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The Complicity of Multinational Corporations in International Crimes : an Examination of Principles

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THE COMPLICITY OF MULTINATIONAL CORPORATIONS IN INTERNATIONAL CRIMES: AN EXAMINATION OF PRINCIPLES

A thesis submitted in fulfilment of the requirements for
the degree of Doctor of Philosophy (PhD)

Presented by

JESSIE CHELLA

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2012

CERTIFICATE

This thesis is submitted to Bond University in fulfilment of the requirements for the Doctor of Philosophy degree.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

…….

Jessie Chella

Bond University

For my family

ACKNOWLEDGEMENTS

I thank the Faculty of Law for a generous Dean's Scholarship throughout my Candidature. I am also indebted to the Graduate School of Research for a timely Completion Scholarship.

Many thanks to my thesis Supervisor, Professor Eric Colvin, who was brave enough to embark on yet another research journey with me.

Special thanks are also due to Professors Laurence Boulle, Duncan Bentley, and Eric Colvin for organising the initial funding for this research.

I extend heartfelt thanks to Professors Jim Corkery, John Farrar, the late John Lessing, and Assistant Professor Tina Hunter for entertaining countless 'what if' questions concerning corporate law, mining and natural resources law, and energy law.

Special thanks to Karl Craig and Cameron Lydster for comments on later drafts.

I also acknowledge insightful comments and suggestions from the blind peer reviewers of the *Bond Law Review* with respect to a conference paper that I wrote in 2011 concerning trade and mining activities in Africa. They provided feedback with respect to some of the material which appears in Chapters 1, 2 and 4 of this thesis.

I am indebted to treasured colleagues for pointing me in the right direction on so many occasions during my Candidature. To name a few: Emma, Janet, and Rosa (the must have miracle workers), Ekua, Theodora, Kim, Laura-Leigh, Kay, Jackie, Lindsey, Maria, and Tina. Thanks also for allowing me to share some very crazy ideas over coffee, dinner, drinks, and chocolate.

Thanks are also due to friends, many of whom have become my second family. I thank

all of you for so many, many things. Special mention to the entourage: Priscilla, Chris, and Destine. The Australian *chikwata*: Bella, Sarah, Melinda, Melanie, Shari, Evelyn, Lina, the groove-man, Jamaa. Also, Davinia, Wendy, DJ, and Rebecca. The original Zimbabwean *chikwata*: Farai, Ngoni, Kudzai, Una, Martha, Sid, Charlotte, Tanaka, Vimbayi, Vusa, Enfa, Rumbi, and Muchi. Also, Tinashe, Ga, Felicity, Tondi, and the lovely Bert and Sophia. I am especially grateful to those who provided insightful comments at various stages of this research.

I dedicate this thesis to my family (the Chellas and Chimas). I am moved by your unwavering love, prayers, and support. To name a few: my inspiring Mum, Mainini, Patrick, Saskia, Tendai, Rungano, Monica, Temwani, Tamzee, and Joe. Thank you for sharing this journey with me, indeed, I could not have done this without you.

Most of all, I thank God for keeping this passion alive. *Mwari ngaakudzwe*!

Jessie Chella

Gold Coast, Australia

THESIS SUMMARY

This thesis examines issues relating to the complicity of legal persons in international crimes. Specifically, this thesis addresses multinational corporations (hereafter MNCs) that aid and abet international crimes such as crimes against humanity, war crimes, and genocide. This thesis discusses these issues with reference to MNCs in the extractive industries, that is, oil, gas or mining MNCs, that operate within conflict-affected areas or weak-governance zones in Africa.

Currently, international criminal law does not recognise the complicit liability of corporations or any other legal persons. This is of grave concern at a time when business enterprises are increasingly being accused of complicity in international crimes. Models of corporate liability can be found in most domestic jurisdictions, but international jurisdictions have yet to develop instruments that address the issue. Regrettably, the domestic jurisdictions, where these kinds of crimes occur, have not been known to enforce criminal sanctions on culpable persons – whether natural or legal persons. Therefore, these issues should be addressed in international forums where domestic jurisdictions prove inadequate. There is a need for a doctrine of corporate liability in international criminal law to address this issue. Hence, this thesis recommends that the International Criminal Court (hereafter ICC) is the preferred institution to deal with the problem of complicit organisational liability in international crimes. This thesis further recommends that the *ICC Rome Statute* should be revisited by the ICC State Parties in order to develop an appropriate framework of liability which takes into account the characteristic forms of corporate complicity in international crimes.

Chapter 1 of this thesis provides an overview of the extent of the research problem.

Chapter 2 examines whether there should be criminal liability for business complicity in international crimes. Chapter 3 discusses the rationale for corporate criminal liability with respect to corporate complicity in the commission of international crimes in the ongoing exploitation of natural resources in conflict-affected areas or weak-governance zones in Africa. Chapter 4 investigates the jurisdictional forums to deal with the problem of corporate complicity by investigating *where* a corporate entity complicit in international crimes could be prosecuted. This thesis examines existing international, regional, and domestic forums. Chapter 5 commences the discussion on *how* a corporate entity complicit in international crimes could be prosecuted by examining organisational liability doctrine. Chapter 6 continues this discussion by examining complicity doctrine, focusing on liability for aiding and abetting international crimes. Chapter 7 concludes the discussion on *how* to deal with corporate complicity in international crimes; Chapter 7 proposes draft legislation to address the research problem at an international forum such as the ICC. Chapter 8 provides the thesis conclusion.

Thesis keywords: organisational complicity, organisational liability, multinational corporations, legal persons, international crimes, international criminal law, criminal law, human rights law, tort law, extractive industries, conflict-affected areas, weak-governance zones, Africa.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACrtHPR	African Court on Human and Peoples' Rights
APEC	Asian Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATS	Alien Tort Statute
AU	African Union
CCL 10	Control Council Law No. 10
CoE	Council of Europe
Draft Codes	Draft Code of Offences against the Peace and Security of Mankind
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
ECCC Agreement	The Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
EITI	Extractive Industries Transparency Initiative
ECHR	European Court of Human Rights
EU	European Union
GAAT	General Agreement on Tariffs and Trade
Guidelines	OECD Guidelines for Multinational Enterprises
HRIA	Human Rights Impact Assessment
HRW	Human Rights Watch
ICC	International Criminal Court

ICC Rome Statute	Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Italy, 15 June–17 July 1998
IACHR	Inter-American Court of Human Rights
ICJ	International Commission of Jurists
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute for the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Republic of Yugoslavia
ICTY Statute	Statute for the International Criminal Tribunal for the former Yugoslavia
IHT	Iraq High Tribunal (officially known as the Supreme Iraqi Criminal Tribunal)
IHT Statute	Law of the Supreme Iraqi Criminal Tribunal
ILC	International Law Commission
IMT	International Military Tribunal
IMT Charter	Charter for the International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IMTFE Charter	Charter for the International Military Tribunal for the Far East
MCCOC	Model Criminal Code Officers' Committee
Model Penal Code	American Law Institute Proposed Official Draft of the Model Penal Code
MNCs	Multinational corporations
Norms	United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights
NCP	National Contact Point
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
Panels of Judges	Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor

Regulation No. 2000/15	Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor
Rome Conference	Conference of Plenipotentiaries held in Rome from 15 June to 17 July 1998
SCSL	Sierra Leone Special Court
SCSL Statute	Statute of the Special Court for Sierra Leone
UNCTAD	United Nations Conference on Trade and Development
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNDP	United Nations Development Programme
UN	United Nations
UNHRC	United Nations Human Rights Council
UNSRSG	United Nations Special Representative of the Secretary-General on the Issue of Human Rights in Transnational Corporations and other Business Enterprises
UNTAET	United Nations Transitional Administration for East Timor
US	United States
Voluntary Principles	Voluntary Principles on Security and Human Rights
WTO	World Trade Organisation

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Dutch Penal Code

Finnish Penal Code

French Penal Code

Indonesian Penal Code

Securities Amendment Act 1988 (NZ)

Swiss Penal Code

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STYLISTIC GUIDELINES

The following stylistic guidelines have been used in writing this thesis:

- The referencing style of the Australian Guide to Legal Citation (3rd edition) has been adopted.
- Australian English Language spellings have been used unless the primary or secondary sources relied upon other spellings. For example: offence not offense; organisation not organization; and conceptualise not conceptualize.
- The word 'Judgment' is deliberately capitalised in this thesis to comply with the way in which the *ad hoc* Tribunals use the word.
- Different spellings are used for the word 'Judgment' to reflect the practices of the institutions under discussion. In the *majority* of instances:
    - The ICTY uses 'Judgment';
    - The ICTR uses 'Judgement';
    - The ICC and the Panels of Judges use both spellings.
- The phrase 'international institutions' is used to collectively describe judicial bodies such as: Panels of Judges, Extraordinary Chambers, Special Courts, and Special Tribunals. Granted, the Iraq High Tribunal and the Sierra Leone Special Court are hybrid institutions in that they largely blend international and domestic criminal law in their legal instruments; however, for ease of reference, the collective phrase 'international institutions' will be applied throughout this thesis.
- The term 'international legal instruments' is used when referring to the legal documents pertaining to international institutions. The *ICC Rome Statute* is an international treaty; however, it is described as an international legal instrument for ease of reference when collectively discussing all the documents pertaining to the international institutions.

CHAPTER 1

Thesis Introduction

'War, in general, is a money making business.'[1]

1.1 The scope of this thesis

Complaints about the complicity of multinational businesses in human rights violations have increased significantly in the last sixty years.[2] Complicit perpetration in international crimes by multinational businesses is alleged to have included the provision of finance, infrastructure, materials, and logistical support.[3]

Some complaints have concerned individual business people.[4] For example, the Dutch business executive Guus Kouwenhoven of the Oriental Timber Corporation was prosecuted in the Netherlands for his role in facilitating war crimes committed during the Liberian civil war of 1999–2003.[5] At the time, Guus Kouwenhoven was the part owner

[1] Florin Jessberger and Julia Geneuss, 'Introduction' (2010) 8(3) *Journal of International Criminal Justice* 695, 695.

[2] International Commission of Jurists, *Corporate Complicity in International Crimes* (2008) volume 1, 1 <http://www.icj.org>. International Commission of Jurists hereafter referred to as ICJ. With respect to reports alleging the involvement of multinational businesses in human rights violations, this thesis relies upon empirical research sourced from multi-stakeholders in the international community, for example, the ICJ, the United Nations, Maplecroft, Global Witness, Amnesty International, and Human Rights Watch.

[3] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19 <http://www.icj.org>.

[4] See, jurisprudence from Military Tribunals established in the aftermath of the World War II. These historic cases lay the foundations for corporate criminal liability whereby corporate executives were held liable for facilitating crimes by the Nazi Regime; for example, Trial of Bruno Tesch and Two Others ('The Zyklon B Case') 1–8 March 1946, *Law Reports of War Criminals*, Vol I.

[5] In 2006, Guus Kouwenhoven was sentenced to eight years by the Dutch District Court. The sentence was overturned in 2008 by the Appeal Court. The appeal was quashed by the Supreme Court in 2010 and the matter sent back for retrial. For detailed analysis of the case see, Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8(3) *Journal of International Criminal Justice* 803, 810–815.

and president of the Oriental Timber Corporation, which had been granted over one and half million hectares of timber logging concessions by the then President of Liberia, Charles Taylor. Guus Kouwenhoven, working through his company the Oriental Timber Corporation, traded with the Liberian government knowing that they relied upon the substantial revenue from the timber industry to illegally procure weapons in violation of a United Nations arms embargo and that such weapons were used to perpetrate war crimes.[6]

A natural person could be prosecuted for the commission of international crimes in either domestic or international jurisdictions. There is, however, a major barrier to the prosecution of the corporate entities through which individual business people commonly operate. International criminal law does not currently recognise the liability of multinational corporations or that of any other legal persons. Corporate liability is now recognised in most domestic jurisdictions.[7] However, it has no international recognition. This omission in international criminal law has become of increasing concern. It has prompted calls in the international community for corporate accountability as a response to what has been described as 'some of the most egregious

[6] See, Global Witness Report, *Bankrolling Brutality* (2010), 6 <http://www.globalwitness.org>. To date, it appears that Dutch corporate entities have not been prosecuted in criminal cases concerning grave breaches of extraterritorial international law, for commentary on this, see generally Nicola M C P Jägers and Marie-José van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands (2008) 33 *Brooklyn Journal of International Law* 832, 862–866. Interestingly, Article 51 of the *Dutch Criminal Code* provides for the prosecution of legal persons with respect to the commission of criminal offences. For discussion on this, see generally, ICJ, *Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands* (2010), 6–15 <http://www.icj.org>.

[7] See generally, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

corporate conduct across the world.'[8]

This thesis examines whether, and how, international criminal law should recognise corporate liability. Its focus is on multinational corporations operating in the extractive industries in 'conflict-affected areas' or 'weak-governance zones'[9] in Africa. These corporations are usually involved in oil, gas, or mining operations.

This thesis also examines how rules of secondary liability may need to be adapted to reflect the characteristic modes of business complicity in international crimes. There are issues respecting the scope of secondary liability that arise in connection with the potential liability of individual business people as well as corporate entities. However, resolving these issues is crucial for any program of criminalising corporate conduct to be effective.

The writer's interest in this research lies primarily with the liability of those legal persons who are complicit with the principal offender. Therefore, this thesis will not focus on the liability of the principal offender, regardless of whether that principal offender is a legal person or not. For example, Blackwater was a security agency contracted to provide security services to American diplomatic nationals in Iraq. In the past, Iraqi civilians have been killed in the crossfire when Blackwater, and other security agencies, have used what has often been criticised as 'disproportionate force' to protect the people that they were guarding. Although the potential criminal culpability of private security agencies presents serious matters of international concern,[10] it is not the

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[8] ICJ, *Corporate Complicity in International Crimes* (2008) volume 1, 1 <http://www.icj.org>.

[9] The terms 'conflict-affected areas' or 'weak-governance zones' are explained later at 1.2.3.

[10] *See, The Montreux Document on Private Military and Security Companies.* The Montreux Document stipulates recommendations for State responsibility to exercise control over private military and

focus of this research. This research is primarily concerned with investigating complicit criminal responsibility of any multinational businesses that actually hire such security agencies.

In summary, this thesis investigates: (i) the need for a doctrine of corporate liability in international criminal law, as a response to misconduct by multinational corporations in Africa; (ii) the jurisdictional forums that would be appropriate to the prosecution of multinational corporations for conduct occurring in Africa; (iii) the forms of corporate liability that may be suitable, particularly with respect to the operations of multinational corporations; and (iv) the amendments that may be needed to the law of complicity for international crimes in order to accommodate the characteristic forms of corporate involvement.

The writer largely adopts *descriptive* and *analytical* methods to provide the reader with an overview of debates about whether there should be criminal liability for business complicity in international crimes, the rationale for corporate criminal liability, jurisdictional forums, and doctrines of organisational liability and complicity. Furthermore, the method of research applied throughout this thesis includes interpretation of international treaty obligations in accordance with the Vienna convention on the law of treaties.

To contribute to this emerging area of law, the writer also assesses what the law currently is. With respect to this, the writer goes on to identify what the law should be. The thesis concludes with draft amendments to the Rome Statute of the International

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security companies to ensure that they adhere to International Humanitarian Law. <http://www.icrc.org >.

Criminal Court.[11]

1.1.1 Overview of the current situation concerning the complicity of multinational businesses in international crimes in Africa

On the whole, multinational corporations play both positive and negative roles in the development of society. Mary Robinson, former United Nations Commissioner for Human Rights, observes:

> … impacts on human rights do not only occur from a state perspective. The role of non-state actors such as multinational enterprises has increasingly been acknowledged. The footprint of a multinational company on society can be enormous, both in a positive and in a negative sense.[12]

On the one hand, multinational corporations positively contribute to the economic and social advancement of the jurisdictions within which they operate. For instance, these corporations wield substantial economic power to the extent that some of them possess greater wealth than the countries where they are located. Often, it is these corporations that are in a better position to provide basic public services, which are ordinarily made available by governments.[13] In Sierra Leone, for example, MNCs provide much needed employment prospects, training and education of corporate personnel, as well as

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[11] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Italy, 15 June–17 July 1998, known as the Rome Statute, (hereafter referred to as *ICC Rome Statute*).

[12] Mary Robinson, 'Foreword' in Dr. Olga Lenzen and Dr. Marina d'Engelbronner (authors), *Human Rights in Business: Guide to Corporations Human Rights Impact Assessment Tools* (January 2009) <http://www.aimforhumanrights.org>.

[13] Interview: Claire Mallinson, Director, Amnesty International Australia in Agnes King, 'Put People First' (August 20–26, 2009) *Business Review Weekly*, 46. In a number of countries, private corporations are responsible for the provision of basic public services such as the provisions of water, telephone, electricity and household gas. Michael K Addo, 'Human Rights and Transnational Corporations – An Introduction' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 7.

development of the communities where they operate.[14]

Yet, in spite of such positive contributions, it is also sometimes alleged that multinationals have negatively impacted societies within which they operate through human rights abuses. MNCs have been accused of illegally possessing land coupled with inadequate compensation to the rightful land owners, forcibly transferring civilian populations, destroying ritual or cultural sites without conferring with the local communities, and violating basic labour rights.[15] Some of these human rights violations may have even amounted to crimes against humanity.[16]

For example, the Canadian multinational oil corporation Talisman Energy faced legal action from the local community while extracting oil in Sudan. A class action lawsuit was lodged in the United States District Court pursuant to the *Alien Tort Statute*.[17] The plaintiffs alleged that Talisman facilitated crimes against humanity in Sudan around 1998. These crimes were alleged to have been carried out by the Sudanese Government at the time Talisman were building supporting infrastructure, such as roads and airports, leading up to their extraction site.[18]

Armed conflicts in largely destabilised African countries have been fuelled by a number

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[14] For example, see generally, Adusei Jumah, *Sierra Leone: As Seen Through International Economic and Social Indicators* (2009) UNDP, 17 <http://www.sl.undp.org/1_doc/indicators_sl.pdf>.

[15] United Nations Conference on Trade and Development, *World Investment Report (2007): Transnational Corporations, Extractive Industries and Development*, 152 <http://www.unctad.org>.

[16] United Nations Conference on Trade and Development, *World Investment Report (2007): Transnational Corporations, Extractive Industries and Development*, 152 <http://www.unctad.org>.

[17] See, *Presbyterian Church of Sudan v Talisman Energy Inc.*, (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009; the *Alien Tort Statute* is codified at 28 U.S.C. Section 1350.

[18] See, *Presbyterian Church of Sudan v Talisman Energy Inc.*, (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009; this action was brought pursuant to the United States *Alien Tort Statute*, but the claim was rejected by the District Court which found Talisman lacked the requisite *mens rea*.

of factors, one of which is the struggle to control natural resources.[19] Much of the African continent boasts vast deposits of natural resources.[20] The presence of these natural resources has led to a significant number of African countries becoming the 'new frontier for the extractives sector.'[21] The extractive industry is dominated by oil, gas or mining corporations, be they publicly or privately owned corporations. These multinational extractive corporations largely operate in conflict-affected areas characterised by unstable local environments where governance and the rule of law is weak or non-existent,[22] or the governments face difficulty enforcing internationally recognised human rights.[23] Granted, natural resources are not the only source of conflict in the African continent; however, the exploitation of these resources has contributed disproportionately to the on-going conflicts in the region. A World Bank report, which assessed the correlation between natural resources and violent conflict, indicated that the struggle to control natural resources at times sparks or prolongs conflict. Specifically, the World Bank report found:

> Natural resources are never the sole source of conflict, and they do not make

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[19] See generally, Jonathan M Winer and Trifin J Roule, 'Follow the Money: The Finance of Illicit Resource Extraction' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 161–215 <www.worldbank.org>; see also, Michael L Ross, 'What Do We Know about Natural Resources and Civil War?'(2004) 41(3) *Journal of Peace Research* 337, 337–356.

[20] For example, oil, diamonds, tantalum, uranium, manganese, iron ores, coffee, timber, coal, rubber, bauxite, and gold. See generally, Jonathan M Winer and Trifin J Roule, 'Follow the Money: The Finance of Illicit Resource Extraction' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 164 <www.worldbank.org>; also, Extractive Industries Transparency Initiative website for details on the resources found in most EITI countries, <www.eiti.org>.

[21] Alyson Warhurst, 'Insight: Human Rights are a Business Issue' (14 December 2007) *Businessweek* <http://www.businessweek.com>.

[22] Alyson Warhurst, 'Insight: Human Rights are a Business Issue' (14 December 2007) *Businessweek* <http://www.businessweek.com>; see also, World Bank governance data available at <http://www.worldbank.org/wbi/governance/govdata/>.

[23] Maplecroft, Media Release, 'Human Rights Risk Extreme throughout much of Asia and Africa', 3 <http://www.maplecroft.net/HR09_Report_Press_release.pdf>.

> conflict inevitable. But the presence of abundant primary commodities, especially in low-income countries, exacerbates the risks of conflict and, if conflict does break out, tends to prolong it and makes it harder to resolve.[24]

Reports alleging the involvement of multinational corporations in egregious human rights violations have increased to such an alarming extent that the international community has responded with a number of initiatives. For example, in July 2005 the United Nations Secretary General appointed a Special Representative to investigate the responsibility and accountability of corporations in such violations.[25] The 2006 interim report from the United Nations Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises[26] found that two-thirds of the allegations about corporate human rights abuses related to extraction corporations that were complicit in crimes against humanity. [27]

The extent of the problem may be indicated by the protective measures that have been devised by international civil groups and 'global risks intelligence consultancies'.[28] This has included initiatives spearheaded by International Alert,[29] the Danish Institute for

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[24] World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), ix <www.worldbank.org>.

[25] See, UN Media Release, 'United Nations Secretary-General Appoints John Ruggie of the United States John Ruggie Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (28 July 2005), SG/A/934, <http://www.un.org>. See also official mandate, Commission on Human Rights, *Protection of Human Rights* (15 April 2005) UN Doc: E/CN.4/2005/L.87.

[26] Hereafter referred to as UNSRSG.

[27] UNSRSG Interim Report, Promotion and Protection of Human Rights (22 February 2006) UN Doc: E/CN.4/2006/97. The UNSRSG's Final Report was released in 2011, see UNSRSG Final Report, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc: A/HRC/17/31.

[28] Maplecroft is an example of a global risks intelligence consultancy which advises businesses on political, economic, social and environmental risks affecting their global business practices.

[29] International Alert, *Conflict-Sensitive Business Practice: Guidance for Extractive Industries* (March 2005) <http://www.international-alert.org/pdf/conflict_sensitive_business_practice_section_1.pdf>.

Human Rights,[30] Rights & Democracy,[31] and Maplecroft.[32] Tools for 'Human Rights Impact Assessment'[33] have been developed to align business activities with emerging principles of good governance. These HRIAs assess the business activities of multinational corporations operating in conflict-affected areas or weak-governance zones where the corporations are likely to be complicit in human rights violations. HRIAs typically assess the difference between the obligations made by a State regarding the protection of human rights with the reality of how such rights are actually respected in practice.[34] In doing so, HRIAs identify those rights that are not protected by a State. This is significant because States bear the primary responsibility to respect and protect human rights pursuant to international law. Hence, HRIAs differ from other types of impact assessments in that they stem from a State's international obligations to protect human rights.[35] Despite the value of the HRIAs, ultimately (as the discussion shows throughout this thesis), enforceable models of liability are preferred, and should continue to be pursued.

With respect to HRIAs, Maplecroft has compiled a comprehensive list of 'risk

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[30] Danish Institute for Human Rights, *Human Rights Compliance Assessment Tool* <http://www.humanrightsbusiness.org/?f=compliance_assessment>.

[31] Rights & Democracy, *Getting it Right: A Step by Step Guide to Assess the Impact of Foreign Investments on Human Rights* (November 2008) <http://www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf>.

[32] Maplecroft, *Human Rights Risk Tools* (2009) <www.maplecrfot.com>.

[33] Hereafter referred to as HRIAs.

[34] Rights & Democracy, *Getting it Right: A Step by Step Guide to Assess the Impact of Foreign Investments on Human Rights* (November 2008), 2 <http://www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf>.

[35] Rights & Democracy, *Getting it Right: A Step by Step Guide to Assess the Impact of Foreign Investments on Human Rights* (November 2008), 2 <http://www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf>.

indicators',[36] summarised below in Table 1. It has suggested that, depending on the presence of such risk indicators, if grave human rights violations occur in countries where a corporation is engaged in business activities with State or non-state actors, then the corporation could very well find itself complicit in those crimes.

Table 1 – Risk indicators applied in the HRIAs

Risk Indicators	Prime examples of factors to consider when conducting the Human Rights Impact Assessment
Human Security Risks	Is there: extrajudicial or unlawful killings, disappearances, kidnappings, torture, internal displacement & refugees, child soldiers, security forces & human rights violations?
Labour Rights and Protection Risks	Is there: child labour, forced or involuntary labour, trafficking, absence of freedom of association & collective bargaining, discrimination, poor standards of working conditions?
Civil and Political Rights Risks	Is there: arbitrary arrest & detention, absence of freedom of conscience, expression and religion, absence of freedom of speech & press, evidence of human rights defenders, female rights, indigenous peoples & minority rights?
Risks Associated with Access to Remedies	Is there: business integrity & corruption, judicial independence, judicial effectiveness, judicial monitoring and reporting environment?

(Source: compiled from Maplecroft <http://www.maplecroft.com>)

Using these HRIA risk indicators, the global risk intelligence consultancy considers that many African countries, as shown in Appendix 1, pose *extreme risks* and *high risks* for corporate complicity in human rights violations. From 2011 to 2012, there were at least

[36] For an in-depth analysis on the various HRIA tools available where the authors provide a useful comparison of the various risk indicators applied by International Alert, the Danish Institute for Human Rights, Rights & Democracy, and Maplecroft, see generally, Dr. Olga Lenzen and Dr. Marina d'Engelbronner (authors), *Human Rights in Business: Guide to Corporations Human Rights Impact Assessment Tools* (January 2009) Aim for Human Rights, 33 <http://www.aimforhumanrights.org/>.

29 countries worldwide considered *extreme risks* for the occurrence of grave human rights violations. Of those, 12 extreme risk countries were in Africa and included, *inter alia*: Democratic Republic of Congo, Sudan, South Sudan, Somalia, and Central African Republic. At least 58 countries worldwide posed *high risks* – those in Africa included 27 countries, *inter alia*: Sierra Leone, Liberia, Burundi, Kenya, Niger, and Algeria.

The most common natural resources which originate from Africa's extreme-risk and high-risk countries are oil, gold, diamonds, iron ore and copper, the relevant countries being Chad, Central Republic of Africa, Democratic Republic of Congo, Nigeria, Sudan, Burkina Faso, Cameroon, Côte D'Ivoire, Ghana, Guinea, Libya, Liberia, and Niger.[37] See Appendices 2 and 3 for a full list.

Africa's natural resources generate billions of dollars for the extractive industry.[38] These resources provide the much needed raw materials that are used for the sustainable development of the global economy.[39] For example, energy minerals, such as coal, uranium, gas, and oil, are essential for the production of electricity, organic chemicals, and processed fuels. Metallic minerals, such as iron ore, tantalum, titanium, gold, platinum, copper, lead, and magnesium, are used for the production of aerospace robotics, jewellery, and electronics. Non-metallic minerals, such as clay, gypsum, sand, diamonds, and gems, are used for the production of ceramics, filters, and construction materials. Appendix 4 provides a list of these minerals and their uses, and shows just

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[37] This does not assume that there are no natural resources found in non-African continents. For example, there are oil fields throughout parts of the Middle East, Europe, and South America.

[38] For example, see Extractives Industries Transparency Initiative Report, *Overview of EITI Reports* (2010), 3 <http://eiti.org> for an overview of the revenues reported by companies and governments operating in a number of the African Extreme- and High-Risk Countries.

[39] United Nations Conference on Trade and Development, *World Investment Report (2007): Transnational Corporations, Extractive Industries and Development*, 83 <http://www.unctad.org>.

how essential they are for all global economic sectors.

According to research conducted by Maplecroft in 2009, the DRC exhibited the worst record of human rights violations globally.[40] Maplecroft published its *Human Rights Risk Report* in 2009. It applied a set of specific indices to measure the potential risk of complicity for corporations engaged in business in countries that posed human rights risks. Maplecroft ranked the DRC as an Extreme Risk Country. The DRC scored 0.39 (on a scale of 0–10 where 0 represented higher risks and 10 lower risks) during the period of 2007–2008 alone.[41] In ranking the DRC, Maplecroft took into account the risk indicators summarised in Table 1 above.[42]

The DRC, commonly referred to as a 'paradox of plenty',[43] is rich in natural resources. These resources include: diamonds, coltan, copper, cobalt, and gold.[44] The struggle to control these resources has led to egregious human rights violations. For instance, Africa's richest goldfields are located in the north-eastern Ituri District of the DRC, where soldiers and armed rebel groups have been engaged in battle since 1998, the ultimate aim being the control of gold mines and trade routes. The armed struggle for

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[40] Maplecroft, Media Release, 'Human Rights Risk Extreme throughout much of Asia and Africa', 3 <http://www.maplecroft.net/HR09_Report_Press_release.pdf>. The 2010 Human Rights Risks Atlas indicated that DRC was ranked third on the list, while Somalia was second and Afghanistan first. By the end of 2011, DRC was ranked second on the list, while Sudan was first and Somalia third. See, Maplecroft, Media Release, 'Arab spring uprisings, African "land grabs" and the economic downturn causing global increase in human rights violations, reveals Maplecroft Risk Atlas' <http://www.maplecroft.com/about/news/hrra_2012.html>.

[41] Maplecroft, Media Release, 'Human Rights Risk Extreme throughout much of Asia and Africa', 3 <http://www.maplecroft.net/HR09_Report_Press_release.pdf>.

[42] Maplecroft, Media Release, 'Human Rights Risk Extreme throughout much of Asia and Africa', 3 <http://www.maplecroft.net/HR09_Report_Press_release.pdf>.

[43] See, DRC Country Profile on Extractives Industries Transparency Initiative website <http://eiti.org/DRCongo>.

[44] See generally, United Nations Environmental Programme <http://www.unep.org> and World Reach/ Exploring Africa, Agricultural and Mineral Resources: African Countries <http://exploringafrica.matrix.msu.edu>.

control continues to this day.[45] International crimes committed in the Ituri District, such as widespread rape, torture, executions, and arbitrary arrests, were particularly attributed to the unfolding violence surrounding the control of gold resource extraction sites.[46] Multinational extractive corporations operating in the Ituri District were accused of being complicit in international crimes committed by rebel forces during the process of gold mining explorations.[47] For example, South African mining multinational corporation AngloGold Ashanti was one of the first multinational corporations to engage in gold mining activities in the Ituri District. It has been alleged that rebel forces used profits from the sale of gold to AngloGold Ashanti to purchase weapons and fund their criminal activities.[48] The allegation is also made that AngloGold, in the course of its mining activities, provided logistical support to the *Front des Nationalistes et Integrationnistes* (National Integrationist Front) rebels.[49] Some of the alleged FNI rebel leaders are currently standing trial before the ICC.[50]

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[45] Human Rights Watch Report, *The Curse of Gold: Democratic Republic of Congo* (2005), 1 <http://www.hrw.org>.

[46] Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC (8 September 2003), 4 <http://www.icc-cpi.int>.

[47] For example, see generally discussion about mining activities in early 2000 by AngloGold Ashanti in the Ituri District in Brandon Prosansky, 'Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo' (Spring 2007) 5(2) *Northwestern Journal of International Human Rights* 236, 241–242.

[48] See generally, Human Rights Watch Report, *The Curse of Gold: Democratic Republic of Congo* (2005) <http://www.hrw.org>.

[49] For details see, Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8(3) *Journal of International Criminal Justice* 803, 818. *Front des Nationalistes et Integrationnistes* (National Integrationist Front) hereafter referred to as FNI. Huisman and Sliedregt point out that prior to the rebel movement in the Ituri district, AngloGold had legitimately obtained mining concessions from a Congolese State-owned mining corporation.

[50] See for example, trial of Mathieu Ngudjolo Chui, who is allegedly a former FNI leader, he is charged with war crimes and crimes against humanity for crimes perpetrated in the Ituri District, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/07, 30 September 2008).

