Liberals vs. Romantics:
Challenges of An Emerging Corporate International Criminal Law

*Carsten Stahn**

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

Keywords: Business and human rights; corporate criminal responsibility; corporate complicity; superior responsibility; Malabo Protocol; International Criminal Court.

I. INTRODUCTION

The legal regime governing criminal liability of corporations is in flux.[1] There is a strong moral case to provide greater attention to the contribution of businesses to conflict and crime. The human rights accountability architecture has developed significantly over past decades. Human rights were traditionally related to violations of states against individuals. But private actors can hold positions of power and control that exceed those of states. As Ronald C. Slye has argued:

* Professor of International Criminal Law and Global Justice, Leiden University and Programme Director, Grotius Centre for International Legal Studies (The Hague).

[1] Desislava Stoichkova, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW (Antwerpen: Intersentia, 2010); Caroline Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351 (2016); Robert Thompson, Anita Ramasastry & Mark Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 844 (2009); Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities* 12 Chinese Journal of International Law 43 (2013); Daniel Leader, *Business and Human Rights: Time to Hold Companies to Account*, 8 ICLR 447 (2008); Andrew Clapham 'MNCs under international criminal law' in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer International Law 2000), 139–95; Larissa van den Herik, Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counter Arguments and Consequences, in Carsten Stahn and Larissa van den Herik (eds.), FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE (TMC Asser Press, 2010), 362. See also Celia Wells, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2nd ed., Oxford University Press, 2001

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

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

Partly due to the rise of the business and human rights movement[5] over past decades, there is a thicker accountability structure. International law has become hostile to the idea that a collective company structure provides a veil against accountability.[6] There is a rich compliance web for human rights violations that includes not only hard law, but soft law and voluntary compliance mechanisms. Violations can be subject to wide range of sanctions, including the revocation of licences (i.e. the 'corporate death penalty' for legal persons), temporary licence suspension, the initiation of investigations and prosecutions, civil or administrative penalties, warning or persuasion techniques.[7] Legally, are at least three major liability regimes to hold companies accountable: civil liability, human rights accountability and criminal responsibility. All of them expanded over time. Yet, the dividing lines are not always clear. There is, in particular a deeper controversy about the limits of human rights accountability and the feasible reach of criminal responsibility.[8]

---

[2] Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brook. J. Int'l L. 955, 961 (2008).

[3] A. Hochschild, KING LEOPOLD'S GHOST: A STORY OF GREED, TERRORISM AND HEROISM IN COLONIAL AFRICA (Mariner Books, 1998).

[4] See Chatham House, Corporate Responsibility for International Crimes, 19 May 2015, at https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/01%2007%2015%20Corporate%20Responsibility%20Meeting%20Summary%20DRAFT%20CP%20SL%20JZ%20RK%20JHJ%20RM%20SL3.pdf.

[5] See OHCHR, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (New York and Geneva, 2011). See generally Larissa van den Herik and Jernej Letnar Černič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again* 8 J. Int'l Crim. Just. 7125 (2010).

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

[7] On penalties, see Art. 10 (4) of the UN Convention against Transnational Organized Crime. It states:

> Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

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

I. THE PLURALIST LEGAL ARCHITECTURE

The idea that 'companies cannot commit offences' (*societas delinquere non potest)* is a relict of the past.[9] Early criminalization started in response to the industrial revolution. Many of the traditional theoretical objections against corporate criminal responsibility, such as the difficulty to ascribe *mens rea* to a juridical person or to inflict punishment have been addressed. Shifts from a naturalistic to a more sociological vision of crime make it possible to argue that corporations can perpetrate crimes.[10] But the legal regime is highly fragmented.

Domestic legal systems diverge in their approaches. Common law jurisdictions have generally been open to admit corporate criminal responsibility. Continental legal traditions are more diverse. Many jurisdictions allow for corporate criminal responsibility, either in general or for specific offences. Other countries (e.g., Italy, Germany, Ukraine) remain more skeptical to the concept and resort to administrative offences or penalty to address wrongdoing.[11] In some systems, it is possible to combine civil and criminal proceedings. This allows victims to link criminal charges against corporate defendants to tort claims.

At the international level, there are seventeen multilateral international instruments with provisions on criminal liability of legal persons, including the UN Convention against Against Transnational Organized Crime.[12] But they leave it largely in the discretion of states to determine the appropriate kind of sanctions. This approach was recently followed by the International Law Commission (ILC) in its work on crimes against humanity. It decided to include a provision on legal persons in its draft articles on Crimes against Humanity in light of the 'the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population'.[13] It states that

> [s]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft

[9] In the 19th century, the concept of corporate criminal liability was rejected, due to inability of legal persons to form a *mens rea* or to be subject of punishment. For a discussion, see Andrew Clapham, *Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. Int'l Crim. Just. 899, 926 (2008). On the obligations of corporations under international law, see Volker Nerlich, *Core Crimes and Transnational Business Corporations,* 8 J. Int'l Crim. Just. 895 (2010).

[10] As Bert Swart has noted, they 'do not act in a physical, but they routinely decide whether or not natural persons will perform physical acts on their behalf'. See Bert Swart, *International Trends towards Establishing Some Form of Punishment for Corporations*, 6 J. Int'l Crim. Just. 947, 951 (2008).

[11] See OHCHR, Corporate liability for gross human rights abuses (2012), 32-33, at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

[12] Art 10 of the United Nations Convention Against Transnational Organized Crime provides:

> 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group …
>
> 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
>
> 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

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

article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.[14]

Criminal responsibility of legal persons cannot be determined in the same way as that of natural persons. The methods differ across criminal traditions. Some theories attribute the conduct of agents to the company as a legal person. Criminal responsibility is thus derived from the criminal acts of agents, i.e. corporate officers and senior managers (attribution model).[15] It is necessary to inquire whether the agent committed the offence, and whether that conduct can be ascribed to the corporation based on a relationship to the agent. The criteria used for attribution differ. The weakness of this model is that it poses causality problems in collective and decentralized networks. Newer theories admit that the conduct of agents is determined by corporate cultures and collective decision-making processes, and take into account the aggregated knowledge of agents.[16] Others hold the company itself accountable for its own wrongful conduct (organizational model). This approach takes into account that the wrong may have been caused by collective failures such as poor organization or communication. Responsibility is thus tied to risk-taking and organizational failures, such as lack of proper organization or control. A classical example is the existence of a corporate culture that facilitates violations.[17] Corporate *mens rea* is inferred from the aggregated knowledge of agents. This approach forces companies to put in place adequate structures to prevent illegal conduct, in order to escape from criminal responsibility.

