ See Article II (1)(d) Control Council Number 10 which stated that '[m]embership in categories of a criminal group or organisation declared criminal by the International Military Tribunal' was recognised as a crime.

⁵⁹ I Trial of The Major War Criminals Before The International Military Tribunal at 250.

⁶⁰ Brief of Amici Curiae Nuremberg Scholars at 21ff.

⁶¹ See Article II (2) Control Council Number 10.

part of the mandate of the IMT.⁶² However, these doctrines were relevant to corporate criminal liability as is discussed below.

4.3. Prosecutors considered prosecuting corporations under Control Council Number 10

4.3.1. *Proposals for the prosecution of corporations*

Prosecutors from the United States explored the possibility of corporate liability prior to and during the proceedings under Control Council Number 10.⁶³ Specifically, two prosecutors of Chief Prosecutor Telford Taylor's team in the United States Military Tribunal (USMT) proposed that German businesses should be indicted.⁶⁴ The doctrine of conspiracy was the basis of these proposed indictments.⁶⁵

One of the prosecutors, Abraham Pomerantz, suggested that two corporations IG Farbenindustrie AG (IG Farben) and Friedrich Krupp AG (Krupp) could be charged as corporate entities.⁶⁶ He argued that although the Nuremberg Charter did not permit cases against corporations, Control Council Number 10 did.⁶⁷ According to Pomerantz, the advantages of charging corporations were ample; it would spare prosecutors the effort of having to gather sufficient evidence to prove the personal involvement of individual directors.⁶⁸ By charging the corporate entity, Pomerantz's proposed aim was to charge directors as conspirators alongside their corporations as entities.⁶⁹ There is no record of whether Pomerantz's proposal was

⁶² Robert H Jackson *Report of United States Representative to the International Conference on Military Trials* (1945) at v (Preface).

⁶³ See Jonathan A Bush 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094 at 1149-1160 ('Bush').

⁶⁴ See Bush at 1149-1160.

⁶⁵ See Article 6 Charter of Nuremberg. Conspiracy, however, was not defined in the Charter. Its meaning and application had to be clarified in the IMT trial.

⁶⁶ Bush at 1150; see also Doreen Lustig 'The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' (2010) 43 *New York University Journal of International Law and Politics* 965 at 989.

⁶⁷ Bush at 1152.

⁶⁸ Ibid 1150.

⁶⁹ Ibid 1152.

rejected or not. Nevertheless, his proposal indicated that prosecutors did consider charging and prosecuting corporations.⁷⁰

Another prosecutor in Telford Taylor's team, Leo Drachsler, proposed an institutional approach to corporate liability.⁷¹ Through this approach Drachsler sought to show that German industry constituted a 'third pillar' of the German regime in addition to the Nazi government and military.⁷² According to Drachsler, German businesses, in important ways, formed a 'single entity' or 'single organisation'.⁷³ He proposed that they could be charged as contributing to the criminal conspiracy propagated by Hitler.⁷⁴ However, Telford Taylor rejected Drachsler's proposal due to the fact that reliance on declarations of criminality as a technique for corporate criminal liability was of limited utility as the IMT had not declared any corporations as criminal organisations.⁷⁵

4.3.2. Why these proposals were not applied

Two elements of the decision of the IMT made the adoption of proposals to charge corporations difficult in subsequent proceedings under Control Council Number 10. The first was a statement by the IMT that implied that international law could be effective only if natural persons were convicted. The second element was that the IMT considered conspiracy not as a standalone crime but as a constituent part of crimes against the peace.

The IMT categorically stated 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'.⁷⁶ The IMT made this statement in *obiter* within the context of a finding that the law of war applied to individuals. Specifically, the IMT stated that individuals, acting as official

⁷⁰ Ibid.

⁷¹ Ibid 1158; Doreen Lustig 'The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' at 991.

⁷² Bush at 1158.

⁷³ Ibid.

⁷⁴ Ibid 1159.

⁷⁵ Ibid 1161 fn 228.

⁷⁶ I Trial of the Major War Criminals Before The International Military Tribunal at 223.

representatives of the state, were liable to punishment for violations of the law of the war.⁷⁷ The IMT emphasised that individuals, as state officials, could not hide behind the veil of the state for the purposes of criminal liability.⁷⁸ The emphasis, therefore, was on introducing the notion of individual criminal liability into international law, as opposed to the historic emphasis on the liability of the state.

The notion that the IMT ought to try ‘men’ and not ‘abstract entities’ in order to guarantee the effectiveness of international criminal law could mean that the IMT interpreted the Nuremberg Charter as not applicable to corporations.⁷⁹ However, the IMT did not use the word ‘corporations’.⁸⁰ The intention of the IMT was to show that individuals could not use the state – and by extension, corporations – as a shield against criminal liability. Though not subject to the provisions of the Nuremberg Charter, both states and corporations, were subject to injunctions not to violate international law. Allied Control Council laws dealt with failures to adhere to these injunctions.

A second aspect of the IMT decision that blocked charges against corporations was the clarification of the meaning and scope of the doctrine of conspiracy. The proposals incorporated the common law crime of conspiracy as the basis of indictments against corporations. The IMT had concluded that since ‘the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war’, it would only consider conspiracy to commit the crime of aggression but not war crimes and crimes against humanity.⁸¹ Therefore, for reasons that follow, corporations could not be prosecuted for conspiracy.

⁷⁷ I Trial of The Major War Criminals Before The International Military Tribunal at 221-3.

⁷⁸ I Trial of The Major War Criminals Before The International Military Tribunal at 221-3.

⁷⁹ This phrase is often used to underline that international criminal law is concerned with individual criminal responsibility. See Kai Ambos ‘Article 25: Individual Criminal Responsibility’ in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court – Observers’ Notes, Article by Article* (2008) 743 para 1; William Schabas ‘General Principles of Criminal Law in the International Criminal Court Statute (Part III)’ (1998) 6 *European Journal of Criminal Law and Criminal Justice* 400 at 409.

⁸⁰ Bush at 1162.

⁸¹ I Trial of The Major War Criminals Before The International Military Tribunal at 224.

The IMT stated that a charge of conspiracy to commit the crime of aggression required that the 'preparation and planning' ought not to have been too remote from the crime of aggression; there had to be participation in a concrete plan to wage a war of aggression.⁸² It would be particularly difficult for prosecutors to prove that corporations participated in a conspiracy to wage aggressive war since they would have to show that the corporation had knowledge of Hitler's aims to wage aggressive warfare, knowledge that was privy to those within his immediate circle.⁸³ This would be difficult to prove in respect of individual corporate defendants and far more difficult in respect of corporations. Nonetheless, the above proposals evidence that prosecutions of corporations were contemplated and had the IMT not limited conspiracy to the crime of aggression, there are grounds to suggest that corporations could have been charged under Control Council Number 10.

4.4. Corporations had a role in the commission of international crimes

Of the twelve trials conducted by the USMT under Control Council Number 10, three of these involved the prosecution of German corporate officials. These were the Farben, Flick and Krupp cases.⁸⁴ The Farben judgment in particular illustrates that the USMT recognised that corporations had a role in the commission of international crimes. The top management members (the *Vorstand*) of the pharmaceutical company IG Farben were charged with planning, preparation, initiation or waging a war of aggression by producing synthetic fuel and rubber (crimes against the peace); involvement in acts of plunder and spoliation (war

⁸² I Trial of The Major War Criminals Before The International Military Tribunal at 222-3. The requirement against remoteness effectively discarded contentions that knowledge of and involvement in Nazi party activities prior to World War II was sufficient to prove participation in a common plan (conspiracy).

⁸³ I Trial of The Major War Criminals Before The International Military Tribunal at 222-3.

⁸⁴ *United States v Carl Krauch* VIII Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10 (1950) 1081 (Farben case); *United States v Friedrich Flick* VII Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10 (1950) 1187 (Flick case) and *United States v Alfred Krupp* IX Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10 (1950) 1327 (Krupp case).

crimes); the supply of toxic gas Zyklon B to concentration camps; medical experiments on prisoners and use of forced labour (crimes against humanity).⁸⁵

The Farben judgment affirmed a number of ways through which Farben had a role in the commission of these international crimes. First, directors of Farben used the corporation as an 'instrument' to perform acts which they would not have been able to perform on their own.⁸⁶ Second, Farben was complicit in the crimes committed by the German Reich. Its complicity was apparent in its foreign and economic policy, essential for the weakening of Germany's potential enemies.⁸⁷ Third, 'Farben carried on propaganda, intelligence, and espionage activities for the benefit of the Reich', all of which illustrated its role in the commission of international crimes.⁸⁸ Finally, the judgment noted that though the form of Farben's transactions appeared to be legal, the substance of their criminality was indefensible.⁸⁹ Farben's criminality was shown by the fact that it stood to benefit – specifically through the acquisition of land and property – by the aggressive war efforts of the German army.⁹⁰ In pinpointing Farben's contribution to the crimes committed by the German Reich, this judgment explicated how corporations can have a role in the commission of international crimes. This judgment also evidences the potential of corporate criminal liability. However, as it followed the judgement of the IMT, the USMT focussed on individual criminal liability to underline the fact that individuals cannot escape liability by using the corporate vehicle as a shield.

⁸⁵ Farben case at 1082.

⁸⁶ See Farben case at 1214, 1224 and 1297.

⁸⁷ Farben case at 1128-9.

⁸⁸ Farben case at 1129.

⁸⁹ Farben case at 1140-1: 'The form of the [Farben] transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage, plunder, and spoliation stands out, and there can be no uncertainty as to the actual result'.

⁹⁰ See Farben case at 1215: 'Farben actively 'and substantially participated in reaping the fruits of aggression by illegal participation in the spoliation of occupied countries; and Farben, owing to its special position, exercised its own initiative in making as early as June 1940, concrete plans for the permanent economic exploitation of countries to be placed under Nazi domination after the anticipated victorious conclusion of the wars of aggression'.

4.5. Corporations possess a distinct form of criminality to that of natural persons

The IMT recognised the criminality of both juristic and natural persons. Juristic persons could be declared criminal in terms of Article 9 of the Nuremberg Charter. However, as discussed above, juristic persons were not prosecuted. Natural persons who were members of juristic persons that were declared criminal could be indicted for the offence of 'membership in a criminal organisation'. Consequently, two questions arose:

- whether a declaration of criminality of a juristic person meant that the natural persons who formed its membership were automatically also criminal and punishable for the offences of such juristic person. This was particularly problematic since juristic persons could have thousands of members; and
- whether such declaration had a bearing on the prosecution's task to establish individual criminal liability.

The approach taken by the IMT to these two questions illustrates that the IMT distinguished the criminality of juristic persons – and by extension – corporations, to that of individuals.⁹¹ This distinction is particularly relevant to concerns that corporate criminal liability can unjustly lead to automatic convictions of natural persons.⁹² This can arise by conflating the acts of natural persons with those of the collective as a corporation. Such conflation would lead to the failure to recognise or distinguish the different levels of knowledge of individuals (of the criminal intention) within the collective and concomitant contributions to the perpetration of a crime. Logically, there may be members of a corporation who have direct knowledge of the crime and those who merely reconcile themselves to the possibility of criminal activity by the corporation to which they belong.

The IMT concluded that a criminal organisation was *analogous* to a conspiracy since the essence of both is cooperation for criminal purposes.⁹³ However, the

⁹¹ Article II (1)(d) of Control Council No 10 provided for criminal liability on the basis of membership in an organisation declared to be criminal by the IMT. Potentially, if the IMT had declared a corporation a criminal organisation, the corporation's members would be liable under this Article.

⁹² I Trial of The Major War Criminals Before The International Military Tribunal at 251.

⁹³ Ibid.

criminality of a juristic person is different to that of the natural persons that make up the juristic person. Therefore, the IMT underlined that it would make declarations of criminality 'in a manner [that would] insure that innocent persons will not be punished'.⁹⁴ Specifically, the IMT stated that it would declare a juristic person a criminal organisation only if it had a common purpose to commit crimes under the Nuremberg Charter.⁹⁵

Further, mere membership was insufficient to secure conviction of a natural person for the crimes committed by a juristic person. The IMT recognised that prosecutions on the basis merely of membership would lead to mass convictions.⁹⁶ Therefore, to safeguard against this possibility, proof of knowledge of the common purpose to commit the crime was required.⁹⁷ Finally, continued membership had to be voluntary despite knowledge about the criminal objectives or acts of the juristic person.⁹⁸

All of these requirements ensured that the declarations of criminality would not automatically lead to convictions of natural persons since the prosecution was not absolved from proving individual criminal liability. Thus, the IMT recognised that individual culpability was not pegged on the culpability of the juristic person. Hence, while ensuring only just convictions of natural persons, the IMT also effectively highlighted that the criminality of juristic persons was different and distinct to that of natural persons.

To sum up, the foregoing discussion has underlined that there is some basis for criminal liability of corporations in the history of international criminal law and specifically in the Nuremberg trials. Prosecutors in Nuremberg recognised that corporations were involved in the commission of international crimes. The IMT chose to adhere to the principle of individual criminal liability for the sake of ensuring that those who were most responsible for the commission of

⁹⁴ I Trial of The Major War Criminals Before The International Military Tribunal at 251.

⁹⁵ I Trial of The Major War Criminals Before The International Military Tribunal at 251.

⁹⁶ I Trial of The Major War Criminals Before The International Military Tribunal at 251.

⁹⁷ I Trial of The Major War Criminals Before The International Military Tribunal at 251.

⁹⁸ I Trial of The Major War Criminals Before The International Military Tribunal 262, 268, and 273.

international crimes would not go unpunished. The Allied Powers chose to respond to the involvement of corporations in the commission of international crimes by passing legislation providing for a variety of sanctions that did not include criminal prosecution. The discussion that follows turns to the development of the notion of corporate criminal liability (within the broader ambit of juristic criminal liability) during negotiations for the Statute of the International Criminal Court.

5. Corporate criminal liability and the International Criminal Court

During the negotiation and deliberation of the text of the convention that would establish the ICC, there was significant development in discussions on juristic criminal liability in international law.⁹⁹ Although the Rome Statute did not extend criminal liability to corporate entities, the discussions in this regard are seminal to the proposal that corporations should be criminally liable under international law. Therefore, this section outlines and discusses the proposed forms of criminal liability against juristic persons in the preparatory works (*travaux préparatoires*) of the Rome Statute.

5.1. Juristic criminal liability in the travaux préparatoires

Prior to the work of the Preparatory Committee for the Establishment of an International Court established in 1995 by the General Assembly of the United Nations, the Draft Statute for an International Criminal Tribunal was the only draft statute that explicitly included a provision extending jurisdiction of the ICC to juristic persons (including corporations).¹⁰⁰ The Draft Statute prepared by the ILC in 1994 could be interpreted as empowering the ICC to have jurisdiction over juristic persons since it stated broadly that the ICC would have jurisdiction over

⁹⁹ See Per Saland 'International criminal law principles' in Roy S Lee (ed) *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189 at 199. See also Kai Ambos 'Article 25' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* 2 ed (2008) at 475; Ilias Bantekas *International Criminal Law* (2010) at 76.

¹⁰⁰ M C Bassiouni 'Rome Statute for the International Criminal Court' in *the Statute of the International Criminal Court: A Documentary History* (1998) at 760.

‘persons’.¹⁰¹ However, such an interpretation was not explicit from the wording of the Draft Statute.

Two preparatory works (travaux préparatoires) of the Rome Statute point to the consideration of the criminal liability of juristic persons. The first is the Report of the Preparatory Committee of 1996 on the Establishment of an ICC. This Report contained a proposal providing for the criminal responsibility of both physical and juristic persons.¹⁰² The second preparatory work that included juristic criminal liability was the working paper circulated by the French delegation in July 1998 during the Rome Conference.¹⁰³ These two preparatory works are considered below in turn.

5.2. Proposal in the report of the Preparatory Committee of 1996: the ‘1996 proposal’

The ‘1996 proposal’ set out in the Report of the Preparatory Committee for the establishment of the ICC stated:

Proposal 2

Physical persons and juristic persons

1. The Court shall be competent to take cognisance of the criminal responsibility of:

- (a) Physical persons;

¹⁰¹ See Article 21(1) ILC Draft Statute for an International Criminal Court (1994).

¹⁰² Report of the Inter-Sessional Meeting from 19-30 January 1998 held in Zutphen, The Netherlands (A./AC.249/1997/L.9Rev.1, 1997). The text of this proposal was included in the full Draft Statute compiled by the Preparatory Committee in April 1998 for deliberation at the Rome Conference in June 1998.

¹⁰³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on General Principles of Criminal Law, UN Doc. A/Conf./183/WGGP/L.5/Rev. 2, 3 July 1998, Draft Article 23. The term ‘physical person’ meant natural person. The term ‘juristic person’ was defined as ‘a corporation whose concrete, real or dominant objective is seeking profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organisation registered, and acting under the national law of a State as a non-profit organisation’.

(b) Juristic persons, with the exception of States, when the crimes committed were committed on behalf of such juristic persons or by their agencies or representatives.

2. The criminal responsibility of juristic persons shall not exclude a criminal responsibility of physical persons who are perpetrators or accomplices in the same crime.

Underlying paragraph 1 of this proposal is the notion that the criminal responsibility of a corporation is hinged on the criminal activity of its representatives authorised to act on its behalf. Thus, proving the criminal liability of a natural person would be a requirement for a corporation's criminal liability. Paragraph 2 of this proposal widens the net of liability to natural persons who participated in or assisted the criminal activity of the corporation.

The '1996 proposal' would have been suitable to the basic form of corporation, i.e. a single company with directors and shareholders. In respect of multinational corporations, this proposal would probably fall short of establishing an adequate framework for the multinational corporation's criminal liability. The reason for this is the fact that the net of liability proposed in paragraph 2 is not sufficiently elaborate to cover the complexity of the structures of multinational corporations.¹⁰⁴

5.3. French proposal on juristic criminal liability: the '1998 proposal'

The '1998 proposal' as contained in the working paper circulated by the French delegation in July 1998 during the Rome Conference stated:

Without prejudice to any individual criminal responsibility of any natural persons under this Statute, the Court may also have jurisdiction over a juristic person for a crime under this Statute.

Charges may be filed by the prosecutor against a juristic person, and the Court may render a judgement over a juristic person for the crime charged, if:

¹⁰⁴ This is discussed thoroughly in Chapter 3 of this thesis.

- (a) The charges filed by the prosecutor against the natural person and the juristic person allege the matters referred to in sub-paragraphs (b) and (c); and
- (b) The natural person charged was in a *position of control* within the juristic person under the national law of the state where the juristic 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 juristic person and in the course of its activities; and
- (d) The natural person has been convicted of the crime charged.

This proposal sets out a form of vicarious corporate criminal liability that incorporates the notion of a ‘directing or controlling mind’ responsible for the criminal conduct.¹⁰⁵ In terms of the proposal, the criminal liability of a corporation is established by proving the criminal liability of an official or employee of the corporation who occupies a leading or prominent role in the corporation. Two requirements must be met before a corporation can be found liable vicariously. First, the official must have been convicted of the crime for which the corporation is charged; and second, the official must have acted on behalf of the corporation, with its explicit consent and in the course of employment.

At the core of both the ‘1996 and the 1998 proposals’ is the notion that the criminal liability of a corporation is wholly dependent on the establishment of the criminal liability of an official or employee.¹⁰⁶ Neither proposal included the possibility of establishing the criminal liability of a corporation in its own right, that is, on the basis of ‘what the corporation did or did not do, as an organisation; 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’.¹⁰⁷ This is an oversight that ought to be

¹⁰⁵ The notion of a ‘directing or controlling mind’ in corporate malfeasance and vicarious corporate criminal liability is discussed fully in Chapter 4 of this thesis.

¹⁰⁶ For a thorough critique of this, see Chapter 4 of this thesis.

¹⁰⁷ Eric Colvin ‘Corporate Personality and Criminal Liability’ (1995) 6 *Criminal Law Forum* 1 at 2.

addressed.¹⁰⁸ These proposals did not take into account the size and complexity of corporations. They also did not consider how the layers of management and decision-making structures make the process of attributing liability from an employee to the corporation practically impervious.¹⁰⁹

5.4. Reasons for the rejection of the extension of criminal liability to juristic persons at the Rome Conference in 1998

There were four reasons why proposals to extend criminal liability to juristic persons at Rome were unsuccessful.