1.1.2 Challenges posed by the current situation

There are a number of regulatory initiatives that address the activities of multinational corporations in general – for example, the Organisation for Economic Co-operation and Development's *Guidelines for Multinational Enterprises*, which is discussed further in Chapter 2. There are also numerous regulatory initiatives dealing with the extraction and trade of natural resources by MNCs operating in conflict-affected areas or weak-governance zones (for example, the *Voluntary Principles on Security and Human Rights*). The greatest difficulty with most of these regulatory initiatives is that they are commonly described as 'soft law'; they do not create binding legal obligations.[51]

Although there are several established international institutions with the jurisdiction to prosecute complicit perpetrators of international crimes, none of these institutions address organisational liability. The International Criminal Court[52] is a prime example of such an international legal institution. The ICC is the first permanent international criminal court. The Court came into existence in 2002 as an independent international institution with the primary objective to 'end impunity for the perpetrators of the most serious crimes of concern to the international community.'[53] There are also other *ad hoc* international institutions whose jurisdiction it is to prosecute complicit perpetrators of international crimes. In Africa,[54] for instance, these include the International Criminal

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[51] Patrick Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7 *International Law Forum du droit international* 281, 283.

[52] International Criminal Court (hereafter referred to as ICC) <www.icc-cpi.int>.

[53] ICC, 'About the Court' <www.icc-cpi.int>.

[54] Outside Africa, there are other *ad hoc* international institutions established with the jurisdiction to prosecute complicit perpetrators of international crimes. Refer to: the International Criminal Tribunal for the former Yugoslavia (hereafter referred to as ICTY) <www.icty.org>; the Iraqi High Tribunal (hereafter referred to as IHT), (formerly Iraqi Special Tribunal for the Prosecution of Crimes against Humanity), see, Iraqi Ministry of Foreign Affairs for updates on legal proceedings <http://www.mofa.gov.iq>; the Extraordinary Chambers in the Courts of Cambodia for the

Tribunal for Rwanda[55] and the Sierra Leone Special Court.[56]

The drawback with these international institutions is that they only exercise jurisdiction over 'natural persons'. None of the institutions are currently empowered with the jurisdiction to prosecute 'legal persons'.[57] As a result of this limitation, although complicit individuals within an organisation may be prosecuted (being natural persons), in most circumstances, the organisation itself (being a legal person) may continue to legally operate elsewhere while perpetrating further international crimes.[58]

1.1.3 Research limitations

There are a number of research limitations.

For instance, the manner in which corporate complicity in the commission of international crimes may be tackled varies. There are a range of approaches, which may

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Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereafter referred to as ECCC) <www.eccc.gov.kh>; and, the Special Tribunal for Lebanon (hereafter referred to as STL <www.stl-tsl.org>.

[55] International Criminal Tribunal for Rwanda (hereafter referred to as ICTR) <www.ictr.org>.

[56] Special Court for Sierra Leone (hereafter referred to as SCSL) <www.sc-sl.org>.

[57] See individual criminal responsibility provisions established by international instruments and treaties from international institutions: Article 25 of the *ICC Rome Statute*; Article 6, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States* (hereafter referred to as *ICTR Statute*); Article 6, *Statute of the Sierra Leone Special Court* (hereafter referred to as *SCSL Statute*). This also is true of *ad hoc* institutions outside Africa: refer to Article 7, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (hereafter referred to as *ICTY Statute*); Article 15, *Law of the Supreme Iraqi Criminal Tribunal* (hereafter referred to as *IHT Statute*). The *IHT Statute* was translated by the Centre for Transitional Justice; Article 29 new of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (hereafter referred to as *ECCC Law*). The *ECCC Law* was translated by the Council of Jurists and the Secretariat of the Task Force.

[58] See generally, Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 96.

be adopted to address the research problem.

One approach is criminal liability. This thesis focuses on the criminal characteristic of corporate involvement in crime; hence the notion of corporate criminal liability is discussed at length.

Another approach is civil liability. This approach is briefly examined in the discussion relating to matters brought before United States District Courts where victims have invoked the *Alien Tort Statute*[59] in civil actions against multinational corporations accused of aiding and abetting torts in violation of customary international law.[60]

Administrative penalties provide another approach. These are briefly discussed, though they tend to be imposed in domestic jurisdictions that have not adopted the traditional models of corporate criminal liability.[61]

Yet another approach is seen through regulatory initiatives.[62] These initiatives are the result of lengthy discussions on a multilateral basis with respect to the issue of regulating the business activities of multinational corporations. They have increased in popularity, particularly among companies and sectors that are either sensitive about their brand or highly visible in the market.[63]

Finally, corporate education is another approach to deal with the research problem.

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[59] United States *Alien Tort Statute*, 28 U.S.C. Section 1350.

[60] See discussion on tort principles and US tort legislation at 4.2.1 of this thesis.

[61] See discussion on this issue at 3.2.1 and 5.2.2 of this thesis.

[62] See discussion at 2.3 of this thesis on regulating the business activities of multinational corporations generally as well as discussion on specific regulation of the business activities of multinational corporations operating within the extractive industries.

[63] John G Ruggie, UNSRSG, 'Next Steps in Business and Human Rights' (Speech delivered at the Royal Institute of International Affairs, Chatham House, London, 22 May 2008).

Corporate education is driven by a number of sectors. For instance, governments are in a position to create and adopt public education initiatives that address the problem of corporate complicity in international crimes.[64] Also, the private sector not only learns valuable economic lessons through the market, but it also gains insight from the deterrent effect of imposing criminal sanctions with respect to pernicious corporate conduct.[65] The non-governmental sector is also involved in corporate education. This sector has engaged in numerous research activities aimed at providing innovative solutions to such social problems.[66]

Regarding all these varied approaches, this thesis identifies their shortcomings insofar as they justify the need for the recommendations made here. The focus of this thesis is corporate criminal liability. This is not to say that this thesis rejects any of the alternative approaches; the views expressed here may even be complimentary. However, it is beyond the scope of this thesis to explain how to strike to a balance between the use of criminal prosecutions and the alternative approaches which may be invoked either by socio-political actors or by prosecutors. Furthermore, the notion of holding a corporate entity criminally responsible for international crimes should be resorted to as an available option when dealing with egregious cases rather than applied indiscriminately in all cases.

Another limitation with this research is that it does not investigate the practical realities, such as political, financial, and procedural considerations, which would need to be taken

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[64] See for example, Australian Human Rights Commission, 'Making a Difference on Human Rights in Business' <www.hreoc.gov.au>.

[65] See discussion on general deterrence at 3.2.1 of this thesis.

[66] See for example the various documents referred to in this thesis by Human Rights Watch and Amnesty International.

into account when attempting to hold multinational corporations accountable for egregious human rights violations. With respect to this, the issue of corporate liability in the sphere of international criminal law is worth revisiting because as the discussion in this thesis shows the doctrine of corporate criminal liability is now widely recognised in most domestic jurisdictions.[67] Indeed, there would be numerous steps involved to bring about the ideas discussed here. It is beyond the scope of this thesis to provide a detailed examination on the complex workings of both domestic and international institutions and the manner in which they would implement legislative change.[68]

Yet another limitation with this research is that it is beyond the scope of this thesis to investigate how the law of substantive crimes might best be utilised against corporate complicity. For example, the notion of corporate complicity in the war crime of pillaging, revisited by academics in more recent years, illustrates this point. The allegation is made that corporations who extract and trade illicit natural resources are providing the principal perpetrators with the means to continue criminal activities in conflict-affected areas.

The war crime of pillaging is well established in international criminal law and most domestic criminal jurisdictions.[69] Following World War II, the IMTs convicted a

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[67] See discussion at 5.2.3 and 5.3.3 of this thesis.

[68] Though, the discussion at 7.5 of this thesis provides an overview of the *ICC Rome Statute* provisions which deal with the procedure that may be followed by State Parties considering amending the statute.

[69] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 320. See, Article 6(b) of the *IMT Charter* criminalised the plunder of public or private property. Identical prohibitions were also reflected in Article 2(b) of the *CCL 10*. Since the IMT trials, war crimes of pillaging or plundering – synonymous terms – have been prohibited in the legal instruments of the *ad hoc* international tribunals and special courts. See, Article 3(e) of the *ICTY Statute*, Article 4(f) of the *ICTR Statute*, Article 3(f) of the *SCSL Statute*, Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the *ICC Rome Statute*, and Article 13(2)(Q) and Article 13(4)(E) of the *IHT Statute*.

multitude of businessmen for pillaging natural resources as well as raw materials.[70] James Stewart argues that, despite the jurisprudence from the IMTs dealing with this crime, international and domestic courts have failed to use this precedent to address the problem of corporate pillaging.[71] Stewart attributes this shortcoming to what he describes as legal amnesia.[72] Presently, some ongoing conflicts are predominately financed by the illicit trade in natural resources.[73] Stewart alleges that multinational businesses in the extractive industries have significantly contributed to such ongoing conflicts. According to Stewart, multinational businesses 'play an indispensible role by extracting or purchasing the illicit resources.'[74] Stewart observes that there have been many instances in the last few years where business entities operating in Africa should have been held liable for the war crime of pillaging. Stewart points to the findings of a United Nations Panel of Experts on the illicit trade in diamonds in Angola as an

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[70] James G Stewart, *Corporate War Crimes: Prosecuting the Pillaging of Natural Resources* (Open Society Justice Initiative Publication, 2010) 10. See also, Andrew Clapham, 'The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States' in Ramesh Chandra Thakur (ed), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press, 2004) 237 discussing cases such as Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, US Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, *Law Reports of Trials of War Criminals*, Vol X, where the Krupp firm plundered machinery from factories in the Netherlands.

[71] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 318.

[72] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 318.

[73] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 320; also, Jonathan M Winer and Trifin J Roule, 'Follow the Money: The Finance of Illicit Resource Extraction' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 167–170 <www.worldbank.org>; for opposing views see, Michael Ross, 'A Closer Look at Oil, Diamonds and Civil War' (2006) 9 *Annual Review of Political Science* 265, 290.

[74] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 320.

example.[75] It is claimed that businesses obtained vast amounts of diamonds from the notorious rebel group known as the National Union for the Total Independence for Angola.[76] UNITA did not have legal title in the diamonds, yet they sold the diamonds to corporations and individuals, and then used the proceeds of sales to sustain their illegal activities.[77]

However, the writer is of the view that the forum for addressing pillaging should not be the sole basis for dealing with the issues addressed in the research problem. The issues discussed in this thesis are much wider than pillaging. It may be appropriate to rely upon the provisions for the war crime of pillaging to deal with the increasing problem of organisational complicity in international crimes in some circumstances. However, a major concern with this approach is that it requires a nexus requisite to an armed conflict.[78] The corporate crimes that are discussed in this thesis take place not only in conflict-affected areas but also in weak-governance zones that are not necessarily

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[75] Other examples that Stewart discusses include the pillaging of natural resources in the DRC and the exploitation of oil and uranium in Namibia during the apartheid era by multinational businesses. See, James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 319–320.

[76] National Union for the Total Independence for Angola, also known in Portuguese as *União Nacional para a Independência Total de Angola*, is hereafter referred to as UNITA.

[77] James G Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 *Journal of International Criminal Justice* 313, 318–319. See, Final Report of the Panel of Experts Established Pursuant to Resolution 1237 (1999) UN Doc. S/2000/203 §§75–114. In contrast, the natural resource of cocoa beans were seemingly acquired legally in the *Côte D'Ivoire* during the time of former President Felix Houphouët-Boigny's regime; the President issued a decree in 1967 stating that land belonged to anyone who cultivated it. Today, the world's largest exports of cocoa beans originate from the *Côte D'Ivoire*. Trading in this natural resource, particularly in the last few years, has funded the activities of both government and rebel forces in the on-going conflict in *Côte D'Ivoire*. However, President Houphouët-Boigny's 1967 decree was replaced in 1998; see, Global Witness Report, *Hot Chocolate: How Cocoa Fuelled the Conflict in Côte D'Ivoire* (June 2007), 13 <http://www.globalwitness.org>.

[78] For a discussion on the challenges that this raises see, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 42, <http://www.icj.org>.

embroiled in conflict.[79] The ICJ has surmised that ordinarily pillage is known as theft if it is not committed in the context of an armed conflict.[80] Granted, as the ICJ has observed, theft is indeed a crime that is prohibited in most domestic criminal jurisdictions.[81] Nevertheless, prosecuting MNCs in domestic jurisdictions for aiding and abetting the theft of natural resources does not seem to reflect the gravity of their complicit perpetration in international crimes, which is really the heart of the issues discussed here. Another concern is that modern day multinational corporations are commonly accused of complicity in crimes against humanity more often than complicity in war crimes. Therefore, it is beyond the scope of this thesis to provide a more detailed discussion examining corporate complicity in the war crime of pillaging.

1.2 Terminology

The writer proposes, for consistency and convenience, the following definitions for the terms used in this thesis.

1.2.1 Business forms

There are a number of business forms:

a) Companies

Incorporated companies operate as either proprietary companies or public companies. Specifically, proprietary companies are those that are registered pursuant to the provisions in the relevant corporations' legislation.[82] This is

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[79] Refer to definition of weak-governance zones at 1.2.3 of this thesis.

[80] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 42, <http://www.icj.org>.

[81] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 42, <http://www.icj.org>.

[82] For example, see Section 45A of the Australian *Corporations Act 2001* (Cth). See also generally, J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 79–80.

the position in Australia and most domestic jurisdictions that have company law provisions in place.[83] Also, in Australia for instance, public companies are simply those companies other than proprietary companies.[84]

There are four types of companies: companies limited by shares,[85] companies limited by guarantees,[86] unlimited liability companies,[87] and no-liability companies. No-liability companies are particularly relevant to the discussion in this thesis because they are unique to the mining sector. With respect to this business form, these are mining companies that do not impose liabilities on their shareholders with respect to unpaid shares.[88] In Australia, for example, only those companies whose sole objects are for mining purposes may operate through this business form.[89]

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[83] For details, see, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law– A Survey of Sixteen Jurisdictions* (FAFO, 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

[84] See definition provided in Section 9 of the Australian *Corporations Act 2001* (Cth). For commentary on this see generally, J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 80.

[85] With a company limited by shares, the personal liability of its members is limited to the unpaid amount on shares. J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 80– 81.

[86] As for a company limited by guarantees, its members are limited by how much they guaranteed to contribute to the company. J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 81.

[87] In an unlimited liability company, its members face no limit to their personal liability. J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 81.

[88] J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 82.

[89] Section 112 of the Australian *Corporations Act 2001* (Cth). Interestingly, the term 'mining purposes' is defined in section 9 of the Australian *Corporations Act 2001* (Cth) as: '(a) prospecting for ores, metals or minerals; (b) obtaining, by any mode or method, ores, metals or minerals; (c) the sale or other

b) Corporations

A corporation is a 'legal entity created by a charter, prescription, or legislation.'[90] A corporation differs from other business entities in that it is treated as a separate legal entity by the law.[91]

The terms 'company' and 'corporation' have different meanings. The former does not have a definite legal meaning and it is spoken of in broad terms, whereas the latter is more precise and used to describe incorporated legal entities.[92] (This thesis adopts a similar approach when it uses the terms 'multinational businesses' and 'multinational corporations', respectively.)

c) Partnerships and joint ventures

Partnerships are informal businesses; they are set up by persons who carry on business together with a view of making a profit. Unlike companies, partnerships are not considered a separate legal entity.[93]

Joint ventures are similar to partnerships. Joint ventures are created to undertake a specific task in a specific time.[94] Hence, one of the characteristics of a joint venture that distinguishes it from a partnership is that the former is

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disposal of ores, metals, minerals or other products of mining; (d) the carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes …'.

[90] Hon. Dr. Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths Australia, 2nd ed, 1998) 99.

[91] Hon. Dr. Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths Australia, 2nd ed, 1998) 99.

[92] J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 2–3.

[93] Paul Latimer, *Australian Business Law* (CCH Australia Limited, 30th ed, 2011) ¶9-130.

[94] Andy Gibson and Douglas Fraser, *Business Law* (Pearson, 5th ed, 2011) 749.

ad hoc.[95] The joint venturers combine their resources and share joint profits, but retain their separate identities throughout the venture initiative.[96]

d) Multinational corporations

A multinational corporation is also known as a transnational corporation or a multinational enterprise. It is a commercial entity that is engaged in business activities in more than one State.[97] Ordinarily, in the extractive industry for example, the headquarters of an MNC could be located in one State while operating business activities in other States through subsidiaries, partnerships, or joint ventures.[98]

e) Other business forms

There are other businesses forms. These include sole proprietorships, cooperatives, incorporated associations, unincorporated associations, trusts, and franchises.[99] However, the discussion of these specific business forms falls outside the scope of this thesis, as MNCs in the extractive industries, generally, do not operate through such business forms.

1.2.2 Complicity

Complicity is defined as: 'the involvement of a person with an offence committed by

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[95] Andy Gibson and Douglas Fraser, *Business Law* (Pearson, 5th ed, 2011) 749.

[96] Paul Latimer, *Australian Business Law* (CCH Australia Limited, 30th ed, 2011) ¶9-140.

[97] Peter Fischer, 'Transnational Enterprises' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (North Holland Publishing Company, 1985) Volume VII, 515.

[98] Michael Likosky, 'Contracting and Regulating Issues in the Oil and Gas and Metallic Minerals Industries' (April 2009) 18(1) *Transnational Corporations* 1, 4; see also, Mo Yamin, Hsin-Ju Tsai and Ulf Holm, '"The Performance Effects of Headquarters" Involvement in Lateral Innovation Transfers in Multinational Corporations' (2011) 51 *Management International Review* 157, 157–177.

[99] See generally, Paul Latimer, *Australian Business Law* (CCH Australia Limited, 30th ed, 2011) ¶9-010.

another which renders the person criminally liable for that offence …'.[100]

There are a number of modes of participation in crimes committed by other persons that establish liability in international criminal law. These varied modes of criminal participation, used interchangeably at times, amount to 'complicity'. These modes of participation include, *inter alia*: aiding and abetting; secondary or accomplice liability; encouraging; ordering; planning; procuring; counselling; instigating; facilitating; and, inciting.[101]

1.2.3 Conflict-affected areas or weak-governance zones

'Conflict-affected areas' are those that are predominately rife with violence, armed conflict, or other risks of harm to the peace and security of civilians.[102] These conflict-affected areas are associated with widespread human rights abuses that amount to breaches of national or international law.[103]

'Weak-governance zones' are characterised by the failure of governments to safeguard political, economic and civic institutions, resulting in dysfunctional management of the public sector, debilitating public services, and egregious human rights violations.[104]

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[100] Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis, 3rd ed, 2004).

[101] ICJ, *Corporate Complicity in International Crimes* (2008), volume 2, 2 <http://www.icj.org>; see also, William A Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (June, 2001) 83(842) *International Review of the Red Cross* 439; also, 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.

[102] Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas* (2010), 6 <http://www.oecd.org>.

[103] Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas* (2010), 6 <http://www.oecd.org>.

[104] Organisation for Economic Co-operation and Development, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006), 42 <http://www.oecd.org>; in sharp

1.2.4 Criminal law

Criminal law is a body of law that defines criminal offences and establishes the punishment for criminal offenders.[105]

1.2.5 Extractive industries

The phrase 'extractive industries' traditionally describes activities in oil, gas, or mining operations.[106]

1.2.6 Human rights

Human rights are rights enshrined in what is commonly referred to as the *International Bill of Rights*.[107] These rights include civil, political, economic, social, and cultural rights. Human rights laws exist to promote and protect such rights.

1.2.7 International crimes

International crimes are acts defined as criminal pursuant to international law. Defining acts as international crimes creates an international obligation on all legal or natural persons to refrain from the commission of those crimes.[108]

There is 'no definitive list' of international crimes,[109] as they are entrenched in international treaties and international customary law. International crimes include those

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contrast with weak-governance zones are zones where 'good governance' is the norm. Good governance is identified with transparent and accountable practises that uphold the rule of the law, and promote political, social, and economic rights in the distribution of development resources, see, <http://mirror.undp.org/magnet/policy/chapter1.htm#b>.

[105] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 22, 37.

[106] See, Extractive Industries Transparency Initiative <http://www.eiti.org>.

[107] See, Office of the High Commissioner for Human Rights <http://www.ohchr.org>; the *International Bill of Rights* includes the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and *the International Covenant on Economic, Social, and Cultural Rights.*

[108] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003) 115.

[109] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003) 121.

of most serious concern to the international community, such as war crimes, crimes against humanity, genocide, piracy, slavery, and torture.[110]

1.2.8 International criminal law

International criminal law is comprised of international law and criminal law.[111] International criminal law imposes criminal liability for violations of international law. This body of law criminalises those offences referred to as international crimes.[112]

1.2.9 Legal persons

Legal persons are also referred to as 'juridical persons', 'juristic persons' or '*personnes morales'*.[113] A 'juristic person' is defined as:

> … an entity, such as a corporation that is recognised as having legal personality (i.e. it is capable of enjoying and being subject to legal rights and duties). It is contrasted with a human being, who is referred to as a natural person.[114]

The actual technical term 'legal person' is not defined in most legal dictionaries. The term is, however, commonly defined in the context of a specific area of law, such as corporations law or taxation law.[115]

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[110] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003) 121; see also, Article 5(1) of the *ICC Rome Statute*, though the Court only exercises jurisdiction over war crimes, genocide, crimes against humanity, and crimes of aggression which are yet to be defined.

[111] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 16.

[112] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2007) 1–2.

[113] Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons' in Menno T Kamminga and Saman Zia Zarifi (eds), *Liability of Multinational Corporations under International Law* , volume 7 (Kluwer Law International, 2000) 139.

[114] Elizabeth A Martin and Jonathan Law (eds), *Oxford Dictionary of Law* (Oxford University Press, 6th ed, 2006) 299.

[115] Refer to LexisNexisAU <http://www.lexisnexis.com/au >, online search of an international collection of Law Dictionaries using the search term 'legal person' resulted in no specific results other than definitions within a specific context of law. For example: (a) 'Corporate capacity – a corporate legal

Examples of legal persons include: corporations, municipalities, partnerships, political parties, sovereigns, States, trade unions, trusts, churches, international organisations, and non-governmental organisations.[116]

1.2.10 Liability of legal persons

a) Derivative liability

Derivative liability of legal persons is attributed from the culpability of an individual within an organisation. There are two forms of derivative liability: vicarious liability, and identification liability. Under vicarious liability, the organisation is liable for the actions of its individuals where those individuals are acting within the scope of their employment or authority. The theory of identification liability differs slightly in that organisational liability is only established through the culpability of specific individuals who act as the 'directing minds' of the organisation. For example: members of a board of directors and senior management.[117]

b) Non-derivative liability

With non-derivative liability, the organisation is treated as a separate legal

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person is an artificial legal person and is sometimes referred to as a body corporate …'; (b) 'Taxation law: All types of legal persons, as well as anything that in practice is treated as … a separate legal identity in the same way as a legal person does, are generally considered to be an entity for taxation…'

[116] See generally, Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press, 1986); Janet McLean, 'Government to State: Globalization, Regulation, and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173, 174; Andrew Clapham, 'The Complexity of International Criminal Law: Looking beyond Individual Responsibility to the Responsibility of Organisations, Corporations and States' in Ramesh Chandra Thakur (ed), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press, 2004) 233.

[117] See generally: Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 122–133, Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 147–152, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

entity in its own right. Hence, the culpability of the organisation itself, as opposed to the culpability of its individuals, is of primary concern. Non-derivative liability is established on the basis of 'corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate "cultures" that tolerate or encourage criminal offences.'[118]

This form of liability is generally described by academics as 'organisational liability'. However, the writer uses the term 'non-derivative liability' to avoid confusion with organisational liability, defined below. The writer also uses the term 'non-derivative liability' to distinguish this from derivative liability.

c) Organisational liability

The writer uses the term 'organisational liability' throughout this thesis when literally referring to the liability of an organisation. The term 'organisation', used in this context, refers, generally, to all manner of legal persons unless otherwise specified.

1.2.11 Principal perpetrator

A 'principal perpetrator' is defined as: 'the chief actor in the commission of a crime, that is, the person who directly commits the criminal act …'.[119] For the purposes of this thesis, the phrase 'principal perpetrator' is used solely to differentiate a perpetrator that is criminally responsible for actually committing an international crime from one that is culpable through complicity in the same crime.

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[118] Allens Arthur Robinson *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008) 6; see also, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1.

[119] George E Rush, *The Dictionary of Criminal Justice* (McGraw-Hill, 6th ed, 2003) 264.

A 'perpetrator' is defined as: 'a person who commits a crime or offence…'.[120]

The term 'principal' has several meanings in the English Language and is defined widely. However, the term includes: 'the person who actually carries out a crime'.[121]

1.2.12 Regulatory initiative

The term 'regulatory initiative' is a broad term that this writer uses to describe major attempts at regulating the activities of multinational businesses. These kinds of measures include international legal instruments and agreements as well as attempts at self-regulation initiated by multi-stakeholders in the international community.[122]

1.2.13 Tort law

Tort law allows injured parties to commence a civil action against a wrongdoer – that is, a legal or natural person, seeking damages or compensation for injuries sustained in the commission of wrongs,[123] including international crimes.[124]

1.3 Structure of this thesis

Should there be jurisdiction over complicit organisational liability in international crimes? Where and how should an organisational entity that is complicit in international crimes

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[120] Bryan A Garner (ed), *Black's Law Dictionary* (West Group, 8th ed, 2004) 1177.

[121] Elizabeth A Martin and Jonathan Law (eds), *Oxford Dictionary of Law* (Oxford University Press, 6th ed, 2006) 409.

[122] For examples of regulatory initiatives, see discussion at 2.3.1 of this thesis.

[123] Stephen Tully, "'Never Say Never Jurisprudence": Comparative Approaches to Corporate Responsibility under the Law of Torts' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 125.

[124] For example, the United States *Alien Tort Statute*, 28 U.S.C. Section 1350, prohibits violations of the laws of nations. There is no exhaustive list of breaches amounting to violations of the law of nations. The US District Court has indicated that these include, *inter alia*: genocide, slave trading, slavery, crimes against humanity, forced labour, war crimes, rape, torture, summary executions, sexual assault, forced relocation, disappearance, cruel, inhuman and degrading treatment; for discussion see, Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 27–28.

be prosecuted? To answer these questions, this thesis discusses the rationale for corporate criminal liability, possible jurisdictional forums, organisational liability and complicity doctrines, and proposes draft legislation to amend the *ICC Rome Statute*.

a) Criminal liability for business complicity in international crimes

The nature of the corporate form has changed significantly over the centuries, more so during the last fifty years due to the globalisation trend.[125] Oftentimes, modern corporations are accused of exercising unparalleled power in a manner that generally inflicts harm upon individuals and society.[126] This has included corporate complicity in international crimes. The extent of this growing problem supports the notion that international criminal law should exercise jurisdiction over corporations that are complicit in international crimes.

Chapter 2 discusses whether there should be criminal liability for business complicity in the perpetration of international crimes.

b) The rationale for corporate criminal liability

The idea of holding a corporate entity criminally responsible for international crimes has been widely debated and continues to be controversial. This thesis examines the notion of corporate liability as well as the complexities of multinational corporations which pose practical difficulties to the enforcement of any finding of liability.

Chapter 3 discusses the rationale for corporate criminal liability.

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[125] Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 259.

[126] Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481, 1483.

c) Jurisdiction

There are a number of forums from which to address the research question. These include:

1. Domestic jurisdictions applying domestic criminal legislation [127] or tort principles;[128]
2. Regional courts – for example, the African Court on Human and Peoples' Rights;[129]
3. *Ad hoc* international tribunals or special courts established on the model of the ICTR or the SCSL;[130] and
4. The ICC.

This thesis discusses these international, regional and domestic forums. Allowing for the principle of complementarity,[131] this thesis proposes that the ICC is the preferred forum to deal with the liability of complicit multinational corporations, but only where domestic jurisdictions prove inadequate. Moreover, the Court's jurisdiction would need to be broadened to include legal persons.

Chapter 4 of this thesis investigates *where* an organisation that is complicit in international crimes could be prosecuted.

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[127] For example, Australia has fully incorporated the Rome statutory provisions in its *Criminal Code* (Cth). In addition, *Australia's Criminal Code* also contains corporate criminal liability provisions.

[128] See, for example, United States *Alien Tort Statute*, 28 U.S.C. Section 1350.

[129] Other regional courts include the European Court of Human Rights and the Inter-American Court of Human Rights.

[130] Other *ad hoc* international tribunals and special courts include the ICTY, the ECCC, and the IHT.

[131] According to paragraph 10 of the *ICC Rome Statute* preamble '… the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.' However, pursuant to Article 17(1) (a) the matter may be admissible before the ICC if a State is '… is unwilling or unable genuinely to carry out the investigation or prosecution.'

d) Corporate liability doctrine

Assuming that domestic jurisdictions prove inadequate to deal with complicit organisational liability, how would international forums, such as the ICC, address this issue? This thesis discusses the organisational liability doctrine by examining the models of corporate criminal liability found in most domestic jurisdictions to determine which is preferred to transplant internationally within the *ICC Rome Statute*.

There are at least two competing models of corporate criminal liability found in most domestic jurisdictions, specifically: the derivative liability model,[132] and the non-derivative liability model.[133] This thesis proposes that non-derivative liability is the preferred model for corporate criminal liability.

Chapter 5 discusses *how* an organisation that is complicit in international crimes could be prosecuted by examining organisational liability doctrine.

e) Complicity doctrine

Multinational corporations, be they publicly or privately owned business entities, are not the principal perpetrators at the heart of most egregious human rights violations. Instead, they tend to be complicit perpetrators in such violations.[134] Most often, complicit perpetration in international crimes by MNCs is in the form of aiding and abetting. This has generally been done

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[132] Derivative liability has two variations: vicarious liability and identification liability. These variations are discussed further throughout this thesis. See also generally, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

[133] For an example of this model, see, Part 2.5, Division 12 of the *Australian Criminal Code* (Cth) 1995. This model is discussed further throughout this thesis.

[134] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 12.

through the provision of finance, infrastructure, materials, and logistic support.[135]

According to customary international law established by *ad hoc* tribunals,[136] the material elements for aiding and abetting the commission of crimes are satisfied when an accused person provides practical assistance, encouragement, or moral support for the commission of a crime.[137] Furthermore, it must be shown that the provision of such practical assistance, encouragement, or moral support bore a substantial effect on the crime.[138] As for the mental element, it must be shown that the complicit perpetrator had knowledge that their actions would assist the commission of the crime.[139] This is commonly referred to as the 'knowledge' test.

The *ICC Rome Statute* takes a different approach from customary international law in its aiding and abetting provisions. It adopts what is commonly referred

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[135] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19 <http://www.icj.org>.

[136] For example, the ICTY, the ICTR, the SCSL, and the ECCC.

[137] *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [89]; see also, *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [45] – [46].

[138] *Prosecutor v Kvočka et al (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-30/1-A, 28 February 2005) [90].

[139] *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [249]. Reasoning upheld in most ICTY chamber decisions, e.g. *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [229]; *Prosecutor v Vasiljević* (*Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-32-A, 25 February 2004) [102], *Prosecutor v Blaškić* (*Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [45]; *Prosecutor v Blagojević and Jokić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-02-60-T, 17 January 2005) [727].

to as the 'purpose' test.[140] Article 25(3)(c) of the *ICC Rome Statute* adopts the phrase 'for the purpose of facilitating the commission of such a crime'.[141] The *ICC Rome Statute* does not explain the phrase further; understandably, this has generated much debate as to what the term 'purpose' means when adopted in this manner. There are a number of interpretations put forward by leading academics and international criminal law practitioners. However, those interpretations tend to exclude both complicit multinational corporations and individual business people from falling within the purview of Article 25(3)(c) of the *ICC Rome Statute*.

There are alternative forms of complicity in the commission of crimes, which are explored later in this thesis. For instance, some academics propose that multinational corporations could be liable for contributing to a crime by a group of persons pursuant to Article 25(3)(d) of the *ICC Rome Statute*.[142]

Chapter 6 continues the discussion on *how* an organisation that is complicit in international crimes could be prosecuted by examining complicity doctrine.

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[140] This purpose test is also applied at the IHT and the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts (hereafter referred to as Panels of Judges). The Panel of Judges are no longer in session having concluded their cases, see discussion at 6.3.2 of this thesis.

[141] Article 25(3)(c) of the *ICC Rome Statute* states: '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: … 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.'