II. TWO COMPETING SCHOOLS IN INTERNATIONAL CRIMINAL LAW

In international criminal law, the idea of corporate criminal responsibility is less developed than at the domestic level. International criminal law has traditionally been concerned with the responsibility of individuals. Neither the Nuremberg and Tokyo tribunals, nor the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) or the International Criminal Court (ICC) were formally vested with the authority to try legal persons. In national jurisdictions, business corporations have been found to be complicit in gross human rights violations.[18] Company leaders may be held accountable in several ways: as perpetrators of violations, for instance the use of forced labor or pillaging of resources, as accomplices[19] or as military or civilian superiors (e.g., private security companies). But it is increasingly whether the individualized approach towards criminal responsibility responds fully to challenges of business involvement in crime. In many instances, it is difficult to tie corporate crime to an individual actor. As Thomas Weigend has noted:

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

[15] See Thomas Weigend, *Societas Delinquere Non Potest: A German Perspective*, 6 JICJ 927-945 (2008).

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

[17] For instance, in Australia, criminal negligence can be established by '(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate'. See OCHR, *supra* note 11, 34.

[18] Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum L Rev 1094 (2009).

[19] Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002).

> It is not a single individual who sells poison gas to a dictator to be used in war crimes, but it is a firm, organized as a legal person that is the provider of the gas. It is not a single individual who buys and re-sells stolen diamonds and thus lends critical financial support to a dictatorial regime, but an enterprise specialized in such lucrative deals.[20]

The ambition to extend criminal responsibility coincides not only with the human rights-driven anti impunity movement, but also with broader structural critiques of international criminal law. For instance, critical legal scholars and Third World Approaches to International Law have long criticized the strong focus of international criminal justice on atrocity violence and its neglect of the socio-economic causes of conflict and broader issues of everyday violence.[21] Strengthening criminal responsibility of corporations and businesses responds to an ever stronger claim to penalize economic drivers of conflict, including Western companies and transnational networks. [22]

A symbolic moment is the famous decision of the Appeals Chamber of the Special Tribunal for Lebanon (STL) against the Lebanese media company Al Jadeed/New TV S.A.L (STL contempt decision). It marks the first decision in which a hybrid criminal tribunal held a corporation criminally liable for contempt of court. The reasoning is filled with historical references and normative ambition. The Chamber noted:

> corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law… Corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.[23]

It represents an old cosmopolitan dream, namely to decouple international criminal law from its traditional ties to state policy. The decision challenges the individualist tradition of international law.[24] It deviates from the classical Nuremberg paradigm according to which 'crimes against international law are committed by men, not by abstract entities'.[25] It argues that the famous Nuremberg passage was an *obiter dictum* and not meant to foreclose responsibility of corporations as abstract entities under international law.[26] It reflects a deeper clash, between what George Fletcher has called 'liberal' and 'romantic' approaches towards

[20] Weigend, *supra* note 15, 927-928.

[21] Anthony Anghie and Bhupinder. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese Journal of International Law 77 (2003); Joanna Kyriakakis, *Corporations before International Criminal Courts: Implications for the International Criminal Justice Project*, 30 LJIL 221 (2017).

[22] William A. Schabas, War Economies, Economic Actors and International Criminal Law', in Karen Ballentine and Heiko Nitzschke (eds.), PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR (Boulder, Colorado: Lynne Rienner Publishers, 2005), 425-443.

[23] STL, *Prosecutor v. New TV S.A.L. and Al Khayat*, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, 2 October 2014, para. 67. For a discussion, see Nadia Bernaz, *Corporate Criminal Liability under International Law* 13 JICJ 313 (2015).

[24] For a critique, see Immi Tallgren, *The Sensibility and Sense of International Criminal Law* 13 EJIL 561, 594 (2002) ('by focusing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background').

[25] *United States of America et al. v. Goring et al*., Judgment, in Trial of the Major War Criminals before the International Military Tribunal - Volume 1: Official Documents (International Military Tribunal, Nuremberg, 1947), 223.

[26] STL, *Prosecutor v. New TV S.A.L. and Al Khayat*, para. 64.

collective responsibility.[27] A liberal conception of responsibility focuses on individual agency and abstracts individual wrong from collective action. The 'romantic' view admits that international crimes are typically by their very nature committed in collectivities, and thus closely connected to some degree of collective will.

The two traditions have been in conflict since the naissance of international criminal law. In the aftermath of World War II, the links between business and regime crime were investigated before military tribunals of the Allied Forces. German industrial agents, such *IG Farben*, *Krupp* or *Flick* faced charges for complicity in war crimes, crimes against humanity and aggression in trials under Control Council Law No. 10. Theories of corporate criminal responsibility were intensely discussed. But tribunals took a pragmatic stance. They found that private individuals could be held responsible under international law. [28] But they did not try corporations as such. In the *IG Farben* trial (Carl Krauch and Twenty-Two Others), thirteen members of IG Farben, were found guilty of enslavement or plunder. But the US Military tribunal held:

> It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[29]

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

The idea of corporate criminal responsibility was discussed since the 1950s. But its feasibility for an international criminal jurisdiction remained contested. In the context of the negotiations of the ICC Statute, the concept of corporate criminal responsibility was controversial.[30] Some delegations rejected the idea on the ground that 'there was no criminal responsibility which

---

[27] George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale Law Journal 1499‑1573 (2002).