First, many states did not recognise the criminal liability of juristic persons in their domestic law.¹¹⁰

Second, even among states that recognised this form of criminal liability there was no uniform approach to the determination of criminal liability that could form the basis of an applicable common legal standard.¹¹¹

Third, there existed some concerns regarding procedural uncertainties relating to the service of indictments, the representation of indicted juristic persons, the

¹⁰⁸ See Chapter 3 for reasons why this oversight has to be addressed. See Chapter 5 for a proposal on how corporations can be prosecuted for their involvement in international crimes.

¹⁰⁹ See Surya Deva 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who should "Bell the Cat?"' (2004) 5 *Melbourne Journal of International Law* 37 at 38-9. See also Beth Stephens 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Law Journal of International Law* 45 at 54:

A review of the history and focus of the transnational enterprise demonstrates that the multilayered, multinational division of labour and responsibility of the modern corporation, its single-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target.

Both authors refer to the difficulty of establishing an effective regulatory framework for multinational corporations albeit in the human rights field. Nevertheless, the principles apply also to international criminal law.

¹¹⁰ Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court – Observers' Notes, Article by Article* (2008) 746.

¹¹¹ Anita Ramasastry 'Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions' (2008) (available at <http://198.170.85.29/Anita-Ramasastry-commentary.pdf> accessed on 12 July 2014).

manner in which evidence could be presented and the determination of corporate intent.¹¹²

Finally, due to the complexity of the issues, delegates felt that there was not enough negotiating time to consider them sufficiently.¹¹³

The need to establish common legal standards for the determination of corporate criminal liability and the need to work out procedural inconsistencies may simply have required more time for negotiation.

The problem posed by the fact that a number of states did not (and still do not) recognise the criminal liability of juristic persons was a critical one. The absence of the recognition of corporate criminal liability in a state that is party to the Rome Statute would prevent that state from prosecuting a corporation in its jurisdiction. This would be contrary to the aim of the principle of complementarity central to the ICC regime. This principle confers primacy of jurisdiction to national authorities to investigate and prosecute international crimes. In order to set out clearly what the contours of this problem are, the section that follows outlines briefly the concept of complementarity.

5.5. The complementarity problem

During the Rome Conference, the main obstacle in the discussion on the extension of criminal liability to corporations centred on the principle of complementarity.¹¹⁴

A major issue in the negotiation for the Rome Statute was how the ICC regime would impact the sovereignty of states, specifically on the right that states have to

¹¹² Andrew Clapham 'The Question of Jurisdiction under International Criminal Law over Juristic persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga & Saman Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* (2000) at 157.

¹¹³ Douglas Cassel 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 *Northwestern Journal of International Human Rights* 304 at 315–316.

¹¹⁴ Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta & John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767 at 778-9; Per Saland 'International criminal law principles' in Roy S Lee (ed) *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189 at 199. See also Kai Ambos 'Article 25' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* 2 ed (2008) at 475.

prosecute their nationals.¹¹⁵ To address this, delegates at the Rome Conference agreed that the jurisdiction of the ICC would be secondary or in the terminology of the Statute, would be 'complementary' to national judicial systems.¹¹⁶ The ICC was to operate as a court of last resort.¹¹⁷ This is the principle of complementarity.¹¹⁸

In terms of the principle of complementarity, the general rule is that the national authorities of a state party to the Rome Statute are to investigate and prosecute a case involving the commission of crimes that fall under its jurisdiction.¹¹⁹

This rule cannot be applied in a number of circumstances.¹²⁰ For instance, it does not apply if a state that has jurisdiction over the case is found to be unwilling or unable genuinely to carry out the investigation or prosecution.¹²¹ This would be the case for those states that did not recognise corporate criminal liability at the

¹¹⁵ Cryer at 153-54. M M El Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869.

¹¹⁶ Unlike the ad hoc international tribunals of the former Yugoslavia and Rwanda, which had primacy of jurisdiction over national courts.

¹¹⁷ Cryer at 153.

¹¹⁸ The principle of complementarity is enunciated in paragraph 10 of the Preamble to the Rome Statute. It states that '...the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Article 1 of the Rome Statute states that the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern' but it limits the exercise of this jurisdiction by directing that the Court shall be complementary to national jurisdictions (see Cryer at 148-9). The Court's jurisdiction is neither concurrent nor exclusive with respect to national courts (see Flavia Lattanzi 'Concurrent Jurisdiction between Primacy and Complementarity' in Roberto Bellelli (ed) *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (2011) at 189). The ICC's jurisdiction can be described as 'subsidiary' or 'complementary' to national courts (see Antonio Cassese *International Criminal Law* (2003) at 351).

¹¹⁹ See Rome Statute, Preamble para 6 read together with Article 17.

¹²⁰ Article 17(1) (a)-(d) Rome Statute.

¹²¹ Article 17(1) (a)-(b) Rome Statute states:

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

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

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

time of the establishment of the ICC.¹²² Thus, the ICC would find these states to be unable genuinely to investigate or prosecute corporations on the grounds that their national laws did not recognise corporate criminal liability.¹²³ Therefore, the ICC would necessarily always assume the task of prosecuting corporations within these states as a matter of first instance, contrary to the complementarity regime.¹²⁴

In light of these considerations, two options were open to delegates if they wanted to retain the principle of complementarity: either all state parties would have to provide for juristic criminal liability in their domestic law or they would have to leave out juristic criminal liability from the Rome Statute. The reasoning behind this strict bifurcated approach underlined that an adherence to the principle of complementarity – while providing simultaneously for juristic criminal liability – was not feasible at the time of the formulation of the Rome Statute. However, this reasoning is not without its critics.

5.6. Remedying the complementarity problem

Joanna Kyriakakis challenges the notion that the extension of criminal liability to juristic persons in the Rome Statute is unworkable or practically difficult.¹²⁵ She contends that the theory that complementarity and juristic criminal liability are irreconcilable is unnecessarily rigid.¹²⁶ She points out that the policy of complementarity reflects a compromise arrived at in the Rome Conference between sovereignty and international criminal justice.¹²⁷ She argues that the extension of criminal liability to juristic persons ought to be considered in terms of

¹²² In terms of Article 17(3), a state would be found unable to carry out a prosecution against a corporation if it does not recognise corporate criminal liability (In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or *otherwise unable* to carry out its proceedings).

¹²³ As argued in Kai Ambos 'Article 25' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* 2 ed (2008) at 478.

¹²⁴ Article 17(1)(a) Rome Statute.

¹²⁵ Joanna Kyriakakis 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19 *Criminal Law Forum* 115 at 120-1.

¹²⁶ Kyriakakis at 121.

¹²⁷ Ibid.

an interpretation of complementarity that recognises this compromise.¹²⁸ This interpretation would require that sovereignty concerns be balanced by the need to facilitate international criminal justice. Therefore, where corporations are involved in international crimes, the ICC should prosecute even though this would be an overreach into sovereignty.

To sum up, it appears that proposals for the inclusion of corporate criminal liability in the Rome Statute were unsuccessful due to concerns about sovereignty. However, the main reason for this was simply one of practicality: states felt that there was not sufficient time to negotiate the terms of the proposals. More importantly, in states that opposed the inclusion of corporate criminal liability there were longstanding traditions that underpinned an approach to corporate accountability that could not be resolved by a simple revision of domestic legislation.¹²⁹

6. Conclusion

This chapter has focused on three points. First, it has outlined the current position of corporate criminal liability in international law generally, concluding that there is no international criminal jurisdiction over corporations.

Secondly, it has analysed the contribution of Nuremberg's judgements on corporate defendants. This analysis evidences (i) that the prosecutors gave recognition to the role that corporations have in the commission of crimes; (ii) that corporations were considered for prosecution and (iii) that judges recognised that corporations possess a distinct form of criminality to their composite natural persons. These conclusions emphasise that corporate criminal liability has some foundation in Nuremberg.

Thirdly, this chapter has discussed the proposals made during the Rome Conference for the introduction of corporate criminal liability. This discussion has illustrated that arguments against the extension of the jurisdiction of the Rome

¹²⁸ Ibid 122ff.

¹²⁹ Douglas Cassel 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 *Northwestern Journal of International Human Rights* 304 at 315–316.

Statute to juristic persons do not have a sufficient basis. Specifically, this chapter has proposed that a flexible interpretation of complementarity that reflects the compromise between state sovereignty and international criminal justice, can facilitate the extension of the ICC's jurisdiction to corporations.

CHAPTER 4: PRINCIPLES OF CORPORATE CRIMINAL LIABILITY IN ENGLISH AND AUSTRALIAN LAW

1 Introduction

Corporations may be held liable criminally in a number of domestic jurisdictions. This chapter focuses on a discussion and detailed analysis of the regimes of corporate criminal liability in England and Australia as paradigmatic examples of the common law legal system. The purpose of this discussion is to demonstrate, by way of example, how these two domestic jurisdictions have grappled with corporate criminal liability. This discussion seeks to show that there are valuable theoretical and practical bases for holding corporations liable criminally. The limited nature of this selection is acknowledged. However, it is intended not to provide authoritative evidence of state practice but rather to propose a methodology for the development of international law principles with reference to national jurisdictions.

There are two reasons for choosing the legal systems of England and Australia. First, approaches to the establishment of corporate criminal liability generally fall under either one of two prominent categories – derivative and non-derivative models of liability.¹ Derivative models of liability determine the criminal liability of a corporation through the imputation of the conduct and mental element of an offence from an individual or group of individuals to a corporation. Under this approach, if there is no individual responsibility, there can be no corporate responsibility.²

Non-derivative models of liability determine the criminal liability of a corporation on the basis of ‘what the corporation did or did not do, as an organisation; what it knew or ought to have known about its conduct; and what it did or ought to have

¹ This thesis discusses derivative/non-derivative models of liability as methods of establishing corporate criminal liability and does focus on showing their relevance to corporate human rights abuses.

² Eric Colvin ‘Corporate Personality and Criminal Liability’ (1995) 6 *Criminal Law Forum* 1 at 2.

done to prevent harm from being caused’.³ Under this approach, the responsibility of the corporation is primary as it is not dependent on the criminal responsibility of any individual.⁴

The legal systems of both England and Australia include principles of corporate criminal liability that fall under these two prominent categories (derivative and non-derivative models of liability). This chapter seeks to discuss how these legal systems apply these principles and how they may be relevant to the formulation of the criminal liability of corporations internationally and/or regionally.

A second reason for the choice of legal systems in this chapter is that English law has played and continues to play a leading role in the development of criminal law in common law jurisdictions. Methods of determining the criminal liability of corporations in many common law countries are founded largely on English criminal law principles. Chief among these is the identification doctrine. In terms of this doctrine, the conduct and mental state of an employee regarded as a ‘directing mind and will’ are imputed to the corporation (derivative model of liability). There has been – both in England and Australia – dissatisfaction with the limitations of this doctrine in the prosecution of corporations. This has led to the development of statutory regimes of corporate criminal liability in both jurisdictions that incorporate non-derivative models of liability. This chapter’s discussion of identification liability and other derivative doctrines of corporate criminal liability places the consideration of non-derivative models of liability in context and highlights their merits as models through which corporations may be held criminally responsible.

2 Structure of the chapter

Due to the breadth of historical analysis, this chapter focuses only on the development of corporate criminal liability from the twentieth century onward.⁵ This discussion traces the development of corporate criminal liability through

³ Ibid.

⁴ Ibid.

⁵ International criminal law has taken shape and has undergone much progress primarily in the twentieth century.

principles formulated by the courts and by legislation. In broad terms, English and Australian principles of criminal liability that reflect a derivative approach in the establishment of corporate criminal liability have arisen in the common law and have been refined by the courts over time. In both jurisdictions, principles of criminal liability that reflect a non-derivative approach to corporate criminal liability have arisen in legislation. This chapter's structure mirrors this division.

Thus, Part 3 discusses the development of principles of corporate criminal liability in English and Australian common law. This discussion includes an analysis of the shortcomings of these common law principles in respect of corporate crime which grounds the discussion in Part 4. Though the principles in both jurisdictions are the same, there are minor differences in the manner in which courts in both jurisdictions have applied these principles. Since Australia is a federation of states, each state has its own judiciary. Where appropriate, this chapter points out ways in which Australian state courts may have applied these principles differentially.

Part 4 of this chapter examines the principles of corporate criminal liability in England and Australia that have arisen in legislation. This examination attempts to draw out the merits of a non-derivative approach to corporate criminal liability and evaluates concerns about their effect on individual criminal responsibility.

Part 5 summarises the arguments in this chapter. These arguments serve to show that non-derivative models of corporate criminal liability are more suitable to the determination of the criminal liability of large companies and multinational corporations. It highlights three reasons for this. First is that there is a greater likelihood of successful convictions. Secondly, there is a growing recognition that corporations are not mere legal fictions devoid of liability. This recognition espouses the view that corporations are real actors that ought to be accountable if and when their activities cause harm. Finally, non-derivative models of corporate criminal liability promote transparency and accountability.

3 Derivative principles of corporate criminal liability in English and Australian common law

3.1 Outline of principles of corporate criminal liability in the common law

There are two general principles through which corporations may be found liable criminally in the common law. These are vicarious liability and identification liability. Vicarious liability and identification liability essentially attribute the criminal acts/conduct (*actus reus*) and requisite states of mind (fault/*mens rea*) of natural persons to the corporation.⁶

Vicarious liability means that a company can be found liable if an offence is committed by one of its employees in the course of their employment and for the intended benefit of the employer.⁷ In English common law, a company can be vicariously liable in two ways: through the principle of strict liability and through the principle of delegation.⁸ The same applies in Australian common law though the principle of delegation is non-existent.⁹

In terms of the principle of strict liability, a company may be found vicariously liable where the *actus reus* of an employee is attributed to the company.¹⁰ This ordinarily applies in statutory offences involving acts such as the selling of liquor illegally or being in the unlawful possession of illicit goods.¹¹

Vicarious liability following the principle of delegation arises where an employee fails to carry out a duty cast on the company by an Act of Parliament (ordinarily

⁶ Amanda Pinto & Martin Evans *Corporate Criminal Liability* 2 ed (2008) at 19 ('Pinto & Evans').

⁷ United Kingdom, the Law Commission Consultation Paper No 195 *Criminal Liability in Regulatory Contexts* (2010) at 207. (Referred to hereafter as 'Consultation Paper').

⁸ David Ormerod *Smith and Hogan Criminal Law* 13 ed (2011) at 276; Celia Wells *Corporations and Criminal Responsibility* (1994) at 103. ('Smith & Hogan').

⁹ Jonathan Clough & Carmel Mulhern *The Prosecution of Corporations* (2002) at 88 ('Clough & Mulhern').

¹⁰ The recent Bribery Act of 2010 creates a new strict liability offence for a commercial organization where a person that is associated with it bribes another person intending to obtain or retain a business advantage (section 7(1) of the Act).

¹¹ Smith & Hogan at 279.

Licensing Acts).¹² Having delegated the duty to the employee, the company may be vicariously liable for the non-performance of this duty.¹³

Whereas vicarious liability generally (though not exclusively) applies to no-fault offences, identification liability applies to all fault-based offences.¹⁴ The approach to liability in terms of the identification liability is that a company can be found liable for an offence only if an individual official is found to have committed the offence with the necessary fault element.¹⁵ The individual official has to be sufficiently senior and be a 'directing mind and will' of the company.¹⁶ A company official is a 'directing mind and will' if he or she is 'seen as [the company's] "brains" and [his or her] acts are identified as those of the company'.¹⁷ In essence, in terms of the identification approach, the guilty mind of the individual official is imputed to the company which is then found to be liable.¹⁸ Importantly, the liability of the company for offences that require fault under identification liability is dependent on proving the liability of an individual official of the company. This individual's conduct and fault are regarded as the conduct and fault of the company.

¹² Smith & Hogan at 276-7.

¹³ Ibid. A recent Law Reform Commission Report (2010) suggests that vicarious liability through the principle of delegation – which requires *mens rea* – should be limited to such cases only, that is, cases where a Licensing Act imposes a duty on an employer who then delegates this duty to his or her employee (Consultation Paper at 189).

¹⁴ Consultation Paper at 199.

¹⁵ Smith & Hogan at 259.

¹⁶ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; Smith & Hogan at 260.

¹⁷ *Tesco Supermarkets v Natrass* [1972] AC 153. The court adopted the vivid description by Lord Denning LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172: 'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

¹⁸ Smith & Hogan at 260.

3.2 Theoretical obstacles in the development of corporate criminal liability

Prior to the twentieth century, companies in England largely enjoyed immunity from prosecution.¹⁹ There were two theoretical obstacles to the extension of criminal liability to corporations. First, corporations were regarded as legal fictions with no power to carry out any function other than that stipulated by law (the *ultra vires* theory).²⁰ As legal fictions, companies could not act on their own. Hence, it was inconceivable that a company could commit a crime.²¹ Second, companies were regarded as incapable of having a guilty mind or possessing a conscience due to the emphasis on the notion that moral blameworthiness is an exclusively human attribute.²² Thus, without the capacity to understand (mind) and without the capacity to act on their own (will), a company was deemed to be incapable of committing a crime.²³ However, during the twentieth century, English courts developed the two principles through which companies could be found liable: vicarious liability and the doctrine of identification. The discussion that follows looks at the development of these two principles in turn.

3.3 The development of vicarious liability in corporate criminal law

3.3.1 *Employer's vicarious liability for the tort of an employee*

The development of vicarious liability in corporate criminal law is closely tied to the attribution of responsibility of the wrongful acts of an employee to an employer. In the early part of the eighteenth century, English courts applied this attribution of responsibility in tort law where an employee committed a civil wrong in the course of his or her employment.²⁴ Since the basis of this attribution was

¹⁹ Pinto & Evans at 17.

²⁰ Guy Stessens 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493 at 495.

²¹ Pinto & Evans at 17-8.

²² Ibid 18.

²³ Ibid 17. This was expressed in the phrase 'corporations have no soul to be damned and no body to be kicked', attributed to Edward, First Baron Thurlow (1731-1806), see 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, note 1; see also Eric A Engle 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?' (2006) 20 *St John's Journal of Legal Commentary* 287 at 302.

²⁴ Smith & Hogan at 275; Pinto & Evans at 20.

the employment relationship, the courts determined that the commission of a tort by an employee had to be sufficiently connected to the employment.²⁵

Notwithstanding the fact that an employer may not have authorised or may have expressly forbidden the tort committed by the employee and irrespective of whether the tort benefitted the employer or not, the employer would still be liable insofar as the tort was committed in the course and within the scope of employment.²⁶ The reasoning behind this was that a principal (employer) was liable for acts committed by its agent (employee).²⁷ The principal would be liable for an employee's wrongful act even where the employer did not authorize, or even forbade, the conduct in question. This was extended to circumstances where a corporation was the principal. Vicarious liability, therefore, was the basis for ascribing intention to a corporation as employer.²⁸

3.3.2 *Extension of employer vicarious liability from tort law to criminal law*

Within the context of tort law, it was established that corporations could act with intention through the agency of individuals. From 1860, the courts began to extend this attribution of responsibility to corporations as principals not only for tortious acts committed by their employees but also for criminal acts.²⁹ The courts limited this extension to crimes that did not require proof of fault such as public nuisance and criminal libel.³⁰

In the latter part of the nineteenth century, courts began to impose criminal liability on corporations in circumstances where their employees violated a statute

²⁵ *Reedie v London & North West Railway* (1849) 4 Ex 244; Pinto & Evans at 20.

²⁶ *Coopen v Moore (No 2)* [1898] 2 QB 306 at 311-3 (a shop owner had given his employees a clear written order not to describe wrongfully goods for sale); Pinto & Evans at 25.

²⁷ Pinto & Evans at 21.

²⁸ Celia Wells *Corporations and Criminal Responsibility* (1994) at 97. She refers to a quotation by Sir Frederick Pollock which stated that once it was established that a master could be vicariously liable for negligence of his servant, 'the difficulty of ascribing wrongful intention to an artificial person was in truth only a residue of anthropomorphic imagination' (See F Pollock 'Has the Common Law Received the Fiction Theory of Corporations?' (1911) 27 *Law Quarterly Review* 219 at 235).

²⁹ Pinto & Evans at 32.