[142] See, Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851; see also, Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals', (2010) 8(3) *Journal of International Criminal Justice* 873.

f) Recommendations

This thesis recommends that the ICC State Parties should revisit the *ICC Rome Statute* in order to include jurisdiction over complicit legal persons. For this reason, the thesis proposes draft legislation to extend the existing Article 25 of the *ICC Rome Statute* provision that deals solely with individual criminal responsibility. Specifically, organisational criminal liability provisions are proposed; these could be incorporated into the *ICC Rome Statute* as Article 25B. The thesis also proposes amendments to Article 25(3)(c) of the *ICC Rome Statute* to do away with the purpose test altogether, that is, the wording 'for the purpose of facilitating the commission of such a crime …'. This would widen the applicability of the aiding and abetting provisions to include characteristic forms of corporate complicity in crimes, which at present are excluded by virtue of the restrictive definition. This would bring the *ICC Rome Statute* provisions on aiding and abetting in line with customary international law.[143] Finally, the thesis proposes Article 77B, which would stipulate the appropriate punishments and penalties for legal persons. This new provision would extend the existing provision found in Article 77 of the *ICC Rome Statute* that currently deals with the applicable penalties meted out on natural persons.

Chapter 7 concludes the discussion on *how* an organisation that is complicit in international crimes could be prosecuted by proposing draft legislation to

[143] Article 30(1) of the *ICC Rome Statute* stipulates a general mental element. The provision states: 'Unless 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.'

address the problem.

g) Thesis conclusion

Chapter 8 summarises the thesis chapters.

CHAPTER 2

Criminal Liability for Business Complicity in International Crimes

'It matters what we do. But it also matters how *we do it, and whether it works.'*[144]

2.1 Chapter introduction

The previous chapter briefly outlined the research problem and identified the major areas of legal doctrine addressed by this thesis. This chapter addresses the issue of whether there should be criminal liability for business complicity in international crimes. Three core questions emerge with respect to the examination of this issue:

1. What does it mean to allege business complicity in international crimes?
2. What is currently being done to regulate the business activities of multinational businesses?
3. Is the current regulatory approach sufficient?

2.2 What does it mean to allege business complicity in international crimes?

Numerous multinational businesses operate globally through business enterprises or supply chains.[145] These multinational businesses often operate in countries embroiled in armed conflict, or they operate where crimes against humanity occur.[146] This is more commonly the case with those businesses operating in the extractive industries. They

[144] Marie-Claire Cordonier Segger, 'Keynote Speech' (Paper presented at GOJIL International Conference: Resources of Conflict – "Conflict over Resources", Germany, 7–9 October 2010).

[145] The term supply chain, when spoken of here, indicates 'the system of all activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.' Organisation for Economic Co-Operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas* (2010), 7 <http://www.oecd.org>.

[146] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 5 <http://www.icj.org>.

also operate in weak-governance zones where the countries face socio-economic challenges. Some of these challenges include waning economies, poor employment conditions, and dominant foreign direct investors, coupled with inadequate corporate social responsibility standards.[147]

Regrettably, instances of corporations inflicting harm upon individuals and society in the course of their business activities are increasing.[148] This has resulted in corporate activities coming under the spotlight now more than ever in the twenty-first century. Corporate behaviour that was once trivialised or brushed aside is now of major concern to the international community at large,[149] to the extent that the UNSRSG applauded the campaign efforts of civil rights groups such as Amnesty International and Human Rights Watch, among others. These groups have continually mounted pressure and campaigned on legal and political international platforms calling for complicit corporate entities to be held liable for the often criminal consequences of their actions.[150]

Corporations are, typically, not the principal perpetrators in the commission of international crimes; instead, they tend to be complicit perpetrators.[151] In most instances, the principal perpetrator is often a State entity, a notorious rebel group, another

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[147] Michael J Gilbert and Steve Russell, 'Globalisation of Criminal Justice in the Corporate Context' (2002) 38 *Crime, Law and Social Change* 211, 213.

[148] Pamela H Bucy, 'Corporate Criminal Liability: When Does it Make Sense?' (Fall, 2007) 44 *American Criminal Law Review* 1437, 1437.

[149] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 1–2 <http://www.ichrp.org>.

[150] See generally discussion by the UNSRSG on human rights advocacy in UNSRSG Report, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development *'Clarifying the Concepts of "Sphere of Influence" and "Complicity"'*, UN Doc, A/HRC/8/16 (15 May 2008), [68] – [69]. See also, annual reports and research papers published by Amnesty International <www.amnesty.org> and Human Rights Watch <www.hrw.org>.

[151] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 12.

organisational entity, or even an individual.[152]

International bodies[153] and leading academics have discussed the problem of corporate complicity in international crimes;[154] however, what constitutes complicity has neither been uniform nor static.[155] Generally, the ordinary language meaning of the term 'complicity' originates from the Latin *complicāre* meaning '… "folding together", an entwining; but it is also an intricacy, a *complexity*; and finally, and more conventionally, it is being party to or involved in wrongdoing, as an accomplice, in a "bad confederacy".'[156] The term 'complicity' also has a strict legal meaning. It is defined in legal dictionaries as: 'the involvement of a person with an offence committed by another which renders the person criminally liable for that offence …'.[157] In this context, there are a number of modes of participation in the commission of crimes that, used

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[152] See, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 265.

[153] For example, the UN *Global Compact*, <http://www.unglobalcompact.org>; also, ICJ, *Corporate Complicity in International Crimes* (2008) 3 volumes <http://www.icj.org>.

[154] For example, Andrew Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights' in Lene Bomann-Larsen and Oddny Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (United Nations University Press, 2004); Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339; Anita Ramasastry, 'Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions' (October 2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>; Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91; Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (Fall 2005) *Human Rights Brief* 14; Margaret Jungk, 'A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999).

[155] UNSRSG Report, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development *'Clarifying the Concepts of "Sphere of Influence" and "Complicity"'*, UN Doc, A/HRC/8/16 (15 May 2008), [70].

[156] Scott Veitch, 'Complicity' (1999) 5(2) *Res Publica* 227, 227; note italicised emphasis appears in the original source.

[157] Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis, 3rd ed, 2004).

interchangeably, amount to complicity. These include, *inter alia*: ordering, instigating, soliciting, inducing, inciting, aiding and abetting, joint criminal enterprise, planning, preparing, attempting, and conspiracy.[158] Of these complicit modes, multinational corporations are often accused of aiding and abetting international crimes.[159] Corporate complicity in international crimes has included the provision of finance, infrastructure, materials, and logistical support.[160] To illustrate the point, suppose an MNC manufacturing mobile phones were to source natural resources, such as coltan,[161] from a buying house that obtained the resources from African local traders in the extractive industries. There could be a risk of complicity in any egregious human rights violations perpetrated in extracting that coltan.[162] This would happen if, for instance, warlords illegally controlling the mining site, or the security forces protecting it, committed widespread or systematic abuses, such as torture, sexual violence, or cruel, inhuman or degrading treatment.[163] Depending on the circumstances, these criminal acts may amount to crimes against humanity, as prohibited under Article 7 of the *ICC Rome*

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[158] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 2, <http://www.icj.org>.

[159] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19, <http://www.icj.org>.

[160] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19, <http://www.icj.org>.

[161] The mineral coltan is highly sought after by the electronics industries for its tantalum properties. Tantalum is a valued metal that is derived from coltan. One of the many unique features of tantalum is that it is a durable metal that stores and discharges an electrical charge, which is useful in gadgets such as mobile phones, video cameras, laptops, and pagers. Pathfinder, 'An Outline of Trade Flows of Legally and Illegally Extracted Mineral Resources from Fragile States: The Case of Coltan in the Kivus, DRC', 1 <http://www.envirosecurity.org/pathfinder/trade/Trade_Flows.pdf>.

[162] See generally, Pathfinder, 'An Outline of Trade Flows of Legally and Illegally Extracted Mineral Resources from Fragile States: The Case of Coltan in the Kivus, DRC', 3 <http://www.envirosecurity.org/pathfinder/trade/Trade_Flows.pdf>.

[163] Organisation for Economic Co-Operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas: Supplement on Tin, Tantalum, and Tungsten* (2010), 3 <http://www.oecd.org>.

Statute.[164] This illustration shows why MNCs should be mindful of potentially falling within the purview of international criminal law when sourcing products or services from supply chains that acquire natural resources originating from conflict-affected areas or weak-governance zones.[165]

In addition, business enterprises may be liable for aiding and abetting crimes against humanity, even though they did not participate in the entire plan or attack. Business enterprises may even find themselves liable for a single act involving human rights abuses that amount to international crimes.[166] A business could be liable if it provides assistance for just one attack that is part of widespread or systematic attacks, and does so with the knowledge that it is assisting such attacks.[167] By way of illustration, the ICJ cautions that:

> … if a company offers trucks, the use of airstrips, fuel, helicopters, shelters or buildings or provides services that substantially assist the principal perpetrator to carry out *one act* such as killing, unlawful destruction of houses, rape or other acts

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[164] According to the chapeau to Article 7(1) of the *ICC Rome Statute*, crimes against humanity occur when there is widespread or systematic attacks which are directed against any civilian population with knowledge of the attack. Also, Article 7(2)(a) of the *ICC Rome Statute* defines an attack against any civilian population as one that is carried out 'pursuant to or in furtherance of a State or organisational policy to commit such attack.' Furthermore, Article 7(1)(a) - (k) of the *ICC Rome Statute* provides that specific acts which constitute crimes against humanity include: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender …, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[165] On this issue, see generally, Organisation for Economic Co-Operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas: Supplement on Tin, Tantalum, and Tungsten* (2010) 3.

[166] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 12, <http://www.icj.org>.

[167] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 12, <http://www.icj.org>.

> of torture, and this act forms part of a widespread or systematic attack, there may be a basis for criminal liability of the company representative for aiding and abetting crimes against humanity.[168]

The situation with Australian multinational corporation Anvil Mining illustrates this further. Anvil was accused of complicity in international crimes when it provided logistic support for the commission of crimes in the Democratic Republic of Congo.[169] It is alleged that, in October 2004, a small group of insurgents occupied the DRC mining town of Kilwa. Anvil evacuated its staff from the region and provided charter planes and trucks to transport the pro-government military to protect the company's mining operations. The military then secured the mining site, but launched attacks against the people of Kilwa, who were believed to have been sympathetic to the insurgents. The military recaptured the town; it also committed crimes of mass execution, arbitrary arrest, rape, and torture.[170] Later, a handful of military officials were charged with the commission of crimes, including war crimes. Three employees of Anvil Mining were also charged with aiding and abetting the criminal offences perpetrated by the military.[171]

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[168] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 12, <http://www.icj.org>. Italic emphasis appears in the original text.

[169] For detailed discussion on the circumstances which unfolded, see, Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (2007) 5 *Journal of International Criminal Justice* 809, 811–814.

[170] See, UN Mission in Democratic Republic of Congo (MONUC) Special Investigations Unit, Preliminary Report, *Report of the Special Investigation in Kilwa 22–24 October 2004, Lubumbashi* (10 November 2004) [8] – [37].

[171] For commentary on the trial and appeal, see, Global Witness Report, '*Kilwa Trial: A Denial of Justice' A Chronology, October 2004–July 2007* (17 July 2007) <http://www.globalwitness.org>; Global Witness Report, *The Kilwa Appeal: A Travesty of Justice'* (5 May 2008) <http://www.globalwitness.org>. A number of the military officials were sentenced to life imprisonment. As for the Anvil Mining employees (the Congolese subsidiary's General Manager, Head of Security, and Security Manager), these were acquitted. There is speculation that this was due to political pressure.

2.3 What is currently being done to regulate the business activities of multinational businesses?

In recent years, the international community has played an increasing role in attempts to regulate the activities of multinational businesses. Multi-stakeholders in the international community have engaged in lengthy discussions on a multilateral basis with respect to this issue. This has resulted in the creation of largely voluntary frameworks that encourage corporations to apply a set of human rights guidelines or principles to their daily operations.[172] Most of these initiatives have, to some extent, added value and influenced the way in which MNCs do business.[173] Business enterprises in the oil and gas industries have been at the forefront in adopting voluntary codes as part of their corporate social responsibilities.[174] Regulatory initiatives with respect to MNCs have been introduced in both domestic[175] and international[176] jurisdictions; the discussion in this thesis will focus on the latter.

Generally, in international jurisdictions, the regulation of multinational businesses has included initiatives such as, *inter alia*: the Organisation for Economic Co-operation and

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[172] Global Witness Report, *Oil and Mining in Violent Places: Why Voluntary Codes for Companies don't Guarantee Human Rights* (October 2007), 3 <http://www.globalwitness.org>.

[173] Global Witness Report, *Oil and Mining in Violent Places: Why Voluntary Codes for Companies don't Guarantee Human Rights* (October 2007), 3 <http://www.globalwitness.org>.

[174] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 222.

[175] There are a number of domestic regulatory initiatives. One example is the United States *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010*. Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* deals with conflict minerals that are said to originate from the DRC and its neighbouring countries. The provision requires companies to publicly disclose on their corporate website the source and chain of custody of any minerals obtained from this conflict region. Domestic regulatory initiatives with respect to MNCs are not discussed further in this thesis. For commentary on Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* see, Christiana Ochoa and Patrick Keenan, 'Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation' (Paper presented at GOJIL International Conference: Resources of Conflict – "Conflict over Resources", Germany, 7–9 October 2010).

[176] The international regulatory initiatives are discussed throughout this chapter.

Development *Guidelines for Multinational Enterprises*, revised in 2011; the *Equator Principles*, launched in 2006; the United Nations *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, adopted in 2003; and, the United Nations *Global Compact*, launched in 2000. More specifically, regulation of MNCs within the extractive industries has included initiatives such as, *inter alia*: *Extractive Industries Transparency Initiative Principles*, adopted in 2003; *Voluntary Principles on Security and Human Rights*, established in 2000; and, the *Kimberley Process*, launched in 2000. These general and specific initiatives are discussed in detail below. A major concern with these initiatives is that they have not developed adequate implementation strategies or efficient sanctions. With respect to this shortcoming, the regulatory initiatives are often seen as 'soft law'. The term 'soft law' is used because the initiatives do not place legally enforceable obligations on the parties.[177] Soft law is widely criticised and depicted as window dressing, or law that falls short on the dimensions of legalisation.[178] This gap in the current regulatory initiatives creates a concern when it comes to addressing corporate accountability for human rights violations.[179] Hence, in assessing these initiatives it becomes apparent that there is a need for tougher measures to regulate the activities of multinational businesses.

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[177] UNSRSG Report, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (9 February 2007) UN Doc: A/HRC/4/035, [45].

[178] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization* 421, 422–423. The authors also describe what they conceive to be general misconceptions about soft law and argue, in contrast, that soft law offers as many advantages as hard law. Also, see generally, Ralph G Steinhardt, 'Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations' (2008) 33(3) *Brooklyn Journal of International Law* 933, 933–942.

[179] See, Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction?' (2003–2004) 10 *ILSA Journal of International and Comparative Law* 493, 513.

2.3.1 Regulating the business activities of MNCs – generally

The initiatives discussed here generally deal with the regulation of multinational corporations; they are also relevant to those MNCs specifically operating in the extractive industries.

a) Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (revised in 2011)

The Organisation for Economic Co-operation and Development [180] has developed a number of international instruments that deal with the liability of complicit corporations.[181] A prime example is its *Guidelines for Multinational Enterprises*, which were crafted in 1976.[182] Since then, these have been revised on several occasions, the most recent in mid 2011.[183]

Human rights are one of many issues that the *Guidelines* address. They implore business enterprises to adopt more effective policies and appropriate management control systems to: respect human rights; avoid contributing to human rights violations; avoid being linked to abuses through their business operations, products, or services; follow due diligence on human rights issues;

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[180] Hereafter referred to as the OECD. The organisation was established by *Convention on the Organisation for Economic Co-Operation and Development* on 14 December 1960. It has 30 member states, these include: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

[181] See also, for example, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997), Article 1(2) specifically criminalises corporate complicity, including aiding and abetting, and the bribery of foreign public officials.

[182] OECD *Guidelines for Multinational Enterprises* hereafter referred to as *Guidelines*.

[183] The latest revisions on the 2011 *Guidelines* incorporate the UNSRSG Final Report, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc: A/HRC/17/31. The revisions also take into account the OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected Areas High-risk Areas* (2010).

and, put policies in place that respect rights.[184] In doing so, the *Guidelines* reflect non-derivative liability in that the corporate culture and policies of the multinational enterprises are of primary concern (the principles of this doctrine are discussed later in this thesis).

In addition, the *Guidelines* establish national contact points to deal with issues pertaining to corporate conduct.[185] *Global Witness v Afrimex (UK) Ltd*[186] is an example of how the NCPs deal with the corporate social responsibilities of MNCs. The matter involved a complaint brought by Global Witness who alleged that Afrimex Ltd, a British corporation, had breached the *Guidelines* when it bribed rebel groups in the Democratic Republic of Congo, and also purchased various minerals from mining corporations in the DRC that employed child and forced labour. The British NCP, in its official findings, came to the conclusion that Afrimex had contributed to the engagement of child and forced labour. Also, it was found to have failed to adequately ensure that its business operations complied with occupational health and safety standards.[187] In doing so, Afrimex breached the *Guidelines*. The NCP delivered an official statement that, after approval by the Minister for Trade and Consumer Affairs, would be placed in the public libraries of the House of

[184] Chapter IV, OECD Guidelines for Multinational Enterprises, 29.

[185] See, Part II: Implementation Procedures of the OECD *Guidelines for Multinational Enterprises*. National Contact Points hereafter referred to as NCPs.

[186] Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: *Global Witness v Afrimex (UK) Ltd* (28 August 2008).

[187] Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: *Global Witness v Afrimex (UK) Ltd* (28 August 2008) [62].

Commons and the House of Lords.[188] The assumption could be made that this was done to deter corporations that do not wish to incur public disapproval or damage to their reputations. No further steps were taken against Afrimex. Hence, a major concern with the *Guidelines* is that, because they are voluntary, they are not legally enforceable. This is a limitation expressly provided in the *Guidelines* themselves.[189]

b) The Equator Principles (2006)

The *Equator Principles*[190] are a set of guidelines launched by leading banks, and aimed at financing projects with capital costs of US$10 million or more.[191]

There are ten principles in total, at least two of which are relevant to the discussion here. *Principle 2* deals with the social and environmental assessment for proposed projects. To obtain funding, each project is classified as either a Category A[192] or Category B project.[193] The classification takes into account the particular social and environmental impacts and risks for that project. This includes, among other indicators, 'protections of human rights and community health, safety and security (including risks, impacts and management of the project's use of security personnel).'[194] *Principle 3*

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[188] See, Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: *Global Witness v Afrimex (UK) Ltd* (28 August 2008) [4].

[189] Chapter I, OECD *Guidelines for Multinational Enterprises*, 15.

[190] Hereafter referred to as EP.

[191] See generally, www.equator-principles.com.

[192] According to Exhibit I of the EPs, Category A relates to 'projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented.'

[193] According to Exhibit I of the EPs, Category B relates to 'projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures.'

[194] For a full list, see, Exhibit II of the EPs.

addresses compliance with the overall applicable social and environmental standards, assessed by applying the International Finance Corporation Standards,[195] as well as industry-specific environmental, health, and safety guidelines.[196]

As much as the EPs provide useful guidelines for project financing, they could also cover the financing of higher-end projects below the stipulated monetary limit, and broaden their criteria to apply to all risk categories, not just Category A projects.[197] Moreover, the EPs, which account for up to 80 per cent of the global financing of commercial projects,[198] are voluntary.

The challenge with project financing, in general, is with respect to the criminal responsibility that may arise from the provision of financial services to business enterprises that may be complicit in international crimes.[199] The commercial financier's liability may be too remote. In this view, there may be instances where there are allegations of armed groups located in countries that are rich in natural resources who 'self-finance' their criminal activities in on-

[195] According to Exhibit III of the EPs, these include: social and environmental assessment and management system; labour and working conditions; pollution prevention and abatement; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resource management; indigenous peoples; and, cultural heritage.

[196] For a full list, see, Exhibit IV of the EPs.

[197] Tim Baines, 'Integration of Corporate Social Responsibility through International Voluntary Initiatives' (2009) 16(1) *Indiana Journal of Global Legal Studies* 223, 244.

[198] International Financial Corporation, Who Benefits: Financial Institutions (2007) <http://www.ifc.org/ifcext/sustainability.nsf/>.

[199] See generally, Julia Geneuss, *et al*, 'Panel Discussion Reports from the Conference on "Transnational Business and International Criminal Law", held at Humboldt University Berlin,15–16 May 2009' (2010) 8(3) *Journal of International Criminal Justice* 957, 963.

going conflicts by trading such resources with individuals and companies.[200] It is believed that these groups perpetrate serious crimes to control the areas where they operate and to exploit the natural resources they obtain.[201] The rules of secondary liability could result in the complicity of companies (as well as individuals) who trade with such groups[202] – but what of the liability of those who financed the companies themselves? One could argue that these commercial financiers are actually supporting the commission of crimes by keeping the project going. In this regard, the commercial financiers could be liable for aiding future crimes, assuming they had anticipated that this would be the likely result.[203] However, it seems doubtful in these circumstances that commercial financiers would be held liable for the commission of future crimes. Unless it could be shown that they had significantly facilitated the commission of future crimes, they would not be considered complicit in a perpetrator's crimes. This may cast the net of liability far too wide to attribute criminal responsibility.[204]

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[200] Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8(3) *Journal of International Criminal Justice* 947, 947–948. Also, see generally, Reports by United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo: (23 October 2003) UN Doc., S/2003/1027, §§ 43–47; (16 October 2002) UN Doc., S/2002/1146, §§ 12–21; (12 December 2008) UN Doc., S/2008/773.

[201] Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8(3) *Journal of International Criminal Justice* 947, 947.

[202] Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8(3) *Journal of International Criminal Justice* 947, 948.

[203] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 4. Also, Christoph Burchard, 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute' (2010) 8(3) *Journal of International Criminal Justice* 919, 932.

[204] For another example on casting the net far too wide to attribute liability see 6.3.2 of this thesis.

c) United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (2003)

The United Nations' *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*[205] were developed by the former Sub-commission on the Promotion and Protection of Human Rights.[206] The *Norms* are a draft UN instrument. They require that States should bear the primary duty to protect human rights standards. Additionally, transnational corporations and other business enterprises bear a legal duty to protect human rights by virtue of their business activities and spheres of influence.[207] The *Norms*, written in language similar to that adopted in most treaties,[208] are best described as codes of conduct relating to corporate social responsibility.[209] For example, paragraph two of the *Norms* cautions business enterprises not to benefit from or find themselves caught up in war crimes, crimes against humanity, genocide, or other similar violations of international law. Furthermore, paragraph 12 proposes that businesses steer clear of such entanglements by upholding the fundamental freedoms enshrined in the *International Bill of Rights* in the course of their business dealings.

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[205] Hereafter referred to as *Norms*.

[206] The Sub-commission on the Promotion and Protection of Human Rights no longer exists. Its functions have been taken over by the UN Human Rights Council (formerly known as the Commission on Human Rights).

[207] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 820.

[208] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 820. See for example, paragraph 1 of the *Norms*.

[209] See generally, David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) *American Journal of International Law* 901, 912.

A major drawback with the kinds of obligations drafted by the *Norms* is that they fall short of articulating precisely how businesses can actually go about integrating such expectations into their business activities.[210]

Also, the UN Human Rights Council did not adopt the *Norms*.[211] They were superseded by the UNSRSGs 'Protect, Respect and Remedy Framework'.[212]

d) United Nations Global Compact (2000)

The United Nations *Global Compact* is a corporate citizenship and sustainability initiative that focuses on human rights, labour, environment, and anti-corruption.[213] This platform encourages multi-stakeholder dialogue with respect to its ten principles. The first two are relevant to this thesis, and address the issue of businesses and complicity in human rights violations. The first principle states that 'businesses should support and respect the protection of internationally proclaimed human rights.'[214] The second principle implores businesses to 'make sure that they are not complicit in human rights abuses.'[215] With regards to these principles, the UN cautions that businesses, depending on the exact nature of their activities, could, in fact, find themselves liable for

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[210] Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction?' (2003–2004) 10 *ILSA Journal of International and Comparative Law* 493, 508.

[211] These *Norms* were not adopted by the UN Human Rights Council, formerly known as the Commission on Human Rights, instead the Council requested a SRSG to look into the matter. See, <http://www2.ohchr.org/english/bodies/subcom/index.htm>.

[212] UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5. This Framework also forms the basis of the UNSRSGs Final Report. It is discussed further in 4.2.3 of this thesis.

[213] UN *Global Compact* <http://www.unglobalcompact.org>.

[214] UN *Global Compact* <http://www.unglobalcompact.org>.

[215] UN *Global Compact* <http://www.unglobalcompact.org>.

complicity in international crimes. The UN states:

> Human rights issues have become increasingly important as the nature and scope of business has changed. Different actors have different roles to play and it is important for business to be aware of the contemporary factors that have made human rights an organizational issue … where an international crime is involved, complicity may arise where a company assisted in the perpetration of the crime, the assistance had a substantial effect on the perpetration of the crime and the company knew that its acts would assist the perpetration of the crime even if it did not intend for the crime to be committed.[216]

With respect to corporate complicity, the *Global Compact* provides that there are at least three forms of this: direct, beneficial, and silent.[217] In essence, these involve corporations directly or indirectly assisting the principal perpetrator/s, or benefiting in some way from the perpetration of a crime.[218]

Direct complicity is said to take place when the complicit legal person assists the principal perpetrator, and actively participates in the human rights violations.[219] According to the *Global Compact*, an example of this would be if a company 'assists in the forced relocation of peoples in circumstances related to business activity.'[220] For another example, Anvil Mining's actions in the provision of logistic support to secure its mining site in the DRC,

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[216] The UN *Global Compact* website, <http://www.unglobalcompact.org>.

[217] UN *Global Compact* <http://www.unglobalcompact.org>.

[218] For general discussion with respect to the links between the concepts of direct, beneficial and silent complicity and concepts of complicity in criminal law see, Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 340–349.

[219] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

[220] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

discussed earlier, would take the form of direct complicity.[221] Of the three forms, direct complicity most closely reflects the criminal culpability incurred for aiding and abetting international crimes.

Beneficial complicity[222] is where a corporation gains some advantage from human rights abuses perpetrated by someone else.[223] As the *Global Compact* states, this occurs when there are 'violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities.'[224] The difficulty with this category of organisational complicity is that, on its own, beneficial complicity is not likely to incur criminal liability. Merely gaining a benefit from human rights abuses would probably, at most, result in negative public perception of the corporation.[225]

Silent complicity occurs when a corporation fails to query systematic or continuing human rights violations in the course of its business dealings with

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[221] Regarding the situation with Anvil Mining, see discussion at 2.2 of this thesis.

[222] Academics, such as Professor Anita Ramasastry, refer to this interchangeably as indirect complicity or beneficial complicity which she describes as 'the broader and more difficult category to conceptualize ...' Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 102–103.

[223] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

[224] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

[225] UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5, [78].

the appropriate authorities.[226] According to the *Global Compact*, an example of this is evidenced by 'inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.'[227] Like beneficial complicity, the mere silent presence of a corporation in an environment of human rights violations is unlikely to incur criminal liability.[228] However, the corporation may be liable if it could be shown that its silence substantially contributed to the commission of the crime, and the principal perpetrator saw the corporation's presence as authorising or exhorting the criminal activity[229] – for example, if corporate personnel are at the scene or in the vicinity of the crime.[230]

2.3.2 Specific regulation of the business activities of MNCs operating within the extractive industries

The regulatory initiatives discussed here are specific to those multinational corporations operating within the extractive industries.

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[226] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

[227] UN *Global Compact*, Commentary on 'Principle 2: Businesses should make sure they are not complicit in human rights abuses' <http://www.unglobalcompact.org>.

[228] UNSRSG Report, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development '*Clarifying the Concepts of "Sphere of Influence" and "Complicity"'*, UN DOC, A/HRC/8/16 (15 May 2008), [39] – [40].

[229] UNSRSG Report, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development '*Clarifying the Concepts of "Sphere of Influence" and "Complicity"'*, UN DOC, A/HRC/8/16 (15 May 2008), [39] – [40].

[230] See generally discussion on individuals who were convicted of aiding and abetting in international criminal law, UNSRSG Report, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development '*Clarifying the Concepts of "Sphere of Influence" and "Complicity"'*, UN DOC, A/HRC/8/16 (15 May 2008), [40].

a) Extractive Industries Transparency Initiative Principles (2003)

The *Extractive Industries Transparency Initiative*[231] is an international scheme established in 2002 by governments and the private sector to enhance the management and good governance of natural resources. This is achieved by encouraging the publication and corroboration of government revenues obtained from the extractive industries.[232]

The EITI is governed by wide-ranging principles and criteria that emerged in 2003, and finalised by the EITI Board in 2007. For example, the first principle recognises that mismanaged wealth generated from the natural resources sector can negatively impact economic and social growth. Alternatively, when managed appropriately, such natural resources could combat poverty and pave the way for sustainable development. [233] Additionally, one of the many EITI criteria purports that payments made by companies to governments should be published regularly; likewise, governments should publicly make available details about revenues generated from extractive companies.[234]

One of the major strengths of the EITI process is that it makes a significant amount of information available about revenues from the sale of minerals to ordinary citizens.[235] This may be viewed positively as an opportunity for

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[231] Hereafter referred to as EITI.

[232] *What is the EITI?* EITI <http://eiti.org/eiti>.

[233] See, EITI, principle number 1 <http://eiti.org/eiti/principles>.

[234] See, EITI, criteria number 1 <http://eiti.org/eiti/principles>.

[235] Matthew Genasci and Sarah Pray, 'Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice' (2008) 11 *Yale Human Rights and Development Law Journal* 37, 51.

governments implementing EITI to form social contracts with their people.[236] However, the reality, at least with some of the EITI African signatories, is that accurate reporting on revenues seems unlikely given that a number of these countries are plagued by corruption, civil unrest, or oppressive governments.[237] Besides, the EITI implementation process is voluntary, and there are no measures in place to stop misappropriation of State revenues stemming from the extractive industries, or incentives to implement safeguards against such malpractice.[238] Moreover, the initiative fails to penalise wrongful behaviour on the part of any of its economic actors.[239]

b) Voluntary Principles on Security and Human Rights (2000)

The *Voluntary Principles on Security and Human Rights*[240] have been incorporated in a number of agreements between corporations and host governments.[241] The *Voluntary Principles* were introduced to assist extractive industry corporations to carry out their activities in an environment that ensured respect for human rights and fundamental freedoms.[242]

Of all the MNC regulatory initiatives, the *Voluntary Principles* are the most

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[236] Matthew Genasci and Sarah Pray, 'Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice' (2008) 11 *Yale Human Rights and Development Law Journal* 37, 51.

[237] Gavin Hilson and Roy Maconachie, '"Good Governance" and the Extractive Industries in Sub-Saharan Africa' (2009) 30(1) *Mineral Processing and Extractive Metallurgy Review* 52, 63.

[238] Gavin Hilson and Roy Maconachie, '"Good Governance" and the Extractive Industries in Sub-Saharan Africa' (2009) 30(1) *Mineral Processing and Extractive Metallurgy Review* 52, 68.

[239] Gavin Hilson and Roy Maconachie, '"Good Governance" and the Extractive Industries in Sub-Saharan Africa' (2009) 30(1) *Mineral Processing and Extractive Metallurgy Review* 52, 70.

[240] Hereafter referred to as *Voluntary Principles*.

[241] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 835.

[242] See, Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org>.

detailed.[243] They are divided into three categories, offering practical advice on: risk assessment; relations with public security; and, relations with private security.[244] For example, on the issue of risk assessment, the *Voluntary Principles* urge companies to:

> … consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability. Also, identification of the capability of the above entities response to situations of violence in a lawful manner (i.e., consistent with applicable international standards) allows Companies to develop appropriate measures in operating environments.[245]

A concern with the *Voluntary Principles* is that they fail to impose mandatory legal obligations upon the extractive MNCs. They are voluntary as the name suggests, but there is no pressure to join the initiative. Corporations that no longer want to be bound by such voluntary frameworks can easily opt out.[246]

c) The Kimberley Process (2000)

The *Kimberley Process* was initiated by Southern African diamond-producing States to combat the trade in conflict diamonds, and put an end to the financing of violence stemming from diamond revenue.[247] The scheme was initiated in 2000 to support the international certification of rough diamonds,

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[243] Global Witness Report, *Oil and Mining in Violent Places: Why Voluntary Codes for Companies don't Guarantee Human Rights* (October 2007), 5 <http://www.globalwitness.org>.