[28] In *Flick*, the US Military Tribunal found: 'International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty. There is no justification for a limitation of responsibility to public officials'

[29] *Trial of Carl Krauch and Twenty-Two Others* (I.G. Farben Trial), United States Military Tribunal, Nuremberg, 14th August 1947–29th July 1948, Law Reports of Trials of War Criminals (UNWCC), Volume X (His Majesty's Stationary Office 1949), 52. See also *United States of America v. Alfred Krupp et al*. (Krupp Case), (1948) 9 L.R.T.W.C. 1, 151, 9 T.W.C. 1448 ('As already said, we hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient').

[30] See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, vol. III (A/CONF.183/13), document A/CONF.183/2, art. 23, para. 6, footnote 71 ('deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute'); Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETHERLANDS INT'L L. REV. 333, 336–39 (2009).

could not be traced back to individuals.'[31] Others supported it. The discussions addressed a broad number of practical scenarios, such as involvement of companies in arms trade fueling conflict, their role in covering up of crime sites through construction work, or their indirect contribution to forcible transfer of persons. France proposed a compromise solution. Corporate criminal responsibility was made dependent on individual criminal responsibility. The scope of responsibility was limited and conditional. It required a conviction of a company agent for acts carried out 'on behalf of and with the explicit consent' of the company concerned. The proposal read:

> Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a judicial person for the crime charged, if:
> (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
> (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
> (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
> (d) The natural person has been convicted of the crime charged.[32]

The proposal was primarily guided by a functional objective, namely to increase the chances of victims to obtain compensation through the ICC reparation regime. It represented a compromise between the 'liberal' and the romantic view. It went too far for those who remained opposed to the idea of extending criminal responsibility beyond moral fault and individual culpability of agents.[33] It did not go far enough for those who claim that corporate criminality cannot be reduced to individuals.[34] It also faced pragmatic concerns.[35] Skeptics feared that corporate criminal responsibility would overburden the ICC and make criminal trials longer and more expensive. The option of civil or administrative responsibility of legal persons was not thoroughly discussed.

Today, there two competing schools. One school seeks to increase corporate accountability trough an expansion and refinement of individual responsibility. It is grounded in the liberal tradition of international criminal justice.[36] It is based on the hypothesis that involvement in atrocity crimes results from the interaction of self-determined individuals in collective structures and specific situational factors that drive individual agency. It cautions against the

[31] Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Vol. II, UN Doc. A/Conf.183/C.1./L.3, 16 June 1998, p. 136.
[32] UN Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2, 3 July 1998 (footnote omitted).
[33] On the German view, see Weigend, *supra* note 15.
[34] Brent Fisse and John Braithwaite, CORPORATIONS, CRIME AND ACCOUNTABILITY (Cambridge University Press, 1993), 46. For a critique of linking corporate criminality to conviction of a natural person, see Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code', 5 JICJ 809, 825 (2007) ('Features such as the commonly opaque nature of accountability within corporate structures, the expendability of individuals, the practice of corporate separation of those responsible for past violations and those responsible for preventing future offences, as well as the safe harbouring within corporations of individual suspects, can all contribute to the difficulty of locating individual wrongdoers, as well undermining any deterrent value of prosecution').
[35] Clapham, *supra* note 1, 157.
[36] On liberalisms of international criminal justice, see Darryl Robinson, *The Identity Crisis of International Criminal Law* 21 LJIL 925 (2008).

risks of overbroad standards of attribution in punishment and an excessive use of criminal law as an instrument to seek corporate compliance with the law.

The second school, the 'romantic approach' sees virtue in holding artificial legal persons accountable as collective entities.[37] It is closer connected to the human rights tradition. It postulates that 'no person, natural or legal, should be placed above the law or be allowed to operate outside of the rule of law'.[38] This view accepts that the blameworthiness of the behavior of corporations may exceed the responsibility of individual. It places the emphasis on the responsibility of a corporation as an autonomous agent. It relies on the premise that corporations enjoy a degree of functional autonomy that allows them to determine their own objectives, organizational structure and social identity and to make choices about the law. It is most vividly reflected in the passionate argument of the STL Appeals Chamber:

> [M]odern history is replete with examples where great harm has been caused by corporations with the advantages that result from the recognition of their status as legal persons […] In such a scenario, there can exist circumstances where the Tribunal may be unable, due to the complexity of corporate structures, internal operating processes, and the aggregate effect of the actions of many individuals, to identify and apprehend the most responsible natural persons within a corporation. Similarly, the prosecution of natural persons, rather than the legal persons that they serve, would fail to underline and punish corporate cultures that condone and in some cases encourage illegal behaviour. Punishing only natural persons in such circumstances would be a poor response where the need for accountability lies beyond anyone person.[39]

The clash between the 'liberal' and the 'romantic'' view is reflected in the scholarly reception of the STL approach. Some have welcomed it as a step in the right direction, namely as a "a foundation for further development of liability of corporate entities in international criminal law".[40] Others have decried it as a novel incarnation for international criminal law's "dream factory".[41]

Recently, this approach has received further support with the adoption of the new Malabo Protocol. It extends the jurisdiction of the proposed African Court of Justice and Human and Peoples Rights to 'legal persons, with the exception of States'.[42] Is the first statutory

---

[37] On judicial romanticism, see also Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 Human Rights Quarterly 628 (2009).
[38] STL, *Prosecutor v. New TV S.A.L. and Al Khayat*, para. 84.
[39] STL, *Prosecutor v. New TV S.A.L. and Al Khayat*, paras. 82-83.
[40] Karlijn Van der Voort, Contempt case against Lebanese journalists at the STL, 30 April 2014, at http://lebanontribunal.blogspot.nl/2014/04/contempt-case-against-lebanese_30.html.
[41] Dov Jacobs, The Dream Factory Strikes Again: the Special Tribunal for Lebanon recognizes International Criminal Corporate Liability, 28 April 2010, at https://dovjacobs.com/2014/04/28/the-dream-factory-strikes-again-the-special-tribunal-for-lebanon-recognizes-international-criminal-corporate-liability/.
[42] Art. 46 C Malabo Protocol on 'Corporate Criminal liability' reads:

> 1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
> 2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
> 3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
> 4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

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

> This means that, rather than focussing upon the conduct and state of mind of specific individuals within the corporation and deriving the corporation's fault from there, corporate culpability is instead deemed to be situated within the corporation itself.[43]

It relates criminal responsibility directly to the company policies and practices of the organization (e.g., policies of compliance, information sharing systems), rather than acts and and state of mind of individual corporate agents. Corporate criminal responsibility may thus exist, irrespective of whether a natural person is held liable or convicted for the conduct. The Protocol allows use of constructive knowledge as proof, and provides that the collective (aggregated) knowledge of company agents may be used to establish responsibility. The Protocol does not require that the corporation must have caused or encouraged the conduct. It was adopted quickly. It fails to define the concept of 'legal person', as well as applicable penalties Not all legal issues may have been fully thought through.[44] It might even raise concerns relating to over-criminalization.