³⁰ Smith & Hogan at 275; Pinto & Evans at 32.

and such violation amounted to an offence.³¹ Naturally, criminal liability would only be imposed insofar as the breach occurred within the scope of employment.³² Thus, where an Act of Parliament imposed a statutory duty on a company under the principle of strict liability, criminal liability for the breach of such duty by an employee was imposed on the company. In *R v Birmingham and Gloucester Railways Co*, a railway company (Birmingham and Gloucester) was found liable criminally for failing to construct connecting arches over a railway line it had built to facilitate safe crossing.³³

With the extension of criminal responsibility to corporations for statutory offences in the late 1800s, a significant development occurred. As outlined above, prior to this period corporations could be found liable criminally only for offences that did not require proof of fault. However, since statutory offences could either be of strict liability or be fault-based, corporations could presumably be found liable criminally for fault-based statutory offences. Hence, at the start of the twentieth century, courts began to impose criminal liability on corporations for fault-based statutory offences through the principle of vicarious liability.³⁴ In *Mousell Brothers Ltd v London & North Western Railway Co*,³⁵ the appellant company (Mousell Brothers) was found liable for an offence committed by one of its employee drivers. The driver had on two occasions given a false accounting of a consignment of goods with intent to avoid paying tolls. This was an offence under section 99 of the Railways Clauses Consolidation Act, 1845. In holding that Mousell Brothers was liable vicariously for the offence committed by its driver, Viscount Reading CJ first asked whether Parliament had intended that a principal would be liable for the forbidden acts of one of its servants.³⁶ He concluded that such intention existed insofar as the forbidden act was performed within the scope of employment.³⁷

³¹ Pinto & Evans at 22. The authors discuss Parliament's introduction of public welfare legislation such as the Adulteration of Food and Drink Act 1860, by which Parliament imposed vicarious liability on companies.

³² Ibid 23.

³³ (1846) 9 QB 315.

³⁴ Pinto & Evans at 33ff.

³⁵ [1917] 2 KB 836.

³⁶ [1917] 2 KB 845.

³⁷ Ibid.

Mousell Brothers was followed by the High Court of Australia in *R & Minister of Customs v Australasian Films Ltd*.³⁸ This case found that an authorised customs agent of Australasian Films had committed an offence under the Customs Act 1901 (Cth) that required 'an intention to defraud the revenue'. The court applied *Mousell Brothers* and held that in enacting the statute, Parliament's intention was to make a principal liable for the acts and relevant states of mind of its authorised agents carried out in the course of their employment.³⁹ The court held that it was possible for a corporation to be a principal in terms of the Customs Act.

Mousell Brothers and *Australasian Films* illustrate how the courts began to extend criminal liability for fault-based offences to corporations through vicarious liability. Importantly, this extension was limited to statutory fault-based offences. Corporations could not be found liable through the principle of vicarious liability for common law offences. As a matter of course, courts would first attempt to establish whether Parliament had the intention of making a principal liable for an offence in statute before concluding that a corporation, as principal, was liable vicariously.

Recently, courts in Australia have held that a corporation as employer will not be liable vicariously if it shows that its employee acted without authority or that it took steps to prevent the criminal conduct.⁴⁰ Thus, in Australia as in England, it is necessary to prove that the employee acted within the scope of employment. However, in Australia though not in England, it is also necessary to prove that the corporation/employer authorised or failed to prevent the relevant conduct.⁴¹

3.3.3 Criticism of vicarious criminal liability

Three main criticisms may be made of corporate criminal liability through the principle of vicarious liability. First, in order to hold a corporation liable criminally, it is necessary to identify which employee or agent committed the crime in

³⁸ (1921) 29 CLR 195.

³⁹ (1921) 29 CLR 217.

⁴⁰ *Evenco Pty Ltd v Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia Union of Employees Queensland* [2001] 2 Qd R 118 at 130; Clough & Mulhern at 87.

⁴¹ Clough & Mulhern at 87.

question.⁴² In many cases, though it is clear that an employee committed an offence, it is not so clear which employee committed the offence.⁴³ This can pose problems to the prosecution particularly in cases involving the commission of statutory fault-based crimes in which a requisite mental element on the part of the employee must be proved. This problem is magnified in cases involving large companies and multinational corporations since the potential number of employees who may have committed the crime in question with the requisite *mens rea* is high.

A second criticism is that vicarious liability can be overbroad. Once it has been established that an employee has committed an offence in the course and scope of employment, a corporation as employer may be held liable vicariously for that offence.⁴⁴ This may happen despite the fact that the corporation may have forbidden its employees to commit such offence or may be unaware that its employees intend to commit such offence. This is arguably open to abuse and may operate harshly and unfairly on corporations.

A third criticism is that the ambit of vicarious liability is limited with respect to the commission of crimes. The reason for this is that vicarious liability was intended as a mechanism to enhance the enforcement of regulatory legislation rather than to show blameworthiness.⁴⁵ This is illustrated in its application at the start of the twentieth century in the 'Railway cases' in England such as *Birmingham and Gloucester* and *Mousell Brothers*. More recently, vicarious liability has ordinarily been applied in consumer protection and environmental offences.⁴⁶

In summary, by the beginning of the twentieth century a corporation could be convicted of a criminal offence under vicarious liability for crimes that did not

⁴² James Gobert 'Corporate criminality: four models of fault' (1994) 14 *Legal Studies* 393 at 398.

⁴³ *Ibid.*

⁴⁴ Clough & Mulhern at 80.

⁴⁵ *Ibid.*

⁴⁶ See *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) NSWLR 715 at 718.

require fault.⁴⁷ These offences included strict liability offences and failures to fulfil statutory duties imposed specifically on the company, whose violation amounted to an offence. When determining a corporation's criminal liability, the courts focused not on the actual breach or wrongful act, but rather on whether the corporation's employee was 'engaged in employment activity' when he or she committed the breach.⁴⁸

Vicarious liability was also extended by the courts to fault-based statutory offences. An important consideration in the establishment of criminal liability in these cases is whether Parliament intended to make principals liable for the acts of their employees or servants. In Australia, courts in addition inquire whether the employee who has committed an act that amounts to an offence was authorised to do so by the corporation.

The criticisms of vicarious liability are threefold. First, its requirement of an identified individual employee that committed an offence is problematic in large corporations where it may not be clear which employee committed the offence in question; secondly, vicarious liability may operate harshly and unfairly on corporations by finding them liable criminally for conduct that they did not authorise or were unaware of or forbade expressly; and thirdly, vicarious liability has a limited ambit of application in criminal law as it is better suited to promote enforcement than to determine culpability or blameworthiness.

3.4 The development of the doctrine of identification in corporate criminal law

Under vicarious liability, corporations could be liable criminally only for no-fault offences with the exception of statutory fault-based offences. Corporations could still not be found liable for fault-based offences under the common law. However, this changed with the development of the doctrine of identification. The development of identification liability rests on three pillars. The first pillar is the civil case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* to which the origin

⁴⁷ Pinto & Evans at 32; Celia Wells 'The Millennium Bug and Corporate Criminal Liability' (1999) 2 *Journal of Information, Law and Technology*
<http://www.law.warwick.ac.uk/jilt/99-2/wells.html> accessed on 21 April 2014

⁴⁸ Pinto & Evans at 23.

of identification liability is attributed.⁴⁹ The second pillar is a set of three criminal cases of the High Court in 1944 in which direct criminal liability of corporations for fault-based offences was considered.⁵⁰ The third pillar is the House of Lords judgment in *Tesco Supermarkets v Natrass*,⁵¹ which is currently the leading authority on the law on corporate criminal liability in England.⁵² This case sets out guidelines that determine which natural persons within the service of a corporation can implicate a corporation and thus it defines the scope of the application of identification liability.⁵³

3.4.1 *Origin of identification liability: Viscount Haldane's dictum in Lennard's Carrying*

Commentators identify *Lennard's Carrying* as the origin of identification liability.⁵⁴ Viscount Haldane's dictum in this case notes that:

... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the *directing mind and will* of the corporation, the *very ego* and centre of the personality of the corporation.⁵⁵

The issue in this case was whether fault for the loss of cargo aboard a tank steamer could be attributed to a company that was registered as the owner of the vessel (Lennard's Carrying Company Ltd).⁵⁶ Section 502 of the Merchant Shipping Act of 1894 excluded liability for the loss or damage of cargo on a ship if such loss or damage occurred without the fault of the owner of the ship.⁵⁷ The court found that John Lennard, the manager and director of Lennard's Carrying Company Ltd, was

⁴⁹ [1915] AC 705 HL.

⁵⁰ See *DPP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (director used a false document); *Moore v Bresler* [1944] 2 KB 515 (tax evasion); *R v ICR Haulage Ltd* [1944] KB 551 (common law conspiracy).

⁵¹ [1972] AC 153.

⁵² *Pinto & Evans* at 56.

⁵³ *Ibid* 47-52.

⁵⁴ *Ibid* 41.

⁵⁵ [1915] AC 705 at 713 (my emphasis).

⁵⁶ [1915] AC 705 at 712.

⁵⁷ [1915] AC 705 at 705.

at fault.⁵⁸ The key question therefore was whether this fault could be imputed to Lennard's Carrying Company Ltd.⁵⁹ The court decided this in the affirmative. Viscount Haldane LC considered whether the acts and states of mind of a natural person can be attributed to a company and concluded that the conduct and mental state of those who are regarded as the 'directing mind and will' of a company can rightly be attributed to the company.⁶⁰

Lennard's Carrying also held that the determination as to whether a natural person is simply an agent or one that is a 'directing mind and will' is a matter of construction and evidence.⁶¹ If prima facie a person is found to be the 'directing mind and will' of the company, the burden falls on the company to prove the contrary.⁶² Though it is a civil case, the dictum in *Lennard's Carrying* embodies the origin of the identification doctrine.

3.4.2 Identification liability for fault-based offences: the '1944' cases

A set of three landmark criminal law cases in 1944 extended the application of identification liability to fault-based offences. In the first of these three cases, *DPP v Kent & Sussex Contractors Ltd*,⁶³ the King's Bench Division held that a company could be liable for an offence that required *mens rea*. Kent & Sussex Contractors was charged with 'issuing a record which was false in a material particular' and with 'furnishing false information' under the Motor Fuel Rationing Order of 1941 in order to obtain petrol coupons.⁶⁴ The issue was whether the provision of information by the transport manager of Kent & Sussex Contractors, knowing it to be false, could be imputed to the company.⁶⁵ Viscount Caldecote LCJ found that 'a company is capable of an act of will or of a state of mind, [and is thus] able to form an intention to deceive or to have knowledge of the truth or falsity of a

⁵⁸ [1915] AC 705 at 718.

⁵⁹ [1915] AC 705 at 715-6.

⁶⁰ [1915] AC 705 at 713.

⁶¹ [1915] AC 705 at 713.

⁶² Pinto & Evans at 45.

⁶³ [1944] 1 KB 146.

⁶⁴ [1944] 1 KB 146 at 146-7.

⁶⁵ [1944] 1 KB 146 at 150-1.

statement'.⁶⁶ *DPP v Kent* recognised that each company makes decisions and operates through certain individuals (directors/managers), who are more than mere agents. The court then declared that because a 'company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought', then the knowledge of these directors can be imputed to a company.⁶⁷

A subsequent 1944 decision, *R v ICR Haulage Co Ltd*,⁶⁸ considered corporate criminal liability for *mens rea* offences and applied *DPP v Kent*. The court held that the offence of conspiracy to defraud on the part of the managing director and some employees of ICR Haulage could be imputed to the company.⁶⁹ Stable J approved and applied *DPP v Kent* holding that since the managing director was solely in charge of the company, his decisions were effectively the decisions of the company and therefore, his acts and state of mind were those of the company.⁷⁰ Similarly, in *Moore v I Bressler Ltd*,⁷¹ Viscount Caldecote LCJ again decided that the criminal acts and state of mind of two important officials of a company involving fraud could be imputed to a company though this would not preclude the criminal liability of the individual officials.⁷² Individual culpability – in the developments advanced by the 1944 cases – were not to be excluded or abolished.

3.4.3 Criticism of the '1944' cases

The judgements of *DPP v Kent*, *ICR Haulage* and *Moore v I Bressler* established that a company could be liable for fault-based offences under the identification doctrine. Surprisingly, none of the judgements considered Viscount Haldane's dictum in *Lennard's Carrying* on the abstract nature of a company. They also did not consider the 'directing mind and will' test.⁷³ Crucially, they did not address the following important questions: under what circumstances would an employee be

⁶⁶ [1944] 1 KB 146 at 151.

⁶⁷ [1944] 1 KB 146 at 154-5.

⁶⁸ [1944] 1 KB 551.

⁶⁹ [1944] 1 KB 551.

⁷⁰ [1944] 1 KB 551.

⁷¹ [1944] 2 KB 515.

⁷² [1944] 2 KB 515 at 516-7.

⁷³ *Pinto & Evans* at 44.

regarded as having acted as more than a mere agent such that his or her conduct could be imputed to the company; would all conduct by such designated employee be imputable; and, if not, what would be the differentiating factors? These issues were addressed in the case of *Tesco Supermarkets*, which endorsed the use of the 'directing mind and will' test as pronounced in *Lennard's Carrying* and extended it to the determination of corporate criminal liability.⁷⁴

3.4.4 *Limiting the scope of identification liability: Tesco Supermarkets v Natrass*

The case of *Tesco Supermarkets v Natrass* centred on whether a company (Tesco Supermarkets) was liable for an offence under the Trade Descriptions Act of 1968. Section 20(1) of this Act provided for the liability of both a body corporate and any of its directors or managers or secretaries if an offence under the Act was proved to have been committed with the consent and connivance of these persons. The facts illustrated that an offence under the Act had indeed been committed under the supervision of one of Tesco Supermarket's store managers. The relevant issue then was whether the conduct and fault of this store manager could be attributed to the company.

Holding that the store manager's fault was not that of the company's, the court stated that a company may only be liable criminally for the acts of the 'board of directors, the managing director and perhaps other superior officers of a company [that] carry out the functions of management and speak and act as the company'.⁷⁵ Alternatively, a company may be liable criminally for the acts of 'a person who is in actual control of the operations of a company or of part of them and who is 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.'⁷⁶ Furthermore, a company may also be liable criminally for the acts of those who exercise the powers of the company in terms of the company's memorandum and articles of association.⁷⁷ Since the store manager was not one of these persons, his fault

⁷⁴ Smith & Hogan at 260-2; Pinto & Evans at 53.

⁷⁵ [1972] AC 153 at 171.

⁷⁶ [1972] AC 153 at 187.

⁷⁷ [1972] AC 153 at 200.

could not be imputed onto the company and therefore the company was not found liable criminally.

According to *Tesco Supermarkets*, in order for the conduct and mental state of an employee of a company to be imputed to the company and thus considered as the conduct and mental state of the company, one of the above three instances must apply. First, the employee must be a member of the board of directors or a managing director or a superior official; second, the employee must occupy a position of control in the company's operations and is not answerable to another person in respect of the carrying out of these operations and third, the employee must be authorised under the company's constitution to exercise the powers of the company. If any one of these three instances applies, the conduct of the employee is the conduct of the company and not merely of a 'responsible agent' or 'high executive'.⁷⁸ These three instances effectively narrowed down the ambit of those whose conduct and fault could be attributed to a company.

3.4.5 A nuanced approach to identification liability in certain statutory fault-based offences: *The Meridian Case*

A decision of the Privy Council, *The Meridian Case*, sought to nuance the approach taken in *Tesco Supermarkets*.⁷⁹ Lord Hoffman held that a determination of whose fault could be imputed to a company in terms of the identification doctrine depended on rules of attribution.⁸⁰ These rules of attribution could either be sourced from a company's memorandum and articles of association or from the wording of a statute that creates an indictable offence.⁸¹ He proposed that the approach to interpreting and applying these rules of attribution should be flexible in order to take into account the purpose and substance of a rule in question.⁸²

In certain circumstances, a statute may impose corporate criminal liability for a fault-based offence in respect of an employee who cannot be said to be a 'directing

⁷⁸ Smith & Hogan at 261.

⁷⁹ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] BCC 942.

⁸⁰ [1995] BCC 942 at 942-3.

⁸¹ [1995 BCC 942 at 946.

⁸² [1995] BCC 942 at 946-7.

mind and will'. In these circumstances, neither vicarious liability nor identification liability would be applicable. Therefore, *The Meridian Case* proposed that in these circumstances, the criminal liability of a corporation would be a matter of construction of the wording of the statute imposing liability and/or the company's constitution. Some commentators have suggested that Lord Hoffman's dictum may not be helpful as it is somewhat controversial.⁸³ It introduces uncertainty into the law of corporate criminal liability by not making it clear whether greater weight would be given to the interpretation of the statute imposing liability or to the company's constitution especially in circumstances where an interpretation of statute may be difficult to reconcile with that of a company's constitution.

Therefore, the law on corporate criminal liability developed under the common law at that stage was as follows: a corporation could be liable for no-fault offences under the principle of vicarious liability except in the case of public nuisance and criminal libel. A corporation could also be liable criminally for statutory fault-based offences through vicarious liability. A corporation could be liable for fault-based offences under the doctrine of identification in terms of which the conduct and mental state of an employee would be regarded as the conduct and mental state of the corporation. Such employee had to occupy one of three positions: a member of the board of directors/superior official or a controlling officer or an employee authorised to exercise the powers of the corporations in terms of the corporation's constitution. This formulation of the identification doctrine is not without its critics.

3.4.6 Is identification liability an appropriate method for determining corporate criminal liability?

There are two main criticisms against identification liability. The first is that due to the narrowing down of who in a company can be considered as acting as and possessing the mental state of the company, the effectiveness of identification

⁸³ Peter Cartwright *Consumer Protection and the Criminal Law* (2001) at 104. See also Celia Wells *Corporations and Criminal Responsibility* 2 ed (2001) at 104. See also Clough & Mulhern at 100-4.

liability is limited.⁸⁴ This first criticism is more directed at the formulation of identification liability as enunciated in *Tesco Supermarkets* than to identification liability as a doctrine. The second criticism is targeted at identification liability as a doctrine for the determination of corporate criminal liability. This criticism suggests that identification liability does not reflect 'corporate fault' adequately. Specifically, identification liability fails to reflect corporate fault adequately in two ways: it is hinged on the conduct and fault of one person which may often disregard how decisions in companies that lead to crime are really made; and it fails to account for corporate fault on the basis of a 'corporate culture' that favours the commission of an offence. These are discussed below in turn.

3.4.6.1 Identification liability relies on the establishment of criminal liability of a natural person

The formulation of identification liability in *Tesco Supermarkets* states that a company cannot be liable for an offence if a 'directing mind and will' was not involved in the commission of the offence. Identification liability in this form is more suited to smaller companies where the involvement of individual directors in actions or omissions that lead to crime is more likely to be proved.⁸⁵ Professor Gobert points out that identification liability is under-inclusive. By this he means that that 'the range of persons within a large company who will possess the relevant characteristics to render the company liable will inevitably be a rather small percentage'.⁸⁶ Where this range is small – ordinarily in small companies – identification liability would be a suitable method of establishing corporate fault. However, in large companies, this would generally not be the case.⁸⁷

Large companies and multinational corporations tend to have diffuse company structures in which directors or controlling officers are far removed both tactically

⁸⁴ Smith & Hogan at 260.

⁸⁵ Ibid 260-1.

⁸⁶ James Gobert 'Corporate criminality: four models of fault' (1994) 14 *Legal Studies* 393 at 400.

⁸⁷ Professor Gobert aptly expresses the limits of identification liability stating that it 'propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most' (Ibid 401).

and operationally from the implementation of decisions of the company.⁸⁸ Importantly, Professor Clarkson notes that decision-making in large companies and multinational corporations 'is often the product of corporate policies and procedures rather than individual decisions'.⁸⁹ Identification liability as formulated in *Tesco Supermarkets* fails to take into account these two factors: complex organisational structures and the role played by corporate policies and procedures in decision-making. Therefore, where decisions in large companies or multinational corporations lead to the commission of an offence, it would be very difficult to find corporations liable criminally through the doctrine of identification since this doctrine requires that an individual official's criminal liability be established first before that can be regarded as being the criminal liability of the company.⁹⁰

3.4.6.2 Identification liability does not reflect corporate fault on the basis of 'corporate culture'

As indicated above, in terms of identification liability, the fault of the company is the fault of an individual director.⁹¹ A related point that follows from the above criticism is that modern day corporations and multinational corporations may commit criminal offences as a result of a 'corporate culture' that is indifferent to abuses or corporate practices that permit abuses by failing to observe due diligence mechanisms. Hence, since identification liability is hinged on the establishment of liability of one individual, it would not assist in establishing fault where there may be a pervasive culture or mind-set in a company that leads to the commission of crimes but one that cannot be located in one director or senior company official. Therefore, where criminal wrongdoing would more likely be a consequence of management or corporate policy rather than of a decision or act traceable to an individual director, identification liability has little or no

⁸⁸ See James Gobert 'Corporate criminality: four models of fault' (1994) 14 *Legal Studies* 393 at 401.