[244] See, Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org>.

[245] Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org>.

[246] Global Witness Report, *Oil and Mining in Violent Places: Why Voluntary Codes for Companies don't Guarantee Human Rights* (October 2007), 3 <http://www.globalwitness.org>.

[247] Kimberly Process, *Background* <http://www.kimberleyprocess.com/background/index_en.html>.

and it is said to account for up to 99.8% of diamond production worldwide.[248]

Participants in the *Kimberley Process Certification Scheme* are required to meet minimum standards, which are itemised in Section IV of the Scheme. It provides general recommendations for diamond mining activities carried out in conflict areas, and provides specific recommendations on: how to go about securing diamond mines; the licensing of small-scale diamond mining; the registration and licensing of buyers, sellers, exporters, agents or couriers of rough diamonds; the certification for export processes; the communication of import processes; and, the shipping of rough diamonds within free-trade zones.

The recommendations in the *Kimberley Process Certification Scheme* do not form the basis of a legally binding treaty. This has led to the criticism that the certification process lacks teeth.[249] The certification process does not sanction non-compliance by its members; neither does it have a regulatory body in place to enforce its standards.[250] Ultimately, the process is a certification initiative that deals with country compliance, not business compliance.

2.3.3 Is the current regulatory approach sufficient?

Examination of the existing regulatory initiatives shows they face numerous challenges to regulate the behaviour of multinational corporations. The bulk of these initiatives were developed between 2000 and 2003. Yet, in spite of them, allegations about the complicity of MNCs in the commission of international crimes continue to be an

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[248] Kimberly Process, *Background* <http://www.kimberleyprocess.com/background/index_en.html>.

[249] Clive Wright, 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme' (Winter 2004) 11(4) *International Peacekeeping* 697, 703.

[250] Clive Wright, 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme' (Winter 2004) 11(4) *International Peacekeeping* 697, 703.

increasing issue of concern. In 2006, well after the international community adopted regulatory initiatives to prohibit corporate human rights abuses, the UNSRSG released an interim report that found – among other issues – corporations were complicit in the commission of crimes in a number of industrial sectors. Top of the list were the extractive industries.[251] According to the UNSRSG 2006 interim report, 'the extractive sector is unique because no other sector has as enormous and as intrusive a social and environmental footprint.'[252] Moreover, the UNSRSG found that two-thirds of the allegations concerning corporate human rights abuses related to extractive corporations, which were often accused of complicity in crimes against humanity.[253]

Given the many regulatory initiatives, and the increasing concern with corporate criminal liability, it is apparent that the initiatives have failed to create legally enforceable obligations that compel businesses to adhere to basic human rights standards.[254] However, for the most part, the regulatory initiatives have not been entirely ineffective. They have set standards for best practice for multinational corporations and, above all, have heightened the need for even tougher measures.

A number of these regulatory initiatives contain provisions obliging States to criminalise conduct emanating from the extraction and trade of natural resources sourced from

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[251] UNSRSG Interim Report, 'Promotion and Protection of Human Rights' (22 February 2006) UN Doc: E/CN.4/2006/97, [24] – [25]. A distant second was the food and beverages sector. This was followed by apparel and footwear sector. The information and communication technology sector came in fourth.

[252] UNSRSG Interim Report, 'Promotion and Protection of Human Rights' (22 February 2006) UN Doc: E/CN.4/2006/97, [24] – [25].

[253] UNSRSG Interim Report, 'Promotion and Protection of Human Rights' (22 February 2006) UN Doc: E/CN.4/2006/97, [24] – [25].

[254] David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) *American Journal of International Law* 901, 903.

conflict-affected areas.[255] However, these instruments adopt an 'indirect enforcement method'. This means that the obligation is not placed directly on the corporation, but the State, which is then required to criminalise corporate misconduct at a domestic level.[256] Granted, States bear a primary responsibility to protect human rights. The reality remains though that some States – particularly those in conflict-affected areas or weak-governance zones – are simply not in a position to do so.[257] Although most domestic jurisdictions apply at least one of the corporate liability models,[258] there are a number of reasons why they are not in a position to deal with misconduct carried out through the corporate form. One reason is the economic influence exerted by MNCs; especially those operating in the extractive industries.[259]

There can be little doubt that multinational corporations wield significant power and economic influence on the environments in which they operate.[260] As early as the seventeenth century, the British, Dutch, and French East India Companies, as well as the Hudson's Bay Company, were among the earliest companies to display the characteristics of today's multinational enterprises.[261] The changing nature of corporate

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[255] For example, paragraph 17 of the *Norms* which stipulates that, 'States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.'

[256] Cristina Chiomenti, 'Corporations and the International Criminal Court' in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 297–298. This is because States bear the primary responsibility to protect against human rights violations. For discussion of international instruments imposing such obligations on States, see generally, John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 828.

[257] For further discussion on this, see 4.2.1 of this thesis.

[258] See discussion at 5.2.3 of this thesis on the corporate liability models applied in domestic jurisdictions.

[259] For further discussion on some of these challenges when dealing with MNCs, see 3.2.2 of this thesis.

[260] See generally, Ian Binnie, 'Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report' (Summer 2009) 38(4) *The Brief* 44, 45.

[261] Peter Hertner and Geoffrey Jones, 'Multinationals: Theory and History' in Peter Hertner and Geoffrey Jones (eds), *Multinationals: Theory and History* (Gower Publishing Company Ltd, 1986) 1; see also,

power could be seen by mid-nineteenth century, as companies actively influenced the global economy. This is evidenced by the significant increase in the number of companies that owned or controlled manufacturing activities in more than one country.[262] Since then, multinational corporations have grown to become powerful economic actors. It is estimated by the United Nations Conference on Trade and Development that, by 2002, up to 29 of the 100 largest economies in the world were MNCs.[263] UNCTAD also estimated in its *World Investment Report* (2002) that there were at least 65,000 MNCs operating worldwide.[264] At that time, these corporations grossed sales of approximately US$19 trillion. This represented 11% of the world's gross domestic product.[265] In 2008, UNCTAD reported that the number of MNCs had increased worldwide to 79,000, with sales grossing US$31 trillion.[266] In 2011, it was estimated that there were approximately 80,000 MNCs operating worldwide, with at least 800,000 subsidiaries.[267] What is also clear is that these large corporations were active in most industries: extraction, leather and footwear, information and communication, food and beverage, textile and clothing, automobile, electronics, medical and healthcare, cosmetics, and construction. Moreover,

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Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 49.

[262] Peter Hertner and Geoffrey Jones, 'Multinationals: Theory and History' in Peter Hertner and Geoffrey Jones (eds), *Multinationals: Theory and History* (Gower Publishing Company Ltd, 1986) 1.

[263] United Nations Conference on Trade and Development, *World Investment Report (2002): Transnational Corporations and Export Competitiveness*, 1 <http://www.unctad.org>. United Nations Conference on Trade and Development hereafter referred to as UNCTAD. The UNCTAD report specifically uses the term 'transnational corporations'. As previously discussed at 1.2.1 of this thesis, the terms 'transnational corporations' and 'multinational corporations' may be used interchangeably.

[264] UNCTAD, *World Investment Report (2002): Transnational Corporations and Export Competitiveness*, 1 <http://www.unctad.org>.

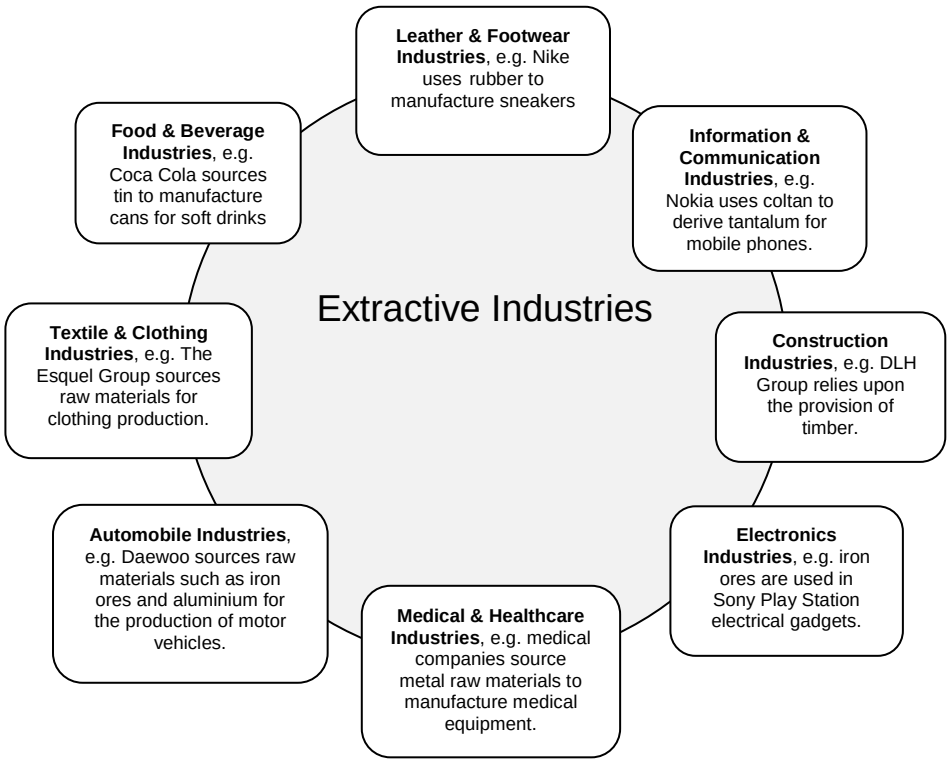
[265] UNCTAD, *World Investment Report (2002): Transnational Corporations and Export Competitiveness*, 1 <http://www.unctad.org>.

[266] UNCTAD, *World Investment Report (2010): Transnational Corporations, Agricultural Production and Development*, 8 <http://www.unctad.org>.

[267] UNSRSG Final Report, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, (21 March 2011) UN Doc A/HRC/17/31, [15].

a common denominator connecting these industries was their reliance on the extractive industries. For example, as illustrated in Figure 1 below, the apparel and footwear industries rely upon the extractive industries to supply them with rubber, a much-needed raw material, for the production of consumer-end products, such as sneakers.[268] Hence, it appears that the extractive industries play a vital role in contributing resources to most economic sectors, which places them in a uniquely powerful position.[269]

Figure 1 – The inter-relationship between extractive industries and other industrial sectors



Despite their economic strength, multinational corporations do not always act

[268] The inter-relationship between most of these industries can also be seen, for example, with the automobile industries relying upon the textile industries to provide comfortable furnishings for the interior of their automobiles.

[269] For example, see, UNSRSG Interim Report, Promotion and Protection of Human Rights (22 February 2006) UN Doc: E/CN.4/2006/97, [25].

responsibly or respect human rights.[270] There are a number of reasons why corporations – particularly those engaged in the extraction of natural resources – may get caught up in international crimes. Extraction activities require substantial capital investments. At times, minimising the risk of losing such an investment seems to be one of the reasons why corporations will remain in country or an area that is prone to conflict, and consequently become involved in international crimes.[271] Granted, in this context, MNCs expose themselves to risk by choosing to carry out their extractive activities in conflict-affected areas or weak-governance zones.

It appears that there is a need to seriously assess the activities of MNCs accused of complicity in international crimes and to ask: is this a crime? And, if so, what should be done about it? On the face, it seems that pernicious corporate conduct is a crime, and there is a pressing need for a doctrine of corporate liability in international criminal law to address the liability of complicit multinational businesses; particularly, in circumstances where domestic jurisdictions are unable or unwilling to prosecute the businesses.[272] Regrettably, there are no multilateral or international judicial mechanisms in place in international criminal law to address this issue. As a result, corporations aid and abet international crimes, and do so with impunity.

2.4 Chapter conclusion

The writer examined whether there should be criminal liability for business complicity in international crimes, and discussed what it means to allege business complicity in

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[270] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 1 <http://www.ichrp.org>

[271] Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8(3) *Journal of International Criminal Justice* 803, 818.

[272] This is subject to the principle of complementarity – see discussion on this at 4.2.4 of this thesis.

international crimes, what is currently being done to regulate the business activities of MNCs, and whether the current regulatory approach is sufficient.

The next chapter deals with the rationale for corporate criminal liability.

CHAPTER 3

Rationale for Corporate Criminal Liability

'... corporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like.'[273]

3.1 Chapter introduction

The previous chapter examined whether there should be criminal liability for business complicity in international crimes. This chapter discusses the rationale for corporate criminal liability with respect to corporate complicity in the commission of international crimes in conflict-affected areas or weak-governance zones. Essentially, all corporate actors who are responsible for corporate crimes should be held accountable, whether it is the corporate entity or the corporate personnel.[274] This chapter is mainly concerned with the rationale for the culpability of the corporate entity itself.

3.2 Rationale for corporate criminal liability

The discussion that follows examines the issue of whether corporate criminal liability should be imposed at all, practical difficulties stemming from the nature of MNCs, the issue of unfairness to shareholders, and fundamental objections arising from the nature of criminal and international law.

3.2.1 What is the point?

Ostensibly, the liability of corporate personnel has held more appeal in criminal law than

[273] Edward, Lord Chancellor Thurlow, English Jurist and Lord Chancellor (1731–1806).

[274] Legal or natural persons may be charged and tried jointly or separately – see discussion at 7.2.1 of this thesis.

looking beyond the individuals to the culpability of the corporate entity itself.[275] On this view, the rationale sometimes advanced is that corporate crime is merely indicative of a corporate governance issue relating to a principal/agent problem, whereby the criminal offence essentially lies with deviant corporate individuals.[276]

Generally, the idea of holding a corporate entity criminally responsible for international crimes has been widely debated and continues to be controversial. Andrew Clapham recalls deliberations held at the 1998 UN Conference of Plenipotentiaries on the establishment of the International Criminal Court with respect to whether to include legal persons within the ICC's jurisdiction. Clapham comments that the query raised by a number of delegates at that time was 'what would be the point?'.[277]

There are a number of reasons why criminal liability should extend to the corporate entity and not be confined to the corporate personnel of the business enterprise.

Firstly, imposing criminal sanctions on corporate entities is necessary to indicate society's condemnation of the corporate wrongdoing.[278] Corporations have been known to engage in business activities that inflict harm upon society; hence, as societal actors, it is expected that by imposing criminal liability, corporations will be brought before the

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[275] See generally discussion in Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 143, 158.

[276] Geraldine Szott Moohr, 'Of Bad Apples and Trees: Considering Fault-Based Liability for the Complicit Corporation' (2007) 44 *American Criminal Law Review* 1343, 1346–1347.

[277] Andrew Clapham, *Corporate Criminal Liability and the Rwandan Genocide* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 975.

[278] Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 103.

most authoritative regulatory mechanism available in society.[279]

Secondly, imposing corporate criminal liability is necessary to deter corporations from engaging in criminal activities. Although explanations vary, criminal penalties that tend to be imposed sporadically, or even leniently, are seen as the leading reason for the failure to deter corporations from engaging in criminal activities.[280] The deterrence theory distinguishes between its general and specific forms.[281] Specific deterrence is concerned with punishing criminals so as to deter them from committing criminal offences again.[282] Corporate punishment could take a number of forms – for example, a corporate death penalty, or subjecting the entity to a probationary period during which the courts monitor its business activities.[283] General deterrence is concerned with what effect punishing a specific offender will have on society at large, given that it might dissuade society from trying to engage in similar criminal conduct.[284] Some see general deterrence as the more appropriate rationale for corporate criminal liability, and rightly so. This is premised on the notion that corporate entities – through their senior management – tend to pay close attention to similar cases that have gone before the courts. They do this when weighing up the risks and rewards of whatever business

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[279] Pamela Bucy, 'Corporate Criminal Liability: When does it Make Sense?' (2009) 46 *American Criminal Law Review* 1437, 1437.

[280] Sally S Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press, 2002) 45.

[281] There are several theories about punishment, these include, *inter alia*: 'deterrence, retribution, rehabilitation, restitution, incapacitation, and denunciation.' David Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press, 11th ed, 2005) 5.

[282] Andrew Weismann with David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 428.

[283] Ordinarily, this is carried out by imposing a term of imprisonment upon a natural person. Andrew Weismann with David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 428.

[284] Andrew Weismann with David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 428.

activities they are about to engage in.[285]

Thirdly, imposing corporate criminal liability would allow for sanctions against corporate assets – which, in turn, could generate funds for victims or their beneficiaries.[286] On this view, corporate entities are likely to have substantially more assets than the corporate personnel. This also increases the likelihood of securing funds when enforcing a court order.[287]

Finally, extending liability to the corporate entity would be beneficial because culpable individuals are not always easily identifiable.[288] At times, undesirable conduct is carried out through the business form, which inevitably makes it difficult to identify culpable individuals. This uncanny ability of multinational enterprises to operate through various business forms poses challenges in attributing liability. Also, large multinational corporations often experience considerable movement of business personnel through their global organisation. They tend to experience a high turnover of corporate personnel. Individuals come and go and are easily replaced in the global business operations. This too, makes it difficult to identify culpable individuals.[289]

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[285] Andrew Weismann with David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 428.

[286] The issue of whether such a move would be unfair to corporate shareholders is discussed later in this chapter.

[287] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8(3) *Journal of International Criminal Justice* 909, 913.

[288] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 6. For further discussion on some of the challenges that lie in identifying the culpable individual see, Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objections Stripped Bare' (2008) 19 *Criminal Law Forum* 115, 149.

[289] On the notion of individuals coming and going through large corporations, see generally, Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 6.

3.2.2 Are there practical difficulties stemming from the nature of MNCs?

There are several characteristic features of multinational corporations. These features, discussed below, include, *inter alia*: participating in large-scale, cross-border activities; adopting complex organisational structures; and, implementing wide-ranging internal control systems. The discussion shows that, in some instances, a number of these characteristic features pose practical difficulties with respect to enforcing individual liability on corporate personnel. In other instances, these characteristic features even make it difficult to identify culpable enterprises within the same corporate group; hence, legal theories such as 'piercing the corporate veil' then become indispensible tools to identify the real controllers of the business enterprise.

a) Participation in large-scale cross-border activities

Multinational corporations participate in large-scale, cross-border activities. They essentially enjoy multi-jurisdictional status. By definition, MNCs are commercial entities that are engaged in business activities in more than one State.[290] The headquarters of an MNC could be located in one State while operating business activities in other States through subsidiaries or other contractual relationships.[291] For instance, international sales are one of the many distinguishing features that make a company multinational in character. The most basic level of multinational activity occurs when a company manufactures goods in its own country that are then sold in another country by

[290] Peter Fischer, 'Transnational Enterprises' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (North Holland Publishing Company, 1985) Volume VII, 515.

[291] Michael Likosky, 'Contracting and Regulating Issues in the Oil and Gas and Metallic Minerals Industries' (April 2009) 18(1) *Transnational Corporations* 1, 4; see also, Mo Yamin, Hsin-Ju Tsai and Ulf Holm, '"The Performance Effects of Headquarters" Involvement in Lateral Innovation Transfers in Multinational Corporations' (2011) 51 *Management International Review* 157, 157–177.

its affiliated businesses.[292] Also, goods may be manufactured in one country from materials primarily sourced from another country, then sold in other countries.[293]

The economic boom experienced during the globalisation era largely influenced the emergence of multinational corporations, particularly in the aftermath of World War II.[294] Since then, MNCs have been perceived as symbolising the globalisation phenomenon itself.[295] Globalisation is defined as: 'the worldwide trend of cross-border economic integration that allows businesses to expand beyond their domestic boundaries.'[296] One of the consequences of globalisation is that the inter-connectedness of global economies has created an environment in which businesses are capable of carrying out their activities anywhere in the world while engaging with anyone of their choosing.[297] In this context, MNCs are powerful economic actors; they exercise tremendous economic power that, one could argue, largely runs

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[292] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 4–5.

[293] This poses some risk challenges, as discussed earlier at 2.2 of this thesis, for businesses that rely upon the extractive industries to manufacture their consumer-end products, for example, mobile phone businesses that source coltan from conflict-affected areas.

[294] Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 259.

[295] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 212.

[296] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 7. There have been several international and regional initiatives that have assisted this process. These include the General Agreement on Tariffs and Trade (hereafter referred to as GATT) and the North American Free Trade Agreement (hereafter referred to as NAFTA), as well as a number of initiatives that have been spearheaded by the World Trade Organisation (hereafter referred to as WTO), the European Union (hereafter referred to as EU), and the Asia-Pacific Economic Cooperation (hereafter referred to as APEC).

[297] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 6–7.

unchecked.[298] They are not created by any single law; neither does any single law define the exact nature of their business activities. Nor are they regulated solely by the laws of one jurisdiction.[299]

b) Adoption of complex organisational structures

Multinational corporations typically adopt complex organisational structures. The term 'organisational structure' literally describes the structure of an organisation. To optimise their business activities, multinational corporations adopt a number of organisational structures; these are widely recognised by leading business management experts.[300] Often, the organisational structures adopted by MNCs are seen as complex,[301] and it appears that the type of organisational structure they adopt is driven by a number of factors, such as products, services, and the geographic location of their business enterprises.

Typical organisational frameworks include: the export division structure; the international division structure; the worldwide geographic structure; the worldwide product structure; the worldwide matrix structure; and, the transnational-network structure. Generally, MNCs adopt at least one of the structures discussed here – but they are not mutually exclusive. With regards to the export division structure, managers who desire greater control over

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[298] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 213.

[299] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 3–4.

[300] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 291.

[301] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 33.

export operations will often create a separate export division when exports represent a significant growth in corporate sales.[302] The export division often grows into an international division as corporate sales increase and the company establishes manufacturing operations across its domestic borders.[303] This is commonly known as the international division structure. As for the worldwide geographic structure, the divisions of an MNC are represented by regions or large market countries in order to adopt multiple domestic or regional strategies.[304] Traditionally, the worldwide product structure is promoted as the ideal one for MNCs desiring to adopt an international strategy, because all product divisions throughout the world are responsible for producing and selling their own products and services.[305] The worldwide matrix structure is a complex hybrid one that places equal emphasis on both the geographic and product structures.[306] Finally, the transnational-network structure is an emerging hybrid structure that has been hailed by the business community as the contemporary solution to the dichotomy between local demands and global economies of scale.[307] The transnational-network structure is best described as one that takes advantage of the location of its

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[302] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 295.

[303] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 298.

[304] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 298.

[305] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 301.

[306] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 303.

[307] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 306.

subsidiaries combining its functional, product, and geographic arms that are scattered throughout the world.[308]

To illustrate, BP is among the world's largest energy companies, with exploration and production in up to 30 countries.[309] BP's international headquarters are located in the United Kingdom – but, the company operates on six continents and its products and services are used in over 100 countries. BP's organisational structure is divided into three specific business segments: Exploration and Production, Refining and Marketing, and BP Alternative Energy.[310] These three business segments are managed by BP's Board of Directors and its corporate senior executives.[311] In Africa, specifically, BP has engaged in joint ventures with local oil companies in Algeria, Angola, and Egypt where it provides management support, technical expertise, and training.[312] For example, the Gulf of Suez Petroleum Company is one of the joint ventures BP operates in Egypt. According to BP, the Gulf of Suez Petroleum Company is among the largest oil and gas extraction operations in the African / Middle Eastern region.[313] The Gulf of Suez Petroleum Company was created as a result of a partnership agreement between BP and Egyptian General Petroleum Corporation, a State-owned commercial entity.[314] BP also engages in retail and marketing activities throughout Southern Africa, trading

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[308] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 306.

[309] BP, *Where we Operate* <http://www.bp.com>.

[310] BP, *Group Organization* <http://www.bp.com>.

[311] BP, *Board and Executive Management* <http://www.bp.com>.

[312] BP, *Where we Operate* <http://www.bp.com>.

[313] See, BP, *BP in Egypt,* <http://www.bp.com>.

[314] See, BP, *BP in Egypt,* <http://www.bp.com>.

in lubricants, oil and gas products, and solar panels.[315] Given its global reach, the writer assumes that BP has incorporated aspects of the various leading organisational structures discussed here in order to co-ordinate its global activities.

c) Implementation of wide-ranging internal control systems

Multinational businesses tend to adopt wide-ranging internal control systems with respect to the pattern of their decision-making. These systems are commonly referred to as 'design options for control systems'. Some of the leading design options for control systems include, *inter alia*: the cultural control system; output control system; the profit control output system; bureaucratic control system; and, the decision-making control system.[316] These control systems are not mutually exclusive.

Of these internal control systems, the cultural one is driven by the organisational culture that is used to control the corporate entity.[317] This is implemented through formal organisational instruments such as: codes of conduct, codes of ethics, mission statements, vision statements, or corporate statements concerning management ideologies.[318]

The cultural control system has emerged as the most desired control mechanism favoured by multinational corporations that have adopted a

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[315] BP, *Where we Operate* <http://www.bp.com>.

[316] For detailed discussion on these see, John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 312–313.

[317] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 313.

[318] Kenneth A Merchant and Wim A Van der Stede, *Management Control Systems: Performance Measurement, Evaluation and Incentives* (Pearson Education, 2nd ed, 2007) 85.

transnational-network organisational structure.[319] Furthermore, the cultural control system is most relevant to the discussion in this thesis, which supports the notion of imposing corporate criminal liability where liability is diagnosed through questions about the culpability of the corporate entity itself.[320]

These systems not only make it difficult to attribute individual liability but, at times, shield enterprises within the same corporate group. To illustrate, these control systems allow parent companies (headquarters) to influence and control the activities of their businesses operations throughout the world.[321] This poses several challenges. For instance, at times, the corporate culture promoted by the parent company may cultivate criminal offences by a subsidiary in another country.[322] Regrettably, in some jurisdictions, a parent corporation located in one country may not necessarily be held liable for the actions of its subsidiary located in another, even where the former committed crimes through the latter.[323] In such circumstances, the subsidiary becomes the scapegoat for the offence that more appropriately should be attributed to the parent company.[324]

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[319] John B Cullen and K Praveen Parboteeah, *Multinational Management: A Strategic Approach* (South Western, 5th ed, 2011) 313.

[320] For detailed discussion concerning corporate criminal liability based on corporate culture and the non-derivative liability model see 5.2 in this thesis.

[321] See generally, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 14.

[322] Allens Arthur Robinson *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008) 3.

[323] See, John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 824.

[324] On the practical difficulties of prosecuting the parent company, which would ordinarily be located in another State altogether, see, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths: LexisNexis, 2003) 157.

d) Limited liability and the act of piercing the corporate veil

Multinational corporations operate globally through a number of business forms.[325] When MNCs enter foreign markets, they generally do so by adopting strategic business initiatives, such as foreign direct investment, joint ventures, and licensing agreements.[326]

In the extractive industries specifically, the parent company of an MNC can operate in foreign countries by entering into contractual relationships, directly or indirectly through its subsidiaries, to form no-liability companies, partnerships, and joint ventures. With respect to no-liability companies, these are attractive to shareholders in the extractive industries, because mining activities are generally perceived to be a risky undertaking.[327] Regarding partnerships and joint ventures, mining and petroleum companies operate through these business forms for a number of strategic reasons. One reason is that most domestic jurisdictions often require foreign MNCs to team up with State-owned companies to carry out their exploration activities.[328]

There are also instances where the business enterprises within the same corporate group have the ability to 'disaggregate, dissolve or reconstitute'[329] themselves. In essence, parent companies strategically adopt or abandon

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[325] See generally, Attila Yaprak, Shichun Xu, and Eric Cavusgil, 'Effective Global Strategy Implementation: Structural and Process Choices Facilitating Global Integration and Coordination' (2011) 51 *Management International Review* 179, 179–192.

[326] Georgios I Zekos, *Economics, Finance and Law on MNEs* (Nova Science Publishers, 2007) 23.

[327] For commentary on this type of business form, see, J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 82.

[328] John Bray, 'Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 321 <www.worldbank.org>.

[329] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 160.

business enterprises to shield themselves from liability or risk to the corporate group. This was somewhat the case, for example, with oil extraction giant Occidental, which renamed and sold one of its enterprises – Piper Alpha – following the disastrous North Sea oil rig explosion that resulted in 167 deaths of personnel and rescue workers.[330] In effect, this strategic move by the parent company, Occidental, hampered efforts by relatives of the deceased who ultimately discontinued a private prosecution of the subsidiary business enterprise.[331]

The notion that each business entity may be afforded its own legal personality could hamper efforts to hold the business enterprise, as a whole, accountable.[332] Although the parent company and its subsidiaries may be part of the same corporate group, the company law applied in most domestic jurisdictions treats these business enterprises individually as distinct legal entities.[333] This feature, commonly known as 'separate legal personality', is a basic tenet of company law that is a cornerstone in the principle of limited liability.[334]

With respect to some of the challenges posed by the principle of limited

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[330] See, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 160.

[331] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 160.

[332] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 200.

[333] See, generally, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

[334] For detailed discussion on the issue of whether MNCs have been conferred with separate legal personality under international law and the implications of this, see 3.2.5 of this thesis.

liability, there is a concern that multinational corporations may try to shield themselves from legal responsibility arising from criminal activities carried out through their overseas business operations.[335] MNCs tend to operate through business forms that adopt intricate organisational structures to minimise their risk. Often, these business forms will appear independent from the parent company,[336] and this may place both the parent company and its subsidiaries in a position of impunity in some domestic jurisdictions. However, this obstacle is not insurmountable – piercing the corporate veil would be the most practical means to challenge the notion of limited liability.

In essence, the act of piercing the corporate veil refers to circumstances where the courts look within the business form to ascertain the real controllers and hold the corporate shareholders accountable.[337] However, courts in most domestic jurisdictions will only consider piercing the corporate veil in exceptional circumstances.[338] In Australia, for example, circumstances where this may occur include:

(a) Where there is agency (the most popular category – 50% of the cases);
(b) Where there are group (of companies) enterprises;
(c) Sham or façade;
(d) Fraud; and
(e) Unfairness or injustice.[339]

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[335] Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 *Cambridge Journal of Economics* 915, 915.

[336] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 33.

[337] Karen Vandekerckhove, *Piercing the Corporate Veil* (Wolters Kluwer, 2007) 11.

[338] Andy Gibson and Douglas Fraser, *Business Law* (Pearson, 5th ed, 2011) 691.

[339] J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 55.

There are a number of reasons for piercing the corporate veil and choosing to go after the parent company instead of its subsidiary, and Sarah Joseph suggests that one could be that the former would have substantially more assets to meet financial penalties imposed upon it than the latter.[340] With respect to this point, MNCs ordinarily choose business forms that minimise their risks – for example, no liability companies that are set up for the sole purpose of mining activities.[341] The act of piercing the corporate veil would be an indispensible tool for courts to access the real controllers of such business forms;[342] especially those adopted to shield the MNC from legal responsibility arising from criminal activities carried out through its subsidiary.

3.2.3 Would it be unfair to the shareholders?

Who are the so-called shareholders of multinational corporations? These are varied. It is common to find that MNCs are wholly or partially owned by either the private sector or the public sector.[343]

Ordinarily, privately owned multinational corporations are owned by a host of business actors, commonly referred to as shareholders or members. These shareholders include, *inter alia*: individual business persons; small groups of investors; and, large groups of diversified investors (particularly MNCs trading on local and international stock

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[340] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 129. The idea of corporate punishments is consistent with the arguments made later in this chapter.

[341] For further discussion business forms see 1.2.1 of this thesis.

[342] For further discussion on this issue, see, Jonathan Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' (2008) 33(3) *Brooklyn Journal of International Law* 899, 915; also see generally, 'Corporate Anonymity: Ultimate Privilege' *The Economist* (January 21–27, 2012).

[343] See generally, John H Dunning and Sarianna M Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2nd ed, 2008) 6.

exchange markets).[344] Private equity firms are at the forefront of the large groups of diversified investors who typically invest in MNCs.[345] With respect to the extractive industries, privately owned MNCs have been known to monopolise the extraction of metallic minerals in the extractive sector.[346] (Metallic minerals include gold, platinum, tantalum, and copper – see Appendix 4 for a full list.)