International criminal law is thus at a tipping point. The classical view that international criminal law is a system without a space for corporate criminal liability is under challenge. There are two potential pathways for the future: Strengthening individualized prosecution of corporate agents, or prosecuting corporate involvement in crime through a collective organizational perspective. Both options raise significant challenges. International criminal law has a stronger stigma, and partly different rationales than human rights law. Criminalization requires caution.[45] Concepts from domestic law cannot be automatically transposed.

III. Extending Individual Criminal Responsibility of Corporate Agents

One path to develop accountability is to develop the legal regime concerning individual criminal responsibility of corporate agents. This rationale is line with the growing 'privatization' of international criminal. It is nowadays widely agreed that business corporations are bound by the prohibitions relating to core crimes under international law.[46]

---

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

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

[43] See Joanna Kyriakakis, Corporate Criminal Liability at the African Criminal Court Briefing Paper – ACRI Meeting, Arusha 2016, 4, at http://www.africancourtresearch.com/wp-content/uploads/2016/07/Kyriakakis_Briefing-Paper_-ACRI-2016-Meeting.pdf.

[44] See Larissa van den Herik and Elies van Sliedregt, International Criminal Law and the Malabo Protocol: About Scholarly Reception, Rebellion and Role Models, in Steven Dewulf, Liber Amicorum Chris Van den Wyngaert (Maklu 2018) 511.

[45] James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity*, 16 New Criminal Law Review 265 (2013).

[46] See Clapham, *supra* note 9; Nerlich, *supra* note 9. Art. 3 of rhe Apartheid Convention expressly acknowledges the capacity of organisations and institutions to commit the crime of apartheid ('International criminal

Corporate actors have made direct and substantial contribution to international crimes. Certain forms of economic crime have become part of atrocity crime.

The legal regime has developed significantly since Nuremberg. Many of the crime structures and principles of individual criminal responsibility have been extended to capture conduct by private actors. The ICC has made it clear since the outset that corporate agents may face criminal responsibility for the use suppliers who commit crimes under international law.[47] It has received various communications relating to business involvement in crime.[48] In 2016, the Office of the Prosecutor has devoted some attention to the problems of economic involvement in conflict in its Policy Paper on Case Selection and Prioritisation. The Policy Paper states that the 'impact of the crimes may be assessed in light of the social, *economic* and environmental damage inflicted on the affected communities'.[49] It specifically mentions specific categories of crimes that are typically under-prosecuted, namely

> crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land. [50]

This statement did not mention business accountability specifically. But had a strong expressivist effect.[51] It triggered a wave of communications in relation to land grabbing in Cambodia and corporate involvement in crimes against asylum seekers in detention centres in Nauru and Manus Island.[52] In May 2017, a coalition of human rights groups requested the Prosecutor to investigate corporate complicity of Chiquita Brands executives in crimes against humanity committed by Colombian paramilitaries.[53] But extending individual criminal responsibility faces several challenges.

---

responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State').

[47] In 2003, the ICC Prosecutor noted:

> the Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted. The Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries.

See Press Release, ICC Prosecutor, Communications Received by the Office of the Prosecutor of the ICC (16 May 2003).

[48] In 2014, the Prosecutor received a communication relating to actions of Chevron in Ecuador.

[49] Office of the Prosecutor (OTP), Policy Paper on Case Selection and Prioritisation, 15 September 2016 (hereafter 'Policy Paper'), para. 41.

[50] Ibid.

[51] Nadia Bernaz, *An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights*, 15 JICJ 527 (2017).

[52] See James Cavallaro, Diala Shamas, Beth Van Schaack, et al., Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity, 14 February 2017, at https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqué-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf. Obn corporate involvement, ibid., 56-58.

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

A. The enforcement dilemma

The first one is the enforcement dilemma. There is a comparatively low rate of business-related prosecutions.[54] Domestic jurisdictions are able to prosecute corporate agents, irrespective of whether the company is incorporated in their jurisdiction. But states are often reluctant to engage investigations and prosecutions against foreign agents, due to fears of negative economic consequences or dependence on foreign investment, or difficulties to obtain evidence.[55] Crimes are often part of a larger supply chain that is difficult to establish or linked to violations that do not cross the threshold to international crimes. The underlying cases are complex in legal terms, due to the need to establish the nexus between the agent and the crime and to prove the necessary mental element. They may require significant resources and exceed the capacity of local courts. Universal jurisdiction cases are rare.[56] If cases are initiated, this mostly done by the national state of the offender, or the territorial state. Moreover, powerful states have often less political incentives to initiate cases for atrocity crimes than classical economic offences, such as corruption.[57] Prosecuting anti-corruption practices in foreign states reduces local competitive advantages. It is thus in the interests of foreign investment. Atrocity crime prosecution may offer less material benefits.

International criminal courts and tribunals are highly selective in their selection of cases. Corporate involvement in crime has enjoyed limit attention. In mass atrocity situations, Prosecutors try to capture a blueprint of the criminality in a given conflict situation. The focus on the most responsible leaders or the most serious crimes. Bystanders or economic drivers of conflict are often at the margins.[58] Extending individual criminal responsibility of corporate agents would require a slightly different prosecutorial strategy, namely a more pronounced commitment to certain thematic prosecutions focused on business criminality.