⁸⁹ C M V Clarkson 'Kicking Corporate Bodies and Damning their Souls' (1996) *Modern Law Review* 557 at 561.

⁹⁰ Consultation Paper 195 at 105.

⁹¹ B Fisse and J Braithwaite *Corporations, Crime and Accountability* (1993) at 47.

application. Identification liability – hinged on individual criminal liability – is modelled on business forms and decision-making arrangements that existed at the start of the twentieth century which have largely been abandoned by modern corporations. Hence, identification liability cannot satisfactorily be a method for the determination of corporate criminal liability and business accountability in general.

3.5 Vicarious liability, identification liability and growing calls for business accountability

The discussion on the need to develop alternative methods for the determination of corporate fault resonates with the general insistence in international law for calls for accountability of companies for gross human rights abuses.⁹² These calls are driven partly by the fact that business has become a major actor in global economic interdependence. Business also has immeasurable social and political impacts by virtue of the economic power it wields.⁹³ Privatisation and sub-contracting has effectively placed on companies responsibilities once reserved for governments.⁹⁴ Thus, companies are in a position where they have a colossal potential to do good or to cause harm. Where companies collude with or are complicit in the perpetration of gross human rights harm by governments or armed groups, there needs to be methods of establishing liability, criminal and/or civil that are practically suitable to how businesses are structured and how they make their decisions. Within the scope of criminal law, vicarious liability and identification liability are, as shown above, far from adequate methods that are practically suitable. New methods of establishing corporate criminal liability ought to take into account that corporate fault often is not located in one person and at times, cannot be located in one person.

In response to national and international calls to hold businesses more accountable, both England and Australia have developed new statutory measures.

⁹² See Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Facing the Facts and Charting a Legal Path (2006) vol 1 at 1. ('Report ICJ').

⁹³ Report ICJ at 1.

⁹⁴ Ibid.

These measures are innovative in that they look to new principles of corporate criminal liability that incorporate non-derivative models of liability. The two relevant statutes include the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007 and Australia's Criminal Code Act 1995 (Cth). In England, the approach has been to develop a new model of criminal liability but one that is limited to the crime of corporate manslaughter. In Australia, the approach of the Commonwealth (Federal government) has been to enact a law that sets out a non-derivative model of criminal liability applicable to federal offences and that may be applied by the various states within their jurisdictions. These two statutes are examined below in turn.

4 Non-derivative principles of corporate criminal liability in English and Australian statutory law

4.1 Outline of principles of liability in the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007 and Australia's Criminal Code Act 1995 (Cth)

The Corporate Manslaughter and Corporate Homicide Act 2007 ('Corporate Manslaughter Act') creates the offence of corporate manslaughter or corporate homicide.⁹⁵ In terms of this offence, a corporation can be found guilty of causing the death negligently of an individual at work. The attribution of fault is characterised by the notion of the 'failure of management'. It reflects the idea of non-derivative liability in the sense that fault for the offence is not imputed or derived from that of an individual official. Through this model of liability, a corporation's culpability and hence criminal liability is due to the failure of its management to observe what the Corporate Manslaughter Act refers to as a duty of care. The Corporate Manslaughter Act is applicable to corporations, specified government departments, the police force and partnerships or trade union or employers' association that are employers.⁹⁶

⁹⁵ In England, Wales and Northern Ireland, it is called corporate manslaughter and in Scotland it is called corporate homicide.

⁹⁶ Section 1(2) (a) – (d) Corporate Manslaughter Act.

The application of Australia's Criminal Code Act 1995 (Cth) ('Criminal Code') is broader than that of the Corporate Manslaughter Act. Rather than focussing on a specific corporate offence, the Criminal Code addresses the subject of corporate criminal responsibility by setting a model for the determination of corporate criminal liability for offences generally. The principles of criminal liability contained in the Criminal Code are divided into 'physical elements' (conduct) and 'fault elements'.⁹⁷ The Criminal Code sets out a non-derivative model through which these elements are applied in the establishment of corporate criminal liability.⁹⁸ This model applies to all Commonwealth (Federal) offences.⁹⁹ However, under Australia's Constitution, most criminal law is State law and Commonwealth offences are restricted to those matters in respect of which the Commonwealth government has legislative power.¹⁰⁰ Therefore, the ambit of offences to which the Criminal Code is applicable at present is limited.¹⁰¹ Nevertheless, there is no conceptual barrier to the Criminal Code's application to a broader range of offences.¹⁰² This will be possible once the existing models within Australia's States seize to apply.

International institutions that seek to hold corporations liable criminally can adopt these models of non-derivative corporate criminal liability. They are particularly suitable for large companies and multinational corporations whose presence, operations and effects transcend national borders.

4.2 Background to the Corporate Manslaughter Act

The bill that was to be enacted as the Corporate Manslaughter Act was introduced in Parliament in 2005 by the UK government. Discussions and debates on and

⁹⁷ Section 3 Criminal Code.

⁹⁸ See Part 2.5, section 12.3 Criminal Code.

⁹⁹ Allens Arthur Robinson '*Corporate culture' as a basis for the criminal liability of corporations* (Report prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business, 2008) at 10 para 3.1. ('Allens Report').

¹⁰⁰ See section 51 of the Constitution Act 1901 (Cth) (Australian Constitution). Allens Report at 10 para 3.1.

¹⁰¹ The limited range of offences under the Criminal Code including bribery of foreign public officials, offences against United Nations personnel, international terrorist activities and people-smuggling (see Chapters 4-10 Criminal Code).

¹⁰² Allens Report at 15 para 3.3.

around the bill reveal the reasons for its introduction.¹⁰³ There was concerns that each year hundreds of workers were killed in work-related incidents.¹⁰⁴ Attempts at prosecuting corporations under the common law for manslaughter proved to be ineffective.¹⁰⁵ The primary reason for their ineffectiveness was that corporate negligence, under identification liability, had to be judged on the basis of individual liability.¹⁰⁶ According to the government, this was ‘a narrow and artificial basis for assessing corporate negligence’ since in practice, ‘only a handful of corporate manslaughter prosecutions [had] ever been brought successfully—all against small companies’.¹⁰⁷ Larger corporations could only be prosecuted for corporate manslaughter under health and safety laws, which however useful, were not and could not address the seriousness of corporate failures that lead to the deaths of workers.¹⁰⁸

The government considered the complexity of the structures of large corporations and acknowledged that due to this complexity ‘it is not possible to lay responsibility for the failings behind a death at the door of one individual and charge them with manslaughter’.¹⁰⁹ More importantly, the government

¹⁰³ See the debates in Hansard available at http://www.publications.parliament.uk/pa/pabills/200607/corporate_manslaughter_and_corporate_homicide.htm.

¹⁰⁴ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq (<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61219-0003.htm#06121937000004>).

¹⁰⁵ The problem really was not that the offence of corporate manslaughter did not exist but that finding corporations liable criminally under the common law models of liability proved to be quite difficult.

¹⁰⁶ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq.

¹⁰⁷ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq.

¹⁰⁸ Ibid. Most of the offences under United Kingdom’s Health and Safety at Work Act 1974 are of strict liability and the penalties imposed for breaches under this Act are not especially large (See Des Taylor and Geraldine Mackenzie ‘Staying focused on the big picture: Should Australia legislate for corporate manslaughter based on the United Kingdom model?’ (2013) 37 *Criminal Law Journal* 99 at 100).

¹⁰⁹ See the comments of the Parliamentary Under-Secretary of State, Mr Gerry Sutcliffe in the Official Report, Commons, 4/12/06; col. 115 available at (<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61219-0003.htm#06121937000004>).

underlined that the immediate causes of death at work were connected to factors that allowed for these deaths to occur.¹¹⁰ These factors were linked to gross failures in management to discharge their duty of care so as to ensure safety and prevent fatalities. Therefore, the government suggested that these failures had to be investigated by prosecutors and considered by the courts.¹¹¹

The government's concerns with the reduction of deaths at work and the prosecution of large corporations were grounded on the fact that there was evidence of a culture in corporations that led to systemic failures in matters of health and safety.¹¹² These failures led to the negligent loss of life at a grand scale. Crucially, the government put forward the idea that 'major corporations set the culture in the industry' and suggested that '[w]hen major firms adopt attitudes of corner-cutting and general sloppiness, then the entire industry is at risk'.¹¹³

These considerations resonate with international calls for greater business accountability for human rights violations. The approach taken by the UK government lends strong support to the notion that the law must address the 'culture' of corporations that leads to failures of management to observe duties of care in matters of safety. Following from this is the notion that negligent conduct is systemic and therefore models of criminal liability have to take this into account for there to be a real likelihood of holding corporations accountable.

4.3 Limitations of the common law offence of corporate manslaughter

The Corporate Manslaughter Act has created a specific statutory offence of corporate manslaughter in response to the inadequacy of the common law offence of manslaughter as applied to corporations. Identification liability was the only avenue through which corporations could be held liable criminally for

¹¹⁰ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq.

¹¹¹ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq.

¹¹² See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1897 et seq.

¹¹³ See the statements of Lord Whitty in the Official Report, Lords, 19/12/06; col. 1934 (<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61219-0008.htm>).

manslaughter at common law. The major limitations inherent in the identification liability approach were twofold: its narrow selection of who in a company can be identified as acting as the company and the requirement to prove that this person's fault satisfied the requisite gross negligence threshold. As illustrated above, this method is unsuitable to large and diffuse corporate structures. Hence, the enactment of the Corporate Manslaughter Act to provide for corporate criminal liability for deaths that occur at work.

A further, yet less significant reason that led to the establishment of corporate criminal liability for corporate deaths was the rejection of the doctrine of aggregation. This doctrine, a modified form of identification liability, sought to establish fault on the part of the company through the accumulative or aggregate conduct and states of mind of a number of directors who, individually, cannot be shown to possess a guilty mind or fault for the purposes of identification liability.¹¹⁴ The English Court of Appeal rejected this doctrine in the *A-G's Reference (No 2 of 1999)* case.¹¹⁵ This case endorsed identification liability as applied in previous case law holding that a company will not be liable unless an identified individual's fault can be attributed to the company.¹¹⁶

4.4 Liability for corporate manslaughter under the Corporate Manslaughter Act

Liability in terms of the Corporate Manslaughter Act is limited to the crime of corporate manslaughter. A corporation may be liable for manslaughter if three requirements are met. First, the management of the organisation's activities must have caused a person's death;¹¹⁷ secondly, that the cause of death must have been due to a gross breach of a relevant duty of care owed by the organisation to the deceased¹¹⁸ and thirdly, that the management of the organisation's activities was a substantial element in the breach of the relevant duty of care owed.¹¹⁹ Crucially,

¹¹⁴ Smith & Hogan at 564.

¹¹⁵ [2000] QB 796. See also *R v H M Coroner for East Kent, Ex Parte Spooner* (1987) 88 Cr App R 10 at 16-17.

¹¹⁶ Smith & Hogan at 564.

¹¹⁷ Section 1(1)(a) Corporate Manslaughter Act.

¹¹⁸ Section 1(1)(b) Corporate Manslaughter Act.

¹¹⁹ Section 1(3) Corporate Manslaughter Act.

the Corporate Manslaughter Act does not create any new relevant duty of care under the law of negligence and therefore relies on the existence of a common law duty or statutory provision imposing such duty of care.¹²⁰

4.5 The elements of the offence of corporate manslaughter

Section 1 of Corporate Manslaughter Act sets out the offence of corporate manslaughter and its elements:

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised —

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2).....

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

For a successful conviction, the prosecution must prove five elements.¹²¹ First, that the organisation owed a relevant duty of care to the victim (deceased).¹²² Second, that the organisation breached that duty of care as a result of the way in which the activities of the organisation were managed.¹²³ Third, a substantial element of the breach must have been due to the way in which senior management of the organisation managed its activities.¹²⁴ Fourth, there must be causation in that the management failure must have caused the death of the victim. Finally, the

¹²⁰ Section 2(4); Smith & Hogan at 268. The notion of duty of care is discussed below.

¹²¹ I draw out these elements from the Explanatory Notes to the Corporate Manslaughter and Corporate Homicide Act 2007 prepared by the Ministry of Justice (accessible at <http://www.legislation.gov.uk/ukpga/2007/19/notes/contents>). Referred to here as 'Explanatory Notes'. See also Smith & Hogan at 567-573.

¹²² Explanatory Notes para 15.

¹²³ Ibid.

¹²⁴ Ibid.

management failure must have been a gross breach of the duty of care.¹²⁵ These elements can be narrowed down to a discussion of three concepts: management failure, relevant duty and gross breach of a relevant duty.

4.5.1 *Management failure*

A breach by an organisation of a duty of care prescribed in the Act is referred to as 'management failure'.¹²⁶ This term, however, is not present in the Act but was formulated by the Explanatory Notes to the Corporate Manslaughter Act. In determining management failure, the Act asks how the activities of an organisation were managed as a whole.¹²⁷ This wider net of examination takes into account both the role played by senior managers and less senior employees in the management and organisation of activities in an organisation.¹²⁸ Thus, the Act to some degree incorporates the notion of aggregate liability by recognising that management failure, and hence fault on the part of an organisation, can arise from the conduct of a varied number of individuals in an organisation.¹²⁹

Crucially, the Act stipulates that an offence can only be committed by an organisation under the Act if 'the way in which its activities are managed and organised by its senior management is a *substantial element* in the breach'.¹³⁰ A breach of duty that leads to death may have a number of elements. However, for an organisation to be found liable, its senior management's contribution to the breach must be a substantial one.¹³¹ However, this does not mean that only the contribution of senior management is relevant to the determination of management failure.¹³² When assessing management failure, the contribution of non-senior staff *in conjunction with* that of senior management in the organisation of activities needs only to be relevant in determining whether there was a breach

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Section 1(4)(c) Corporate Manslaughter Act; Explanatory Notes para 15; Smith & Hogan at 571.

¹²⁸ Explanatory Notes para 15; Smith & Hogan at 571.

¹²⁹ Smith & Hogan at 571.

¹³⁰ Section 1(1) Corporate Manslaughter Act.

¹³¹ Section 1(3) Corporate Manslaughter Act.

¹³² Smith & Hogan at 571.

in terms of the Act.¹³³ Therefore, by including the contribution of non-senior staff of a corporation in the assessment of management failure as the basis of corporate fault, the Act moves beyond the confines of the 'directing mind and will' test of the identification doctrine.¹³⁴

The significance of including the contribution of non-senior staff in the assessment of management failure is directly connected to the increased effectiveness of the regime of the Act. Ordinarily, where there are fatalities at work, non-senior staff will be found to have committed acts that are the immediate cause of these fatalities. In respect of the element of causation, their inclusion in the wider ambit of a corporation's management failure therefore raises the probability of finding corporations liable. The reason for this is that the inclusion of non-senior staff in conjunction with senior staff members in the assessment of management failure bridges gaps that link the failures of senior management with the conduct of non-senior staff that leads to workplace fatalities. If non-senior staff were not to be included in this assessment, corporations would escape liability by delegating health and safety management below senior management level.¹³⁵

4.5.2 Relevant duty in terms of the Act

Section 2 of the Act defines the term 'relevant duty'. Section 2 includes as a duty of care any duty owed by an organisation for activities run on a commercial basis.¹³⁶ The section incorporates duties owed under civil law such as duties owed by employers to employees, duties owed as occupiers of premises, duties owed as suppliers of goods or services and in construction and maintenance operations.¹³⁷ The Act does not create new duties but simply recognises those duties that arise in the common law of gross negligence and manslaughter.¹³⁸

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ See the briefing of Liberty (an UK-based NGO promoting civil liberties and human rights) Briefing for Second Reading in the House of Commons (October 2006) at para 28 (<https://www.liberty-human-rights.org.uk/sites/default/files/corporate-manslaughter-bill-second-reading-commons.pdf>) accessed on 10 October 2014.

¹³⁶ Section 2(1)(c)(iii) Corporate Manslaughter Act.

¹³⁷ See s 2(1)(a) - (d) Corporate Manslaughter Act.

¹³⁸ Explanatory Notes para 20.

Section 2(5) of the Act stipulates that the existence of a duty is a question of law not of fact to be decided by the judge. This section adds that in making this determination, a judge must make any necessary findings of fact. This latter statement is linked to arguments put forward during the debates prior to the passing of the Act. One of these arguments was that though the determination of a duty of care under the Act would generally be based on the civil law (statute and case law), judges should not be constrained to follow civil law principles.¹³⁹ In circumstances where the civil law recognises no duty of care, public policy considerations underlying the offence may require that a judge find on the facts that a duty of care does exist.¹⁴⁰

The rationale behind this argument is that public policy issues in civil law may be quite different from the needs and purpose of the criminal law.¹⁴¹ Hence, in section 2(6) the Act directs, contrary to the common law, that a person may be found to owe a duty of care to another in circumstances where they both were engaged jointly in unlawful conduct. Similarly, the Act disregards the operation of any rule that would have 'the effect of preventing a duty of care from being owed to a person by reason of his or her acceptance of a risk of harm'.¹⁴²

4.5.3 *Meaning of gross breach under the Act*

Section 1(4)(b) of the Act describes what is meant by 'gross breach'. This section states that a breach of a duty of care amounts to a gross breach if the conduct in question 'falls far below what can reasonably be expected of the organisation in the circumstances'. The determination of falling far below is a question of fact.¹⁴³

Debates in the House of Lords prior to the passing of the Corporate Manslaughter Bill considered concerns that the Bill may overburden business with unnecessary

¹³⁹ See Centre for Corporate Accountability *Corporate Manslaughter and Corporate Homicide Bill: Briefing on Amendments* (Lords second reading, 19 December 2006) at para 3.9 – 3.11 (<http://www.corporateaccountability.org.uk/dl/manslaughter/reform/2006/ccalordsecondreaddec06.pdf>) accessed on 10 October 2014.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Section 2(6)(b) Corporate Manslaughter Act.

¹⁴³ Smith & Hogan at 572.

legislation that stifles entrepreneurship and industry.¹⁴⁴ In dealing with these concerns, the Minister of State of the Home Office underlined that for criminal liability to attach, the conduct alleged to amount to a gross breach would have to fall far below acceptable standards.¹⁴⁵ The threshold for gross negligence is a high one and where the threshold is not met, appropriate sanctions would follow from health and safety legislation and not the Corporate Manslaughter Act.¹⁴⁶ Therefore, it would be inaccurate to characterise the Act as being an excessive burden on business.

Section 8 of the Act details four factors to be considered in the determination of a 'gross breach'. Two of these factors must be considered and the other two may be considered.¹⁴⁷ The listed factors nonetheless do not constitute a closed list.¹⁴⁸ The two factors that must be considered in the examination of evidence of management failure that relates to an alleged breach are the seriousness of the failure and the extent of risk of death posed by such failure.¹⁴⁹ In considering these two factors, the Sentencing Council in England and Wales, through its Definitive Guideline, has indicated a range of issues that ought to be taken into account. These issues look at foreseeability of harm, existing standards applicable in the context, frequency of breaches of duty of care and how far up the organisation the breach goes (the higher up the responsibility for the breach, the more serious the offence).¹⁵⁰

These factors were considered and applied in *The Queen v JMW Farm Limited*.¹⁵¹ In this case, an employee of JMW Farm, Robert Wilson, suffered fatal injuries as

¹⁴⁴ See the statements of the Minister of State, Home Office, Baroness Scotland of Asthal in the Official Report, Lords, 19/12/06; col. 1901 (<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61219-0003.htm#06121937000004>)

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Section 8(2)-(3) Corporate Manslaughter Act.

¹⁴⁸ Section 8(4) Corporate Manslaughter Act.

¹⁴⁹ Section 8(2)(a)-(b) Corporate Manslaughter Act.

¹⁵⁰ Sentencing Guidelines Council *Definitive Guideline: Corporate Manslaughter & Health and Safety Offences Causing Death* (2010) paras 5-6 (http://sentencingcouncil.judiciary.gov.uk/docs/web__guideline_on_corporate_manslaughter_accessible.pdf).

¹⁵¹ [2012] NICC 17.

he was washing a metal bin raised up on the forks of a forklift truck operated by one of the company's directors. The bin fell on him and as a result he died.¹⁵² Senior management of the defendant company was aware that the forklift was unsuitable for carrying bins and using it posed a hazard.¹⁵³ The judge found that despite awareness of this hazard, the company had continued to use these forklifts repeatedly. It was clearly foreseeable that using these forklifts could cause harm.¹⁵⁴ The company was found guilty of corporate manslaughter and fined £187,500.¹⁵⁵ The approach in the determination of liability in this case took a holistic view of the company, analysing the mediate causes of failures to observe a duty of care, the reason for these causes and whether steps were taken to prevent them. This is a realistic approach that furthers the prospects of successful convictions in such cases.