In contrast, publicly owned multinational corporations are owned and managed by State-owned commercial enterprises.[347] Those operating in the extractive industries tend to be involved largely in extraction activities carried out in the oil and gas sectors where they play a key role in developing and transitioning economies.[348] However, there are varying degrees of State involvement in the domestic business activities of MNCs in the extractive industries. At times, the State operates through a State-owned company where it is the majority shareholder in a joint venture or partnership.[349] At other times, the State-owned company only owns a small fraction of the joint venture or partnership.[350]

A common argument put forward by critics of corporate criminal liability is that it would be unfair to the corporations' shareholders to sanction corporate assets. The rationale

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[344] See generally, John H Dunning and Sarianna M Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2nd ed, 2008) 6.

[345] See generally, John H Dunning and Sarianna M Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2nd ed, 2008) 6.

[346] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 229.

[347] See generally, John H Dunning and Sarianna M Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2nd ed, 2008) 6.

[348] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 229.

[349] John Bray, 'Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 321 <www.worldbank.org>.

[350] John Bray, 'Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies' in World Bank Report, Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 321 <www.worldbank.org>.

sometimes advanced is that shareholders are innocent actors who do not exercise control over the conduct of the corporate entity or its employees.[351] The shareholder's role in the business enterprise is seen as passive – they are out of the management loop, so to speak.[352] It is argued by some that shareholders elect the board of directors; however, the corporate entity is run by the board and not the shareholders.[353] Therefore, corporate liability punishes blameless shareholders; this is seen by some as defying a liberal system of criminal justice.[354] However, in reality, there are competing views about the role played by shareholders. On the one hand, some shareholders perceive themselves not as bystanders, but an integral part of the corporation's collective enterprise, and morally entangled in the corporation's policies and practices.[355] On the other hand, there are those who view their role as mere speculators who simply keep tabs on their investments.[356]

Indeed, it would seem that holding a multinational corporation criminally responsible for its actions – particularly where corporate assets have been sanctioned – would negatively impact its shareholders. However, the criticism advanced by sceptics of corporate liability in this context does not take into consideration the critical role that shareholders

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[351] John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1357.

[352] Daniel J Morrissey, 'Piercing all the Veils: Applying an Established Doctrine to a New Business Order' (2007) 32 *Journal of Corporation Law* 529, 537.

[353] Daniel J Morrissey, 'Piercing all the Veils: Applying an Established Doctrine to a New Business Order' (2007) 32 *Journal of Corporation Law* 529, 537.

[354] John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1357. See also generally, 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, 386–387.

[355] Ian B Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) *Oxford Journal of Legal Studies* 755, 771.

[356] Ian B Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) *Oxford Journal of Legal Studies* 755, 771–772.

can, and should, play. To a large extent, shareholders can monitor corporate activities.[357] This may be carried out in a number of ways. Shareholders may play a more active role in corporate activities, they could oversee corporate behaviour, select exemplary corporate personnel – albeit board members – as well as positively influence appropriate corporate policy.[358] Moreover, shareholders benefit from the positive and successful corporate activities. It is only reasonable that they should bear some of the costs resulting from corporate wrongdoing.[359]

3.2.4 Are there any fundamental objections arising from the nature of criminal law?

At least three theoretical objections have been voiced to the notion of corporate criminal responsibility. Firstly, there is an objection that corporate entities are incapable of possessing the requisite *mens rea*; they are amoral, and have no will of their own.[360] Secondly, an objection is that corporate entities are legal fictions; they cannot function

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[357] See, Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 473; also generally, Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objections Stripped Bare' (2008) 19 *Criminal Law Forum* 115, 149.

[358] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2nd ed, 2005) 358. Dinah Shelton points out that this appears to be the view taken by courts in some domestic jurisdictions with respect to rationalising the losses that shareholders have incurred in paying punitive damages, see 358. See also, Ian B Lee, 'Corporate Law, Profit Maximization, and the "Responsible" Shareholder' (2005) 10(2) *Stanford Journal of Law, Business and Finance* 31, 64.

[359] See generally, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 29. Granted, there may be some instances where the shareholders who benefit from the corporate wrongdoing may not necessarily be the ones who are left to bear the costs. 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, 417.

[360] See discussion in Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 495. Also generally, Larissa van den Herik, 'Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (T. M. C. Asser Press, 2010) 363.

independently.[361] Lastly, that corporate entities, *per se*, cannot be punished.[362] In this context, the following discussion shows that legal developments over the past few decades have, indeed, overcome these theoretical objections to the notion of corporate criminal responsibility; corporate entities can be held at fault and punished.

a) Could corporate entities possess the requisite mens rea*?*

It is generally understood that the purpose of criminal law is to hold individuals responsible for morally reprehensible acts.[363] This view is often promulgated by those who hold fast to the traditional maxim that 'the deed does not make a man guilty unless his mind be guilty.'[364] Regardless, the idea that corporations might be found morally blameworthy has been problematic for centuries. This is evinced by the views of Lord Chancellor Thurlow in the eighteenth century when he commented that, 'corporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like.'[365] Such views are often relied upon by the critics of corporate criminal liability, who commonly argue that corporations are not real persons and, therefore, incapable of forming the requisite *mens rea*.[366]

Indeed, criminal law requires that a crime involves both physical and mental

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[361] See discussion in Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 495.

[362] See discussion in Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 495.

[363] Helen Stacy, 'Criminalizing Culture' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 85.

[364] *'Actus no facit reum, nisi mens sit rea'* discussed in Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 18.

[365] Edward, Lord Chancellor Thurlow, English Jurist and Lord Chancellor (1731–1806).

[366] See discussion in Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899, 900.

elements, known in law as *actus reus* and *mens rea.*[367] *Actus reus* is defined as: 'all elements in the definition of the crime except the accused's mental element.'[368] *Mens rea* is defined as: 'the mental element required by the definition of the particular crime – typically, intention to cause the *actus reus* of that crime, or recklessness whether it be caused.'[369] Intention, knowledge, and recklessness are indicative of *mens rea*. Both the physical and mental elements must be present to establish the individual's criminal responsibility for perpetrating a crime.[370] To illustrate, Article 7(1)(a) of the ICC's *Elements of Crime* provides that the *actus reus* that constitute the crime against humanity of murder include: 'the perpetrator killed one or more persons; and the conduct was committed as part of a widespread or systematic attack directed against a civilian population.'[371] Article 7(1)(a) further provides that the *mens rea* for the same crime is: 'the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.'[372]

Establishing the requisite *mens rea* for criminal offences is seen as the crux in

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[367] Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crime' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., 2001) 14.

[368] David Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press, 11th ed, 2005) 37.

[369] David Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press, 11th ed, 2005) 92.

[370] Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crime' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., 2001) 14.

[371] Article 7 (1)(a) of the Elements of Crimes, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes* (13–31 March and 12–30 June).

[372] Article 7 (1)(a) of the Elements of Crimes, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes* (13–31 March and 12–30 June).

attributing corporate liability,[373] and it is for this reason that attributing corporate criminal liability has long been problematic. Criminal law has only responded to corporate criminality over the last century by developing models of corporate liability. These models address the issue of how corporate entities could possess the requisite *mens rea*. There are at least two competing corporate liability models: derivative liability, and non-derivative liability.[374] These corporate liability models are examined further in Chapter 5 of this thesis. Briefly, under derivative liability, it is the actions of the corporate individuals that are of primary concern. The culpability of the individuals is attributed to the corporate entity if it can be shown that the individuals acted either as the directing minds of the corporation – that is, senior managers (identification liability) – or acted within the course of their employment (vicarious liability).[375] Under non-derivative liability, the corporation is treated as a real entity that possesses a separate legal personality in its own right; hence, corporate liability is primarily diagnosed through questions about the culpability of the corporate entity itself.[376] In essence, a corporation's liability is established on the basis of its corporate culture, policies, and

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[373] For detailed discussion on criticisms of corporate criminal liability see, Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 167.

[374] For further details on the corporate liability models, see discussion in 5.2.3 of this thesis.

[375] See generally, Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 122–133; Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 147–152; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

[376] See generally, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1; Celia Wells, *International Trade in Models of Corporate Liability* (2002), The Centre for Business Relationships, Accountability, Sustainability and Society <http://www.brass.cf.ac.uk/>; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 64–65.

knowledge.[377]

b) Are corporate entities legal fictions?

i. Nature of legal personhood

Corporate entities can be held at fault in their own right. Most domestic jurisdictions recognise that corporate entities are legal persons. Legal personhood[378] is defined as:

> … conceptualizing an organized body of individuals as a person, a legal person, or a legal entity, so that it might be treated at law as if it were an individual rather than an amalgamation of individuals …[379]

Ordinarily, the word 'person' is adopted to describe human beings. Evidently, the legislature and judiciary have adopted a more technical meaning for a person.[380] The law describes this person as a 'legal person', 'juristic person' or '*personne morale*'. This distinguishes them from natural persons,[381] who are defined in law as: 'human beings in the ordinary sense.'[382]

Conferring legal personhood on corporate entities enables them to operate as

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[377] See, for example, Part 2.5, Division 12 of the *Australian Criminal Code* (Cth).

[378] Legal theorists and philosophers recognise at least three forms of personhood: metaphysical, moral, and legal. Celia Wells provides a lengthy discussion on these forms of personhood and addresses the concepts proposed by moral philosophers and theorists such as Peter French, Thomas Donaldson, Joel Feinberg, and Philip Pettit. See, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 76.

[379] Gregory A Mark, 'Personification in Three Legal Cultures: The Case of the Conception of the Corporate Unit' (2006) 63 *Washington & Lee Law Review* 1479, 1480; see also, discussion in Jess M Krannich, 'The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation' (2005) 37 *Loyola University Chicago Law Journal* 61, 66–67.

[380] Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (Oxford University Press, 8th ed, 2008) 31.

[381] George F Deiser, 'The Juristic Person – I' (1908) 57 (3) *University of Pennsylvania Law Review and American Law Register* 131, 138.

[382] Hon Dr Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths Australia, 2nd ed, 1998) 300.

autonomous legal entities.[383] In essence, the law treats a corporation as a separate legal person in its own right,[384] one that enjoys rights and duties.[385] Registration is a required act to form a company[386] – incorporation was the term commonly used to describe this process in the past. Once registered, the company is considered a separate legal person.[387] The concept of the company being a separate legal person is known as the 'veil of incorporation'.[388] This enables a corporation to use its name to acquire property, engage in contractual obligations, and be held liable for criminal or tort offences.[389] Having a legal personality also entitles a corporation to perpetual succession, long after its members, management, or employees have departed. This is an indispensible feature that facilitates trade.[390]

The idea that a corporation could be regarded as a separate legal person with

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[383] Karen Vandekerckhove, *Piercing the Corporate Veil* (Wolters Kluwer, 2007) 3; see also, Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 146–148.

[384] Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (Oxford University Press, 8th ed, 2008) 31. See also, J F Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 36–44, where the authors provide a detailed account tracing the historic developments of corporate personality. See generally, Olufemi Amao, 'Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations' (2008) 33 *Australian Journal of Legal Philosophy* 100.

[385] Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (Oxford University Press, 8th ed, 2008) 31.

[386] Paul Latimer, *Australian Business Law* (CCH Australia Limited, 30th ed, 2011) ¶9270.

[387] Paul Latimer, *Australian Business Law* (CCH Australia Limited, 30th ed, 2011) ¶9-270.

[388] Andy Gibson and Douglas Fraser, *Business Law* (Pearson, 5th ed, 2011) 691. This veil of incorporation essentially means that the law treats the corporate directors and shareholders as separate from the corporate entity. See earlier discussion on this point in this chapter.

[389] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 200.

[390] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 200.

distinct rights and obligations is a *sine qua non* of any corporate law model.[391] This principle was cemented in *Salomon v Salomon & Co Ltd*.[392] Aron Salomon and his family ran a private business. They decided to incorporate their business by transforming it into a company that was limited by shares. Aron Salomon borrowed money from a mortgagee, which he then lent to the family business in return for shares. The company went into liquidation. When the time came for the liquidator to pay the company debts, one of the contentious issues was whether Aron Salomon and the company were one in the same. If they were, Aron Salomon would forfeit his right to payment as a valid debenture holder ahead of the unsecured debtors. The Court held that the company was a separate legal entity.[393] The *Salomon* precedent is well established as a leading authority applied in most common law jurisdictions; it has also been adopted in some civil law jurisdictions.[394]

ii. The effect of the nominalist and the realist views of legal personality

There are two competing philosophical views regarding the concept of legal personality: the nominalist and realist views. The nominalist view, also referred to as the atomic view,[395] suggests that legal persons, specifically corporations, are fictitious, artificial persons and essentially nothing more than

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[391] David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 60.

[392] *Salomon v Salomon & Co Ltd* [1897] AC 22.

[393] *Salomon v Salomon & Co Ltd* [1897] AC 22, 51.

[394] David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 61.

[395] See, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 147; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 46.

a collection of individuals.[396] However, according to the realist view, corporations are, indeed, real and exist independently; they possess a separate legal personality in their own right.[397] The realist view is also referred to as the 'organic' or 'holistic' view.[398] The realist view tends to reflect how ordinary people perceive companies.[399] According to James Gobert and Maurice Punch ordinary people do not think of a specific individual when they refer to companies such as IBM, BT, or ESSO. Though, in exceptional circumstances, they may identify Bill Gates with Microsoft or Virgin Blue with Richard Branson. Despite these exceptions, there is still a consciousness that the decision-making processes of such companies tends to involve a lot more executives than the high-profile ones.[400]

Regarding these competing views, William S Laufer makes the point that the legislature and judiciary have trouble applying principles of corporate personhood to criminal matters, despite the ease with which the same principles are applied when asserting corporate rights and privileges.[401] Mordechai Kremnitzer echoes this sentiment, albeit with a touch of humour. Kremnitzer speculates that 'if the corporation has enough mind and free will to

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[396] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 4–5.

[397] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 64–65.

[398] See, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 147; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 46.

[399] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 49.

[400] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 49.

[401] William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) 48.

commit itself to a contract, where do the mind and the will disappear when we turn to the penal law?'[402] Both Laufer and Kremnitzer present an interesting point that requires further consideration. Perhaps one reason for this inconsistency in legal approaches could be that the perception of legal personality in criminal law differs from that of corporate law. Legal personality is important to these two diverse disciplines of law for different reasons. For instance, in criminal law, the concept of legal personality is important because it is required to determine which corporate liability model will be applied when attributing criminal responsibility to the corporate entity.[403] Whereas, in corporate law, the corporate entity is personified in order to be treated by analogy as an individual that enjoys rights and privileges.[404]

With respect to how this issue is treated in criminal law, the competing concepts of legal personality – that is, the nominalist and realist views – determine the model of corporate liability that will be applied. It is important to distinguish between these two views of legal personality, because they entail considerably different approaches in attributing criminal responsibility.[405] Although all the corporate liability models found within

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[402] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8(3) *Journal of International Criminal Justice* 909, 913.

[403] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 2.

[404] Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Hyde Park Press, 3rd ed, 2006) 84. Welling states: 'legal academics have had a field day with corporate personality over the years... corporate activities are to be analysed for legal purposes by analogy to human activities... Law is about an actor's capacity, rights, powers and privileges. A corporation's capacity, rights and privileges are pretty much the same as an individual's...' see, 112–114.

[405] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 2. For an opposing view, William S Laufer and S D Walt opine: 'finding moral responsibility and criminal

most domestic jurisdictions could ultimately result in the liability of the organisational entity, the models differ in the approach taken to establish that liability.[406] Based on the nominalist view of legal personality, a derivative approach is taken whereby the culpability of an individual, or specific individuals, is imputed to the organisation. Whereas, the realist view adopts a non-derivative liability model in which the culpability of the organisation itself – as opposed to the culpability of its individuals – is of primary concern.[407] In such circumstances, there can be liability even where no individual may have committed an offence.[408]

c) Forms of corporate punishment

Corporations can, and should, indeed, be punished. Although corporate entities cannot be imprisoned,[409] most domestic jurisdictions apply a variety of corporate punishments and penalties. These criminal sanctions include

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liability does not depend on first determining whether an entity is a person… Rather, conditions for the ascription of both sorts of liability are needed. Liability is assigned to an entity when those conditions are satisfied. Personhood plays no part in the assignment.' William S Laufer and S D Walt, 'Why Personhood doesn't Matter: Corporate Criminal Liability and Sanctions' (1991) 18 *American Journal of Criminal Law* 63, 276. Laufer and Walt's stance on this point seems somewhat radical and this is not in keeping with contemporary views on this issue.

[406] See generally, Celia Wells, 'Corporate Crime: Opening the Eyes of the Sentry' (2010) 30(3) *Legal Studies* 370, 386.

[407] See, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 2.

[408] See, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 2. See also further discussion on this point in 5.2 of this thesis.

[409] On this, critics of corporate criminal liability often question whether it is appropriate to impose corporate criminal sanctions – as opposed to civil or administrative sanctions – given that corporate entities cannot be imprisoned; in such circumstances, criminal law is seen by some as an unsuitable means of dealing with corporate behaviour. For further discussion on the views regarding this, and counter-arguments, see, Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1097–1098. Also, on the issue of why corporations are not fit subjects for criminal law because they are said to be incapable of moral fault, see generally, Susan R Wolf, 'The Legal and Moral Responsibility of Organizations' in J Roland Pennock and John W Chapman (eds), *Criminal Justice* (New York University Press, 1985) 267–286.

measures such as: fines; imprisonment of senior management or members of the board of directors; corporate probation; and, corporate capital punishment.[410] Of these forms of punishment, fines are the most common.[411] Granted, fines could just as easily be imposed through civil liability. However, imposing a criminal fine not only punishes pernicious corporate conduct, but also attaches an undesirable stigma to the corporate wrongdoing in the commission of a criminal offence.[412]

3.2.5 Are there any fundamental objections arising from the nature of international law?

The issue of whether business enterprises are appropriate subjects for criminal liability in international law remains controversial. Presently, a difficulty is that the conferral of legal personality on corporations, as well as multinational ones, is still blurred in international law.[413] Arguably, the lack of clarity on this issue has created a legal vacuum.[414] It would seem that there is a pressing need for the international community to dispel scepticism as to whether corporate entities are equally as responsible as

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[410] See generally, Allens Arthur Robinson, *Brief on Corporations and Human Rights in the Asia-Pacific Region* (2006); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

[411] Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 955, 970.

[412] Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 955, 970. Also see generally, Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' (2007) 44 *American Criminal Law Review* 1503, 1524–1525.

[413] Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 269.

[414] Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Personality' (2001) 111 *Yale Law Journal* 443, 451.

individuals and States and, as such, should be required to observe *jus cogens* norms.[415]

Traditionally, having international legal personality bestows an entity with rights, duties, and capacities pursuant to international law.[416] Historically, States were the only subjects of international law.[417] This view, which was well established by the early 1900s, largely influenced the development of international law. It was premised on the hypothesis that 'international persons' originated from the concept of the Law of Nations.[418] Hence, at that time, international law only applied to States.

The traditional view shifted somewhat after World War II, whereupon customary international law was conferred on natural persons. This not only enabled natural persons to possess rights and duties, but also provided the capacity to maintain those rights by bringing their claims before international bodies.[419] With regard to some of the duties conferred upon natural persons, it is now widely recognised in customary international law that natural persons can be held liable for perpetrating international crimes. The IMTs established in the aftermath of World War II are attributed to this

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[415] See, Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Personality' (2001) 111 *Yale Law Journal* 443, 451.

[416] Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005) 74–75. It is widely recognised by the international community that the terms 'subjects of international law' and 'international legal personality' are interchangeable.

[417] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 57. This included intergovernmental organisations.

[418] Lassa Oppenheim, *International Law: A Treatise*, I, (Longmans, Green & Co., 4th ed, 1928) 133–134.

[419] Though according to Bassiouni this was subject to limitations within the body of international law. M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 58. See generally, principles that emerged from *Reparations for Injuries in the Service of the United Nations* [1949] ICJ Rep 174. Nicola Jägers discusses this case and also indicates that human rights doctrine began to increase after WWII. This saw the creation of international platforms, such as the European Court of Human Rights, which further enabled natural persons to bring their claims seeking justice – see, Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 263.

development.[420] Today, the concept of natural persons being held responsible for breaching core international crimes is one of the cornerstones of international criminal law.[421] Individual criminal responsibility provisions are contained in the statutes of the ICC, as well as *ad hoc* tribunals and special courts established within the last sixty years.[422] This period has seen an increase in corporations that have amassed great power; their influence is felt throughout the global economy.[423] Approximately, fifty-one per cent of the 100 top economies worldwide are corporations; States only account for forty-nine per cent.[424] Yet, the issue of whether corporations are subjects of international law at all is still widely debated.[425] The UNSRSG remains hopeful. In his 2007 interim report, the UNSRSG, John Ruggie, remarked that the long drawn-out debate as to

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[420] See, Article 6 of the *IMT Charter* and Article 5 of the *IMTFE Charter* ; see also M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 57.

[421] Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8(3) *Journal of International Criminal Justice* 895, 895.

[422] Refer to provisions on individual criminal responsibility: Article 25 of the *ICC Rome Statute*; Article 7 of the *ICTY Statute*; Article 6 of the *ICTR Statute*; Article 6 of the *SCSL Statute*; Article 15 of the *IHT Statute*; Article 29 new of the *ECCC Law*.

[423] 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' (2010) 8(3) *Journal of International Criminal Justice* 725, 727.

[424] David Kinley and Justine Nolan, 'Trading and Aiding Human Rights: Corporations in the Global Economy' (Sydney Law School Studies Research Paper No 08/13, January 2008) 358. This percentage is calculated on a comparison of corporate sales and the gross domestic products (GDPs) of countries. As previously discussed at 2.3.3 of this thesis, MNCs are increasingly among some of the largest economies in the world.

[425] See generally, Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8(3) *Journal of International Criminal Justice* 699, 719. For a detailed discussion on this issue see, Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Violations: Recent Changes and Recurring Challenges' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 222, 237–242; H Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 *The Law Quarterly Review* 438, 444–450. Even in tort law cases, the United States Court of Appeal for the Second Circuit, in deciding a matter brought under the *Alien Tort Statute*, was adamant that 'although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation;' see *Kiobel v Royal Dutch Petroleum*, (Docket No. 06-4800-cv) USCA 2nd Circuit, 17 September 2010, 6, 9 (emphasis appears in the Judgment).

whether corporations were subjects of international law was giving way to new realities.[426] Moreover, Andrew Clapham argues that corporations should have similar duties under international criminal law as those imposed on natural persons.[427] According to Clapham, the absence of an international forum to prosecute corporations does not imply that corporations do not have any international legal obligations.[428]

The same arguments could be made with respect to multinational corporations. Presently, the issue of whether MNCs have international legal personality continues to be controversial.[429] The argument is made by Nicola Jägers, and rightly so, that in the absence of express provisions conferring such, a good starting point is to ask if MNCs enjoy rights and duties as well as the capacity to enforce these pursuant to international law.[430] MNCs enjoy rights under international law, and there are a number of jurisdictional forums where multinational corporations could bring claims before

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[426] UNSRSG Interim Report, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc: A/HRC/4/35 (19 February 2007) 8 [20].

[427] Andrew Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations' in Lene Bomann-Larsen and Oddny Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (United Nations University Press, 2004) 51–52.

[428] Andrew Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations' in Lene Bomann-Larsen and Oddny Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (United Nations University Press, 2004) 57.

[429] See, Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) 143–160, 179–190.

[430] Nicola Jägers relies upon the test laid down in *Reparations for Injuries in the Service of the United Nations* [1949] ICJ Rep 174, 178–179, see, Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 264. Anna-Karin Lindblom also falls back on this same test to determine if non-governmental organisations are subjects of international law, see, Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005) 87–88.

international bodies to enforce such rights.[431] For example, MNCs may appear as parties lodging a complaint before regional courts, such as the European Court of Human Rights. Article 1 of the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* is such an example. The provision applies to the rights of legal persons (and natural persons) to protect their property and have peaceful enjoyment of their possessions.

There are a number of regulatory initiatives that have been introduced by the international community in the last few years that impose obligations on MNCs with respect to human rights. Some of these contain provisions dealing with corporate criminal liability and, in some instances, they even oblige States to criminalise corporate misconduct.[432] In recent years, it appears that the international community seems to be shifting its attention to conferring international personality on non-State actors.[433]

As discussed previously, MNCs can enforce their rights before some regional forums – however, as for enforcing duties, the argument could be made that while presently there is no jurisdictional forum in international law that deals with MNCs who perpetrate (or are complicit in) international crimes, this should not detract from the need to hold them accountable.[434] MNCs may be prosecuted in domestic jurisdictions. In cases where

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[431] See, Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Personality' (2001) 111 *Yale Law Journal* 443, 476.

[432] See detailed discussion earlier at 2.3 in this thesis discussing the regulatory initiatives introduced to deal with MNCs and their obligations. Although, see Cristina Chiomenti on the issue of 'indirect enforcement method' discussed earlier in this thesis; Cristina Chiomenti, 'Corporations and the International Criminal Court' in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 297–298.

[433] See discussion in Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Personality' (2001) 111 *Yale Law Journal* 443, 475.

[434] See discussion in Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Personality' (2001) 111 *Yale Law Journal* 443, 476.

domestic jurisdictions prove inadequate, international or regional institutions should address the issue. In such circumstances, the argument is made in this thesis that the ICC is a preferred forum to deal with this issue and, given time, the Court may very well extend its jurisdiction to include legal persons.[435]

On the whole, it would appear that multinational corporations not only enjoy rights and duties, but also there are judicial forums where they can enforce their rights. Taking these factors into consideration, the writer supports the view that MNCs are indeed subjects of international law. Furthermore, it stands to reason that if MNCs are subjects of international law (and criminal law), then they are also subjects of international criminal law.[436] It is widely recognised that international criminal law is comprised of international law and criminal law.[437] International criminal law imposes criminal responsibility for violations of international law. This body of law criminalises grave offences, which are referred to as international crimes.[438]

3.3 Chapter conclusion

This chapter discussed the rationale for corporate criminal liability. Specifically, it identified that there are a number of reasons for imposing corporate criminal liability. Also, the practical difficulties that stem from the nature of MNCs were examined, along with the issue of whether there was unfairness to shareholders where liability is imposed. Finally, the chapter discussed fundamental objections arising from the nature of criminal

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[435] See detailed discussion on jurisdictional forums in 4.2 of this thesis.

[436] See generally, Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 955, 959.

[437] Robert Cryer, *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 16.

[438] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2007) 1–2.

and international law. The writer concluded that corporations are capable of possessing the requisite *mens rea*, they are real entities, and, they can be held at fault and punished.

The next chapter deals with possible jurisdictional forums to address the problem.

CHAPTER 4

Scope of Liability for Organisational Complicity: Jurisdictional Forums

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'We have a world in which a handful of corporations, detached from any link to any place or community, have extended their power beyond the reach of most governments.'[439]

4.1 Chapter introduction

The previous chapter examined the rationale for corporate criminal liability.

This chapter investigates *where* an organisation that is complicit in international crimes could be prosecuted by exploring the preferred forum to deal with the research problem. This chapter discusses a number of jurisdictional forums. The writer considers jurisdictional forums that may address corporate complicity in international crimes generally as well as those forums applicable to crimes perpetrated in Africa. The writer examines existing international, regional and domestic forums that exercise jurisdiction over international crimes. These include:

1. Domestic jurisdictions applying domestic criminal legislation [440] or tort principles;[441]
2. Regional courts (e.g. the African Court on Human and Peoples' Rights);[442]

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[439] David Korten, Economist and Author of *When Corporations Rule the World* (Kumarian Press, Inc., 2nd ed, 2001).

[440] For example, Australia has fully incorporated the Rome statutory provisions in its *Criminal Code*. In addition, Australia's *Criminal Code* (Cth) also contains corporate criminal liability provisions.

[441] See, for example, United States *Alien Tort Statute*.

[442] Other regional courts include the European Court of Human Rights and Inter-American Court of Human Rights.

3. *Ad hoc* international tribunals or special courts established on the model of the ICTR or the SCSL;[443] and
4. The ICC.

Of the existing forums with jurisdiction over international crimes, this thesis proposes that the ICC is the preferred one to deal with complicit organisational liability in cases where domestic jurisdictions prove inadequate. However, a major limitation with this forum is that the competence of the Court is currently limited to natural persons.[444] Hence, the ICC Rome Statute provisions that deal with individual criminal responsibility would need to be amended in order to exercise jurisdiction over complicit organisational liability.

With respect to the term 'jurisdiction', there are at least three dimensions to this: prescription, adjudication, and enforcement.[445] Prescription relates to the authority of a State to establish laws that regulate criminal conduct.[446] 'Adjudication' concerns the power of a State to bring persons before its judicial forums.[447] 'Enforcement' relates to the power of a State to direct persons to observe the laws it has created.[448] These dimensions to jurisdiction over international crimes are explored throughout this chapter.

Also, the doctrine of *forum non conveniens* is considered here. This doctrine is ordinarily applied in common law jurisdictions where it is most popular; however, it is

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[443] Other *ad hoc* international tribunals and special courts include the ICTY and the ECCC.

[444] Additionally, as the discussion which follows shows, the ICC would require the consent of the home and host States in order to exercise its jurisdiction over complicit organisational liability.

[445] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 27.

[446] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 27.

[447] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 27.

[448] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 27.

less popular in civil jurisdictions to the extent that it is even constitutionally prohibited in some countries.[449] According to this doctrine, a legal matter may be brought before a court in more than one domestic jurisdiction.[450] Courts in common law jurisdictions apply this doctrine to determine whether or not to decline jurisdiction to hear a matter. The test ordinarily applied by courts is to consider whether there is 'some other available forum having jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitability for the interests of all parties and the ends of justice.'[451]

In theory, the application of this means that multinational corporations may be held liable for the commission of crimes in either their home State[452] or host State.[453] This may be attributed to the trans-border business operation of MNCs, which makes them peculiar in their nature.[454] MNCs are individual juridical persons comprised of individual business enterprises; these enterprises are subject to domestic legal systems in

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[449] See generally, James J Fawcett, 'General Report' in James J Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford University Press, 2005) 1–10, 21–27.

[450] Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 108.

[451] *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460, 476; for detailed discussion on this ruling and its application in common law jurisdictions see, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 108–111.

[452] The home State is where the parent corporation is incorporated or the seat of decision-making is located. See, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 14.

[453] The host State is where the corporation operates or carries out its business activities. See, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 14.

[454] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 2.

the places where they operate.[455] Conversely, MNCs exist as an amalgamation of business enterprises that enjoy common business strategies and shared resources; yet, the MNCs function outside the control of any individual State.[456] It is this autonomous nature of MNCs that makes them difficult to control.[457] With respect to this challenge, Beth Stephens argues that while multinational corporations have evolved significantly over the past century, the legal structures regulating these business entities have tended to lag behind such evolvement.[458] Stephens is of the view that the existing laws regulating the activities of modern MNCs are more in keeping with outdated legal structures put in place to regulate nineteenth-century corporations. Corporations of the past were largely based on single-nation structures.[459] Hence, Stephens opines, and rightly so, that 'corporations are multinational while legal systems are still largely national, creating a disconnect between international corporate structures and the law.'[460] Essentially, it appears that this is a case of modern-day regulators desperately playing catch-up with rapidly shifting industries in a global economy that is largely dominated by influential MNCs. Regardless, subject to the principle of complementarity (discussed later in this chapter), the challenges posed by the legal doctrine of *forum non conveniens*

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[455] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 5.

[456] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 5.

[457] Nicola Jägers, 'The Legal Status of the Multinational Corporation under International Law' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 259.

[458] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 54.

[459] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 54.

[460] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 54.

may be overcome by dealing with MNCs at an international institution such as the ICC in cases where domestic jurisdictions are unwilling or unable to exercise jurisdiction.[461]

4.2 Exploring the existing forums with jurisdiction over international crimes

4.2.1 Domestic jurisdictions: criminal legislation and tort principles

a) Criminal legislation

i. Traditional principles of jurisdiction

Natural and legal persons may be held liable for the commission of international crimes in both domestic and international jurisdictions on the basis of the traditional principles that trigger jurisdiction over crimes. The jurisdictional tenets discussed in this thesis are: territorial principle, nationality principle, protective principle, passive personality principle, and universality principle. Broadly speaking, the traditional principles of jurisdiction could be applied to regulate the criminal activities of multinational corporations in their home State or host State. However, there are several challenges posed in applying these traditional principles of jurisdiction to MNCs. For instance, these jurisdictional principles could be limited in their application, depending on the structure of the MNC. Multinational corporations operate through various business forms and adopt complex organisational structures. MNCs form contractual relationships, such as joint ventures, which go on to operate as separate legal entities with their own rights and duties.[462]

The **territorial principle** encompasses two approaches: the subjective and the

[461] As the discussion shows later in this chapter, pursuant to Article 17(1) of the *ICC Rome Statute*, the ICC may assert its jurisdiction to hear a matter when there is a State that is unwilling or unable to genuinely carry out investigation or prosecution of the matter.