B. The scope of liability

A second challenge is the legal approach towards network criminality. In past decades, international criminal law has been significantly developed to capture new types of criminality. It has developed techniques to hold persons accountable who are remote from the scene of crime.[59] But there is a fundamental tension between individual culpability and responsibility for involvement in collective crime.

---

[54] See Kyle R. Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes against Humanity*, 56 Air Force Law Review 167 (2005) 167; Jonahtan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 Brook. J. Int'l L. (2008).

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

[56] On the Dutch situation, see WODC, DUTIES OF CARE OF DUTCH BUSINESS ENTERPRISES WITH RESPECT TO INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY, December 2015, 10 ('From the very limited number of criminal cases in the ICSR context that the Public Prosecutor's Office has decided to prosecute, it seems to follow that the Public Prosecutor's Office does not opt for the prosecution of business-related human rights abuses in prioritizing the types of cases for which to deploy the scarce means for criminal investigation and prosecution'). The report is at https://www.wodc.nl/binaries/2531-summary_tcm28-124392.pdf.

[57] Ole Kristian Fauchald and Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1040, 1044 (2009).

[58] See generally Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 Mich. J. Int'l L. 1013 (2004).

[59] See Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 J. Int'l Crim. Just. 851 (2010).

1. Perpetration

It is uncontroversial that corporate agents may face direct responsibility as perpetrators. For instance, private security contractors or company officials may be held accountable if they commit war crimes, crimes against humanity or genocide.[60] Classical examples are sexual offences, torture, slave labor or modern types of slavery that meet the contextual of international crimes. For instance after World War II, *Flick* and *IG Farben* officials were convicted for using prisoners of war to meet their production quota.

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

> principals to a crime are not limited to those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[61]

This control theory has been expanded to capture 'control over an organization'.[62] These are cases in which a perpetrator commits the crime 'through another person' by means of 'control over an organization. The 'organisational theory' has traditionally been applied in the context of crimes committed through hierarchical organisations of power. German Scholar Claus Roxin developed the idea that a person who leads a hierarchically structured military or political organization may be held accountable as principal for crimes committed by subordinates in that organization if he or she dominated the will of that organization. [63] The decisive criterion is whether the choice of members of the organization is controlled through leadership. Roxin used three criteria: the existence of hierarchical organizational structures that facilitates 'rule determined processes', the exchangeable nature of the members of the organizations, and a focus of organizational activity that is outside the law. The classical example is state-organized criminality.[64] Roxin sought to capture crimes committed by Nazi leaders through organizations such as the SS. But the relevance of this theory goes beyond state-based crime. The ICC extended it to control structures inside non-state actors, such organized armed groups. It held that

> this type of structure … is not …inconsistent with the very varied manifestations of modern-day group criminality wherever it arises.[65]

[60] Chia Lehnhardt, *Individual Liability of Private Military Personnel under International Criminal Law* 19 EJIL 1015 (2008).
[61] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN. 07 February 2007, para. 330.
[62] *Prosecutor. V. Katanga, Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07-3436-tENG, 07 March 2014, paras. 1404-1410. See Jens David Ohlin, Elies van Sliedregt, and Thomas Weigend, *Assessing the Control-Theory* , 26 LJIL 725 (2013); Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 Chicago Journal of International Law 158 (2011).
[63] Claus Roxin, *Crimes as Part of Organized Power Structures*, 9 JICJ 191 (2011).
[64] Ibid.
[65] *Prosecutor v. Katanga*, *supra* note 62, para. 1410.

The theory has also relevance for business criminality. It might be used to argue that corporate leaders may commit crimes through corporate structures. For instance, German Courts have suggested to extend the concept of organizational control to business enterprises.[66] They have argued that leaders of business organization can be held accountable as perpetrators for crimes committed by subordinates in corporate structures, based on the organizational rules and structures found within corporations. The idea of organizational control might for instance, apply in relations between parent corporations and its subsidiaries. But in the business context, criteria such as hierarchical structure, the replaceable nature of company members, or the lawless nature of the operation are more difficult to establish than in the context of military or para-military structures.[67]

2 The controversy over aiding and abetting

Most types of business involvement in international crime are more indirect. It is difficult to determine under what circumstances professional commercial activities may constitute assistance or otherwise participation in a crime.[68] The treatment depends on the nature of the contribution. Inconsequential or trivial contributions might not be sufficient to cross the line from a human rights violation to a criminal act. Criminalization requires a departure from regular commercial behavior. The treatment might vary according to the nature of the traded object (e.g., harmless goods vs dangerous, risky or prohibited goods) or the nexus of the contribution to the relevant crimes (e.g., loan to an atrocity regime).

Due to novel human rights and fact finding mechanisms, international crimes are relatively well documented at the international. There are increasing due diligence duties. For instance, Article 6 (3) of the Arms Trade Treaty prohibits transfers of arms in cases where a state has knowledge that the items 'would be used to commit genocide, crimes against humanity or certain serious violations of international humanitarian law.[69] It requires risk determinations.[70] This changing normative environment has repercussions for standards of corporate behavior. Certain commercial activities, such as trade with certain militia forces or regimes with a track record in serious human rights violations, are more suspect than others. A relevant criteria for accessorial liability is whether the contribution of the corporate agent increases the risk in relation the commission of crimes.[71]

[66] See the *obiter dictum* of the German Federal Supreme Court in the case against Former Minister of National Defence Keβler and Others, Judgment, 26 July 1994, BGHSt 40, 218 ('Auch das Problem der Verantwortlichkeit beim Betrieb wirtschaftlicher Unternehmen lässt sich so lösen').

[67] See Thomas Weigend, *Perpetration through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. Int'l Crim. Just. 91, 99 (2011).

[68] For a discussion, see William Schabas, Enforcing International Humanitarian Law: Catching the Accomplices' 83 *International Review of the Red Cross* 439 (2001).

[69] It reads: 'A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party'.