Among the factors that may be considered by a court in the determination of the existence of a 'gross breach' is 'the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged' the failure that led to the 'gross breach'.¹⁵⁶ The inclusion of this consideration illustrates how the Act has sought to make up for a deficiency of the identification doctrine which locates fault in an individual director and not the organisation as a whole. By making compulsory the examination of attitudes and policies within a corporation in the determination of gross negligence for the crime of manslaughter, the Act seeks to develop the law on corporate criminal liability by recognising that fault can and does exist in the corporation as a legal entity.

A second factor that may be considered by a court in the determination of the existence of a 'gross breach' is the application of any health and safety guidance related to the alleged breach. Section 8(5) defines 'health and safety guidance' as any code, guidance manual or similar publication...concerned with health and

¹⁵² [2012] NICC 17 para 3.

¹⁵³ [2012] NICC 17 paras 4-6.

¹⁵⁴ [2012] NICC 17 para 15.

¹⁵⁵ [2012] NICC 17 para 23.

¹⁵⁶ Section 8(3)(a) Corporate Manslaughter Act.

safety matters by an authority responsible for its enforcement. Failure to heed applicable health and safety guides would be indicative of conduct that falls below acceptable standards. In *R v Cotswold Geotechnical Holdings Ltd*,¹⁵⁷ the court found that Cotswold Geotechnical's soil operations in deep unsupported pits had fallen far below the standard applicable in observing its duty of care towards its employees. The court arrived at this conclusion partly because Cotswold Geotechnical had failed to heed advice and guidance given by the Health and Safety Executive.¹⁵⁸

The determination of the element of 'gross breach' under the Act will vary from case to case. The term 'gross' points to a substantial failure to run operations according to an acceptable standard within an industry, ordinarily available by reference to authoritative guidelines on health and safety. This further points to the possible implication of senior members of staff in allowing for this failure to happen. Hence, this element of the offence of corporate manslaughter lies at the heart of the determination of criminal liability since it links senior management, company operations, employee involvement and applicable standards of health and safety to the death of the victim.

4.6 Human rights obligations and the Corporate Manslaughter Act

Prior to the enactment of the Act, the Joint Committee on Human Rights of the House of Lords and Commons considered the human rights implications of the Corporate Manslaughter Bill. It suggested that the passing of the Bill would enhance the prospects of prosecuting corporations successfully for gross negligence manslaughter.¹⁵⁹ This would enable the UK to fulfil its obligation to secure the right to life in terms of the European Convention on Human Rights of 1950 (the Convention).¹⁶⁰ As a Contracting Party to the Convention, the UK sought

¹⁵⁷ [2011] EWCA Crim 1337.

¹⁵⁸ [2011] EWCA Crim 1337 para 28.

¹⁵⁹ See Summary, Joint Committee on Human Rights Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill (Twenty-seventh report, 12 October 2006). The Joint Committee on Human Rights Report is available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/jtrights.htm>

¹⁶⁰ Available at www.echr.coe.int.

to give further effect to this Convention by enacting the Human Rights Act in 1998.¹⁶¹ Section 1 of the Human Rights Act incorporates Articles 2 to 12 of the Convention. Article 2 of the Convention sets out the obligation states have to secure the right to life.¹⁶²

A fundamental issue that the Joint Committee on Human Rights considered was whether Article 2 of the Convention required states to have a criminal offence of corporate manslaughter.¹⁶³ The Committee examined the Ministry of Justice's Explanatory Notes to the Corporate Manslaughter Bill which stated that there was no positive obligation on the UK to set up criminal justice remedies under Article 2.¹⁶⁴ The Committee stated that this assertion in the Explanatory Notes called for careful scrutiny in light of the Convention's case law.¹⁶⁵ The Committee agreed with the UK government that there was no absolute right to a criminal law remedy under Article 2 in every case of unintentional infringement of the right to life.¹⁶⁶ However, the Committee put forward the view that States do have an obligation to ensure that it is possible 'to prosecute for appropriately serious criminal offences' in circumstances that Article 2 would require.¹⁶⁷ Applying this to the UK, the Committee concluded that the common law remedies available in such

¹⁶¹ Available at <http://www.legislation.gov.uk/ukpga/1998/42/data.pdf>.

¹⁶² Article 2 of the European Convention on Human Rights states:

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

¹⁶³ Joint Committee on Human Rights Report para 1.20.

¹⁶⁴ Explanatory Notes to the Corporate Manslaughter and Corporate Homicide Bill as introduced in the House of Commons on 20 July 2006 prepared by the Ministry of Justice (accessible at http://www.publications.parliament.uk/pa/cm200506/cmbills/220/en/06220x--.htm#index_link_2) para 78.

¹⁶⁵ Joint Committee on Human Rights Report para 1.21.

¹⁶⁶ Ibid para 1.22.

¹⁶⁷ Ibid.

circumstances were deficient and that the government had the obligation of ensuring that criminal prosecution would be possible in such circumstances.¹⁶⁸

To support its proposal the Committee referred to *Oneryildiz v Turkey*, a case under the Convention that dealt with safeguarding the right to life.¹⁶⁹ The applicant in this case was a resident of a slum in Istanbul. The slum was surrounded by a tip of rubbish. This tip exploded and killed 9 relatives of the applicant.¹⁷⁰ Expert reports indicated that the tip exploded due to methane gas.¹⁷¹ This could have been avoided had the authorities taken the necessary measures.¹⁷² The court found that the authorities had failed to fulfil their obligation under Article 2.¹⁷³

The Committee referred to the Court's statement that Article 2 may require criminal penalties to be imposed on public authorities as 'bodies' if they are found to have been responsible for endangering life and/or causing death.¹⁷⁴ The import of this – as set out by the Court – is that Article 2 would entail that an investigation be carried out to ascertain whether charges of criminal liability should be brought against individual officials or bodies or both.¹⁷⁵ This investigation would also be necessary since the true circumstances of death may largely be confined to state officials/authorities.¹⁷⁶

Therefore, the Committee proposed that to fulfil its obligations in terms of Article 2 of the Convention, the UK government would have to do three things. First, it would have to ensure that its law provide for the carrying out of an investigation in circumstances where there has been serious harm to human life or death due to gross negligence. This investigation should be applicable to natural persons as officials and organisations. Secondly, as a follow up to the outcome of the investigation, the law must offer appropriate avenues for the institution of

¹⁶⁸ Ibid.

¹⁶⁹ European Court on Human Rights, Application no. 48939/99, judgement of 30 November 2004.

¹⁷⁰ *Oneryildiz v Turkey* paras 9-18.

¹⁷¹ *Oneryildiz v Turkey* para 23.

¹⁷² *Oneryildiz v Turkey* para 23.

¹⁷³ *Oneryildiz v Turkey* para 155.

¹⁷⁴ *Oneryildiz v Turkey* para 93; Joint Committee on Human Rights Report para 1.24.

¹⁷⁵ *Oneryildiz v Turkey* paras 93-4.

¹⁷⁶ *Oneryildiz v Turkey* para 93.

proceedings to establish liability, including criminal liability. Finally, that the avenues the law affords must permit the real possibility of finding criminally liable those alleged under the investigation to have been responsible, individuals and/or organisations. Having considered the most significant part of the UK's statutory regime in respect of corporate criminal liability, this chapter now turns to Australia.

4.7 Background to the Criminal Code Act

The Australian government enacted the Criminal Code as part of a larger exercise to revise Commonwealth criminal law and develop a Model Criminal Code.¹⁷⁷ The Criminal Code seeks to unify Australian criminal law.¹⁷⁸ There are disparities in principles of criminal law between Australian States that are governed by a system of common law and those governed by criminal codes.¹⁷⁹ The attribution of criminal liability to corporations is part of this pursuit.

Proposals within the Criminal Code Bill 1994 pointed to the fact that Australia's common law – based on (and in most aspects the same as) English common law – failed to deal adequately with the criminal conduct of corporations.¹⁸⁰ The deficiencies of identification liability as developed by *Tesco Supermarkets* were highlighted as being at the core of this failure. The primary reason for this was the fact that, in practice, identification liability was suitable only to small corporations and less readily applicable to large corporations.¹⁸¹ These proposals also indicated that it would be unwise for the government to rely on the evolution of the common law for robust principles of corporate criminal liability to be developed.¹⁸² Hence, it would be necessary to develop such principles under legislation. These

¹⁷⁷ Commonwealth, Parliamentary Debates, Senate, 30 June 1994, 2379, 2381 (Senator Crowley, Minister for Family Services) available at <http://parlinfoweb.aph.gov.au>.

¹⁷⁸ Criminal Code Bill 1994 at 4 (available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FLOU10%22>).

¹⁷⁹ Criminal Code Bill 1994 at 5.

¹⁸⁰ Criminal Code Bill 1994 at 18 (available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FLOU10%22>).

¹⁸¹ Criminal Code Bill 1994 at 18.

¹⁸² Criminal Code Bill 1994 at 18.

principles are contained in Division 12 of the Criminal Code. The success and utility of these principles is yet to be determined through case law.¹⁸³

4.8 Corporate criminal liability under the Criminal Code

In terms of section 12 of the Criminal Code, a corporation will be liable criminally if the physical element and the fault element of a crime are proved subject to offences for which there is no fault element.¹⁸⁴ Section 12 reflects a non-derivative approach to the establishment of corporate criminal liability. It focuses on what the corporation did or did not do to prevent harmful conduct.

4.8.1 *Physical elements*

Section 4.1(1) specifies that the physical element of an offence includes: 'conduct or a result of conduct or a circumstance in which conduct, or a result of conduct, occurs.' Conduct includes an act, an omission or a state of affairs.¹⁸⁵ The physical element of an offence will be attributed to a corporation if it is committed by an employee, agent or officer acting within the scope of employment.¹⁸⁶ Where the physical element is satisfied in respect of offences of strict liability, a corporation will be found liable criminally through the principle of vicarious liability.¹⁸⁷

4.8.2 *Fault elements*

There are two categories of corporate fault under the Criminal Code. The first includes fault elements other than negligence.¹⁸⁸ The second is negligence.¹⁸⁹ Fault elements other than negligence comprise knowledge, intention or recklessness. These sub-elements are not treated distinctly under the Criminal Code. The requirements for proving these sub-elements are the same in respect of a

¹⁸³ To this author's knowledge, there are no cases in Australian law that have applied section 12.3 Criminal Code to corporations.

¹⁸⁴ Sections 3.1, 3.2 and 12.1 (read together) Criminal Code.

¹⁸⁵ Section 4.1(2) Criminal Code.

¹⁸⁶ Section 12.2 Criminal Code.

¹⁸⁷ Clough & Mulhern at 139.

¹⁸⁸ Section 12.3 Criminal Code.

¹⁸⁹ Section 12.4 Criminal Code.

corporation though not in respect of an individual.¹⁹⁰ However, proof of negligence on the part of a corporation is subject to different requirements.

4.8.2.1 Corporate intention, knowledge or recklessness

Intention, knowledge or reckless in respect of a physical element of an offence will be attributed to a corporation if it authorised or permitted the commission of the offence.¹⁹¹ This authorisation or permission may be tacit, express or implied.¹⁹² Authorisation or permission may be established in three ways. First, by proving that a corporation's board of directors or high managerial agent 'intentionally, knowingly or recklessly carried out the relevant conduct' or 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.¹⁹³ Secondly, authorisation or permission may be established by proving that 'a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision'.¹⁹⁴ Finally, authorisation or permission may be established by proving that the 'body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision'.¹⁹⁵

4.8.2.2 Corporate culture

Under the Criminal Code, the term "corporate culture" is defined as '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'.¹⁹⁶ The Criminal Code indicates two sets of factors that point to the existence of a 'corporate culture' that directs, encourages, tolerates or leads to non-compliance: (i) whether a high managerial agent authorised the commission of an offence and (ii) 'whether an employee, agent or officer who committed the

¹⁹⁰ See sections 5.2 (intention) 5.3 (knowledge), 5.4 (recklessness) and 5.5 (negligence) Criminal Code.

¹⁹¹ Section 12.3(1) Criminal Code.

¹⁹² Section 12.3(1) Criminal Code.

¹⁹³ Section 12.3(2)(a) and (b) Criminal Code.

¹⁹⁴ Section 12.3(2)(c) Criminal Code.

¹⁹⁵ Section 12.3(2)(d) Criminal Code.

¹⁹⁶ Section 12.3(6) Criminal Code.

offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent ... would have authorised or permitted the commission of the offence'.¹⁹⁷

Three important issues surface in respect of the above. First is the incorporation of the common law principle of attribution of fault to a corporation from an individual; second is the notion of 'corporate culture'; and third is whether the determination of intention or knowledge (fault) on the basis of a failure to create and maintain a culture of compliance is appropriate.¹⁹⁸

4.8.2.3 Attribution of subjective fault to a corporation under the Criminal Code

Section 12.3 sets out how fault elements other than negligence are established. These fault elements include intention, knowledge and recklessness. The establishment of these fault requirements is based essentially on authorisation or permission of conduct that amounts to an offence. One of the ways in which authorisation may be determined is through the decision of a high managerial agent as provided under section 12.3(2)(b). The high managerial agent may have made this decision intending that the conduct amounting to an offence occur or aware that the conduct may amount to an offence. Alternatively, the high managerial agent may have made the decision recklessly without consideration that the conduct in question may amount to an offence. This will be attributed to the corporation. This attribution then serves to illustrate that the corporation authorised conduct that amounted to an offence. Hence, this section to some extent reflects a derivative approach to the determination of criminal liability, specifically identification liability.¹⁹⁹ It is arguable that through this section, the Criminal Code basically incorporates the common law doctrine of identification.

¹⁹⁷ Section 12.3(4)(a)-(b) Criminal Code.

¹⁹⁸ See Clough & Mulhern at 143-7.

¹⁹⁹ See Commonwealth Attorney-General's Department *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) at 299.

4.8.2.4 Corporate culture and fault

The Criminal Code states that a 'corporate culture' that directs, encourages, tolerates or leads to non-compliance can serve as evidence of the authorisation of conduct that amounts to an offence.²⁰⁰ This authorisation, attributed to the corporation, satisfies intention, knowledge or recklessness. Some commentators maintain that intention, knowledge or recklessness as subjective mental states should only be attributable to natural persons.²⁰¹ According to this reasoning, since corporations are fictional entities with no minds of their own, subjective mental states may – if necessary – only be attributed to them by imputation.²⁰² Thus, one would conclude that corporations by themselves have no intention, knowledge or recklessness.

Professor Colvin argues that a corporation can have intention, knowledge or recklessness by itself.²⁰³ He draws an analogy between the construction of the intention of a legislature in statutory interpretation and the construction of the intention of a corporation in the interpretation of its policy documents.²⁰⁴ This intention is distinct from any aggregation of intentions of individuals, who are part of the legislature or corporation as a collective.²⁰⁵ This intention is real, not fictional. It contains the rationale that best explains a statute. In the case of a corporation, this intention is the rationale that best explains the actions of the corporation considered as a whole independent of any aims or goals articulated by individual employees or agents.²⁰⁶

²⁰⁰ Section 12.3(2)(c) Criminal Code.

²⁰¹ V S Khanna 'Is the notion of corporate fault a faulty notion?' (1999) 79 *Boston University Law Review* 355 at 412-4 (the author argues that corporate *mens rea* is not a socially desirable method of establishing liability and should be considered exceptionally in the sanctioning stage of criminal proceedings against corporations)

²⁰² V S Khanna 'Is the notion of corporate fault a faulty notion?' (1999) 79 *Boston University Law Review* 355 at 356.

²⁰³ Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 32-3. See also Brent Fisse & John Braithwaite 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468 at 479.

²⁰⁴ Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 33.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

The Criminal Code describes 'corporate culture' as inclusive of policy, conduct and practice. Thus a 'corporate culture' that directs, encourages, tolerates or leads to non-compliance refers to a policy, conduct or practice that directs, encourages, tolerates or leads to non-compliance. Hence, the intention or knowledge of corporation may be constructed by looking to the corporation's policy and practices which are elements of the culture of the corporation.²⁰⁷ This is an important reformulation of the method of establishing corporate fault. It is particularly apt for large companies and multinational corporations and facilitates the process of determining their criminal liability.

Corporate recklessness or knowledge or intention through authorisation may be manifested through 'corporate culture'. Though the Criminal Code describes it to mean 'attitude, policy, rule or course of conduct through which the activities in a corporation take place', this term escapes precise definition.²⁰⁸ Some commentators laud Australia's introduction of the notion of 'corporate culture' but warn that it is likely to present considerable challenges in its application in practice as it is a nebulous concept.²⁰⁹ Whereas the 'corporate culture' of a corporation may be readily discernible from its formal or official policy, this may pose a problem in situations in which unofficial policy would have to be relied on for its determination.

Professor Pamela Bucy has made efforts to try to facilitate the determination of 'corporate culture' where official policy is of limited or no use.²¹⁰ Some of the factors she lists include: whether a corporation is organised in such a way as to promote non-compliance; whether corporate goals are unrealistic to such an extent that they encourage unlawful behaviour; whether the corporation educates

²⁰⁷ Ibid 34.

²⁰⁸ Section 12.3(6) Criminal Code.

²⁰⁹ Clough & Mulhern at 144.

²¹⁰ See also Brent Fisse & John Braithwaite 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' who argue that:

[A]n organisation has a culture which is transmitted from one generation of organisational role incumbents to the next. Indeed, the entire personnel of an organisation may change without reshaping the corporate culture; this may be so even if the new incumbents have personalities quite different from those of the old' (at 479).

its employees on best practices; whether employees are able to report concerns about unlawful activity without fear of prejudice; the manner in which the corporation responded to past violations and whether there any incentives for lawful behaviour.²¹¹ These factors clearly focus on the day-to-day management of a corporation and its activities. As Professor Colvin suggests, '[t]he substantive consideration is that the life of a corporation inheres as much in its informal practices as in its official decisions'.²¹² This means that in practice, a prosecution will have to scrutinise carefully many facets of the running of the business of a corporation in cases where it seeks to establish the existence of a 'corporate culture' that encouraged unlawful conduct.

As discussed in chapter 2, the current legal framework in domestic jurisdictions does not permit the attribution of criminal conduct of constituent elements of a MNC to the MNC as a whole due to the doctrine of separate legal personality.²¹³ In cases involving allegations of gross abuse committed by companies that are part of a multinational corporate group, the notion of corporate culture faces the challenge presented by separate legal personality. Specifically, even if proved that there is in a company group a corporate culture that encourages criminal conduct, the utility of such a finding could only be used to establish the criminal liability of individual companies within the group. Thus, this thesis acknowledges that the notion of corporate culture is not sufficiently developed to address the abuses committed by multinational corporate groups.

4.8.2.5 Appropriateness of failure to maintain a culture of compliance as a manifestation of authority

A final consideration revolves around the appropriateness of a failure to create and maintain a culture of compliance as evidence of authorisation or permission to commit an offence. In terms of section 12.3(2)(d), knowledge, intention or recklessness may be established by proving that a corporation failed to create and

²¹¹ Pamela Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095 at 1128–1146.

²¹² Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 36.

²¹³ See chapter 2, sections 4.3.2 and 4.3.3.

maintain a culture of compliance. A failure to create and maintain a culture of compliance points more towards negligence or recklessness of the corporation itself (as in the case of corporate manslaughter) rather than towards an authorisation or permission of an individual committing relevant conduct knowingly or intentionally (as would be the case for murder).²¹⁴ Admittedly therefore, more than the mere illustration of a failure to create and maintain a culture of compliance would be required to prove intention or knowledge on the part of the corporation.²¹⁵

4.8.2.6 Corporate negligence

Under the Criminal Code, a corporation is negligent if its conduct involves such a great falling short of the standard of care that a reasonable company would exercise in the circumstances and such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment.²¹⁶ Thus, there must be proof of conduct that falls far below an objective standard of care and proof that this conduct was undertaken with a high likelihood that the physical element of an offence exists or will exist. The Criminal Code does not require that an individual employee or agent be shown to have been negligent. The conduct of the corporations as a whole may be established by aggregating the conduct of any number of employees or agents.²¹⁷ This is a marked departure from the common law. Evidence of negligence may be shown by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision or failure to provide adequate systems for conveying relevant information to relevant persons in the corporation.²¹⁸

The Criminal Code attempts to simplify holding corporations liable criminally on the basis of negligence. It does this by doing away with the common law rule that requires an individual employee or agent of corporation to be shown to have been

²¹⁴ Clough & Mulhern at 146. Colvin at 37.