[462] See, Georgios I Zekos, *Economics, Finance and Law on MNEs* (Nova Science Publishers, 2007) 23.

objective. The subjective territorial principle may be triggered by a State exercising jurisdiction over crimes that are *perpetrated* in another State if it can be shown that at least one of the elements of the crime were committed within the territory of the State that is asserting jurisdiction.[463] In contrast, the objective territorial principle asserts that a State may exercise jurisdiction over crimes that were *initiated* in another State if it can be shown that at least one element of the crime was committed within the territory of the State asserting jurisdiction.[464] To illustrate both these approaches: if a rocket were fired from one State into another, then the State from which the rocket was fired would exercise subjective territoriality jurisdiction to deal with the incident, while the State with the objects fired upon would exercise objective territoriality over the matter.[465]

One of the difficulties of relying upon the territorial principle to exercise jurisdiction over international crimes is that States tend to be reluctant to prosecute such offences perpetrated (or even initiated) within their territories.[466] Robert Cryer suggests that this may be for political reasons.[467]

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[463] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 98.

[464] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 98.

[465] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 57.

[466] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 47. See also, Graeme Niemann, 'Strengthening Enforcement of International Criminal Law', in Ustinia Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (2006) 459. Graeme Niemann argues that enforcement of international criminal law is different from domestic criminal law because the former threatens State sovereignty and 'States will not tolerate interference in how they conduct their internal affairs. Similarly, other States are reluctant to interfere in the affairs of another State, lest they themselves be interfered with.'

The State may simply be selective about its national prosecutions or, in other instances, it may fear that such proceedings could result in the State itself being put on trial.[468] Interestingly, this could very well be the case if a multinational corporation accused of complicity in international crimes were State-owned. A number of dominant MNCs in the extractive industries are State-owned.[469]

With respect to the thesis research problem, the host or home State could very well act on the territoriality principle to exercise jurisdiction over multinational corporations accused of complicity in international crimes. However, in all likelihood, the host State is unlikely to have the capacity to do so given that the MNC is operating in conflict-affected areas or weak-governance zones. Also, the home State tends to be reluctant to apply criminal sanctions to MNCs. This may be attributed, in part, to circumstances where the State weighs the consequences of any domestic economic and political fallout that is likely to result over prosecutions concerning corporate misconduct for crimes perpetrated in a country that is seemingly far away.[470] Also, the home State would have to rely on the host State to provide witnesses or evidence pertaining to the alleged crimes. This kind of international cooperation seems unlikely given the preoccupation of the host State with the

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[467] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 57.

[468] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 57.

[469] See, for example a comprehensive list of State-owned MNCs operating in the extractive industries on the EITI website <http://www.eiti.org>.

[470] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 14, 22.

challenges it faces in the conflict-affected area or weak-governance zone.

The **nationality principle** entitles a State to regulate the behaviour of its nationals overseas.[471] According to customary international law, nationality is defined as: 'a legal bond having as its basis a social fact of attachment, a genuine connection of reciprocal rights and duties.'[472] Additionally, a State has the discretion to decide who will be considered one of its nationals.[473]

A major criticism of the nationality principle is that States, at times, apply it with partiality.[474] For example, States tend to trigger the nationality principle in order to exercise jurisdiction over their armed forces in relation to allegations of crimes that may have been committed during an armed conflict overseas.[475] Critics of the nationality principle argue that the courts might empathise with the armed forces from their own State, or bow to political pressure exerted to be lenient or acquit the armed forces.[476]

With regard to the nationality principle and its application to multinational corporations, a State has the discretion to determine the nationality of a natural

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[471] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thomson: Sweet & Maxwell, 2003) 40.

[472] *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4; for detailed commentary on *Nottebohm*, see, Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thomson: Sweet & Maxwell, 2003) 40. For commentary on the opposing views to this widely accepted nationality test, see discussion in, Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 48.

[473] Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 345.

[474] Robert Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005) 76.

[475] Robert Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005) 76.

[476] Robert Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005) 76.

person as well as a corporation.[477] Traditionally, a State determines corporate nationality based on the location of the corporate headquarters or its seat of management.[478] A State can 'regulate legal persons organized or having their principal place of business abroad when such entities are owned or controlled by domestic organizations or nationals.'[479]

The BP illustration discussed earlier provides an example of how the nationality principle would be triggered. The corporate headquarters of BP are located in the UK. In theory, if BP, an extraction business entity, was accused of complicity in international crimes in Egypt, then it could be prosecuted in the UK, despite the fact that the crimes occurred overseas. The principle would allow this, but in reality, it would depend on whether UK legislation provided for such prosecution.

According to Sarah Joseph, a leading proponent of corporate liability for human rights violations, it is more realistic to pursue the parent company in its home State than to pursue a subsidiary in its host State. This is because, in all likelihood, the home State is better placed to exercise jurisdiction over the parent company.[480] Joseph makes a compelling point; especially if one considers that the MNCs who are accused of complicity in international

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[477] Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 345–346.

[478] Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 345–346.

[479] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 105. See also, Celia Wells and Juanita Elias, 'Nanotechnologies and Corporate Criminal Liability' in Geoffrey Hunt and Michael Mehta (eds), *Nanotechnology: Risks, Ethics and Law* (Earthscan Publication Ltd, 2008) 265.

[480] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 129.

crimes typically operate in conflict-affected areas or weak-governance zones where domestic courts face numerous socio-legal challenges. Indeed, the home State could act on the nationality principle to exercise jurisdiction over MNCs accused of complicity in international crimes, though they tend to be reluctant to do so.[481]

The **protective principle** recognises circumstances when a State's national interests are threatened. This may occur even if the threat to the State is posed by non-nationals operating beyond its territory.[482] States may rely upon the protective principle to protect themselves from such threat.[483] Essentially, to safeguard national security, geographical integrity, or national economic interests, States may exercise the right to impose jurisdiction for criminal liability over foreign nationals for crimes committed overseas.[484] Although the protective principle is firmly entrenched in international law, its application has been relatively rare.[485]

A prime example of applying the protective principle to legal persons would be where a State sought to trigger jurisdiction to exercise control over a corporation that the State believed was engaged in the production of weapons

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[481] On reluctance to apply criminal sanctions to corporations with respect to human rights abuses, see generally, Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 143.

[482] Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 347.

[483] Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 347.

[484] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thomson: Sweet & Maxwell, 2003) 40.

[485] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thomson: Sweet & Maxwell, 2003) 40.

to threaten or invade its territory.[486] In reality, though, States have tended to regulate these kinds of corporate activity through alternative avenues, such as imposing sanctions on the States in which the corporations operated.[487] In another example, a State might trigger the protective principle to exercise jurisdiction over a multinational corporation where the State wanted to protect its national economic interests to prevent the pillaging of its natural resources – however, it could rely on the territoriality principle instead.

The **passive personality principle** entitles a State to exercise jurisdiction over crimes committed against its nationals while abroad.[488] The principle could be triggered even when both the crime committed and the accused person are outside the boundaries of the State asserting jurisdiction.[489] The passive personality principle is becoming less controversial,[490] as States tend to assert this principle to enact anti-terrorism legislation to shield their nationals from acts of terrorism committed abroad.[491]

States could rely upon the passive personality principle to trigger jurisdiction over terrorist crimes committed by multinational corporations against the State's nationals if it could be shown, for example, that the corporation was

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[486] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 33.

[487] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 33.

[488] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 49.

[489] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thomson: Sweet & Maxwell, 2003) 44.

[490] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 98.

[491] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 98.

funding terrorist activities.[492]

The **universality principle** overrides the traditional view that a State could only prosecute a crime committed outside its territory if it was able to show a connection to the 'crime, the perpetrator or the victim.'[493] The development of the universality principle has relaxed this restriction.[494] Of late, it has become widely accepted that the principle confers upon every State the right to exercise unrestricted jurisdiction over serious crimes of universal concern[495] (e.g. war crimes, crimes against humanity, and genocide).[496] Hence, universal jurisdiction over serious crimes is triggered regardless of the location of the crime, or the nationality of the perpetrator or the victim.[497]

The universality principle has been the most controversial of the traditional principles of jurisdiction.[498] It has been widely referred to as a principle with no practical value in the prosecution of war criminals;[499] one of the more confused doctrines of international law; [500] a gap filler where other

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[492] Beth van Schaack and Ronald C Slye, *International Criminal Law and its Enforcement: Cases and Materials* (Foundation Press, 2nd ed, 2010) 98.

[493] W Cory Wanless, 'Corporate Liability for International Crimes under Canada's Crimes against Humanity and War Crimes Act' (2009) 7 *Journal of International Criminal Justice* 201, 205.

[494] Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford University Press, 2008) 496.

[495] Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford University Press, 2008) 496.

[496] See, Article 5(1) of the *ICC Rome Statute*.

[497] Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford University Press, 2008) 496.

[498] For detailed discussion on some of the challenges posed by this concept, see, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2000] ICJ Rep 3, particularly the separate opinion of President Guillaume at 35–45, and joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal at 63–90.

[499] Yves Sandoz, 'Penal Aspects of International Humanitarian Law' in M Cherif Bassiouni (ed), *International Criminal Law: Crimes* (Ardsley, 1986) 230.

[500] Anthony J Colangelo, 'The Legal Limits of Universal Jurisdiction' (2006–2007) 47(1) *Virginia Journal of International Law* 149, 149.

jurisdictional principles have fallen short;[501] and a principle which is increasingly taking on a more dominant role on centre stage.[502]

There are a number of observations to make here concerning domestic courts exercising criminal jurisdiction over international crimes:

1. International crimes should trigger universal jurisdiction by nature of the seriousness of the crimes.
2. Domestic jurisdictions bear an obligation to prosecute international crimes.
3. A number of domestic jurisdictions have adopted the *ICC Rome Statute* provisions, or the provisions of other international legal instruments, prohibiting international crimes.
4. A number of domestic jurisdictions have enacted provisions that allow for the prosecution of organisational entities in criminal matters. Some of these jurisdictions include prohibitions against complicit involvement in those crimes.
5. Domestic criminal law jurisdiction has, in effect, expanded to include the prosecution of legal entities for international crimes, but the international jurisdiction has not.

Universal jurisdiction could easily be the jurisdictional principle that States rely upon to deal with complicit multinational corporations.[503] This is because if a State were to apply the universality principle, it would not need to show that there is a connection between the complicit perpetrator and the State seeking to prosecute that perpetrator for the commission of crimes prohibited

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[501] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) 106.

[502] Menno T Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23 *Human Rights Quarterly* 940, 941.

[503] See generally discussion in, William A Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (June 2001) 83(842) *International Review of the Red Cross* 439, 453–454.

under customary international law.[504]

Most countries that have ratified the *ICC Rome Statute* have implemented the provisions into their domestic legal systems, thus, extending domestic criminal law jurisdiction to prosecute international crimes.[505] Over 100 countries have ratified the *ICC Rome Statute*, which entered into force in 2002, and Appendix 4 provides a full list of countries that have ratified it. Briefly, as shown in Appendix 4, African countries that have ratified the *Statute* include: Lesotho, Liberia, Malawi, Mozambique, and Namibia. European countries include: Denmark, Italy, and The Netherlands. Middle Eastern countries include: Jordan and Oman. Asian countries include: Tajikistan, Afghanistan, and Japan. Canada, Costa Rica, and Argentina comprise some of the countries from the Americas to have ratified the *ICC Rome Statute*.

According to research led by Professor Anita Ramasastry, there are a number of countries which have 'fully incorporated' the *ICC Rome Statute* provisions into their domestic legal instruments.[506] The legal instruments from these countries prohibit genocide, crimes against humanity, and war crimes –

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[504] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 53 <http://www.icj.org>.

[505] Mark Taylor, Deputy Managing Director, FAFO, 'Companies Should Obey the Law in Lawless Lands' *The Lawyer.com* <http://www.thelawyer.com/cgi-bin/item.cgi?id=132799>; see also, Mark Taylor, Deputy Managing Director, FAFO, 'Commentary: The Corporate Accountability Evolution' (June 2008), <http://www.redflags.info>.

[506] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>. For a list of countries that have partially implemented the ICC Rome Statute see, Amnesty International Report, *International Criminal Court: Rome Statute Implementation Report Card, Part One* (2010) <www.amnesty.org>.

essentially, mirroring the wording of the *ICC Rome Statute*.[507] These countries include Argentina, Australia, Belgium, Canada, Germany, The Netherlands, South Africa, Spain, the United Kingdom, and New Zealand. France and Norway, who had pre-existing legislation that incorporated aspects of genocide, crimes against humanity, and war crimes, are yet to fully complete adoption of the *ICC Rome Statute* provisions.[508]

Although it would seem that only a handful of countries have 'fully incorporated' the *ICC Rome Statute* provisions on international crimes, domestic law in *all* jurisdictions already criminalises and prosecutes the underlying offences that constitute international crimes, such as genocide and crimes against humanity.[509] For example, an underlying offence for crimes against humanity includes murder, and the offence of murder is generally

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[507] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>.

[508] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>. See also, Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 75, where the authors include New Zealand on the list of countries that have 'fully incorporated' the Rome Statute provisions. For an in-depth discussion on the ratification status of number of States, refer to the following sources: Damien Vandermeersch, 'The ICC Statute and Belgian Law' (2004) 2 *Journal of International Criminal Justice* 133; Göran Sluiter, 'Implementation of the ICC Statute in the Dutch Legal Order' (2004) 2 *Journal of International Criminal Justice* 158; Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court' (2004) *2 Journal of International Criminal Justice* 179; Marco Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy' (2007) 5(2) *Journal of International Criminal Justice* 493; Alejandro E Alvarez, 'The Implementation of the ICC Statute in Argentina' (2007) 5(2) *Journal of International Criminal Justice* 480; Max du Plessis, 'South Africa's Implementation of the ICC Statute' (2007) 5(2) *Journal of International Criminal Justice* 460; Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales' (2007) 5(2) *Journal of International Criminal Justice* 441.

[509] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 73. The authors qualify this point by indicating instances where 'reliance upon "ordinary crimes" may fall short of criminalization in international law, and thus the State may violate its duty to enact with the manifestation of seriousness that is embedded in the international crimes.'

prohibited in all domestic jurisdictions.[510] Furthermore, while some States require domestic legislation to fulfil their treaty obligations, other States have dispensed with this formality and directly apply international law within their domestic legal systems.[511]

India, Indonesia, the Ukraine, and the United States, although not parties to the ICC or signatories of the *Rome Statute*, have adopted legislation incorporating some of the statutory provisions into their own domestic legislation.[512] For example, the Indonesian Parliament passed *Law No. 26/2000* in January 2000, which effectively implemented the *ICC Rome Statute* provisions into domestic criminal laws to allow the *ad hoc* Indonesian Human Rights Tribunal to prosecute perpetrators responsible for crimes committed in East Timor.[513]

Additionally, the law of organisational liability applies in most domestic jurisdictions, as the criminal liability provisions found in these jurisdictions do not distinguish between natural and legal persons.[514]

The following domestic jurisdictions have general provisions in place that

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[510] Article 7(1)(a) *ICC Rome Statute*; see also discussion on underlying offences for crimes against humanity in Gideon Boas, James L Bischoff and Natalie L Reid, *Elements of Crimes under International Law: International Criminal Law Practitioner Library, Volume 2* (Cambridge University Press, 2009) 57.

[511] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 73.

[512] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>.

[513] Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law International, 2005) 13.

[514] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>.

could apply to international crimes perpetrated by complicit legal persons: Australia, [515] Norway, [516] Belgium, [517] Canada, [518] France, [519] India, [520] The Netherlands,[521] and the United Kingdom.[522]

ii. Suitability of this domestic forum

Domestic jurisdictions recognise a much broader scope of offences that amount to international crimes pursuant to international law. For example, although piracy and terrorism fit this description, neither falls within the jurisdiction of the *ad hoc* international institutions or the ICC. There are, however, numerous international legal instruments that prohibit piracy and terrorism,[523] with the offences addressed by regional and domestic courts.

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[515] 'Survey Response, Laws of Australia (Richard Meeran), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006', 3, 7.

[516] 'Survey Response, Laws of Norway (Ingrid Hillblom), *Business and International Crimes* Fafo AIS, [accessed 8 February 2008] 2004', 2 and 7.

[517] 'Survey Response, Laws of Belgium (Bruno Demeyere), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006', 6–7, 38.

[518] 'Survey Response, Laws of Canada, *Business and International Crimes* Fafo AIS, [accessed 8 February 2008] 2004.' For an in-depth discussion see, W Cory Wanless, 'Corporate Liability for International Crimes under Canada's Crimes against Humanity and War Crimes Act' (2009) 7 *Journal of International Criminal Justice* 201.

[519] 'Survey Response, Laws of France (Abigail Hansen and William Bourdon), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006', 4, 13, 21.

[520] 'Survey Response, Laws of India (S Muralidhar), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006', 5, 14.

[521] 'Survey Response, Laws of the Netherlands (Nicola Jägers), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006', 9, 17.

[522] 'Survey Response, Laws of the United Kingdom (Powles, et al), *Business and International Crimes* Fafo AIS, [accessed 8 February 2008] 2004', 24.

[523] For example, the League of Nations' *Convention for the Prevention and Punishment of Terrorism*, 16 November 1937, League of Nations Doc.C.546M.383 (1937); *Declaration on Measures to Eliminate International Terrorism* (1994), UN General Assembly A/Res/49/60. For further reading on these and other international legal instruments dealing with terrorism, see, Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 23, 36–39. For discussion on whether, and how, the crime of terrorism could be dealt with at the ICC, see, Fiona de Londras, 'Terrorism as an International Crime' in William A Schabas and Nadia Bernaz

Regardless, MNCs in the extractive industries tend to be accused of complicity in crimes against humanity rather than piracy or terrorism.

There are several reasons why domestic jurisdictions are frequently seen as an inadequate forum to deal with multinational corporations complicit in international crimes. With regard to the option of using domestic forums, it should be noted that although there are at least two competing traditional models of corporate liability, the doctrinal or theoretical approach to the corporate liability legislation varies in most domestic jurisdictions.[524] Granted, these traditional models of liability are not mutually exclusive. Some jurisdictions apply derivative liability, which is primarily concerned with the culpable actions of the corporate individuals; whereas, other jurisdictions apply non-derivative liability, which is diagnosed through questions concerning the culpability of the corporate entity itself.[525] Moreover, domestic jurisdictions do not apply uniform corporate criminal liability legislation; some jurisdictions (though only a handful in comparison) do not even have corporate liability provisions in place.[526]

The reality also remains that, in most cases where allegations are levelled

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(eds), *Routledge Handbook of International Criminal Law* (Routledge, Taylor & Francis Group, 2011) 169.

[524] See generally, Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 143–147. Also, the authors make the point that in some States there are administrative sanctions as opposed to criminal sanctions in place to deal with corporate misconduct, see 155.

[525] These traditional models of corporate criminal liability are examined further in chapter 5 of this thesis.

[526] Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8(3) *Journal of International Criminal Justice* 699, 715–716. Although the authors discuss this in the context of European countries, the same argument could be said of African countries.

against complicit multinational corporations, these corporations have tended to be operating in conflict-affected areas embroiled in a state of internal or regional war.[527] In other instances, the States in these areas have weak or illegitimate governments.[528] The national courts, if they exist, face a number of challenges in dealing with organisational complicity in international crimes. First, they lack the necessary resources, such as facilities, finances, and adequately trained staff.[529] Second, these countries are typified by the absence of the rule of law and lack independent judiciaries.[530] Also, since multinationals are often seen as essential to nation-building activities – such as providing much-needed investment, infrastructure, employment, and foreign exchange – there is an unwillingness to prosecute them.[531] With respect to this, as previously discussed, when MNCs enter foreign markets, they generally do so by adopting strategic business initiatives; foreign direct investments are one

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[527] See generally, Global Witness Report, *Oil and Mining in Violent Places: Why Voluntary Codes for Companies don't Guarantee Human Rights* (October 2007), 4 <http://www.globalwitness.org>. See also, allegations regarding secondary liability claims filed against multinational corporations in the United States pursuant to the *Alien Tort Statute*; for example, *Wiwa v Royal Dutch Petroleum Co, et al*, 96 Civ 8386 (KMW) (HBP), (April 23, 2009); *Presbyterian Church of Sudan v Talisman Energy*, 244 F Supp 2d 289 (March 19, 2003).

[528] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008) <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>.

[529] See generally, World Bank governance data available at http://www.worldbank.org; see also, Jelena Pejić, 'Accountability for International Crimes: From Conjecture to Reality' (March 2002) 84(845) *International Review of the Red Cross* 13, 31.

[530] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 22.

[531] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 22–23. For general discussion on the role that MNCs play in the economic development of States through foreign direct investment, see, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 1.

of the strategies that they tend to adopt.[532] Corruption of the judiciary, compounded by a lack of independence, further reduces the likelihood of successful prosecution.[533] In contrast, MNCs would not be in a position to manipulate judicial proceedings brought before an international forum.[534]

In essence, it is the weak governance in the host State, and the reluctance of the home State to apply criminal sanctions to the MNCs, that leads to the conclusion that domestic jurisdictions are, perhaps, inadequate forums. It is for these reasons that the ICC is the preferred forum to exercise jurisdiction over complicit organisational liability.

b) Tort principles

i. Tort principles in general

Generally, tort law enables a wronged party to commence a civil action to claim damages against the wrongdoer, known in law as the tortfeasor. The injured party in a tort claim must show:

1. The claimant was injured, thus has sufficient standing (*jus standi*).
2. The injured party suffered damage caused by the tortfeasor.

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[532] Georgios I Zekos, *Economics, Finance and Law on MNEs* (Nova Science Publishers, 2007) 23. See discussion earlier at 3.2.2 of this thesis.

[533] See, United Nations Conference on Trade and Development, *World Investment Report (2007): Transnational Corporations, Extractive Industries and Development*, 152–153 <http://www.unctad.org>. For a practical example illustrating the situation in the DRC on corruption and political interference in the judiciary, see, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, on his Mission to the Democratic Republic of the Congo (15–21 April 2007), UN General Assembly Doc. A/HRC/8/4/Add.2, 16.

[534] See, Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8(3) *Journal of International Criminal Justice* 909, 916–917.

3. The tortfeasor breached a duty of care owed to the injured party.[535]

There are at least three ways in which tort law might be applied to a corporation that found itself complicit in a tort committed by someone else. One way is if the business entity has entered into a joint enterprise with a tortfeasor.[536] For example, if a corporation entered into a joint venture with a government agency, the corporation, which is known as a joint tortfeasor in such circumstances, would be held responsible for torts committed by the government agency, its partner, if those torts were carried out to further a joint plan, such as mining extraction activities.[537] Alternatively, a complicit corporation could be liable if the corporation fails to act on its duty of care to protect persons from being injured, or its duty to control those persons inflicting injury in circumstances where the corporation has a special relationship with the injured person or the person inflicting the injury.[538] Finally, a complicit corporation may be held liable for torts committed by independent subcontractors, but only in exceptional circumstances.[539] For example, if a corporation contracted a government agency to clear access points leading into a mining area, the corporation may be under a duty to take

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[535] Stephen Tully, '"Never Say Never Jurisprudence": Comparative Approaches to Corporate Responsibility under the Law of Torts' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 125; for a general overview on tort law, see, John S Hodgson and John Lewthwaite, *Tort Law Textbook* (Oxford University Press, 2nd ed, 2007).

[536] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <http://www.ichrp.org>.

[537] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <http://www.ichrp.org>.

[538] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <http://www.ichrp.org>.

[539] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <http://www.ichrp.org>.

reasonable precautions to ensure the safety of the people in that area.[540]

ii. US tort legislation

The United States *Alien Tort Statute* is a prime example of domestic legislation invoked in a civil action dealing with violations of customary international law. The entire United States *Alien Tort Statute*, hereafter referred to as the ATS, states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[541]

The ATS has a number of distinguishing features.[542] First, the aggrieved persons, or their representatives, do not have to be United States citizens; the ATS is empowered with jurisdiction to hear claims made by aliens of the State.[543] Second, the tort offences need not have occurred within the United States.[544] Third, the tort offences must be violations of the law of nations or a

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[540] International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <http://www.ichrp.org>.

[541] The ATS is codified at 28 U.S.C. Section 1350. The Statute was formerly known as the *Alien Tort Claims Act* (ATCA).

[542] For general reading regarding the ATS refer to the following sources: ICJ, *Corporate Complicity in International Crimes* (2008) volume 3: Civil Remedies <http://www.icj.org>; Richard L Herz, 'The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement' (2008) 21 *Harvard Human Rights Journal* 207.

[543] *Filártiga v Peña-Irala,* 630 F 2d 876 (2nd Circuit, 1980) 878; the Second Circuit held that the statute conveys jurisdiction for civil matters concerning violations of international law regardless of the nationality of the parties involved.

[544] Matters filed with the District Court included tort offences allegedly perpetrated abroad in places such as, *inter alia*: India, Indonesia, Sudan, Nigeria, Liberia, Burma, South Africa, Colombia, Guatemala, Peru, and Iraq. A recent ruling by the District Court in *In Re South African Apartheid Litigation* (relates to the matters of *Lungisile Ntsebeza, et al v Daimler AG, et al* and *Khulumani, et al v Barclays National Bank Ltd, et al*) 02 MDL 1499 (SAS) (8 April 2009) 17–18, discussed the issue of extraterritoriality and the application of the ATS. Judge Shira A Scheindlin found that there was nothing barring the Court from exercising jurisdiction over tort matters that occurred abroad pursuant to the ATS.

treaty of the United States.[545]

The ATS dates back to 1789 when the statute was passed as part of the *First Judiciary Act.* It remained dormant for almost two hundred years until 1980 when the statute was relied upon in *Filártiga v Peña-Irala*.[546] The suit was brought in a US Federal Court, although it involved a seventeen-year-old Paraguayan national allegedly tortured to death in Paraguay by a state official.[547] The US Federal Court found that 'torture' amounted to a tort committed in violation of the law of nations, and allowed the matter to proceed pursuant to the ATS provisions.[548] This decision was significant

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[545] See discussion on the recognition of torts under the law of nations in *In Re South African Apartheid Litigation* (relates to the matters of *Lungisile Ntsebeza, et al v Daimler AG, et al* and *Khulumani, et al v Barclays National Bank Ltd, et al*) 02 MDL 1499 (SAS) (8 April 2009) 19–23. It may be noted that there is no exhaustive list of breaches that amount to violations of the law of nations. The District Court has indicated that these include, *inter alia*: genocide, slave trading, slavery, crimes against humanity, forced labour, war crimes, rape, torture, summary executions, sexual assault, forced relocation, disappearance, cruel, inhuman and degrading treatment, forced exile, forced displacement, arbitrary detention, arbitrary arrest, racial discrimination, pollution. However, the District Court has also found that the following rights do not constitute breaches of the law of nations pursuant to the ATS, these include, *inter alia*: the right to life, the right to health, the right to sustainable development, freedom of speech, cultural genocide, forced prison labour, conscripted labour, etc; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 27–28. See also discussion in Chapter 12, Beth Stephens, *et al*, *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff Publishers, 2nd ed, 2008), Jordan J Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801, 805–809.

[546] Richard L Herz, 'The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement' (2008) 21 *Harvard Human Rights Journal* 207, 211 discussing *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Circuit, 1980). See also generally, 'Civil Rights Statute was Dormant for 200 Years' (18 May 2003) *Financial Times* <http://www.ft.com>. It may be noted that ATS was invoked only twice during the first 200 years of its existence: *Adra v Clift*, 195 F Supp 857 (D Md 1961) a matter concerning child custody dispute between two non US nationals; *Bolchos v Darrel*, 1 Bee 74, 3 F Cas 810 (DSC 1795) a suit brought for the restitution of three slaves on board a Spanish ship seized during war. See discussion on the relevance of these two cases in David D Christensen, 'Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute after Sosa v Alvarez-Machain' (Summer 2005) *62 Washington & Lee Law Review* 1219.

[547] The Second Circuit held that the statute conveys jurisdiction for civil matters concerning violations of international law regardless of the nationality of the parties involved, *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Circuit, 1980) 878.

[548] *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Circuit, 1980) 880, 884, and 887.

because it affirmed the ATS provisions and established that foreign nationals could invoke the statute in relation to crimes committed abroad.

To date, the ATS has been invoked in over one hundred court cases in the United States.[549] The majority of tort claims were against multinational corporations accused of aiding and abetting torts in violation of customary international law.[550] Despite its popularity, cases relying on the ATS provisions have not seen a single judgment awarded *against* a corporate entity or its officials.[551] It appears that, so far, cases brought pursuant to the ATS 'have been bogged down by procedural difficulties, dismissed, or settled.'[552]

There is conflicting jurisprudence emerging from the United States regarding corporate complicity in tort offences. On the one hand, there is case law that indicates that the ATS may not be relied upon when dealing with corporate complicity in violation of customary international law. The *Kiobel v Royal Dutch Petroleum* judgment, recently handed down by the Court of Appeals for the Second Circuit, is a prime example of this. *Kiobel* concerned a civil suit filed pursuant to the ATS in the United States by one of the wives of nine Nigerian human-rights activists and environmentalists executed by the

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[549] 'Test Case: How Far can America's Legal System be Applied for Foreign Human-Rights Cases?' *The Economist* (November 1–7, 2008) 66.

[550] Beth Stephens, et al, *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff Publishers, 2nd ed, 2008) 309; see also, Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) specifically, Chapter 2 which deals with the 'Alien Tort Claims Act'.

[551] Faith E Gay and J Noah Hagey, 'Corporate Liability under the Alien Tort Claims Act' (25 October 2007) Law.com's *In-House Counsel* <http://www.inhousecounsel.com>.

[552] Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (Fall 2005) *Human Rights Brief* 14, 14 <http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1>.

Nigerian government in the mid 1990s.[553] The plaintiffs alleged that the corporations, exploring for oil in the area, aided and abetted the Nigerian government in the violations of the law of nations, which resulted in the death of the locals.[554] The US Court of Appeals for the Second Circuit was of the opinion that corporations were not liable for human rights violations under the customary international law and, therefore, could not be the subject of liability under the ATS.[555] The Court opined that '… [while] international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation.'[556] Following this decision, the plaintiff filed a petition with the US Court of Appeals for the Second Circuit requesting a panel rehearing of the *Kiobel* suit; the petition was denied.[557]

Following the *Kiobel* suit, there have been at least two decisions in the United States (*John Doe VIII v Exxon Mobil Corporation*[558] and *Boimah Flomo, et al v Firestone Natural Rubber Co*[559]) handed down by the Court of Appeals for

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[553] For a detailed discussion on the facts surrounding the suit see, Chimène I Keitner, '*Kiobel v Royal Dutch Petroleum*: Another Round in the Fight over Corporate Liability under the Alien Tort Statute' 14(30) *ASIL Insight* (30 September 2010).

[554] *Kiobel v Royal Dutch Petroleum,* (Docket No. 06-4800-cv) USCA 2nd Circuit, 17 September 2010, 5.

[555] *Kiobel v Royal Dutch Petroleum,* (Docket No. 06-4800-cv) USCA 2nd Circuit, 17 September 2010, 9.

[556] *Kiobel v Royal Dutch Petroleum,* (Docket No. 06-4800-cv) USCA 2nd Circuit, 17 September 2010, 6, 9.

[557] *Kiobel v Royal Dutch Petroleum,* (Docket No. 06-4800-cv) USCA 2nd Circuit, 17 September 2010, 2.

[558] *John Doe VIII v Exxon Mobil Corporation,* No. 09-7125 (8 July 2011). The security forces of Exxon Mobil, operating through its wholly owned subsidiaries based in Indonesia, were accused of violations of customary international law including murder, torture, sexual assault, battery and false imprisonment. Exxon Mobil subsidiaries operated natural gas extraction activities in the Aceh province of Indonesia.

[559] *Boimah Flomo, et al v Firestone Natural Rubber Co,* No. 10-3675 (11 July 2011). Firestone Natural Rubber Company, operating through a subsidiary, was accused of employing child labour to work in its rubber plantations based in Liberia.

the D.C. Circuit and the Seventh Circuit Court of Appeals, respectively, which differ from the *Kiobel* approach. The Court of Appeals in the *John Doe VIII* and *Boimah Flomo* suits rejected the claim that corporations could not be held liable for violations of customary international law – thus, corporate liability fell within the scope of the ATS.[560] These inconsistencies remain to be resolved by the US Supreme Court.