[70] On the relevant threshold, see Andrew Clapham, Art. 6, in Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca, and Sarah Parker (eds.), *The Arms Trade Treaty: A Commentary* (Oxford University Press, 2016), 208-209.

[71] Kai Ambos, *Treatise on International Criminal Law*, Vol. I: Foundations and General Part (Oxford University Press, 2014), 165.

The International Commission of Jurists has developed a useful taxonomy that might provide some guidance. [72] It includes, first of all, the provision of goods or services used in the commission of crimes. Classical examples are delivery of chemicals or arms. An early example is the Trial of *Bruno Tesch* and two others before the British Military Court in 1946. Tesch was the owner of a firm which arranged the supply of poison gas, including Zyklon B, to the SS. The Court found that he had knowledge that the gas was used to exterminate detainees in concentration camps.[73] Two more recent examples are the cases against two Dutch businessmen in the Netherlands. Cornelius Van Anraat delivered of tons of thiodiglycol (TDG) to the Saddam Hussein regime which was used to create mustard gas. He was convicted as an accessory to war crimes committed through the use of chemical weapons, since it was evident that the quantity of TDG was not used for agricultural purposes, but relevant to military activity.[74] In 2017, Guus Kouwenhoven, the president of the Oriental Timber Company and director of the Royal Timber Company during the civil war in Liberia, was convicted as an aider or abettor for supplying weapons, and material, personnel and other resources to former Liberian President Charles Taylor and his armed forces between 2000 and 2002. The Court held that Mr Kouwenhoven 'must have been aware' that 'in the ordinary course of events' the weapons and ammunition he supplied and helped import *would* be used.[75]

Second, the contribution may lie in a provision of information that leads to the commission of crimes. This was, for instance, shown in a case against Mercedes Benz in Argentina. Juan Tasselkraut, a Mercedes Benz Manager during the military dictatorship in Argentina, was charged for sharing private information about company officials with the military regime that led enforced disappearances.[76] A similar case was brought against the Ledesma sugar company. Company officials were charged for providing personnel that aided in the disappearances of trade unionists[77].

Other forms of assistance include: 'the procurement and use of products or resources (including labor) in the knowledge that the supply of these resources involves the commission

[72] International Commission of Jurists, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS' EXPERT PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, CORPORATE CRIMINALITY & LEGAL ACCOUNTABILITY, VOL. 2: CRIMINAL LAW AND INTERNATIONAL CRIMES (International Commission of Jurists, 2008), 7, 19.

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

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

[75] See Dieneke de Vos, *Corporate accountability: Dutch court convicts former "Timber baron" of war crimes in Liberia*'=, 14 April 2017, at https://me.eui.eu/dieneke-de-vos/blog/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/. See *Prosecutor v. Kouwenhoven*, Court of Appeal, Judgment, 21 April 2017, at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:1760.

[76] See Victoria Basualdo , Tomás Ojea Quintana , and Carolina Varsky, The cases of Ford and Mercedes Benz, in Horacio Verbitsky and Juan Pablo Bohoslavsky, THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP (Cambridge University Press, 2015), 159.

[77] On the Ledesma case, see European Centre for Constitutional and Human Rights, *Corporations supported the Argentinian military dictatorship*, at https://www.ecchr.eu/en/our_work/business-and-human-rights/corporations-and-dictatorships.html

of crimes'; or 'the provision of banking facilities so that the proceeds of crimes can be deposited'.[78] In 2017, criminal proceedings were opened against Lafarge, a French cement provider, for financing ISIS activities and contributing to international crimes.[79]

The key problem is that the primary purpose of business activity is mostly to make economic gain, rather than to commit crimes. The scope of liability depends on the relevant *mens rea* standard. Domestic and international approaches differ in this respect. For instance, Dutch Courts held in *van Anraat* that *dolus eventualis* of the defendant in relation to the commission of crimes might be sufficient in relation to war crimes, but cannot support a conviction for aiding and abetting of genocide as a special intent crime.[80]

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

> [I]n most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary."[81]

This reasoning was later rejected by the *Taylor* Appeals judgment and the *Sainovic* et al. judgment.[82] The decisions argued that specific direction is not an element of aiding and abetting under customary international law based on an independent review of post-WWII jurisprudence[83]. The trend points thus towards a knowledge-based approach.

This controversy has direct relevance for business accountability. A specific direction standard would set a very high threshold for corporate criminality. It would imply that the corporate agents needs to share the perpetrator's intent to commit the underlying crime. This would make it very difficult to bring cases against corporate actors that are mainly profiteers of war. The knowledge-based approach is more realistic. It implies that persons can be responsible as accomplices if they have knowledge that the main perpetrator uses the contribution to commit crimes. The relevant knowledge relating to the impact of contribution is enough even if the corporate agent merely intends to perform 'business' activities. Tribunals have established that the aider and abettor must know the main perpetrator's specific intent in the context of specific intent crimes, such as genocide.[84]

---

[78] International Commission of Jurists, *supra* note 72, 19.
[79] European Centre for Constitutional and Human Rights, *French Judiciary indicts former directors of Lafarge in Syria case*, at https://www.ecchr.eu/en/business-and-human-rights/lafarge-syria.html.
[80] See *Van Anraat, supra* note 74.
[81] ICTY, *Prosecutor v. Perisić* , Judgment, IT-04-81-A, 28 February 2013, para. 44.
[82] ICTY, *Prosecutor v. Sainovic et al.*, IT-05-87-A, 23 January 2014, paras. 1649-1650.
[83] SCSL, *Prosecutor v. Taylor,* SCSL-03-01-A , Judgment, 26 September 2013, para. 474. The decision argued that the law on aiding and abetting criminalises knowing participation in the commission of a crime where an accused's willing act or conduct had a substantial effect on the crime.
[84] ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 140 ('an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime').