²¹⁵ See Commonwealth Attorney-General's Department *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) at 311-2.

²¹⁶ Section 12.4(1) incorporating section 5.5 Criminal Code.

²¹⁷ Section 12.4(2) Criminal Code.

²¹⁸ Section 12.4(3)(a)-(b) Criminal Code.

negligent in order for the corporation to be found to be negligent. However, some commentators argue that since the intention of this section is to find corporations negligent for allowing the relevant conduct to occur, then this means that attribution of conduct (through aggregation) on the corporation is unnecessary.²¹⁹ What would be necessary is to determine whether the conduct that was permitted was negligent. This could be done by looking at the quality of the conduct itself.²²⁰

4.9 Non-derivative models of liability and corporations

Both England's and Australia's statutory regimes provide for non-derivative models for the establishment of corporate criminal liability. Non-derivative liability in either jurisdiction underlines that blame lies with the corporation. Professor Colvin points out that the object of blame assumes that there is a decision-making process in corporation that exists independently of the individual employees and to which responsibility can be attached.²²¹ In the above statutory models of criminal liability, a corporation can be blamed for harm for its failure to take steps to prevent such harm (in respect of a duty of care or a culture of compliance or a culture that encourages unlawful behaviour). This failure is due to some deficiency in a corporation's decision-making process. Both the Australian and English model emphasise that where there is a deficiency in a corporation's decision-making process which leads to a failure to prevent grievous harm, criminal liability should follow.

5 Summary and conclusion

The criminal liability of corporations has been developed incrementally in England and in Australia. Central to the common law in both jurisdictions is the notion that the fault of a corporation can only arise where the fault of an individual employee of such corporation has been established. This is a derivative approach to criminal liability. The main problem with this approach is that it is unsuited to large corporations and even less to multinational corporations due to the high

²¹⁹ Clough & Mulhern at 147.

²²⁰ Ibid 148.

²²¹ Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 24-5.

improbability of identifying an individual employee who may be said to possess the requisite guilty state of mind for the purpose of prosecution.

Developments in both jurisdictions have resulted in statutory regimes which provide for the criminal responsibility of a corporation without reliance on the fault of an individual officer or employee. This is a non-derivative approach to criminal liability. This principled approach to corporate criminal liability should be adopted in international and regional institutions that seek to hold corporations liable criminally.

To conclude, there are three reasons why this chapter has proposed that international and regional mechanisms for the establishment of corporate criminal liability should adopt non-derivative models of criminal liability as found in England and Australia. The first is that non-derivative models of liability are more likely to achieve successful prosecutions of large companies and multinational corporations. These models generally do not base the criminal liability of corporations on individuals but on systemic failures in corporations that lead to the commission of an offence.

A second reason is that non-derivative models of criminal liability recognise that corporations are real actors with significant responsibilities. Corporations are not mere fictions. They possess real subjectivity. Developments in the statutory law in England and Australia illustrate how corporate mental states can be determined by reference to 'corporate culture' which includes attitudes, policies, rules and practices. Thus, as real actors, corporations should be held to account under the criminal law if their decisions or inaction cause serious harm.

Finally, non-derivative models of criminal liability facilitate transparency and accountability. The process of attaching responsibility for harm requires an analysis of a corporation's activities at all levels and within a broad span of time. The role of senior management and the role of employees in failures to prevent harm are taken into account. Similarly, in order to determine liability, the operations of a corporation over time must be scrutinised to find out whether there has been a history of unlawful conduct that may lead to harm. The rigour of

this process promotes transparency and accountability within a corporation and in industries where such process is applied to major corporations.

CHAPTER 5: CRIMINAL LIABILITY OF CORPORATIONS FOR AIDING AND ABETTING INTERNATIONAL CRIMES

1. Introduction

This chapter develops the analysis of the essential elements of the corporate criminal conduct in national jurisdictions that gives rise to non-derivative criminal liability. Chapter 4 discussed these essential elements. This chapter contemplates the extent to which these elements could apply in the international setting. The crisp argument in this chapter is that the elements of accomplice liability under domestic law can be used to extend corporate criminal liability under international law. I limit this discussion to the commission of a crime by a corporation as an accomplice or an accessory (complicit involvement).¹ In particular, I focus on non-derivative accomplice liability.

Non-derivative corporate criminal liability means that the criminal liability of a corporation is established without reliance on the proof of the conduct and fault elements of an individual officer or employee of the corporation.² Instead, the establishment of criminal liability is based on ‘what the corporation did or did not do, as an organisation; 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’.³ The reason for focusing on this method of liability lies in the fact that the identification

¹ This chapter recognises that it is possible that a corporation may perpetrate international crimes as a principal, see Eric Colvin & Jessie Chella ‘Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa’ in Vincent Nmeihelle (ed) *Africa and the Future of International Criminal Justice* (2012) at 297 at 299. However, see Jennifer Zerk ‘Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies’ (Report prepared for the Office of the UN High Commissioner for Human Rights, May 2013) at 31, available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (accessed on 19 September 2015). This report states that ‘[c]orporate complicity has emerged as a key concept in relation to corporate liability for gross human rights abuses. Most litigated cases against businesses involve claims of corporate complicity rather than direct or “frontline” responsibility.

² See Allens Arthur Robinson ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations (2008) at 6.

³ Eric Colvin ‘Corporate Personality and Criminal Liability’ (1995) 6 *Criminal Law Forum* 1 at 2.

of an individual employee or group of employees (senior or otherwise) who may be said to possess the requisite guilty state of mind for the purpose of prosecution is highly unlikely.⁴ It is highly unlikely since diffuse company structures make it practically impossible to identify an employee or a director whose conduct and mental state can be imputed to the corporation thus establishing the corporation's criminal liability.

Chapter 4 discussed how a corporation in domestic jurisdictions may be found criminally liable through a non-derivative process.⁵ In such jurisdictions, criminal liability arises where a corporation fails to fulfil a duty of care and this failure contributes or leads to harm. Thus, for example, in terms of the United Kingdom Corporate Manslaughter and Corporate Homicide Act 2007 ('Corporate Manslaughter Act'), a corporation will be guilty of manslaughter where its management – due to negligence – is shown to have failed to fulfil a duty of care owed to its employees (such as health and safety safeguards) and this failure leads to the employee's death.⁶ Hence, the conduct element of the offence is an omission on the part of the corporation in its obligation to fulfil a duty of care and the fault element is its management's negligence.⁷ This negligence is evidenced partly in practices, policies and attitudes within the corporation that encourage derelictions or malpractices. This is referred to as the corporation's 'corporate culture'.⁸

This chapter proposes that this non-derivative approach be used to establish corporate criminal liability in international law based on complicity, and in particular, liability for aiding and abetting. Aiding and abetting is one of the modes of complicit participation in the commission of an international crime as set out in Article 25(3)(c) of the Statute of the International Criminal Court (Rome Statute).

⁴ See discussion in Chapter 4, section 3.4.

⁵ See Chapter 4, section 4.

⁶ See Section 1 Corporate Manslaughter Act.

⁷ In Australia, criminal intention may be established through corporate culture (see section 12.3 Criminal Code Act (1995) (Cth)). This is discussed in Chapter 4, section 4.8.2.

⁸ For a discussion of 'corporate culture', see Allens Arthur Robinson *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (Report prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business, 2008) part 2 at 4ff.

This chapter proposes that Article 25(3)(c) may theoretically apply to corporate criminal conduct. This new theory of liability can be applied to multinational corporations.⁹

Therefore, in sum, I argue that a corporation may be criminally liable in international law by using the principles of non-derivative complicit liability in the form of aiding and abetting. How would this work practically?

In terms of this theory of non-derivative corporate criminal liability, the conduct element is an omission on the part of a corporation. The omission consists of a failure to fulfil a duty of care. To be sure, not all failures to observe a duty of care can or should give rise to criminal liability. Much depends on the degree and gravity of the omission and whether the duty of care in question is one specifically imposed on corporations operating in a particular industry. In order to substantiate this argument, this chapter borrows the concept of ‘duty of care’ from the law of delict and – by analogy – applies it to establish a legal duty to act. Therefore, by failing to act in circumstances where there is a legal duty to act, a corporation will be criminally liable as an accomplice.

For example, in 2013, the European Centre for Constitutional and Human Rights and Global Witness filed a criminal complaint with the state prosecution authorities in Tübingen, Germany against a senior employee of the Danzer Group, a timber corporation.¹⁰ The Danzer Group had a local subsidiary, Siforco SARL, in the village of Bongulu (Équateur province) in the Democratic Republic of Congo.¹¹ After a dispute with some inhabitants of Bongulu, Siforco SARL contracted the services of a task force of local security forces comprising sixty soldiers and police

⁹ The extent of juristic persons to which criminal liability can be extended is very wide. The discussion in this chapter acknowledges that the debate about the type of juristic persons to which criminal liability should be extended is as yet unsettled in international law.

¹⁰ See ‘Criminal complaint against Danzer manager over human rights abuses against community in DRC’, available at http://www.ecchr.eu/en/our_work/business-and-human-rights/danzer.html (accessed on 19 September 2015).

¹¹ See ‘Case report: The Danzer Case: German manager's liability for subsidiary in Congo’ at 1-2, available at http://www.ecchr.eu/en/our_work/business-and-human-rights/danzer.html (accessed on 19 September 2015).

officers.¹² These forces – using vehicles belonging to Siforco SARL – brutally attacked the village, beat and physically abused numerous inhabitants, raped women and girls and subjected more than twenty individuals to arbitrary arrest.¹³ The European Centre for Constitutional and Human Rights and Global Witness allege that the senior manager at Danzer failed to give sufficient direction to Siforco SARL and its employees regarding how they should engage local security forces in cases of disputes with local inhabitants.¹⁴ This matter is still under examination by the State Prosecutor's office in Tübingen. This complaint is based on German laws relating to the duty of care of senior corporate managers to those affected by the actions of their employees.¹⁵ The failure of the Danzer manager to direct the subsidiary was an omission that aided the crimes committed by the local security forces. This failure had a substantial effect on the commission of these crimes.

In this chapter, the theory of non-derivative criminal liability developed discusses the fault element of the corporation as triggered by the notion of 'corporate culture'. Usually this means that a corporation has a culture that favours, facilitates or encourages practices that lead to the non-observance of its duties of care. Fault may also be proved through evidence that the corporation was aware that its failure to fulfil its duty of care would likely result in the commission of a crime.

2. Structure of the chapter

This chapter has five parts. The first part discusses complicity in international criminal law generally. The second part discusses the approach of the International Criminal Court (ICC) to the establishment of liability for aiding and abetting an international crime (the 'standard ICC approach'). The third part develops a theory of liability that underpins an alternative approach to proving the definitional elements of corporate aiding and abetting in international criminal law (my proposed 'new approach'). The final part discusses how this 'new approach' can

¹² See 'Case report: The Danzer Case: German manager's liability for subsidiary in Congo' at 1-2.

¹³ See Case report: The Danzer Case at 1-2.

¹⁴ See Case report: The Danzer Case at 1-2.

¹⁵ See Case report: The Danzer Case at 1-2.

be applied practically to establish corporate criminal liability for aiding and abetting. The fifth part proposes possible language that may be incorporated into provisions of the Rome Statute that would reflect the principles behind this 'new approach'.

3. Complicity in international criminal law

International criminal law attaches accomplice liability to persons who are proved to have been complicit in the commission of international crimes.¹⁶ There are two general ways – and thus two forms of liability – through which a person may participate in the commission of a crime in international law: as a perpetrator/principal or as an accomplice/accessory.¹⁷ Accomplices may fall into one of two categories: those that 'prompt' the perpetration of a crime by inciting, or instigating or soliciting or inducing its commission; and those that 'assist' the perpetration of a crime by aiding or abetting.¹⁸ This chapter examines how accomplice liability on the part of a corporation can be established for aiding and abetting international crimes, that is, how the failure to fulfil a duty of care can amount to assisting the perpetration of a crime (through an omission).

4. Criminal liability for aiding and abetting in international law

Aiding and abetting refers to any act which contributes to the commission or attempted commission of a crime.¹⁹ It includes conduct that assists, encourages or

¹⁶ Cf Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta & John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767 at 986ff.

¹⁷ Bert Swart 'Modes of International Criminal Liability' in Antonio Cassese (ed) *Oxford Companion to International Criminal Justice* (2009) 82 at 83. The consequences of accomplice liability are not necessarily less serious than the consequences of principal liability (International Commission of Jurists, *Corporate Complicity in International Crimes* (2008) volume 2 at 1; Robert Cryer et al *An Introduction to International Criminal Law and Procedure* (2010) at 375).

¹⁸ See Article 2(2) Control Council Law No 10, Article 7(1) ICTY Statute, Article 6(1) ICTR Statute, Article 6(1) SCSL Statute and Article 25(3)(c) Rome Statute.

¹⁹ Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court – Observers' Notes, Article by Article* (2008) 743 para 15.

lends moral support to the perpetration of crime.²⁰ This assistance or support may occur before, during or after the perpetration of crime by the principal.²¹

Criminal liability for aiding and abetting is a form of accomplice liability.²² Such liability envisages that there must be at least one principal offender/perpetrator and an accomplice.²³ A person can only be found liable for aiding and abetting a crime in international criminal law when three requirements are proved. First, an international crime must have been committed or attempted; that is, there must be underlying conduct that constitutes a crime in international law (the conduct element).²⁴ Second, the conduct must have aided or abetted those who are the principal offenders of this international crime (the causation element) and third, such conduct must be committed for the purpose of facilitating the commission of this international crime (the fault element).²⁵

Liability of the principal perpetrator need not be proved to establish accomplice liability.²⁶ Insofar as an international crime has been committed or attempted, a person's liability as an accomplice can be established for aiding and abetting this international crime.²⁷ Therefore, to establish this liability the critical requirements that must be proved are the conduct, causation and fault elements for aiding and abetting an international crime. These elements, as contained in Article 25(3)(c) of the Rome Statute, are laid out and discussed below.

²⁰ *Prosecutor v Tadic* (Appeals Chamber) IT-94-1-A (15 July 1999) para 229.

²¹ *Tadic* 1999 Appeal para 229; *Prosecutor v Blaskic* (Appeals Chamber Judgment) IT-95-14-A (29 July 2004) paras 1 and 48.

²² Bert Swart 'Modes of International Criminal Liability' in Antonio Cassese (ed) *Oxford Companion to International Criminal Justice* (2009) 82 at 83.

²³ William Schabas 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83 *International Review-Red Cross* 439 at 447.

²⁴ *Ibid* 446.

²⁵ *Ibid*.

²⁶ *Ibid* 447.

²⁷ Article 25(3)(c) Rome Statute; William Schabas 'Enforcing International Humanitarian Law' at 446.

4.1. Approach to proving the conduct, causation and fault elements of aiding and abetting in the Rome Statute: the 'standard ICC approach'

Article 25(3)(c) of the Rome Statute sets out the elements for aiding and abetting. The wording of this article does not explicitly state what the conduct and fault elements are. The ICC has relied on the jurisprudence of the ad hoc International Criminal Tribunals (ad hoc tribunals) in formulating these elements.²⁸ Article 25(3)(c) of the Rome Statute states:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(c) For the purpose of facilitating the commission of such a crime, aids, abets *or otherwise assists* in its commission or its attempted commission, including providing the means for its commission; (my emphasis)

The words 'or otherwise assists', broadly interpreted, mean that the commission of a crime under the Rome Statute may possibly be facilitated by both commissions and omissions, that is, by positive or active conduct and by inaction insofar as the relevant fault element is established.²⁹ Hence, where a legal officer in the office of the Deputy President, becomes aware of the Deputy President's intention to embezzle funds and does not advise against this, that legal officer will be liable for aiding and abetting through this omission.

4.2. Conduct element of aiding and abetting

According to the jurisprudence of the ad hoc tribunals, the conduct element of aiding and abetting is that the accused must lend practical, assistance, moral

²⁸ Cf Ilias Bantekas *International Criminal Law* (2010) at 68-9.

²⁹ Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta & John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767 at 798. He says: "the Rome Statute speaks of a person who 'aids, abets or otherwise assists' in the attempt or accomplishment of a crime, including 'providing the means for its commission'. This wording indicates that, first, aiding and abetting are no more an indistinguishable unity but that each of them has its own meaning, secondly, that aiding and abetting are just two ways of other possible forms of 'assistance', the latter thus serving as a *sort of umbrella term*, and thirdly, that 'providing the means' for the commission of a crime is merely a special example of assistance."

support or encouragement to the principal perpetrator.³⁰ This is relevant to the discussion in section 6.1 of this chapter on the proof required to establish the conduct element of corporate aiding and abetting.

Aiding and abetting can be perpetrated through acts of omission where there is a particular duty to act and failure to do so amounts to conduct that has a substantial effect on the commission of the crime.³¹ Conduct by omission takes two forms: 1) passivity combined with physical presence and authority; 2) failure to fulfil a duty imposed by law (civil or criminal). *Furundzija* typifies the first form of omission; the second form was recognised in *Milutinović and Orić*.³² Para 90 of *Milutinović* stated:

An accused may aid and abet not only by means of positive action, but also through omission. The Trial Chamber in *Mrkšić et al* held that, aside from the “approving spectator” form of omission, responsibility for aiding and abetting could also arise where the accused was under a duty to prevent the commission of a crime or underlying offence and failed to do so, provided that his inaction had a substantial effect upon the commission of the crime or underlying offence and that the accused possessed the requisite state of mind. (...) The Chamber follows this approach, and considers that, along with the “approving spectator” doctrine, this form of responsibility also encompasses culpable omissions, where (a) there is a legal duty to act, (b) the accused has

³⁰ *Prosecutor v Mrkšić* (Appeals Chamber Judgment) IT-95-13/1-A (5 May 2009) para 49; *Prosecutor v Orić* (Appeals Chamber Judgment) IT-03-68-A (3 July 2008) para 43; *Nahimana v Prosecutor* (Appeal Chamber Judgment) ICTR-99-52-A para 482; *Prosecutor v Simić* (Appeals Chamber Judgment) IT-95-9-A (28 November 2006) para 85 and *Prosecutor v Blaskić* (Appeals Chamber Judgment) IT-95-14-A (29 July 2004) para 45.

³¹ See *Prosecutor v Brđjanin* (Appeal Judgment) IT-99-36-A (3 April 2007) para 274; *Prosecutor v Galić* (Appeal Judgment) IT-98-29-A (30 November 2006) para 175; *Prosecutor v Ntagerura* (Appeal Judgment) ICTR-99-46-A (7 July 2006) paras 334, 370; *Blaskić* Appeal paras 47 and 663. In *Blaskić* the court stated at fn 1385 that: ‘[t]he Appeals Chamber notes that while these [international humanitarian law] obligations are technically incumbent on the States Party to [international humanitarian law] Conventions, they have resulted in the recognition of a general principle of criminal liability for omission (see A Cassese *International Criminal Law* (2003) at 201).’ Therefore, superior responsibility based on liability for omission in international criminal law is not the only instance in which criminal liability for omission can arise.

³² *Prosecutor v Orić* (Trial Judgment) IT-03-68-T (30 June 2006) para 283, 303.

the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensue, and (d) the failure to act results in the commission of the crime.³³

A legal duty to act need not necessarily arise from criminal law but can be mandated by other areas of law.³⁴ For example, in circumstances where the laws and customs of war place a duty on army Majors to ensure that prisoners of war are not subjected to torture, a failure to do so could amount to aiding and abetting an international crime.³⁵ The aider and abettor must be shown to have had the ability to fulfil the obligation imposed by the duty to act.³⁶ Therefore a person that fails to fulfil this obligation and yet has the capacity to take necessary or reasonable measures to carry it out, satisfies the conduct element for aiding and abetting if such failure has a substantial effect on the perpetration of the international crime.

4.3. Causation element of aiding and abetting

The aider or abettor's conduct has to have a substantial effect on the perpetration of the crime.³⁷ This means that this conduct must have a causal relationship with the crime though proof of this cause-effect relationship is not required.³⁸ Article 25(3)(c) of the Rome Statute requires the aider or abettor to have assisted the principal crime. It does not specify what conduct qualifies as assistance, that is, it does not specify the quantitative degree of aiding and abetting required to constitute the conduct element.³⁹

³³ *Prosecutor v Milutinovic* (Trial Chamber Judgment) IT-05-87-T (26 February 2009) para 90.