There are grave concerns among leading academics that these conflicting legal decisions could negatively impact future corporate liability suits brought pursuant to the ATS.[561] Also, there are still a number of cases that are before the Court of Appeals for the Second Circuit, and the *Kiobel* suit could negatively impact the outcome of those appeals and further shield corporations from liability for violation of customary international law.[562]

iii. Suitability of this domestic forum

It is undeniable that torts cases – such as those brought before Federal Courts in the United States pursuant to the ATS – have increased public awareness of corporate liability in the commission of international crimes.[563] However, the

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[560] See, *John Doe VIII v Exxon Mobil Corporation*, No. 09-7125 (8 July 2011), 69–81; *Boimah Flomo, et al v Firestone Natural Rubber Co,* No. 10-3675 (11 July 2011), 6, 15.

[561] See generally, Business and Human Rights Resources Centre, <http://www.business-humanrights.org>. Furthermore, decisions such as *Boim v Holy Land Foundation*, 549 F 3d 685 (3 December 2008) where the US Court of Appeals for the Seventh Circuit found a number of not-for-profit organisations liable for aiding violent acts of terrorist activities in Israel, puts corporations on notice concerning the potential of the US courts to find legal persons liable for violations of customary international law pursuant to the ATS.

[562] Chimène I Keitner, '*Kiobel v Royal Dutch Petroleum*: Another Round in the Fight over Corporate Liability under the Alien Tort Statute' 14(30) *ASIL Insight* (30 September 2010).

[563] For further discussion on this see, Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8(3) *Journal of International Criminal Justice* 699, 703.

writer is of the view that it is the criminal characteristic of corporate involvement in international crimes that should be the focus of concern here. Goals of accountability in criminal prosecutions include punishment, public awareness, condemnation, and deterrence.[564] Criminal sanctions best reflect the prohibitory nature of pernicious corporate conduct.[565] Hence, dealing with the research problem in domestic jurisdictions that apply tort principles is not the ideal approach. Ideally, international criminal law should play a key role in bringing about corporate accountability.

c) Other forums in domestic jurisdictions

There are other forums in domestic jurisdictions. For example, the current trend sweeping across Africa, particularly over last decade, has been the creation of specialised commercial courts or the introduction of commercial divisions within national courts.[566] These types of courts have been established in Kenya, Madagascar, Tanzania, Uganda, Zambia, Burkina Faso, DRC, Ghana, Mauritania, Mozambique, Nigeria, and Rwanda.[567] The specialised courts have primarily been established to resolve commercial disputes. They function predominantly as civil courts throughout parts of Africa. Also, these courts in a handful of African countries, such as South

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[564] For further discussion on these as well as the pros and cons of criminal or civil liability see, Beth Stephens, 'Accountability for International Crimes: The Synergy between the International Criminal Court and Alternate Remedies' (2003) *Wisconsin International Law Journal* 527, 533.

[565] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 518. See generally discussion on the merits of imposing corporate criminal liability in Chapter 3 of this thesis.

[566] World Bank and the International Finance Corporation, *Doing Business 2009: Comparing Regulation in 181 Economies (2008)*, 51 <http://www.doingbusiness.org>

[567] See, World Bank and the International Finance Corporation, *Doing Business 2009: Comparing Regulation in 181 Economies (2008)*, 52 <http://www.doingbusiness.org>.

Africa, exercise criminal jurisdiction, but their scope seems to be confined to white collar crimes.[568] This thesis does not deal extensively with these specialised courts.

4.2.2 Regional courts

Regional forums are comprised of three *existing* regional courts: the African Court on Human and Peoples' Rights; the European Court of Human Rights; and the Inter-American Court of Human Rights (there are other regional bodies, which are noted below).

These regional forums are discussed to assess whether they would be in a position to deal with the on-going problem of corporate complicity in international crimes, especially where multinational corporations initiate or perpetrate such crimes within their jurisdiction.

As the following discussion shows, the difficulty with these three courts is that they only exercise jurisdiction over matters brought regarding their own State Parties. Submissions concerning the prosecution of MNCs that may be complicit in crimes fall outside their jurisdiction.[569] More than anything, these regional courts provide a forum for corporate entities to enforce their rights rather than have obligations imposed on

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[568] Hon. Justice B J Odoki, The Chief Justice of Uganda, 'The Relevance of Commercial Courts to the Modern Judiciary' (Paper presented at the Southern African Chief Justices Forum Conference, Johannesburg, South Africa, 13–14 August 2010) 4. On the approach taken in South Africa, see generally, Sadhana Singh, 'South Africa: "Corporate Crime and the Criminal Liability of Corporate Entities"' (Paper presented at the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 137th International Training Course, Resource Material Series No. 76, 5 September–12 October 2007) 84.

[569] Corporations may appear as parties to proceedings when they are seeking to enforce their rights, but not as parties who are being prosecuted.

them.[570] Furthermore, the regional courts are not empowered with the jurisdiction to prosecute complicit persons.

a) African Regional Courts

There are two courts to consider here: the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights. The former court is operational, and currently sits in Arusha, Tanzania; the latter is yet to commence.

Of these two courts, the African Court of Justice and Human Rights is the most promising as a forum to consider in the future with respect to the commission of international crimes in Africa. However, much like the arguments made with respect to the domestic jurisdictions, it too faces some challenges, which are discussed in this chapter.

i. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights is a temporary court.[571]

According to Article 3 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights*, the ACrtHPR shall exercise its jurisdiction with respect to the interpretation and application of a number of instruments. These include: the *Protocol*, the *African Charter on Human and Peoples' Rights*, and any other

[570] For further discussion, see Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6(2) *Northwestern Journal of International Human Rights Law* 262, 263.

[571] The African Court on Human and Peoples' Rights hereafter referred to as ACrtHPR. For further discussion on this Court and its scope see, Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge: Taylor Francis Group, 2011) 195–200.

human rights instruments, which have been ratified by its member State Parties. The Court's jurisdiction appears to be limited to cases concerning its own member State Parties.

Pursuant to Article 5(1) of the *Protocol*, access to the Court is only granted for submissions made by the African Commission on Human and People's Rights, State Parties, and African Intergovernmental Organisations.

Article 5(1)(c) of the Protocol provides that a State Party whose citizen has been the victim of a human rights violation is entitled to submit its case before the ACrtHPR. In theory, this provision could easily be relied upon by a State Party seeking to use this regional forum to deal with the corporate criminal liability of multinational businesses in human rights violations perpetrated against its own nationals. However, the concern with this is that none of the instruments that the Court relies upon empower it with jurisdiction to prosecute complicit persons. Also, the Court's jurisdiction is limited to matters with respect to State Parties.[572]

Article 5(3) provides non-State actors, such as individuals and Non Governmental Organisations accorded observer status by the African Commission, with access to the ACrtHPR. However, such access is granted in restricted circumstances. With respect to this, Article 34(6) of the *Protocol* stipulates that non-State actors may only bring a case against a State Party if the State Party recognises the jurisdiction of the Court to hear the matter.

[572] Granted, there are some multinational corporations that are wholly State-owned. The act of piercing the corporate veil would provide access to the real controllers of the business entity.

There is a concern that this provision may shield a State Party, which perpetrates serious human rights violations, and does so with impunity.

ii. African Court of Justice and Human Rights

The African Court of Justice and Human Rights shall be established sometime in the future as a permanent court.[573] The ACJHR will be the result of having merged the ACrtHPR and the African Court of Justice.[574] The ACJHR shall only become operational when at least fifteen of the fifty-three African Union member States ratify the Court's statutory instruments.[575] To date, only three AU members have done so: Burkina Faso, Mali, and Libya.[576]

The *Protocol on the Statute of the African Court of Justice and Human Rights* is one of the legal instruments adopted by the ACJHR. This legal instrument is silent on the issue of prosecuting complicit persons. According to Articles 29 and 30 of the *Statute of the African Court of Justice and Human Rights* (annexed to the *Protocol*), State Parties, as well as individuals, may submit cases before the Court. The ACJHR will hear cases concerning human rights

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[573] The African Court of Justice and Human Rights hereafter referred to as ACJHR.

[574] See, Article 2 of the *Protocol on the Statute of the African Court of Justice and Human Rights* regarding merger of the two courts into one regulatory body. The African Court of Justice hereafter referred to as ACJ.

[575] See, Article 9(1) of the *Protocol on the Statute of the African Court of Justice and Human Rights*. African Union hereafter referred to as AU. Members include: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, *Côte D'Ivoire*, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea Bissau, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

[576] Despite the appalling number of ratifications, at least twenty-two AU members have signed the *Protocol on the Statute of the African Court of Justice and Human Rights*. See generally, <http://www.africancourtcoalition.org>.

violations perpetrated by AU members.[577] It appears that the Court will exercise broad powers.[578] For instance, pursuant to Article 28(d) of the *Statute*, the Court is empowered to exercise jurisdiction over cases and legal disputes that include offences relating to 'any question of international law.'[579] Though, it seems that this does not include jurisdiction over international crimes.[580] Recently, the AU consulted with member States and resolved to further investigate how to extend the ACJHR's jurisdiction to include jurisdiction over international crimes. Specifically, the AU made the following declaration to:

> … reflect on how best Africa's interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly's Decisions on the African Court of Justice and Human and Peoples' Rights being empowered to try serious international crimes committed on African soil …[581]

There are concerns over the practical feasibility of the ACJHR establishing a criminal chamber to deal with the perpetration of international crimes. The argument is made by some that, although this would be a milestone for the African continent, there are several factors that would hamper efforts to bring about accountability. For instance, it is posited that the Court would not operate freely due to widespread political pressure exerted by senior State

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[577] Article 29(2) of the *Statute of the African Court of Justice and Human Rights*.

[578] Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2010) 953.

[579] See, Article 28 of the *Statute of the African Court of Justice and Human Rights* for a list of the kinds of cases and legal disputes that the Court shall exercise jurisdiction over.

[580] See, Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1067.

[581] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670(XIX), 2.

officials and military commanders.[582] Also, African States have tended to be reluctant to fulfil their international obligations with respect to triggering universal jurisdiction over international crimes. For example, it appears that this has been the case in regards to international arrest warrants issued over Heads of State, such as Omar Al-Bashir.[583] Finally, the argument is made that financial constraints may impede the criminal chamber's functions if member States fail to honour their pledges, a problem that is already faced by the existing courts.[584]

In theory, the ACJHR is a promising forum to deal with the issues discussed in this thesis; though, it does, indeed, face several challenges. The difficulty with the ACJHR is that the Court's jurisdiction is limited to human rights violations perpetrated by African Union members (i.e. State Parties). The jurisdiction of the ACJHR would need to expand beyond State Parties to include multinational businesses. Presently, the corporate criminal liability of multinational businesses falls outside the scope of the Court's jurisdiction, much like the restricted jurisdiction exercised by the international institutions discussed later. In reality, this writer recognises that the 'weak-governance syndrome' afflicting member States – who may be unable or unwilling to

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[582] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1083. These kinds of problems are not unique to an African regional court. Alice de Jonge makes a similar argument that the ICC is enshrined in political controversy and so is not an ideal forum, she supports matters brought before the International Court of Justice instead, for further discussion on this see, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 161, 202–207.

[583] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1084.

[584] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1084.

prosecute corporate misconduct – could also affect the ACJHR.[585] Moreover, the ACJHR is comprised of member States from developing nations. Even if the ACJHR were to become an aggressive regional institution, it may not cope with the challenges of prosecuting powerful global multinational businesses whose headquarters are primarily based in developed States.

b) European Court of Human Rights

The European Court of Human Rights[586] was established in 1959,[587] and has 47 members.[588] The legal instrument of the Court is the *European Convention on Human Rights*. All State members that are parties to the Court have signed and ratified the *Convention*,[589] which is silent on the issue of prosecuting complicit persons. It expressly prohibits torture and inhuman or degrading treatment or punishment,[590] slavery and forced labour,[591] arbitrary and unlawful detention,[592] among other violations. Perpetrating any of these amounts to an

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[585] For further discussion on some of the challenges plaguing the African continent, see, Okechukwu Oko, 'The Challenges of International Criminal Prosecutions in Africa' (2008) 31 *Fordham International Law Journal* 343, 348–354.

[586] Hereafter referred to as ECHR.

[587] For an in-depth discussion on the Court see, Mark W Janis, *et al*, *European Human Rights Law: Text and Materials* (Oxford University Press, 3rd ed, 2008) 69–111.

[588] ECHR members include: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, the Ukraine, and the United Kingdom.

[589] See generally, ECHR, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/>.

[590] See, Article 3 of the *European Convention on Human Rights*.

[591] See, Article 4 of the *European Convention on Human Rights*.

[592] See, Article 5 of the *European Convention on Human Rights*.

international crime.[593]

However, the ECHR is not the ideal forum to deal with MNCs complicit in international crimes because, pursuant to Articles 33 and 34 of the *Convention*, the Court only exercises jurisdiction over inter-State or individual [594] applications regarding alleged violations. In addition, according to Article 35, cases can only be brought before the Court if the matter concerns a member State Party and, even then, only after exhausting all available domestic remedies. The jurisdiction of the Court is limited to cases concerning its own member State Parties. The corporate criminal liability of multinational businesses falls outside the scope of the Court's jurisdiction.

c) Inter-American Court of Human Rights

The protection of human rights in the Inter-American system is co-ordinated through a dual institutional structure, which comprises the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[595] The Inter-American Court of Human Rights[596] began operating in 1979. It functions as the sole judicial institution of the Organisation for American States, which has 35 members. [597] The IACHR exercises its

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[593] For discussion on prosecutions pursuant to the *European Convention on Human Rights*, see Anja Siebert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press, 2009) 111–152.

[594] According to Article 34 of the *European Convention on Human Rights*, an individual includes: 'any person, non-governmental organisations or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties …'.

[595] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2nd ed, 2005) 208.

[596] Hereafter referred to as IACHR.

[597] Hereafter referred to as OAS. Members include: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico,

functions in accordance with the *Statute of the Inter-American Court of Human Rights*[598] and the *American Convention on Human Rights*. Neither of these legal instruments empowers the Court with the jurisdiction to prosecute complicit persons.

The IACHR does have jurisdiction to hear cases concerning violations of civil and political rights, such as the right to life,[599] the right to humane treatment,[600] and freedom from slavery.[601] The Court also has jurisdiction to hear cases concerning violations of economic, social, and cultural rights pursuant to Article 26 of the *American Convention on Human Rights* – though this does not specify what these rights encompass.

The IACHR is not the ideal forum to deal with the prosecution of MNCs that are complicit in international crimes, because according to Article 61 of the *American Convention on Human Rights*, only State Parties and the Inter-American Commission on Human Rights may refer a case to the Court. Moreover, the Court's jurisdiction is limited to cases concerning human rights violations perpetrated by its own State Parties. Like the ACrtHPR and ECHR, the corporate criminal liability of multinational businesses falls outside the scope of the IACHR's jurisdiction.

Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St Kitts & Nevis, Suriname, Trinidad and Tobago, US, Uruguay, and Venezuela.

[598] The actual *Statute of the Inter-American Court of Human Rights* does not deal with jurisdiction over offences or jurisdiction over persons who commit offences, instead the Statute only deals with issues such as the composition of the Court, the structure of the Court, the rights, duties and responsibilities of the judges, the workings of the Court, and relations with governments and organisations.

[599] See, Article 4 of the *American Convention on Human Rights*.

[600] See, Article 5 of the *American Convention on Human Rights*.

[601] See, Article 6 of the *American Convention on Human Rights*.

d) Other regional bodies

There are other regional institutions besides the existing regional courts.[602] For example, the Association of South East Asian Nations established an Intergovernmental Commission on Human Rights in 2009.[603] There is also the League of Arab States,[604] and the Commonwealth of Independent States.[605] These additional regional institutions exercise quasi-judicial powers. They are not discussed further here. This thesis only examines the judicial mechanisms of the regional courts (i.e. the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights).

4.2.3 International tribunals and special courts

International forums with jurisdiction over international crimes include the ICTR, SCSL,

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[602] For a detailed discussion on the alternative regional initiatives, see, Rhonda K M Smith, *Textbook on International Human Rights* (Oxford University Press, 3rd ed, 2007) 83–86.

[603] Members of the Association of South East Asian Nations (hereafter referred to as ASEAN) include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Article 14(2) of the *ASEAN Charter* stipulates that the human rights body would operate in accordance with 'terms of reference', which would be finalised by ASEAN Foreign Ministers. According to Paragraph 1 of the ASEAN Intergovernmental Commission on Human Rights' terms of reference, the Commission is limited to the protection and promotion of human rights and fundamental freedoms of the peoples of ASEAN.

[604] The League of Arab States adopted the *Arab Charter on Human Rights* in 2004; its members include Algeria, Egypt, Lebanon, Oman, Somalia, United Arab Emirates, Bahrain, Iraq, Libya, Palestine, Sudan, Yemen, Comoros, Jordan, Mauritania, Qatar, Syria, Djibouti, Kuwait, Morocco, Saudi Arabia, and Tunisia. The *Arab Charter on Human Rights* was first adopted in 1994; however, it was not ratified. The Charter, which protects civil, cultural, economic, political and social rights, was revised by State Parties in 2004 and that revised version seems more favourable as it has attracted ratifications. See, Rhonda K M Smith, *Textbook on International Human Rights* (Oxford University Press, 3rd ed, 2007) 84; see also, League of Arab States official website <http://www.arableagueonline.org/las/index.jsp>.

[605] The Commonwealth of Independent States adopted a *Convention on Human Rights and Fundamental Freedoms* in 1995; its members include Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and the Ukraine. For more information, see, http://www.cisstat.com/eng/cis.htm. The *Convention on Human Rights and Fundamental Freedoms* safeguards human rights. For example, the right to life, freedom from torture, and prohibitions on slavery stipulated respectively in Article 2, 3, and 4 of the Convention.

ICTY, IHT, and ECCC. Of these, only two have been established in Africa: the ICTR and the SCSL. There are other international institutions, which are noted below.

These international forums are discussed to assess whether they would be in a position to deal with the on-going problem of corporate complicity in international crimes, especially where MNCs initiate or perpetrate such crimes within their jurisdiction.

As the following discussion shows, a number of these institutions are unsuitable to deal with this on-going problem because their jurisdiction is limited by temporal and territorial factors. Furthermore, the *ad hoc* international tribunals and special courts are limited by completion strategies. Also, though much like the ICC, most of these only exercise jurisdiction over natural persons liable for the commission of international crimes.

a) ICTR

i. About the Tribunal

The UN Security Council enacted Chapter VII provisions of the *UN Charter* in response to the serious violations of humanitarian law committed in Rwanda in 1994.[606] At that time, it is estimated that between half a million to a million civilians died in Rwanda.[607]

ii. Scope of jurisdiction over persons and offences

The ICTR exercises jurisdiction over natural persons pursuant to Article 5 of the *ICTR Statute*, and has indicted over 110 accused persons. These have

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[606] UN Security Council Resolution (8 November 1994) UN Doc. S/RES/955(1994).

[607] For a detailed discussion on the Rwandan humanitarian crisis, see, Romeo A Dallaire, 'The End of Innocence, Rwanda 1994' in Jonathan Moore (ed), *Hard Choices – Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield, 1998) 71.

included a former prime minister, interior ministers, councillors, chiefs-of-staff, military leaders, politicians, *bourgmestres*, prefects, businessmen, journalists, church ministers, and priests.[608] In addition, Article 6 of the *ICTR Statute* empowers the Tribunal with the jurisdiction to prosecute complicit persons.[609]

The serious violations of humanitarian law that trigger the ICTR's jurisdiction include genocide, crimes against humanity, and violations of Article 3 Common to the *Geneva Conventions* and *Additional Protocol II*. These offences are prohibited pursuant to Articles 2, 3, and 4 of the *ICTR Statute*, respectively.

According to Article 7 of the *ICTR Statute*, the tribunal exercises territorial jurisdiction over crimes committed in the Rwandan territory, as well as crimes committed by Rwandan citizens in neighbouring States. Furthermore, Article 7 specifically stipulates that the temporal jurisdiction of the tribunal is limited to crimes committed between 1 January 1994 and 31 December 1994. The ICTR and national courts of Rwanda share concurrent jurisdiction to prosecute the commission of crimes according to Article 8 of the *ICTR Statute*. The ICTR has primacy over national courts pursuant to Article 8(2) of the *ICTR Statute*. This is a feature that differentiates the ICTR and the other *ad hoc* tribunals and special courts from the ICC, whose jurisdiction is limited by the principle of complementarity.[610]

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[608] See, Annexes attached to 'Letter dated 14 May 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council' UN Doc. S/2009/247. A *bourgmestre* is the equivalent of a modern day Mayor.

[609] For example, according to Article 6(1) of the *ICTR Statute*: 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.'

[610] The principle of complementarity is discussed later at 4.2.4 of this thesis.

The ICTR is approaching the completion of its work. The Tribunal will finalise all trials in the first instance at the end of 2012, and appeals by the end of 2014.[611] The Tribunal has also referred a number of cases that will be heard in the domestic courts of Rwanda.[612]

b) SCSL

i. About the Court

Sierra Leone experienced a decade-long civil war during the 1990s, generally regarded as the most deplorable of all civil conflicts.[613] The SCSL was established as a joint initiative between the Sierra Leonean Government and the United Nations.[614] The Court is an internationalised or hybrid court – that is, a court that adopts a blend of both international criminal law and domestic criminal law in its legal instruments, as well as a mix of local and international judges.[615]

ii. Scope of jurisdiction over persons and offences

According to Article 1 of the *SCSL Statute*, the Court's jurisdiction is limited to serious violations of international humanitarian law and Sierra Leonean law. Furthermore, the Court's jurisdiction is limited to offences committed in

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[611] See, Address by Judge Khalida Rachid Khan, President of the ICTR, to the United Nations Security Council – Six monthly Report on the Completion Strategy of the ICTR (7 December 2011).

[612] See, Address by Judge Khalida Rachid Khan, President of the ICTR, to the United Nations Security Council – Six monthly Report on the Completion Strategy of the ICTR (7 December 2011).

[613] 'Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council' UN Doc. S/2000/786, 2.

[614] See generally, SCSL, *About the Special Court for Sierra Leone*, <http://www.sc-sl.org>.

[615] For detailed discussion about the SCSL and other hybrid courts see, Cesare P R Romano, *et al*, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia – International Courts and Tribunals Series* (Oxford University Press, 2004); see also, Kate Gibson, 'An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and their Domestic Counterparts' (2009) 9(2) *International Criminal Law Review* 275, 288–292.

Sierra Leone since 30 November 1996.

The SCSL has only heard a limited number of cases, though at least seven were brought before it. Of these, three involved the former leaders of the Civil Defence Forces, [616] Revolutionary United Front, [617] and Armed Forces Revolutionary Council.[618] Also, of those brought before the Court, two were withdrawn upon the death of the defendants,[619] and one involves an accused person still at large.[620] The final case, the trial of the former Liberian President Charles Taylor, is ongoing.[621]

Like the ICTY and ICTR, the *SCSL Statute* prohibits crimes against humanity[622] and violations of Article 3 Common to the *Geneva Conventions* and *Additional Protocol II*. [623] In addition, the SCSL also exercises jurisdiction over persons who have committed other violations of international

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[616] See, *The Prosecutor v Fofana and Kondewa (CDF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); *The Prosecutor v Fofana and Kondewa (CDF Case) (Appeal Judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008).

[617] *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Appeal Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009).

[618] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Appeal Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008).

[619] *The Prosecutor v Foday Saybana Sankoh (Withdrawal of Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003), case was withdrawn upon Sankoh's death; *The Prosecutor v Sam Bockarie (Withdrawal of Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003), case was withdrawn upon Bockarie's death.

[620] *The Prosecutor v Johnny Paul Koroma (Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003), the Accused is still at large.

[621] *The Prosecutor v Charles Ghankay Taylor (Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007). The Defence concluded their submissions in December 2010. See, SCSL, case information, <http://www.sc-sl.org>.

[622] Article 2 of the *SCSL Statute*.

[623] Article 3 of the *SCSL Statute*.

humanitarian law.[624] According to Article 4 of the *SCSL Statute*, offences amounting to violations of international humanitarian law include attacking peacekeeping or humanitarian personnel and their property. Also, Article 5 of the *SCSL Statute* prohibits the perpetration of crimes pursuant to Sierra Leonean law. Offences amounting to crimes pursuant to Sierra Leonean law include: the abuse of girls in violation of the *Prevention of Cruelty to Children Act*;[625] and, the wanton destruction of property pursuant to the *Malicious Damage Act*.[626]

Like the ICTY and the ICTR, the SCSL and national courts of Sierra Leone share concurrent jurisdiction to prosecute the commission of crimes according to Article 8 of the *SCSL Statute*. Furthermore, pursuant to Article 8(2), the SCSL has primacy over national courts. The SCSL exercises jurisdiction over natural persons pursuant to Article 6, which also empowers the Tribunal with the jurisdiction to prosecute complicit persons.[627]

c) ICTY

i. About the Tribunal

Between 1991 and 2001, mass atrocities were committed in the former Yugoslavia – specifically, Croatia, Bosnia and Herzegovina, Serbia, Kosovo, and the Former Yugoslav Republic of Macedonia.[628] The atrocities were of

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[624] Article 4 of the *SCSL Statute*.

[625] Prohibited pursuant to Article 5(a) of the *SCSL Statute*.

[626] Prohibited pursuant to Article 5(b) of the *SCSL Statute*.

[627] For example, according to Article 6(1) of the *SCSL Statute*: 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.'

[628] See also, ICTY <http://www.icty.org>.

such widespread gravity, they amounted to a threat to international peace and security.[629] This led the UN Security Council to intervene and establish the ICTY in 1993 pursuant to Chapter VII of the *UN Charter*. The Tribunal was created to enable the prosecution of persons responsible for serious violations of international humanitarian law.[630]

ii. Scope of jurisdiction over persons and offences

The ICTY only exercises jurisdiction over natural persons pursuant to Article 6 of the *ICTY Statute*. To this end, the tribunal has indicted over 160 accused persons for the commission of international crimes. The accused have included the former head of state, army chiefs-of-staff, interior ministers, politicians, police, and military leaders.[631] In addition, Article 7 of the *ICTY Statute* empowers the Tribunal with the jurisdiction to prosecute complicit persons.[632] The *ICTY Statute* does not include jurisdiction over complicit legal persons, though it had the opportunity to do so.[633] In hindsight, one could

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[629] For a detailed analysis on the establishment of the ICTY, see, Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 22.

[630] UN Security Council Resolution (25 May 1993) UN Doc. S/RES/827(1993).

[631] See, ICTY <http://www.icty.org>.

[632] For example, according to Article 7(1) of the *ICTY Statute*: 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.'

[633] This is interesting considering that the ICTY was the first *ad hoc* international criminal tribunal that was established almost 50 years after the IMTs. There were numerous reports singling out the international crimes perpetrated by paramilitary groups with respect to the atrocities committed in the former Yugoslavia. The paramilitary groups included: 'Tigers', the 'Cetniks' 'White Eagles' and the 'Fire Horses'. Nina Jørgensen notes that the 'Tigers' were a Serb group commanded by Zaljko Raznjatovic, the 'Cetniks' a Serb group commanded by Vojislav Seselj, the 'White Eagles' a Serb group commanded by Mirko Jovic and the 'Fire Horses' were a Bosnian Croat group. Jørgensen argues that these groups, whether acting as complicit perpetrators or principal perpetrators were not held liable because the idea of prosecuting paramilitary groups or even their members was dismissed during the drafting of the *ICTY Statute*. See, Nina H B Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (2001) 12(3) *Criminal Law Forum* 371, 375.

argue that had it done so, this precedent could have paved the way for other institutions that followed to do the same. As the discussion that follows later in this thesis shows, this could have been case for the ICTR and the SCSL.[634]

The ICTY exercises jurisdiction over grave breaches of the *Geneva Conventions* of 1949, violations of the laws or the customs of war, genocide, and crimes against humanity pursuant to Articles 2, 3, 4, and 5, respectively.

According to Article 8 of the *ICTY Statute*, the ICTY exercises territorial jurisdiction by specifically dealing with crimes committed in the former Yugoslavia. It also exercises temporal jurisdiction, investigating and prosecuting crimes committed in the former Yugoslavia from January 1991. The ICTY and national courts of the former Yugoslavia share concurrent jurisdiction to prosecute the commission of crimes according to Article 9 of the *ICTY Statute*; and the ICTY exercises primacy over national courts pursuant to Article 9(2) of *the ICTY Statute*.

The ICTY has a completion strategy in place as it nears the end of its work. The Tribunal anticipates that it will finalise all its trials in the first instance by 2014 and appeals by 2016.[635] In the meantime, the Tribunal has been referring cases to national jurisdictions to reduce its workload; to date, cases have been sent to Bosnia, Herzegovina, Croatia, and Serbia.[636]

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[634] See discussion on this at 5.3.2 of this thesis.

[635] See, ICTY, *Completion Strategy*, <http://www.icty.org/sid/10016>.

[636] 'Letter dated 12 May 2011 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council', UN DOC. S/2011/316, 19, 20.

d) IHT

i. About the Tribunal

The Coalition Provisional Authority briefly governed Iraq following the fall of the Ba'ath regime that had been ruled by Saddam Hussein.[637] In 2003, the CPA authorised the Governing Council to establish an Iraqi Special Tribunal.[638] Later in 2005, the Iraqi National Assembly amended and passed the original statute again. The Iraqi National Assembly also renamed the Tribunal and called it the Iraqi High Criminal Court, though it is commonly referred to as the Iraqi High Tribunal.[639]

ii. Scope of jurisdiction over persons and offences

According to Article 1 of the *IHT Statute*, the Tribunal exercises jurisdiction over natural persons, be they Iraqi or non-Iraqi residents, for offences committed in violation of Articles 11, 12, 13 and 14 of the *IHT Statute* during 17 July 1968 to 1 May 2003. Article 1 provides that the Tribunal may exercise jurisdiction over offences 'in the Republic of Iraq or elsewhere.' The Tribunal has power to prosecute persons who have committed genocide, crimes against humanity, and war crimes. These offences are prohibited pursuant to Articles 11, 12, and 13, respectively. Also, pursuant to Article 14, the Tribunal has jurisdiction over violations of Iraqi laws. For example, these offences include Article 2(g) of the *Punishment of Conspirators against*

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[637] Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 429. Coalition Provisional Authority hereafter referred to as CPA.

[638] Section 1 of the Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Special Tribunal.

[639] See, Stuart Alford, 'Some Thoughts on the Trial of Saddam Hussein: The Realities of the Complementarity Principle' (2008) 8 *International Criminal Law Review* 463, 466.

Public Safety and Corrupters of the System of Governance Law 7 of 1958, which deal with the wastage and squandering of national resources.

The IHT exercises jurisdiction over natural persons pursuant to Article 1(2) of the *IHT Statute*. In addition, Article 15 empowers the Tribunal with the jurisdiction to prosecute complicit persons.[640] Like the ICTY, ICTR, and SCSL, the IHT shares concurrent jurisdiction with the national courts of Iraq to prosecute the commission of crimes according to Article 29(1) of the *IHT Statute*. Furthermore, pursuant to Article 29(2), the IHT has primacy over all other Iraqi courts.

e) ECCC

i. About the Extraordinary Chambers

The Khmer Rouge perpetrated serious human rights violations during 1975 and 1979 that led to the death of up to three million people in Cambodia (formerly known as Democratic Kampuchea).[641] Following international pressure, the ECCC was eventually established by agreement with the United Nations in 2003.[642]

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[640] For example, according to Article 15(2) of the *IHT Statute*: '… a person shall be criminally responsible if he [or she]: 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.'

[641] ECCC, *Introduction to the ECCC* <http://www.eccc.gov.kh>. For detailed discussion on the ECCC background and the crimes perpetrated by the Khmer Rouge, see, Kate Gibson, 'An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and their Domestic Counterparts (2009) 9 *International Criminal Law Review* 275, 292–295.