The ICC Statute is in many ways a *sui generis* instrument. It has a specific threshold. It requires that the contribution must be made for the 'purpose of facilitating the crime. 'Neutral acts of assistance, i.e. acts that are *per se* harmless, become thus criminal only when they committed with relevant *mens rea* standard. The implications of this qualifier is contested. Some argue that it requires shared intent between accessory and principal. Other claim that a certain degree of knowledge is sufficient to establish the 'purpose' requirement since it is related to the consequences of a person's conduct.[85] It might thus be satisfied by oblique intent, i.e. certainty that the crime will occur in the ordinary course of events. This second interpretation is more in line with the Statute's *mens rea* approach in relation to consequences and existing case law, such as the *van Anraat* case.[86]

3. Common purpose liability

Some systems contain even further-reaching concepts to hold persons accountable for contributions to collective crime. For instance, Art. 25 (3) (d) of the ICC Statute provides a specific liability regime for contribution to a group crime. It differs from the concept of Joint Criminal Enterprise developed by the *ad hoc* tribunals.[87] It offers a potentially wide basis to hold business leaders accountable. It penalizes 'any contribution' made with (i) 'the aim of furthering the criminal activity of criminal purpose of the group'; or with (ii) 'the knowledge of the intention of the group to commit a crime'.[88] This clause is framed so wide that it has been limited to 'significant' contributions.[89] It requires a minimum threshold in order not criminalize standard business behavior or contributions to non-criminal activities of collectives.

4. Superior responsibilit*y*

A final concept to establish individual criminal responsibility is the concept of superior responsibility.[90] It is a combination of omission liability and responsibility for crimes of others, that is based on failure to exercise proper control in superior-subordinate relationships. It is grounded in duties of order and obedience in collective entities.

The concept has its origin in duties of authority in military command structures. It has been extended to other contexts, such as police structures, private military companies or business enterprises. An early example in the field of business crime is the *Flick* case. Flick was

[85] Elies van Sliedregt and Alexandra Popova, Interpreting "for the purpose of facilitating" in Article 25(3)(c)?, at https://cicj.org/2014/12/interpreting-for-the-purpose-of-facilitating-in-article-253c/.
[86] *Van Anraat*, *supra* note 74.
[87] Allison M. Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law* (2005) 9 California Law Review 150 (2005); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109 (2007).
[88] Art. 25 (3) d).
[89] *Prosecutor v Mbarushimana*, ICC-01/04-01/10. Decision on the Confirmation of Charges, 16 December 2011, para. 285.
[90] See Jenny Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. Int'l Crim. Just. 638 (2007); Ilias Bantekas, *The Contemporary Law of Superior Responsibility* 93 AJIL 573 (1999).

convicted as superior because he knew and approved forced labor, and failed to prevent the acts of his subordinates.[91]

But it is controversial to what types of civilian superior-subordinate relationships the concept be applied. In civilian settings, in particular contractual employer-employee relationships, concepts of effective control and disciplinary powers of superiors differ from military settings. Civilian superiors do not necessarily enjoy the same degree of disciplinary power over their subordinates as military superiors. It is controversial to what extent analogies can be drawn. Mere positions of influence within corporate structures would not suffice to meet the effective control test. An ICTY Chamber argued that it suffices that

> the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.[92]

The ICTR applied a relaxed threshold in the *Musema* case.[93] The case concerned the responsibility of Alfred Musema, the director of a tea company for the participation of his employees in the Rwandan genocide. The employees used *inter alia* factory vehicles and property in the commission of crimes The tribunal derived Musema's effective control from his power to appoint and remove employees. It argued that he violated his supervisory duties and failed to take reasonable measures to prevent the crimes. This approach has been criticized for blurring the distinction between psychological pressure, influence and effective control. The reasoning implied that company managers may face responsibility for mere managerial failures. The crucial point is the knowledge of the crimes and the failure to report them. As Alexander Zahar has argued:

> [The reasoning] does not distinguish Musema from any ordinary factor director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the sole reason that they were only linked to them through commonplace ties of labour.[94]

Companies active in conflict must put in place proper management structures to ensure that superior exercise due diligence duties and take necessary and reasonable measures to prevent crimes by subordinates. Superior responsibility may, for instance, be invoked, if a business leader fails to prevent his employees from selling weapons to states or armed groups that are known for their involvement in international crimes.[95] But the doctrine should be applied with a certain degree caution in business contexts, in order to avoid risks of undue over-criminalization.

Art. 28 (b) of the ICC Statute requires the crimes must concern 'activities that were within the effective responsibility and control of the superior'. This implies that crimes of employees

[91] *Trial of Friedrich Flick et al*., Vol IX, Law Reports, p. 54. See also ICTY, *Prosecutor. V. Delalić et al*., IT-96-21-T, Judgment, 16 November 1998, para. 360 ('it "seems clear" that the tribunal's finding of guilt was based on an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent"').
[92] See *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 15 June 1999, para. 78.
[93] ICTR, *Prosecutor v. Musema*, ICTR-96-13-T,Judgment, 16 November 2001, paras. 889-926 and 942-951.
[94] Alexander Zahar, *Command responsibility of civilian superiors for genocide* 14 LJIL, 591, 602 (2001).
[95] See Vest, *supra* note 59, 871.

that are not connected to their business functions. i.e. crimes committed outside working hours or company structures, might not be covered.[96]

C. Critiques

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

One critique is that the path of individual criminal responsibility focuses the blameworthiness of corporate crime too much on company individuals. It struggles to take into account the collective dynamics of corporate crime.[97] Corporate wrongdoing exceeds the wrongdoing of its individuals. There is a risk that extending individual criminal responsibility to all different types of human rights violations by corporate actors places excessive culpability on individuals for collective harm. Exclusive punishment of individual business leaders might produce judgments that exceed the share and guilt of individuals.[98] Violations of individual business agents are often linked to corporate policies. Some of them might not have occurred, had the individuals not been placed into a specific context by the company. The possibility to correct this through contextual sentencing considerations are limited. The liberal approach encounters thus certain limits from a due process perspective.