³⁴ Mrksic appeal para 151; *Prosecutor v Milutinovic* (Trial Chamber Judgment) IT-05-87-T (26 February 2009) para 91.

³⁵ Mrksic appeal para 151.

³⁶ Mrksic appeal para 154; Blaskic appeal fns 1384-5.

³⁷ Blaskic Appeal para 48.

³⁸ Blaskic Appeal para 75. Conduct that amounts to aiding and abetting need not be proved to be a condition precedent for the commission of the crime. It simply has to facilitate the principal's offence.

³⁹ William Schabas 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400 at 411.

According to Andrea Reggio, there are two types of contribution that satisfy the causation element: material contributions and moral contributions.⁴⁰ This categorisation matches the description of aiding and abetting as lending practical assistance or moral support.⁴¹ A material contribution can take three forms: it can facilitate the criminal conduct of the principal (supplying vehicles used to ferry soldiers who unlawfully evict people) or it can be essential to the principal's criminal conduct (provision of funds used to buy weapons) or it can increase the possibility of the commission of the crime by the principal (bribery of public officials to secure access to mines unlawfully).⁴²

A moral contribution may also satisfy the causation element.⁴³ For example, paying public officials of a poor developing country for the unlawful dumping of toxic waste in terms of a legally binding contract encourages these officials to harm both human health and the environment in exchange for money. The ICC Trial Chamber has read in the words 'substantial effect' as a requirement of assistance for aiding and abetting.⁴⁴ This may be interpreted to mean that the ICC contemplates that a contribution that satisfies the causation element should be one that facilitates the commission of the offence by the principal. Moreover, any assistance which is more than *de minimis* may be accepted as having a substantial effect on the perpetration of the crime.⁴⁵ However, the 'substantial contribution' is a very

⁴⁰ Andrea Reggio 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623 at 670.

⁴¹ *Prosecutor v Mrkšić* (Appeals Chamber Judgment) IT-95-13/1-A (5 May 2009) para 49; *Prosecutor v Oric* (Appeals Chamber Judgment) IT-03-68-A (3 July 2008) para 43; *Nahimana v Prosecutor* (Appeal Chamber Judgment) ICTR-99-52-A para 482; *Prosecutor v Simić* (Appeals Chamber Judgment) IT-95-9-A (28 November 2006) para 85 and *Prosecutor v Blaskić* (Appeals Chamber Judgment) IT-95-14-A (29 July 2004) para 45.

⁴² Andrea Reggio 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623 at 670-1.

⁴³ Andrea Reggio 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623 at 672.

⁴⁴ See *Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10 (16 December 2011) para 279.

⁴⁵ Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court – Observers' Notes, Article by Article* (2008) 743 para 15.

indeterminate concept.⁴⁶ Thus, the determination as to whether conduct has a substantial effect on the perpetration of crime can only be made on a case by case basis.⁴⁷ Some factors that can be taken into account to determine this causal relationship are:

- the existence of a business relationship between the corporation and principal perpetrator and the frequency of their commercial dealings; (for example, Nigerian residents who protested against the environmental impacts of oil exploration in the Ogoni region of the Niger Delta. The complaint alleges that Royal Dutch Shell armed, financed, and conspired with Nigerian military forces to suppress the protests).⁴⁸
- whether corporate property was used by the principal perpetrator in the commission of crime⁴⁹ (for example, the Zyklon B case in which gas belonging to a firm owned by Bruno Tesch was used by the Nazi for the extermination of Jews in concentration camps).

4.4. Fault element of aiding and abetting

The fault element of aiding and abetting under Article 25(3)(c) contains a distinct *mens rea* standard to the general *mens rea* standard in the Rome Statute.⁵⁰ In terms of Article 25(3)(c), a person that aids and abets a crime must be shown to have acted '[f]or the purpose of facilitating the commission of such a crime' (*mens rea* 'purpose test'). This 'purpose test' is a narrower test than the 'knowledge test' developed in the jurisprudence of the ad hoc tribunals.⁵¹

⁴⁶ Andrea Reggio 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623 at 671.

⁴⁷ Kai Ambos 'Article 25: Individual Criminal Responsibility' para 16 referring to Claus Roxin *Strafrecht. Allgemeiner Teil* vol I 3 ed (1997) at 287 et seq.

⁴⁸ *Kiobel v Royal Dutch Shell Petroleum Co*, No. 10-1491 (US 2012).

⁴⁹ Report ICJ vol 2 at 23-4.

⁵⁰ Article 30(1) Rome Statute is only applicable where no fault element (*mens rea* standard) is provided.

⁵¹ Robert Cryer et al *An Introduction to International Criminal Law and Procedure* (2010) at 377 ('Cryer'); Kai Ambos 'Article 25: Individual Criminal Responsibility' at 483.

While Article 25(3)(c) states that conduct amounting to aiding and abetting must be done with the purpose of facilitating the crime, the ad hoc tribunals require that the person who aids and abets possess knowledge that their actions will assist the principal in the commission of the offence.⁵² The distinction between the *mens rea* ‘purpose test’ and the ‘knowledge test’ is relevant to the discussion in section 6.3 of this chapter on the proof required to establish the fault element of corporate aiding and abetting. Elements of the ‘knowledge test’ are useful in satisfying the ‘purpose test’ as will be seen.

4.4.1. *Mens rea ‘knowledge test’ of the ad hoc international criminal tribunals*

In the jurisprudence of the ad hoc tribunals, the *mens rea* of the aider and abettor is determined with respect to the criminal act of the principal.⁵³ This jurisprudence states that the aider and abettor must at the minimum know that his or her conduct assists the perpetration of crime by the principal.⁵⁴ This knowledge may be actual or constructive.⁵⁵ Actual knowledge means that the aider and abettor is aware that his or her conduct contributes to the principal’s perpetration of crime.⁵⁶ However, he or she is not required to share the *mens rea* or intention of the principal perpetrator.⁵⁷ Constructive or reasonable knowledge refers to the fact that the aider and abettor had reason to know – on the basis of circumstantial evidence – that the principal intended to commit the crime.⁵⁸ For example, the physical presence of the aider and abettor may be used as circumstantial evidence of awareness that his or her conduct contributes to the principal’s offence.⁵⁹

⁵² *Prosecutor v Tadic* (Trial Chamber Judgment) IT-94-1-T (7 May 1997) para 692; *Prosecutor v Delalic* (Trial Chamber Judgment) T-96-21-T (16 November 1998) paras 326, 328; *Prosecutor v Furundzija* (Trial Chamber Judgment) IT-95-17/1-T (10 December 1998) paras 236, 245-6, 249; *Prosecutor v Akayesu* (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998) paras 476-9.

⁵³ Bantekas at 69.

⁵⁴ Cryer at 376.

⁵⁵ *Furundzija* Trial Chamber 1998 para 245.

⁵⁶ *Furundzija* Trial Chamber 1998 para 245.

⁵⁷ *Furundzija* Trial Chamber 1998 para 245.

⁵⁸ *Prosecutor v Musema* (Appeals Chamber) ICTR-96-13 (16 November 2001) para 182.

⁵⁹ See *Prosecutor v Brdjanin* (Trial Chamber Judgment) IT-99-36-T (1 September 2004) para 271..

The Appeals Chamber in *Tadic* stated that it must be proved that the aider and abettor was 'aware of the essential elements of the crime ultimately committed by the principal'.⁶⁰ The Blaskic Appeal interpreted this to mean that the aider and abettor was 'aware that one of a number of crimes will probably be committed and he or she intended to facilitate its commission'.⁶¹ Thus, the 'knowledge test' has two requirements. First, the aider and abettor must have known that his or her conduct contributes to the commission of the principal offence. Second, the aider and abettor must be aware of the fact that one of a number of crimes will be committed by the principal. He or she need not have known the precise crime the principal committed. It only requires foreknowledge or awareness of the probable commission of crime through or with their assistance.

4.4.2. *Mens rea 'purpose test' of the Rome Statute*

There has been no ICC judicial pronouncement on the *mens rea* standard under Article 25(3)(c) of the Rome Statute.⁶² According to Kai Ambos, the wording of this article apparently ignores the jurisprudence of the ad hoc tribunals on aiding and abetting.⁶³ Thus, following this wording, those who aid and abet knowing their conduct will facilitate the commission of a crime are not liable as accomplices unless such conduct was performed *for the purpose* of committing the crime.

This is a higher *mens rea* standard since the aider and abettor must be shown to have acted with the 'purpose of assisting' and not merely 'in the knowledge that their act will assist' the commission of the crime.⁶⁴ Thus, knowledge by itself is not enough to establish the fault element for aiding and abetting. There has to be

⁶⁰ *Prosecutor v Tadic* (Appeals Chamber) IT-94-1-A (15 July 1999) para 164. See also Simic Appeals para 86.

⁶¹ Furundzija Trial Chamber 1998 para 246; Blaskic Appeal para 50.

⁶² Sabine Michalowski 'The mens rea standard for corporate aiding and abetting liability – conclusions from International Criminal Law' (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 237 at 257.

⁶³ Kai Ambos 'Article 25: Individual Criminal Responsibility' at 483.

⁶⁴ See Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Facing the Facts and Charting a Legal Path (2006) vol 2 at 22. ('Report ICJ'); Cryer at 377. Kai Ambos 'Article 25: Individual Criminal Responsibility' at 480; A Eser 'Individual Criminal Responsibility' in A Cassese, P Gaeta & JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767 at 902.

evidence that illustrates that it was the defendant's purpose to assist the principal in the commission of the offence.

4.4.3. *The meaning of 'purpose' in Article 25(3)(c) of the Rome Statute*

The meaning of 'purpose' in Article 25(3)(c) is far from clear. One commentator argues that the key questions underlining this article are the following:⁶⁵

- i) whether 'purpose' means that the aider and abettor must wish or have as his or her conscious object that the principal offence is committed;⁶⁶ or
- ii) whether 'purpose' means that the aider and abettor simply must know or be aware that the principal offence would be the outcome in the ordinary course of events due to their contribution.⁶⁷

In respect of question i), evidence of a volitional element – a *desire* – directed at the perpetration of the principal offence has to be produced.⁶⁸ Robert Cryer has suggested that for a successful prosecution for aiding and abetting, difficult determinations of *motive* have to be made.⁶⁹ Albin Eser suggests that in addition

⁶⁵ Sabine Michalowski 'The mens rea standard for corporate aiding and abetting liability – conclusions from International Criminal Law' (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 237 at 257.

⁶⁶ The term 'conscious object' is drawn from section 2.02(a)(i) of the United States Model Penal Code whose wording forms the basis of Article 25(3)(c) of the Rome Statute (see Kai Ambos 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1 at 10.

⁶⁷ See Sabine Michalowski 'The mens rea standard for corporate aiding and abetting liability - conclusions from International Criminal Law' (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 237 at 259.

⁶⁸ Sabine Michalowski 'The mens rea standard for corporate aiding and abetting liability - conclusions from International Criminal Law' (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 237 at 257. Commentators that support this interpretation of 'purpose' are: Christoph Burchard 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime: Initial Enquiries Concerning the Rome Statute"' (2010) 8 *Journal of International Criminal Justice* 919 at 941; Kai Ambos 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1 fn 36 and Mohamed Elewa 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* 473 at 507-8.

⁶⁹ Cryer at 377. In referring to corporations, the author states that motive has to be determined irrespective of the corporation's stated purpose to make profit through its business activities.

to proving that the aider and abettor knew that their contribution would assist the commission of a crime, it must be proved that they *wished* their assistance would result in the commission of a crime.⁷⁰ These views highlight that some effort has to be made to prove that the aider and abettor had an ulterior or secondary reason or motivation in his or her conduct other than what he or she stated to be as the primary aim of their conduct.

In respect of question ii), ‘purpose’ is interpreted to mean ‘intent’ as defined in Article 30(2)(b) of the Rome Statute.⁷¹ Article 30(2)(b) states that a person has intent where ‘[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events’. Thus, an aider and abettor can be shown to have acted for the purpose of facilitating the commission of a crime (the consequence) if there is evidence that illustrates that he or she possessed knowledge of the fact that the crime (the consequence) would occur in the ordinary course of events as a result of his or her omission.

The notion of ‘purpose’ in question i) seems to be the more accurate interpretation.⁷² The reasons for this are twofold: i) Article 30 only applies where a distinct *mens rea* standard is not provided, which is not the case;⁷³ and ii) rules for the interpretation of treaties state that the terms of a treaty shall be interpreted in accordance with their ordinary meaning.⁷⁴ The term ‘purpose’ points to ‘desire’ or ‘wish’, which in turn point to the reasons for the conduct of the aider and abettor. Thus, in order to establish criminal liability for aiding and abetting, there must be evidence that the defendant desired or wished that his or

⁷⁰ Albin Eser Individual Criminal Responsibility at 902.

⁷¹ See Donald K Piragoff & Darryl Robinson ‘Article 30: Mental Element’ in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court* (2008) 849 at 855; David Scheffer & Caroline Kaeb ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory’ (2001) 29 *Berkeley Journal of International Law* 334 at 355.

⁷² See Report ICJ vol 2 at 22.

⁷³ Article 30(1) Rome Statute states that ‘[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.’ This means that this article applies in the determination of the fault element in provisions of the Rome Statute unless another fault element is specified in a particular provision. Hence, it is referred to as the general *mens rea* standard clause.

⁷⁴ Article 31(1) Vienna Convention on the Law of Treaties 1969.

her conduct (omission) would facilitate the commission of the principal offence. This desire or wish indicates the ulterior purpose behind the conduct that led to the omission. This ulterior or secondary purpose can serve as evidence to satisfy the *mens rea* 'purpose test' as the fault element of aiding and abetting.

5. My proposed theory underpinning 'new approach' to proving the definitional elements of corporate aiding and abetting

5.1. Due diligence and duty of care in international law

Some authors argue that international law contemplates a duty of care for human rights abuses that is owed by corporations both to employees and to persons outside the corporation.⁷⁵ Corporations fulfil these duties primarily by ensuring that they manage their activities in ways that comply with human rights standards.⁷⁶ This ensures that corporations fulfil their duty 'to do no harm'.⁷⁷ The Special Representative of the Secretary-General on the issue of human rights and transnational corporations ('Special Representative on human rights') refers to this process as 'due diligence'.⁷⁸ When a corporation adheres to a due diligence approach in its business activities, failure to fulfil these duties must give rise to legal liability. Criminal liability should follow if the extent of failure to fulfil these duties of care is gross, the necessary fault element exists and the harm that results as consequence of this failure is serious. This approach to liability is not part of the international law framework. However, the theory that follows is an attempt to argue for its inclusion.

⁷⁵ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) A/HRC/8/5 para 1; Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 161.

⁷⁶ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) A/HRC/8/5 para 25. See also Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 155.

⁷⁷ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) A/HRC/8/5 para 24.

⁷⁸ *Ibid* para 56.

5.2. Proposed theory of liability on the basis of non-derivative criminal liability

The theory of liability developed in this chapter is based on chapter 4's analysis and extraction of the definitional elements used to establish non-derivative corporate criminal liability in the United Kingdom and Australia, detailed below. This theory incorporates these definitional elements into the 'standard ICC approach'. This theory adopts this non-derivative process that examines how the activities of a corporation (and/or corporate group) are *organised and managed as a whole*. Thus, this theory of corporate liability is not based on establishing the criminal liability of individual employees. As discussed in previous chapters, there are three reasons why non-derivative corporate criminal liability is preferable to the corporate criminal liability on the basis of the criminal liability of an employee or group of employees:

- i) Diffuse company structures make it practically impossible to identify an employee/director whose conduct and mental state can be imputed to the corporation thus establishing the corporation's criminal liability. These diffuse structures also mean that those employees who make decisions of the company (usually senior managers), decisions that determine the way the company is managed, are far removed both tactically and operationally from the conduct that causes harm. The complexity of these structures and the inability to identify who had made what decision is amplified in the context of corporate groups.⁷⁹
- ii) Non-derivative criminal liability takes into account a 'corporate culture' that allows human rights violations and failures to observe due diligence. Hence, through a non-derivative process the criminal fault that lies in a pervasive culture or mind-set in a company that leads to the commission of crimes (but that cannot be located in an employee or senior manager) can be established.⁸⁰

⁷⁹ See discussion in Chapter 4, section 3.4.6.1.

⁸⁰ See discussion in Chapter 4, section 3.4.6.2.

- iii) The doctrines of separate legal personality and limited liability cumulatively mean that responsibility for the criminal activities of one corporation (such as a subsidiary in a corporate group) cannot be attributed to another corporation (such as its parent corporation) even where the parent corporation benefits from the profits made by the subsidiary. Corporate malfeasance permeates the legal structures within corporate groups. However, these two doctrines make it impossible to impute liability for the criminal activities of one corporation to its parent corporation thus enabling the corporate group to escape liability.⁸¹

In each of these instances, there is probably no evidence that can sufficiently link any one individual in the corporation to conduct that causes harm though it is clearly corporate conduct. Hence non-derivative criminal liability is necessary.

5.3. Non-derivative criminal liability based on corporate failure to observe a duty of care

To capture adequately the involvement of multinational corporations in human rights violations, there is a need to develop the notion of omission in the current law of aiding and abetting. The theory of (non-derivative) liability developed in this chapter is founded on the failure of the management of a corporation to adhere to due diligence in its activities. Due to this failure, the corporation fails to observe its duty of care. This failure constitutes an omission on the part of the corporation. This omission can – where the necessary elements are proved – amount to conduct that aids and abets an international crime. Not all omissions can or should constitute conduct that aids and abets an international crime. An examination of the degree of failure of management and the consequent harm caused is therefore necessary. This examination can reveal that a corporation had constructive knowledge (it was aware) that its omission would facilitate the commission of a crime. This differs from mere criminal negligence which looks at what a reasonable person – in this case, a reasonable board of directors – would have done in the circumstances. Falling short of this reasonable person standard amounts to

⁸¹ See discussion in Chapter 2, sections 4.3.1 to 4.3.3.

negligence not intention in the form of constructive knowledge. The theory proposed here discusses how the former examination can be done, that is, possession of constructive knowledge. Through this theory a corporation could be found liable for aiding and abetting an international crime as set out in Article 25(3)(c) of the Rome Statute.

6. Proposed 'new approach' to establishing the crime of corporate aiding and abetting

6.1. Conduct element of corporate aiding and abetting

As discussed above, liability for aiding and abetting requires that the defendant's conduct must have assisted the principal perpetrator in the commission of crime.⁸² If the defendant omitted to observe a duty of care, this omission can constitute conduct.

The UK Corporate Manslaughter Act provides for criminal liability for the negligent causing of deaths by a corporation.⁸³ Criminal liability under the Corporate Manslaughter Act is founded on a gross breach in the observance of a duty of care.⁸⁴ The failure of a corporation in the management of its activities leads to this breach of a duty of care which results in harm to the victim. The factors for the determination of criminal liability in terms of this Act can be used as factors to prove the conduct element for aiding and abetting on the basis of an omission.

In terms of my proposed theory, the breach of a duty of care caused by management failure is the omission for the purpose of proof of corporate aiding and abetting. In order for criminal liability to follow, the breach caused by management failure must be gross or serious.

Therefore, the sub-elements that must be proved to establish the conduct element of corporate aiding and abetting include:

- i) There is an omission constituting conduct of the corporation;

⁸² See section 4.2 of this Chapter.

⁸³ See section 1 Corporate Manslaughter Act.

⁸⁴ Section 1(1)(b) Corporate Manslaughter Act.

- ii) The omission is a gross breach of a duty of care (or legal duty)

6.1.1. Omission constituting conduct of the corporation

An omission by a corporation that constitutes conduct for the purposes of aiding and abetting can be proved by examining the conduct of its management. The omission that leads to harm will ordinarily be due to the physical conduct of a lower-level employee. The prosecution needs to evaluate *how the activities of the organisation as a whole* are managed in order to establish two issues:

- whether the conduct of the lower-level employee that led to the omission is attributable to the management of the corporation; and
- whether the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failure to fulfil a duty of care.⁸⁵

The conduct of the lower-level employee has to be attributed to the management of the corporation in order to link the omission to the corporation. An omission on the part of the corporation can be satisfied if it is shown that such conduct is ordinarily the result of how activities of the corporation are organised.⁸⁶ The way activities are organised is in turn determined by corporate policy and practices.