Second, criminal responsibility of individuals is often unsatisfactory from a victim's perspective. Individual criminal convictions can be used for purposes of civil claims. But they often only address a fraction of the facts and causes of liability. The option to obtain reparations through criminal proceedings is still limited at the international level. This creates critical frictions. Individuals may bear symbolic responsibility, while corporations are allowed to retain the profits gained from corporate activities.[99]

IV. MERITS AND RISKS OF CORPORATE CRIMINAL RESPONSIBILITY

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

1. The case for corporate criminal responsibility

The idea of holding companies accountable as collective entities serves a certain corrective from a retributive perspective. It is also attractive from a restorative justice perspective.

[96] See Otto Triffterer and Roberta Arnold, Article 28, in Otto Triffterer and Kai Ambos, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (C.H. Beck/Hart/Nomos, 2016), 1102.
[97] See generally Brent Fisse and John Braithwate, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Acccountability* 11 Sidney LR 468 (1988).
[98] See also Van der Wilt, *supra* note 1, 73.
[99] See Michael McGregor, *Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources*, 42 Case Western Reserve Journal of International Law 469, 490 (2009).

Victim participation in criminal proceedings has increased in past decades. This has created high expectations among victim communities. Existing international and hybrid courts struggle to satisfy demands for reparation. Many defendants before international criminal tribunals have found to be indigent.[100] Reparations awarded by the International Criminal Court, the Extraordinary Chambers in Cambodia or the Extraordinary Chambers in the Courts of Senegal have remained largely symbolic. Corporate responsibility may offer a new pathway to award individual or collective reparation that is more commensurate to the harm caused. As Harmen van der Wilt has shown, in many cases 'where business leaders as natural persons have been convicted on charges of complicity in international crimes, the corporation itself would have easily qualified for criminal responsibility as well'.[101]

2. Caveats

But there are important caveats. The merits of the 'romantic approach' should not be overstated. Some of the arguments made in existing discourse in favor of broader recognition of corporate criminal responsibility deserve careful scrutiny.

The first is the deterrence argument. It is often argued that corporate criminal responsibility sheds greater light on corporate misconduct and helps deter offences. This argument is pertinent in relation to natural persons. Business agents are even more likely than other perpetrators of international crimes to consider risks of criminal prosecution in their cost-benefit analysis.[102] But legal persons do not necessarily follow the same behavioral patterns. Deterrence arguments relating to individuals cannot be automatically transposed to legal persons. Corporations are highly sensitive to reputational benefits. Human rights strategies, such as naming and shaming or transparency of violations may have more immediate effects than criminal justice. Criminal justice is typically slow and an *ultima ratio* instrument. Its added value to deterrence may more limited to assumed. The expressivist effect may be more important.

Second, in many situations, corporations are not among those masterminding international crimes. They rather benefit from a given situation. Corporate criminal responsibility is thus likely to remain exceptional in international criminal justice. The STL contempt decision does not go as far as some business and human rights advocates might have hoped. It concerned responsibility for contempt of court, rather than for core crimes under the jurisdiction of the tribunal. It was visibly driven by the hybrid nature of the tribunal. The choice in favor of corporate criminal responsibility was influenced by the fact that legal persons can be held criminally accountable under Article 210 (2) of the Lebanese Criminal Code. The Malabo Protocol approaches corporate misbehavior as a regional problem. It is questionable whether a regional approach does justice to the global nature of corporate involvement in international crime. The extended scope of corporate criminal responsibility is contrasted by sweeping immunity concessions to senior state officials based on their functions during their term of

[100] On the ICC approach, see Carsten Stahn, *Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?* 13 J. Int'l Crim. Just. 801 (2015).
[101] Van der Wilt, *supra* note 1, 72.
[102] Harmen van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 7 J. Int'l Crim. Just. 557, 567 (2009) ('While the average perpetrator of international crimes, whether imbued with ideological fervor or forced by the circumstances to participate in crimes, will perhaps be uninfluenced by the possibility of trial and punishment, the calculating businessman will probably incorporate the prospect of criminal prosecution into his cost-benefit analysis').

office.[103] This may hamper the prosecution of cases in which governments are involved in corporate crime.

Third, detaching corporate criminal responsibility too much from individual criminal responsibility has downsides. As rightly pointed out in scholarship, '[p]utting the blame exclusively on the corporation entails the risk that at the end of the day no one is guilty but the abstract entity'.[104] It is thus important to find the synergies and connections between individual and collective responsibility.[105] The turn to a fully autonomous organizational model facilitates proof. It enables judges to infer corporate *mens rea* from the collective knowledge of the members of the company or corporate policies. It recognizes that the blameworthiness of the company may differ from that of individual agents. It might fill accountability gaps in cases where no individual cannot or should not he held responsible for the harm caused. But it stands in contrast to the individual-centred investigative and trial culture of international criminal courts and tribunals. The attribution model is still more common in many domestic jurisdictions that recognize corporate criminal responsibility. For efficiency and expressivist purposes, it might thus be more feasible to pursue corporate criminal responsibility in conjunction with individual criminal responsibility.

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

IV. Concluding Reflections

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

---

[103] Art. 46A bis of The Malabo Protocol reads:

> No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

[104] Van der Wilt, *supra* note 1, 74.

[105] Van der Wilt argues that 'complicity in international crimes of individual business leaders should […] be a prerequisite for corporate criminal liability'. See Van der Wilt, *supra* note 1, 77.

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

The idea of corporate criminal responsibility should not be 'romanticized'. The benefits of criminal responsibility over civil liability or human rights accountability are not always fully clear. It is certainly too early to claim that corporate criminal responsibility is a general principle of law. The ILC has been visibly more cautious in its draft articles on crimes against humanity. It recognizes the responsibility of legal persons, but leaves states the option to choose between criminal, civil or administrative responsibility.[106]

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

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

The role of the ICC will remain limited. The effect of the 2016 Policy Paper should not be overstated. It is unlikely that there will be a broad range of new cases regarding corporate involvement in crime. But the transparency and stigma of communications may have a certain alert effect, with reputational costs for companies.[107] It might have an indirect effect on compliance strategies, not necessarily through trials, but through the shadow of potential cases and the advocacy of civil society organizations.

[106] See above note 14.
[107] On the role and functions of ICC preliminary examinations, see Carsten Stahn, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 J. Int'l Crim. Just 413 (2017).