The fact that evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failure to fulfil a duty of care shows that physical conduct of an employee needs to be considered in the context of how activities are managed in the corporation. Where there are repeated instances of individual employees failing to observe duties of care, this failure can be attributed to the corporation.

6.1.2. The omission is a gross breach of a duty of care (or legal duty)

An omission on the part of a corporation has to amount to a gross breach of a duty of care (a legal duty) in order for criminal liability to follow. The prosecution must prove that the corporation had a legal obligation to fulfil the duty of care. In

⁸⁵ See Section 1(1) Corporate Manslaughter Act.

⁸⁶ See Section (1)(4)(c) Corporate Manslaughter Act.

company group cases, English and Canadian courts have recognised that parent companies can have a duty of care to the employees and clients of their subsidiaries.⁸⁷ *Caparo Industries*, a leading case, set out a test to determine the existence of such a duty.⁸⁸ The test states that 'the damage should be foreseeable; that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood"; and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.'⁸⁹ Hence, where the employees of a subsidiary habitually work in conditions that are hazardous to their health and safety and the parent company is aware of this and does not intervene, any harm suffered by the employees would be attributable to the parent company. Though this test has been developed in the area of tort law, it is useful in clarifying when a corporation does have a duty of care and its intentional failure (based on the fault elements discussed below) to fulfil such a duty amounts to an omission for the purpose of aiding and abetting a crime.

The existence of a duty of care can also be established through a number of factors:

- a due diligence study carried by the corporation. Such a study can reveal any legal obligations the corporation has recognised which prohibit it from violating human rights or causing harm through its activities;⁹⁰
- reports from reputable third party sources such as other businesses, non-governmental organisations, trade unions and United Nations agencies that underline the legal obligations corporations have in the industry in question;⁹¹

⁸⁷ England and Wales Court of Appeal *Chandler v Cape PLC*, [2012] EWCA Civ 525 (25 April 2012) para 80, and Superior Court of Justice of Ontario, *Choc v HudBay Minerals, Inc*, 2013 ONSC 1414, Decision of 22 July 2013, paras 74-75.

⁸⁸ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

⁸⁹ *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 (per Lord Bridge).

⁹⁰ Report ICJ vol 2 at 23-4.

⁹¹ See Antonio Cassese *International Criminal Law* (2003) at 201-2.

- the awareness of the corporation of human rights violations being perpetrated by actors with whom it has interactions.⁹²

Proving that conduct amounted to a gross breach of a duty of care may be based on the standards reasonably expected of a corporation in the management of its activities. If the failure of management fell far below these standards, then this can serve as evidence that the conduct of the corporation amounted to a gross breach of a duty of care.⁹³ The extent of failure of management to meet these standards may be determined by a number of factors:

- the seriousness of the impact of the breach of the duty of care;⁹⁴
- the foreseeability of the harm that could be caused by this breach;⁹⁵
- whether there had been similar failures in management in the past that gave rise to the breach of the duty of care; and
- whether there are policies or attitudes within the corporation that encouraged the failure to observe a duty of care.⁹⁶

6.2. Causation element of aiding and abetting

In order for this conduct to lead to liability for aiding and abetting, it must have had a substantial effect on the perpetration of the crime. The seriousness of the breach tells us whether the breach as an omission had a substantial effect on the commission of crime by the principal perpetrator. The seriousness of the breach itself has little to do with causality between the conduct and harm. However, the test that is to be used is one of 'substantial effect', whether the breach (as conduct by omission) had a substantial effect on the crime (harm), thus constituting aiding and abetting. Thus, where a breach in the duty of care is very serious but has no substantial effect on the commission of a crime, it would not satisfy the causation requirement. For example, a public transport company is notorious for not keeping

⁹² Report ICJ vol 2 at 23-4.

⁹³ Section 1(4)(b) Corporate Manslaughter Act.

⁹⁴ Section 8(2)(a) Corporate Manslaughter Act.

⁹⁵ Section 8(2)(a) Corporate Manslaughter Act. This sub-section refers to 'risk of death' though it can be interpreted as foreseeability of harm.

⁹⁶ Section 8(5) Corporate Manslaughter Act.

its buses in good working condition. The brakes are not regularly changed as they are particularly expensive and the company often delays purchasing new brakes as soon as they are needed. One of the company's bus drivers is in a hurry to end his shift and drives recklessly. While at an intersection, with the traffic light still red, he drives into the intersection supposing that there is no oncoming traffic. Unfortunately, a truck that was crossing the intersection collides with the bus severely injuring a number of passengers. The injuries sustained by the passengers are a direct result of the bus driver's reckless driving and not the faulty brakes, which in any event is a serious breach of the company's duty of care to ensure that its vehicles are in good working condition.

Whether the corporation's conduct had a substantial effect on the perpetration of the principal crime will usually be determined on a case by case basis.⁹⁷ However, the prosecution can rely on the causal relationship between the principal crime and the omission of the corporation in order to prove that the gross breach of the corporation had a substantial effect on the crime perpetrated by the principal perpetrator. This causal relationship need not be proved to have been a *conditio sine qua non* (but for) of the principal crime.⁹⁸ It is sufficient for a prosecution to prove that without this omission, the criminal act would probably not have occurred in the same way.⁹⁹ Hence, the 'but for' test is not required for proof of a causal relationship between a corporation's omission and the resultant crime.

Aside from the *conditio sine qua non* theory of causation, two other theories may be looked at: the increase of risk theory and the facilitation theory.¹⁰⁰ In terms of the increase of risk theory, a contribution need only increase the possibility of the commission of the crime, even if it does not give any actual help to the commission of the crime. For example, a parent corporation fails to instruct its

⁹⁷ Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on The Rome Statute of The International Criminal Court – Observers' Notes, Article by Article* (2008) 743 para 16.

⁹⁸ Blaskic Appeal para 75.

⁹⁹ Tadic Trial Judgment 1997 para 688.

¹⁰⁰ Andrea Reggio 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind' (2005) 5 *International Criminal Law Review* 623 at 670.

local subsidiary in a developing country to conduct business only with factories that adhere to international human rights standards in their labour practices. Such corporation would be liable for aiding and abetting the crime of forced labour if its local subsidiary contracts the services of factories that hire workers under contractual conditions that amount to forced labour.

In terms of the facilitation theory, a material contribution that constitutes aiding and abetting the commission of a crime by omission does not need to be essential but only needs to facilitate the commission of a crime.¹⁰¹ Thus, where an auditing company contracted by a mining corporation to audit its accounts fails to report that the mining corporation makes payments to a security services company that physically abuses, kills and rapes the local population, the auditing company's omission would facilitate the criminal acts of the security company.

6.3. Fault element of corporate aiding and abetting

As discussed above, liability for aiding and abetting requires that the defendant must have acted for the purpose of facilitating or assisting the commission of crime by the principal perpetrator.¹⁰²

A wish or desire or ulterior motive on the part of the defendant can satisfy the requirement of 'acting for the purpose of facilitating the commission of crime'. This desire or ulterior motive will ordinarily be one that is other than the stated aim of making profit or advancing a corporation's business opportunities. Thus, in *Bruno Tesch* (a case involving the sale of the poisonous gas Zyklon B to the internal security police),¹⁰³ a British Military Court held that the defendant's knowledge that Zyklon B would be used in the gas chambers in Auschwitz was determined by the fact that he knew every little detail about his business and that the amount of gas solicited by the authorities at Auschwitz could not possibly have been for the

¹⁰¹ Ibid; see also Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta & John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767 at 799.

¹⁰² See section 3.3 of this Chapter.

¹⁰³ Trial of Bruno Tesch and two others (Zyklon B case), March 1946, British Military Court Hamburg, Law Reports of Trials of War Criminals (UNWCC) Vol I (His Majesty's Stationary Office, 1949).

delousing of clothing or for disinfecting buildings as alleged.¹⁰⁴ This determination was sufficient to satisfy his fault element for murder despite the fact that he sold the gas for the purpose of exterminating vermin (and thus making profit).¹⁰⁵ Through his extensive knowledge of the use of Zyklon B and in view of the large quantities sold to the Nazis, the court inferred that one of the defendant's purposes was to kill human beings through the sale of Zyklon B.¹⁰⁶

Hence, an ulterior motive or secondary purpose can be deduced in two ways:

- i) by examining whether there were any corporate policies or practices that were likely to have encouraged the omission in the observance of a duty of care imposed on the corporation.¹⁰⁷
- ii) by analysing whether omissions of a duty of care occurred despite knowledge that allowing these omissions would likely facilitate the commission of a crime.

6.3.1. Determining 'purpose' through 'corporate culture'

An ulterior motive or secondary purpose behind corporate conduct that leads to omissions of a duty of care can be deduced by examining a corporation's 'corporate culture'. This refers to the corporation's policies, conduct and practice that characterise management decisions that lead to omissions in the observance of a duty of care.

A number of factors can be used to prove the existence of such a 'corporate culture'.¹⁰⁸ These include:

- i) whether corporate goals are unrealistic to such an extent that they encourage unlawful behaviour;
- ii) whether the corporation educates its employees on best practices;

¹⁰⁴ Zyklon B case at 101.

¹⁰⁵ Zyklon B case at 101.

¹⁰⁶ Zyklon B case at 101-2.

¹⁰⁷ Colvin and Chella at 307.

¹⁰⁸ Pamela Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095 at 1128–1146.

- iii) whether employees are able to report concerns about unlawful activity without fear of prejudice;
- iv) the manner in which the corporation has responded to past omissions; and
- v) whether there any incentives for lawful behaviour.

These factors can reveal the existence of a culture in a corporation that leads to the omissions in duties of care which facilitate the commission of crime. However, a 'corporate culture' that encourages, tolerates or leads to omissions of duties of care may be insufficient as evidence that a corporation desired or wished that these omissions would facilitate the commission of crime.¹⁰⁹ It may be necessary to show that it was corporate policy to allow these omissions. This policy can be proved by inferences that provide the most reasonable explanation of the corporation's omissions of duties of care.¹¹⁰ For example, where there is a pattern in a corporate group in which the parent company fails to give sufficient direction to its subsidiaries regarding how they should engage local security forces in cases of disputes with local inhabitants, this can amount to a criminal corporate culture. Such a pattern may not be explicit in the corporation's internal documents but an overall analysis of its decisions can satisfactorily prove that this was its policy.¹¹¹

Australia's Criminal Code states that corporate policy may fairly be assumed from the conduct of 'high managerial agents' due to the nature of their responsibilities in a corporation.¹¹² Where senior members of management have played a role in the organisation of activities that led to omissions of duties of care, then this may serve as evidence that it is part of corporate policy to allow for these omissions. Therefore, once it is established that corporate policy permitted omissions that facilitated the commission of crime, then this is evidence that the corporation desired or wished that principal offence would be perpetrated thus satisfying the *mens rea* 'purpose test'.

¹⁰⁹ Colvin and Chella at 308.

¹¹⁰ Colvin and Chella at 308.

¹¹¹ See the Danzer case in section 1.

¹¹² See section 12.3(6) Criminal Code Act 1995.

6.3.2. *Determining 'purpose' through knowledge of the likely consequences of facilitating the commission of a crime*

An ulterior motive or secondary purpose behind corporate conduct that leads to omissions of a duty of care can be deduced by combining two factors:

- i) knowledge of the likely consequences of facilitating the commission of a crime through omissions of a duty of care and
- ii) the deliberate continuation of commercial activity characterised by these omissions.

The discussion that follows looks at different ways through which the possession of the 'knowledge of the likely consequences of facilitating the commission of a crime' can be established and suggests how a secondary purpose that satisfies the *mens rea* 'purpose test' can be deduced in each instance.

6.3.2.1. Knowledge acquired from due diligence investigations and the business relationship with the principal

Corporations routinely carry out due diligence investigations prior to entering into business transactions and the commencement of operations. These investigations will ordinarily include assessments of future business partners and affiliates.¹¹³ The main purpose behind this is to discover any legal liabilities and the integrity of financial information essential to commercially effective transactions.¹¹⁴ Minimising risk, including risk to human rights, is part of this process.¹¹⁵

Thus, corporations that carry out thorough investigations should necessarily be considered as being aware of the potential impact of their activities on human rights. In certain circumstances a corporation may seek to maximise profit by

¹¹³ Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 156.

¹¹⁴ Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 156.

¹¹⁵ Peter Muchlinski 'Implementing the New United Nations Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145 at 156.

engaging in commercial activity that is characterised by a management style that allows omissions in respect of duties of care. Such a corporation may also be aware that these omissions will adversely affect human rights and contribute to the commission of international crimes. Therefore, a deliberate continuation of commercial activity in the knowledge of its likely consequences can serve as proof that the corporation's conduct was carried out for the purpose of facilitating the commission of crime.

6.3.2.2. Knowledge acquired from the business relationship with the principal

A secondary purpose can also be inferred from knowledge acquired from a business relationship with a principal perpetrator.¹¹⁶ The duration and nature of the commercial relationship between the corporation and this principal perpetrator may be relevant in determining whether the corporation has knowledge that its commercial activities assist the commission of crime by the principal perpetrator.¹¹⁷

The possession of technical knowledge of the intricate aspects of a business and the use of its products may well prove knowledge of the likely consequences of facilitating the commission of a crime. Such knowledge on the part of an aider and abettor may be proved even if the products of the business sold to a principal perpetrator are used for a criminal goal that is not explicitly mentioned by the principal to the aider and abettor in their commercial dealings.

Once a corporation suspects that its commercial activity is facilitating the commission of crime by a principal (its business partner), a deliberate continuation of this relationship can serve as proof of the corporation's secondary purpose that satisfies the *mens rea* 'purpose test'.

¹¹⁶ Douglas Cassel 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 *Northwestern Journal of International Human Rights* 304 at 312.

¹¹⁷ See for instance *Farben* case at 1187 (concerning the use of slave labour in coal mines acquired from the German Reich); *Zyklon B* case at 94 (dealing with the sale of gas and gassing equipment for "disinfecting public buildings", including Wehrmacht barracks and SS concentration camps). Report ICJ vol 2 at 24.

6.4. Summing up: elements of corporate aiding and abetting

The discussion of the evidence a prosecution would need to show to establish the criminal liability of a corporation for aiding and abetting is threefold: evidence to satisfy the conduct element, the causation element and the fault element.

Evidence that establishes the conduct element for omissions in the observance of a duty of care that amount to aiding and abetting includes: proof that the corporation breached a duty of care; proof that shows that this breach was gross.

Evidence that establishes the causation element is proof that this gross breach had a substantial effect on the perpetration of the international crime by the principal.

Evidence that establishes the fault element includes: proof that the omission on the part of the corporation was for the purpose of facilitating the commission of an international crime. The existence of such purpose is satisfied by proof that the corporation had knowledge that allowing these omissions would likely facilitate the commission of a crime and by an analysis of the corporation's 'corporate culture'.

7. Proposed language to be incorporated in provisions of the Rome Statute

This chapter proposes the following possible provisions for inclusion in the Rome Statute that would incorporate the principles of the 'new approach' developed in this chapter:

7.1. Provisions addressing jurisdiction over juristic persons

Amended Article 25

Criminal responsibility (deletion of Individual)

1. The Court shall, pursuant to this Statute, have jurisdiction over:

(a) natural and

(b) juristic persons. For the purpose of this Statute, a juristic person refers to a publicly or privately owned corporation that may be multinational and its affiliated business entities.

...

4. No provision in this Statute relating to criminal responsibility shall affect the responsibility of States under international law (deletion of individual).

7.2. Provisions addressing substantive law

Amended Article 30

Mental element

4. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to commit the offence. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

5. Corporate knowledge of the commission of an offence may be established by 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. Knowledge may be possessed within a corporation even though the relevant

8. Conclusion

This chapter has sought to address a gap in international criminal justice. This gap is characterised by the fact that corporations cannot be found criminally liable in international law. This chapter has therefore developed a possible 'new approach' to determining how corporations can be found criminally liable in international law for aiding and abetting.

This chapter contemplates that the perpetration of crime by a corporation will ordinarily be indirect or complicit. The 'new approach' rests on a theory of modes of liability developed by an incorporation of non-derivative principles of liability. This theory is grounded on the failure of the management of a corporation in its activities. As a result of its management's failure, the corporation fails to observe its duty of care which constitutes an omission. This omission can amount to

conduct that aids and abets an international crime. This chapter concludes by suggesting possible language that may be incorporated into provisions of the Rome Statute that would reflect the principles of this theory. The recommendations set out in this chapter would by no means be easy to implement. I acknowledge that the debate as to whether the criminal jurisdiction of the Rome Statute should be extended to corporations is a contested issue. Nevertheless, this does not preclude attempts – as in this thesis – to propose ways through which corporations may be found criminal liable for their complicity in human rights violations. As with all international law, the adoption of proposals for reform largely depends on the political will of the international community, particularly that of the more powerful and influential states of which this thesis is no exception.

CHAPTER 6: CONCLUSION

This thesis has explored the possibility of establishing the criminal liability of multinational corporations (MNCs) in international law for complicity in the commission of international crimes in Africa. The key proposition in this thesis is that MNCs may be found criminally liable for aiding and abetting international crimes in terms of Article 25(3)(c) of the Statute of the International Criminal Court (Rome Statute). The basis for this criminal liability for aiding and abetting is the MNC's intentional failure to fulfil a duty of care so as to facilitate the commission of a crime. There are four key findings detailed below.

1. Multinational corporations should be recognised as legal persons in international law

At present, the fact that MNCs are not recognised as persons in international law is an obstacle to claims that they should be subject to international criminal law. This thesis has argued that this requirement of legal personality is merely a rule of expediency and ought to be removed. In the alternative, this thesis has argued that if the requirement of legal personality were to apply, then MNCs can and should be recognised as legal persons in international law. The three reasons why MNCs should be recognised as legal persons in international law are: first, MNCs have an important global role in the advancement of impoverishment of states. This is observable in the tremendous political and economic power and influence that they exercise over governments both in developed and in developing countries. Second, MNC have the capacity to be subjects of international law based on their unique ability to participate meaningfully in international legal processes. Third, MNCs enjoy a wide recognition of their rights in international law and they have concomitant duties/obligations. The possession of rights and duties illustrates that MNCs have legal personhood that ought to be recognised in international law.

2. Corporate criminal intention exists and it is observable in the failure to observe a duty of care

The analysis of the jurisprudence of Nuremberg regarding corporations evidences (i) that the prosecutors gave recognition to the role that corporations have in the commission of crimes; (ii) that corporations were considered for prosecution and (iii) that judges recognised that corporations possess a distinct form of criminality to their composite natural persons. These findings underline that corporations possess an intentionality that is distinct to that of individual officials, employees or directors of the corporation. This criminal intention is often manifested in what is called 'corporate culture'. This includes the corporation's policies, practices and attitudes that promote or encourage non-compliance with the law or the non-observance of duties of care. These failures to fulfil duties of care can lead to harm by facilitating the commission of a crime.

3. Non-derivative criminal liability is an appropriate method of establishing corporate criminal liability

Non-derivative criminal liability means that a corporation may be found criminally liable in its own right, without proof of the criminal liability of one of its employees or officials. Such a process of establishing corporate criminal liability overcomes the obstacle of diffuse company structures that make it practically impossible to identify an employee/director whose conduct and mental state can be imputed to the corporation. Non-derivative criminal liability takes into account corporate cultures that permit abuses through failures to fulfil duties of care. Criminal liability through a non-derivative process also overcomes the effect of the doctrines of separate legal personality and limited liability. These two doctrines make it impossible to impute liability for the criminal activities of one corporation to its parent corporation.

4. Corporations can be found criminally liable in international law for aiding and abetting international crimes

This thesis has discussed how a corporation can be held criminally liable in international law for aiding and abetting an international crime. Aiding and

abetting is a form of accomplice liability that presupposes that in the commission of a crime, there must be a principal offender (whose criminal liability need not be proved). The criminal liability of the corporation as an aider and abettor is founded on satisfying the conduct, causation and fault elements of aiding and abetting an international crime. The conduct element is satisfied by proof of omissions in the observance of a duty of care on the part of the corporation. Specifically, the conduct element is satisfied by proof that the corporation has breached a duty of care and proof that shows that this breach was gross. The causation element is satisfied by proof that this gross breach had a substantial effect on the perpetration of the international crime by the principal offender. The fault element is satisfied by proof that the omission on the part of the corporation was for the purpose of facilitating the commission of an international crime. The existence of such purpose is satisfied by evidence that the corporation had knowledge that allowing these omissions would likely facilitate the commission of a crime and by evidence of a corporate culture that encouraged or promoted these omissions.

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