[642] ECCC, Introduction to the ECCC <http://www.eccc.gov.kh/english>. For details see, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005.

ii. Scope of jurisdiction over persons and offences

Crimes committed during 17 April 1975 to 6 January 1979 fall within the scope of temporal jurisdiction of the Chambers pursuant to Article 2 new of the *ECCC Law*. Furthermore, the Extraordinary Chambers exercise territorial jurisdiction over offences committed in violation of Cambodian law, international humanitarian law and custom, as well as offences in contravention of international conventions recognised by Cambodia pursuant to Article 2 new of the *ECCC Law*. In addition, according to Article 3 new of both the *ECCC Law* and the *ECCC Agreement*,[643] the Extraordinary Chambers exercise subject-matter jurisdiction over crimes prohibited in the 1956 *Cambodian Penal Code*. Offences under the *Penal Code* that fall within the jurisdiction of the Extraordinary Chambers include homicide, torture, and religious persecution.[644]

Like the ICTR, the SCSL, and the ICTY, the *ECCC Agreement* prohibits genocide,[645] crimes against humanity[646] and violations of the *Geneva Conventions*.[647] Also, Article 7 of the *ECCC Agreement* prohibits the destruction of cultural property during armed conflict in violation of the 1954 *Hague Convention for Protection of Cultural Property in the Event of Armed Conflict*. Furthermore, Article 8 of the *ECCC Agreement* prohibits offences against the *Vienna Convention of 1961 on Diplomatic Relations* that result in

[643] The *ECCC Agreement* is relied upon in the judicial reasoning of the Extraordinary Chambers; see, *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [2], [35].

[644] Prohibited pursuant to Article 3 new of the *ECCC Law*.

[645] Article 4 of the *ECCC Agreement*.

[646] Article 5 of the *ECCC Agreement*.

[647] Article 6 of the *ECCC Agreement*.

crimes against internationally protected persons. The *ECCC Law* is silent on the commission of these offences. The ECCC exercises jurisdiction over natural persons pursuant to Article 2 new of the *ECCC Law*. In addition, Article 29 new of the *ECCC Law* empowers the Extraordinary Chambers with the jurisdiction to prosecute complicit persons.[648]

f) Other international institutions

There are international institutions that exercise jurisdiction over legal persons – for example, the International Court of Justice.[649] There have been several cases brought before the ICJ dealing with disputes over the control of natural resources.[650] Although these disputes have concerned legal persons in the form of State Parties, the ICJ does not exercise criminal jurisdiction. This thesis will not deal extensively with jurisprudence from the ICJ.

The United Nations Human Rights Council [651] is another example of an international institution that exercises jurisdiction over legal persons. The HRC is an inter-governmental body, which primarily examines complaints concerning human rights violations by State Parties, and provides recommendations with

[648] For example, according to Article 29 new of the *ECCC Law*: 'Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.'

[649] International Court of Justice hereafter referred to as ICJ.

[650] See for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Uganda)* [2005] ICJ Rep 168, dealing with looting, plundering and illegal exploitation of natural resources in armed conflict; *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep 90, dealing with the regulation of natural resources use; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equatorial Guinea Intervening)* [2002] ICJ Rep 303, dealing with oil concessions.

[651] United Nations Human Rights Council hereafter referred to as UNHRC.

respect to such complaints.[652] There are some who argue that the HRC complaints procedure does not expressly exclude complaints with respect to human rights violations perpetrated by MNCs.[653] This argument is made in view of a recent development at the seventeenth Council session, whereby the HRC endorsed the Final Report of the UNSRSG,[654] which is modelled on the UNSRSGs 'Protect, Respect and Remedy Framework'.[655] The 'Protect, Respect and Remedy Framework' is seen by some as the prevailing guide for future actions by the United Nations with respect to businesses and human rights violations. However, this thesis is concerned with (and prefers) enforceable corporate criminal liability models. The reality remains that the UNHRC does not exercise criminal jurisdiction.[656] Hence, this thesis will not deal extensively with the UNHRC with

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[652] See, UNHRC general information available at http://www2.ohchr.org/english/bodies/hrcouncil/.

[653] Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 177.

[654] See, UNSRSG Final Report, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc: A/HRC/17/31.

[655] The UNHRC originally adopted the UNSRSGs 'Protect, Respect and Remedy Framework' in 2008 (see discussion earlier in Chapter 2 of this thesis). The Framework is premised on three notions: States have a duty to protect against human rights violations; corporations bear a responsibility to respect human rights; and, effective grievance mechanisms are needed to ensure access to remedies (i.e. judicial and non-judicial). See generally, UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5, [18] – [26].

[656] For example, on this issue, see the report of the UNHRC international fact-finding mission which was established under resolution 14/1 of 2 June 2010 with respect to the Gaza Flotilla Incident. Pursuant to this resolution, the UNHRC sent a Mission to investigate the tragic facts surrounding the interception of Gaza-bound flotilla of ships by the Israeli military. As a result of the Israeli military intervention, nine people died and several others were seriously injured. The UNHRC Mission found that there was sufficient evidence of serious violations of law by the Israeli military giving rise to criminal responsibility, but the Mission was only in a position to recommend that the Israeli authorities would carry out their own investigations and hold the responsible perpetrators accountable. See, UN Human Rights Council, Report of the International Fact-finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, 27 September 2010, A/HRC/15/21, [258] – [278].

respect to complaints regarding legal persons, albeit State or non-State actors.

There are also additional international institutions with quasi-judicial powers. These include, *inter alia*, the World Trade Organisation.[657] The WTO is a multilateral trading system, which has a procedure in place for settling disputes between its member parties.[658] There are some who argue that this forum could, indeed, address the international human rights obligations of MNCs.[659] However, a concern is that the WTO does not exercise criminal jurisdiction. More than anything, this forum could positively influence the governance of natural resources through the environmental or social principles at the core of the WTO's multilateral treaties.[660] Regardless, this thesis will not deal extensively with rulings from the WTO.

4.2.4 ICC

a) About the Court

The ICC is a permanent international criminal court that was created to end impunity and bring about accountability for the most serious crimes of concern to the international community.[661] In 1998, 120 State parties adopted

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[657] The World Trade Organisation is hereafter referred to as WTO.

[658] Initially, disputes are settled by holding mediation or consultation with the disputing parties. Following this procedure, a panel is convened, which prepares an official report that is presented to the parties. The report is then presented to WTO members, and adopted by the Dispute Settlement Body, if there is no appeal. For a detailed discussion on the dispute settlement procedure, see generally, WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.

[659] See discussion in, Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 181–182.

[660] See generally, Adam McBeth, *International Economic Actors and Human Rights* (Routledge, 2010) 85–164; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press, 2009) 37–89; Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011) 196–203.

[661] See generally, ICC <http://www.icc-cpi.int>.

the *Rome Statute*, an international treaty, establishing the Court.[662] The *Statute* entered into force in 2002 subsequent to ratification by at least 60 countries.[663]

b) Scope of jurisdiction over persons and offences

Crimes of most serious concern to the international community include genocide, crimes against humanity, war crimes, and the crime of aggression[664] pursuant to Article 5(1) of the *ICC Rome Statute*. Considering that MNCs are most often accused of complicity in crimes against humanity,[665] these crimes fall squarely within the scope of the Court's jurisdiction.[666]

Article 12 of the *ICC Rome Statute* provides the preconditions to the exercise of the Court's jurisdiction with respect to situations where a State Party has referred a matter to the Prosecutor or where the Prosecutor has initiated an investigation pursuant to Article 13. Specifically, according to Article 12(2)(a) of the *ICC Rome Statute*, the Court may exercise its jurisdiction if dealing with the 'State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration

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[662] See generally, ICC <http://www.icc-cpi.int>.

[663] See generally, ICC <http://www.icc-cpi.int>. The *ICC Rome Statute* has since been ratified by over 100 counties as of February 2012.

[664] Article 5(2) of the *ICC Rome Statute* provides the following provision regarding the crime of aggression: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.' Also, participants at the Review Conference of the Rome Statute held in Kampala, Uganda in 2010 engaged in deliberations over a definition for the crime of aggression.

[665] ICJ, *Corporate Complicity in International Crimes* (2008) volume 1, 27 <http://www.icj.org>.

[666] In addition, with respect to multinational businesses which are often accused of aiding and abetting crimes against humanity, these legal persons would tend to fall within the purview of the ICC Prosecutor's policy to punish those most responsible for the commission of crimes. See generally interview with ICC Prosecutor Luis Moreno-Ocampo in James Podgers, 'Corporations in the Line of Fire' (January 2004) *American Bar Association Journal* 13.

of that vessel or aircraft.'[667] Also, Article 12(2)(c) of the *ICC Rome Statute* provides that the Court may exercise its jurisdiction if the matter concerns the 'State of which the person accused of the crime is a national.'[668]

Article 13 of the *ICC Rome Statute* stipulates that the Court may exercise jurisdiction over most serious crimes of concern in one of three ways. One way is that a State Party may refer a situation in which crimes have been committed to the ICC Prosecutor.[669] For example, Uganda, DRC, and the Central African Republic all referred situations to the ICC to exercise jurisdiction over crimes committed within their territories.[670] Another way is that the UN Security Council may refer a situation in which crimes have been committed to the ICC Prosecutor pursuant to Chapter VII of the *UN Charter*.[671] For example, the Security Council referred the situation in Darfur, Sudan, to the ICC[672] and, more recently, the situation in Libya.[673] Yet another way is that the ICC Prosecutor may initiate an investigation into allegations that crimes have been committed.[674] The Prosecutor initiates an investigation, *proprio motu*, in accordance with the provisions of Article 15 of the *ICC Rome Statute*. The *proprio motu* powers of the ICC Prosecutor are a unique

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[667] This is in keeping with the territoriality principle discussed earlier at 4.2.1 of this thesis.

[668] This is in keeping with the nationality principle discussed earlier at 4.2.1 of this thesis.

[669] Article 13(a) of the *ICC Rome Statute*.

[670] See generally, ICC, *Situations and Cases* <http://www.icc-cpi.int>.

[671] Article 13(b) of the *ICC Rome Statute*.

[672] Security Council Resolution 1593 (2005), announced via UN Press Release, Doc. SG/SM/9797, AFR/1132; see generally, ICC, *Situations and Cases* <http://www.icc-cpi.int>. It may be noted that Sudan is not a State Party of the ICC.

[673] Resolution 1970 (2011), Adopted by the Security Council at its 6491st Meeting on 26 February 2011, UN Doc. S/RES/1970 (2011).

[674] Article 13(c) of the *ICC Rome Statute*.

feature of the ICC, especially when compared to the other *ad hoc* institutions.[675] In essence, Article 15 'creates a new autonomous actor on the international scene'.[676] The Prosecutor may initiate investigations on the basis of information received concerning crimes that fall within the jurisdiction of the Court.[677] The Prosecutor may then formally request the Pre-Trial Chamber for authorisation to investigate those crimes.[678] The Chamber may authorise the Prosecutor to proceed with an investigation where it considers that there is a reasonable basis to do so.[679] An example of this is when ICC Prosecutor, Luis Moreno-Ocampo, exercised his jurisdiction to initiate an investigation into crimes committed during Kenya's violent post-election period in 2007 to 2008.[680]

The ICC does not exercise primary jurisdiction over most serious crimes of concern to the international community. Instead, the Court's jurisdiction is limited by the principle of complementarity.[681] Both Article 1 and paragraph 10 of the Preamble of the *ICC Rome Statute* stipulate that the Court 'shall be complementary to national criminal jurisdictions.' According to this principle,

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[675] Louis Moreno Ocampo, 'The International Criminal Court in Motion' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 13.

[676] Louis Moreno Ocampo, 'The International Criminal Court in Motion' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 14.

[677] Article 15(1) of the *ICC Rome Statute*.

[678] Article 15(3) of the *ICC Rome Statute*.

[679] Article 15(4) of the *ICC Rome Statute*.

[680] See generally, ICC, *Situations and Cases* <http://www.icc-cpi.int>.

[681] For an in-depth discussion on the principle of complementarity, see, Cedric Ryngaert, 'The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice' in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia, 2009) 145–172.

the ICC can only determine that a case is admissible before the Court when there has been inactivity on the part of a State; and, in such circumstances the inactivity is because a 'State is unwilling or unable genuinely to carry out the investigation or prosecution' pursuant to the provision stipulated in Article 17(1) of the *ICC Rome Statute*.

The ICC is also limited by temporal jurisdiction. According to Article 11(1) of the *ICC Rome Statute*, the Court's jurisdiction is limited to crimes committed after the Statute came into force (i.e. 2002). Furthermore, according to Article 11(2), when the Court is dealing with States that have become parties to the *Statute* after its entry into force, it may only exercise its jurisdiction after the *Statute* has entered into force for that particular State.[682]

In terms of who may be prosecuted before the Court, Article 25(1) of the *ICC Rome Statute* stipulates that the ICC only exercises jurisdiction over natural persons. This provision would need to be amended to accommodate legal persons. Also, Article 25 of the *ICC Rome Statute* empowers the Court with the jurisdiction to prosecute complicit persons, which includes aiders and abettors of international crimes. It is widely accepted in customary international law that corporate personnel could be held liable for complicit perpetration of international crimes.[683] However, the specific wording of

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[682] The exception to Article 11(2) of the *ICC Rome Statute* is if a State makes a declaration pursuant to Article 12(3) of the *Statute* which provides: 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.'

[683] ICJ, *Corporate Complicity in International Crimes* (2008) volume 1, 6 <http://www.icj.org>. Also, see jurisprudence from the IMTs where corporate executives were liable for facilitating crimes by the Nazi Regime. For example, I G Farben Trial, Case No. 57, US Military Tribunal, Nuremberg, 14

> Article 25(3)(c) of the *ICC Rome Statute* is a major barrier to the prosecution of corporate personnel, such as senior executives and the members of the board of directors, who bear the most responsibility as decision-makers (as well as the prosecution of corporate entities). According to this Article, only those complicit perpetrators that aided and abetted a crime *for the purpose of facilitating such crime* shall be criminally responsible.[684]

4.3 Most appropriate forum for dealing with complicit organisational liability

As the discussion above has shown, domestic forums ultimately exercise primary jurisdiction over the type of crimes discussed in this thesis. However, the reality seems to be that given the lagging prosecutions to date, the States where these MNCs are headquartered appear disinterested. Also, the domestic courts in conflict-affected areas or weak-governance zones where these crimes take place face numerous administrative and socio-legal challenges. Moreover, the nature of foreign direct investments made by MNCs in such domestic jurisdictions far outweighs the need to prosecute them.

The regional courts face several challenges too. The most pressing being that the courts are limited by geographical constraints. Also, of those in Africa, the ACJHR – which shall operate as the region's permanent court – is yet to commence, and there are still concerns as to whether or not it will possess criminal chambers.

The *ad hoc* international tribunals and special courts are shutting down soon, and are all working towards completion strategies. For example, the SCSL is currently hearing its

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August 1947–29 July 1948, *Law Reports of War Criminals*, Vol X; Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, US Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, *Law Reports of Trials of War Criminal*, Vol X.

[684] On the limitations of this wording see 6.3.2 of this thesis.

last case. Also, all existing international institutions that exercise jurisdiction over international crimes are restricted by geographical constraints, and are limited by their specificity (for example, the ICTR only deals with serious violations of humanitarian law specifically committed in Rwanda in 1994).[685]

Hence, the writer is of the view that the ICC would be the preferred forum, but only where domestic jurisdictions are unwilling or unable to exercise jurisdiction over the complicit MNCs. This Court is a permanent institution; it is not restricted by geographical constraints. However, as previously noted, a major drawback for the ICC (as a desirable forum to deal with complicit organisational liability in international crimes) is that, currently, it only exercises jurisdiction over natural persons. It does not have provisions for organisational liability, whereas the doctrine of corporate criminal liability is well established in most domestic jurisdictions. Ideally, the ICC State Parties should revisit the *ICC Rome Statute* in order to amend its provisions to include jurisdiction over complicit legal persons, specifically multinational corporations. Also, there is a need to amend Article 25(3)(c) of the *ICC Rome Statute* to accommodate the characteristic forms through which corporations usually operate.

There is still a real possibility that the ICC may amend its jurisdiction to include legal persons at some point in the future. This may be carried out pursuant to Articles 121 and 123 of the *ICC Rome Statute*. The manner in which a State Party to the *Statute* may go about amending the statutory provisions is discussed later in this thesis.[686]

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[685] Though it should be borne in mind that although the ICC has no geographical constraints it is limited by temporal jurisdiction. According to Article 11(1) of the *ICC Rome Statute*, the Court's jurisdiction is limited to crimes committed after the Statute came into force, specifically 2002.

[686] See discussion at 7.5 of this thesis.

4.4 Chapter conclusion

This chapter investigated *where* an organisation that is complicit in international crimes could be prosecuted. In doing so, the writer examined the existing international, regional, and domestic jurisdictional forums to determine the preferred forum to deal with the problem of complicit organisational liability. As the discussion above has shown, the writer identified that the ICC was the most appropriate forum for this purpose where domestic jurisdictions proved inadequate.

The next chapter discusses organisational liability doctrine.

CHAPTER 5

Scope of Liability for Organisational Complicity: Organisational Liability Doctrine

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'There are far too many examples of companies which are complicit in or profit from appalling human rights abuses in conflict areas – but no successful prosecutions to date … There is no moral, legal or economic argument for this status quo. For it to change, we must equip prosecutors and the courts with the tools to bring the guilty to justice and discourage other companies from becoming involved in these appalling crimes.'[687]

5.1 Chapter introduction

In the previous chapter, the writer investigated jurisdictional forums to determine the most appropriate for the prosecution of multinational corporations for conduct occurring in Africa.

This chapter commences the discussion on *how* an organisation that is complicit in international crimes could be prosecuted. The writer discusses organisational liability doctrine by examining the models applied in domestic jurisdictions. Furthermore, this chapter examines missed opportunities of what could have been the attribution of corporate liability in international criminal law over the last sixty years. Finally, the writer identifies the preferred model of corporate liability to transplant internationally within the *ICC Rome Statute* to deal with MNCs that are complicit in international crimes.

The doctrine of organisational liability is generally discussed in the context of

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[687] Andie Lambe, Global Witness Proposes New Framework that could Close Legal Loopholes which Allow Corporate Crimes in Conflict Zones (10 January 2011) <http://www.globalwitness.org>.

corporations unless otherwise indicated. This is not to say other legal entities should be exempt from liability. Rather, the nature of the organisational liability models developed within domestic jurisdictions tends to focus on corporate entities. A number of the legal principles discussed here could, by extension or analogy, be applied to other legal persons; however, the focus of this thesis is multinational corporations in the extractive industries.

5.2 Attributing corporate liability in domestic jurisdictions

5.2.1 Brief historical examination on the birth of the corporation

Corporations have grown in stature in most domestic jurisdictions over the last few centuries. There is a wealth of literature that traces the birth of the corporation and the law governing corporate activities in a number of domestic legal systems.[688] The manner by which corporations have developed has played a significant role in shaping corporate criminal liability in most domestic legal systems. In particular, the developments in common law jurisdictions have largely influenced the corporate liability models that are applied today. The emergence of corporations in common law jurisdictions is briefly examined here.

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[688] For example, see generally, Thomas Weigend, '*Societas delinquere non potest*? A German Perspective' (2008) 6 *Journal of International Criminal Justice* 927, 930–932; Leonard Orland and Charles Cachera, 'Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (*Personnes Morales*) under the New French Criminal Code (*Nouveau Code Pénal*)' (1995)11 *Connecticut Journal of International Law* 111, 114–120; Carl F Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Wolters Kluwer, 2nd rev ed, 2008) 261–266; Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) 85. The discussion on common law influences follows below. Regarding civil law jurisdictions, developments in French company law largely influenced wider Europe, French African colonies, the Caribbean and South America, South Asia, and Quebec. Dutch and German influences were also felt throughout their former colonies. Also, other influences affecting corporations worth noting are the recent developments seen, for example, by the influence of the European Union, the banding together of Eastern European states which are not part of the European Union, and the emerging corporate practises within Sharia Law enforced by Islamic states. On this, see, David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 10–11.

Common law jurisdictions were largely influenced by the British Empire. A significant number of statutory instruments dealing with corporations originated in the United Kingdom, and these were received throughout the British colonies in Africa, the Indian subcontinent, Asia, and the Caribbean.[689] Although the United States was a former British colony, it significantly influenced the development of company law in the Philippines and Japan (immediately after WWII). In more recent times, US company law influences have been felt in parts of the Caribbean, Central and South America and, to some extent, in Canada, New Zealand, and some jurisdictions in the Pacific Rim.[690]

With regard to corporations in England, trade up until the sixteenth century was controlled through a system of guilds that were issued with a Royal Seal of approval.[691] These guilds managed the right to engage in specific trade dealings.[692] By the sixteenth century, England and much of Europe began a rapid trade expansion throughout eastern and western territories in search of natural resources.[693] At that time, monarchs were the only authorities vested with the power to create companies.[694] They did so by granting what was known as a Royal Charter. This Royal Charter enabled merchants to engage in trade through what became known as regulated companies,[695] because although the company's members engaged in trade individually, the trade itself was actually regulated

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[689] David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 7–8.

[690] David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 9.

[691] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 82.

[692] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 82.

[693] Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Hyde Park Press, 3rd ed, 2006) 46–47.

[694] Elizabeth Boros and John Duns, *Corporate Law* (Oxford University Press, 2007) 9.

[695] R P Austin and I M Ramsay, *Ford's Principles of Corporation Law* (LexisNexis Butterworths, 14th ed, 2010) 35.

by the State.[696] There were a number of distinguishing features of the Royal Charter that later became the founding legal principles with respect to the incorporation of companies. The Royal Charter included provisions: that the company was capable of suing and being sued; the company could hold a common seal; merchants could acquire property in the company name; and, the company name could also enjoy perpetual succession.[697] Leading up to the seventeenth century, Parliament began to play a more prominent role in the creation of companies, when merchants, instead, brought their petitions to Parliament if they sought a grant of incorporation. Parliament responded to each individual request and delivered a specific Act of Parliament granting incorporation.[698] It was only during the nineteenth century that Parliament enacted legislation that showed early signs of regulating companies.[699] For example, the British Parliament passed the *Companies Act* (UK) in 1844, which not only indicated how a group of individuals could register a company, but also put provisions in place that required the appointment of auditors, the reporting of company accounts and, more significantly, the personal liability of corporate directors in circumstances where the company traded while insolvent.[700]

5.2.2 The emerging nature of corporate liability

The emerging nature of corporate criminal liability has curiously been described as a

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[696] Elizabeth Boros and John Duns, *Corporate Law* (Oxford University Press, 2007) 10.

[697] R P Austin and I M Ramsay, *Ford's Principles of Corporation Law* (LexisNexis Butterworths, 14th ed, 2010) 35.

[698] R P Austin and I M Ramsay, *Ford's Principles of Corporation Law* (LexisNexis Butterworths, 14th ed, 2010) 37.

[699] Elizabeth Boros and John Duns, *Corporate Law* (Oxford University Press, 2007) 12.

[700] Elizabeth Boros and John Duns, *Corporate Law* (Oxford University Press, 2007) 1213.

'weed … nobody bred it, nobody cultivated it, nobody planted it. It just grew.'[701] Indeed, the gradual recognition of corporate criminal liability has been a lengthy and somewhat patchy process. It has resulted in what Jonathan Clough and Carmel Mulhern describe as 'an *ad hoc* doctrine of law at best and rudimentary at worst'.[702] This may be attributed to a number of factors. Lawmakers were traditionally averse to the notion of recognising corporate activities as criminal. Granted, this traditional view has gradually diminished; however, this kind of attitude toward the notion of corporate criminal conduct stunted the manner in which the law developed.[703] In the past, corporate activities were generally regulated by statutory regimes containing criminal provisions that dealt with corporations. A major shortcoming of these statutory regimes is that they were not based on a prosecutorial model, but rather administered on a compliance model.[704] The result was the courts and legislative bodies failed to clearly develop provisions dealing with corporate criminal liability. This lacuna has led to the practise of enforcing specific offences as opposed to developing a consistent body of law.[705]

Tracing historical developments in common law jurisdictions

Incorporated companies emerged as early as the sixteenth century.[706] At the time, there were no provisions in place to deal with corporate criminal liability in common law

[701] Gerhard O W Mueller, 'Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability' (1957) 19 *University of Pittsburgh Law Review* 21, 21.

[702] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 2.

[703] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 2.

[704] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 2. Also, on the issue of compliance and how this impacts corporate criminal liability, see, Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' (2007) 44 *American Criminal Law Review* 1503, 1513–1523.

[705] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 2.

[706] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 82.

jurisdictions. In fact, as early as 1701, Sir John Holt C.J., in *obiter dictum*, reflected upon the existing common law position when he said that corporations were incapable of committing criminal offences. According to Holt C.J., only particular members of the corporation could be indicted for criminal offences, but not the corporate entity itself.[707] This approach changed at the turn of the century. Historical examination shows that there was a significant difference between the corporate form which existed in the early 1700s from that which emerged much later in the 1800s.[708] When Holt C.J. dismissed the idea of corporate criminal liability, the idea of corporate entities was still taking shape. Developments in the body of company law really unfolded in 1862 with the introduction of the *Companies Act*.[709]

Looking back, it is apparent that the idea of corporate criminal liability is not a novel one. In common law jurisdictions, the earliest forms of corporate criminal liability were formulated in the nineteenth century.[710] Despite corporations having existed in common law for centuries, it was not until the nineteenth century that their regulation became imperative.[711] At that time, the rapid industrialisation of society and the increasing materialisation of limited liability companies created a dilemma. How would criminal law impute the commission of criminal offences to a corporation when it was

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[707] *Anon* (1701) 12 Mod 560, 88 ER 1518, discussed in Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 6.

[708] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 6.

[709] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 6.

[710] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 198.

[711] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267, 270.

predominantly seen as an artificial entity?[712]

Traditionally, criminal liability primarily dealt with the responsibility of natural persons for the commission of crimes against other natural persons or their possessions.[713] The common law courts were confronted with a challenge. How, if at all, could they apply general principles of criminal law, such as *actus reus* and *mens rea*, to convey corporate criminality.[714] The argument is also made that corporate criminality would have developed less strenuously if the courts had not distracted themselves with 'fitting corporate square pegs into the round holes of existing criminal law dogma.'[715] Historical examination reveals that the earliest semblance of corporate prosecutions during the nineteenth century showed a narrow regard for corporate criminal liability, which was restricted in its application to public nuisance, criminal libel, and breach of statutory duties.[716] It was only in the twentieth century that corporate criminal liability became well established in common law jurisdictions. By this time, the common law courts had formulated a solution for attributing corporate criminal liability, which stemmed from the doctrine of derivative liability; they applied vicarious liability and identification liability (discussed below).[717]

Tracing historical developments in civil law jurisdictions

In contrast, continental Europe had embraced forms of corporate criminal liability

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[712] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267, 270.

[713] Michael J Gilbert and Steve Russell, 'Globalisation of Criminal Justice in the Corporate Context' (2002) 38 *Crime, Law and Social Change* 211, 217.

[714] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 19.

[715] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 54.

[716] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 19.

[717] See generally, Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267, 270–271.

throughout much of the seventeenth and eighteenth centuries.[718] The *French Criminal Code*, which dealt in great detail with the criminal sanctioning of corporations, largely influenced the European continent.[719] However, this all changed during the French Revolution of 1789; individualism dominated the revolutionary era while any concepts of corporate liability were swept away.[720] The doctrine of corporate criminal liability was thwarted in France and throughout much of Europe on account of the legal maxim: *societas delinquere non potest*. At the time, this principle was entrenched in most European legal systems; the principle insinuated that legal entities were incapable of being found blameworthy.[721] This principle dominated most civil legal systems, and it was only in the late 1970s that it began to be challenged by legal scholars in Western Europe.[722] The criticism is attributed primarily to the growing influence exerted by corporations in Western Europe and the increasing instances of corporate misconduct that posed unique challenges for European society.[723] By 2000, many European countries were forced to reassess their position on corporate criminal liability in light of

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[718] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 64.

[719] Leonard Orland and Charles Cachera, 'Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (*Personnes Morales*) under the New French Criminal Code (*Nouveau Code Pénal*)' (1995) 11 *Connecticut Journal of International Law* 111, 115.

[720] Leonard Orland and Charles Cachera, 'Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (*Personnes Morales*) under the New French Criminal Code (*Nouveau Code Pénal*)' (1995) 11 *Connecticut Journal of International Law* 111, 115; for detailed history see, John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (Oxford University Press, 2nd ed, 2008) 234–236.

[721] Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 105.

[722] Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 107.

[723] Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 107-108.

a number of international and regional conventions.[724] These conventions were important milestones that obliged signatory States to implement whatever necessary measures to punish corporate entities engaged in unlawful conduct.[725] Presently, a number of countries in civil law jurisdictions have abandoned the principle of *societas delinquere non potest* and adopted at least one of the corporate liability models discussed below.

Jurisdictions that have not adopted the traditional corporate liability models

Not all domestic jurisdictions apply models of corporate criminal liability. For instance, Brazil, Bulgaria, Luxembourg, and the Slovak Republic are among the domestic jurisdictions that do not recognise any form of criminal liability for corporate entities. Also, countries like Germany, Greece, Hungary, Mexico, and Sweden have no specific provisions for corporate criminal liability, but they impose administrative penalties for the criminal acts of employees.[726] It is beyond the scope of this thesis to provide a more detailed discussion on these domestic jurisdictions. This chapter focuses on corporate criminal liability and the identification of an appropriate model to transplant

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[724] For example, the UN *Convention against Transnational Organised Crime*, the European Union's *Convention on the Protection of the Environment through Criminal Law* and the OECD *Convention on Combating Bribery of Public Officials in International Business Transactions*; for detailed discussion on these, see, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008) 34.

[725] For example, see generally OECD, Switzerland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and 1997 Recommendations on Combating Bribery in International Business Transactions (2004).

[726] On jurisdictions that have not adopted the traditional corporate liability models, see generally, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

internationally within the *ICC Rome Statute*.

5.2.3 Models of corporate liability

The legal doctrine of corporate liability has long been problematic and debated widely among academics, international bodies, and law enforcement agencies.[727] The focus of the debate is shifting. Some academics, such as Celia Wells, have taken the view that 'the debate is no longer whether to have corporate liability but what form it should take.'[728] The emerging issue is whether the corporation's wrongs are attributable to the corporate entity itself, or whether the wrong only lies with an individual within the corporation.[729]

Most domestic legal systems have developed at least one of the two models of corporate liability. These models are summarised in Table 5 and discussed below. They are the 'derivative liability model' (which comprises vicarious liability and identification liability) and the 'non-derivative liability model'.[730] These models are not mutually exclusive. Some jurisdictions apply both models of corporate criminal liability. For example, Australia applies a combination of both identification liability and non-derivative liability.[731]

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[727] See generally, Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005).

[728] Celia Wells, 'International Trade in Models of Corporate Liability' (2002), The Centre for Business Relationships, Accountability, Sustainability and Society <http://www.brass.cf.ac.uk>.

[729] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 75.

[730] It is noted in Chapter 1 that the term 'non-derivative liability' is used to avoid confusion with the term 'organisational liability'. The writer also noted that non-derivative liability is generally described by academics as 'organisational liability'. Finally, this thesis uses the term 'non-derivative liability' to distinguish it from derivative liability.

[731] See, Part 2.5, Division 12 of the *Criminal Code* (Cth).

Table 2 – Corporate liability models within most domestic jurisdictions

Type of Model [These models are not mutually exclusive]	Prime examples of domestic jurisdictions reflecting these models
Non-derivative liability (favours realist personality)	
Jurisdictions incorporating 'corporate culture' concept	Australia and Switzerland
Jurisdictions borrowing some aspects of non-derivative model	United Kingdom, Canada, United States, Finland, and Japan
Derivative liability (two types) (favours nominalist personality)	
1. Vicarious Liability	United States, parts of Western Europe and South Africa
2. Identification Liability: →Narrow application	United Kingdom, Canada and most Commonwealth countries
→Wider application (broader approach)	Primarily throughout continental Europe

Note: information in the table compiled from the following sources: Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008)*;* Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008*);* Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law- A Survey of Sixteen Jurisdictions* (FAFO, 2006)*;* FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

a) Derivative liability model

Legal theorists who support the derivative liability model tend to favour the nominalist view of legal personality, which suggests that legal persons, specifically corporations, are fictitious, artificial persons and essentially nothing more than a collection of individuals.[732]

The derivative liability model is the traditional model applied in most domestic jurisdictions. It has two approaches: vicarious liability, or identification liability. Vicarious liability is a broad principle, while

[732] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 4–5.

identification liability is quite narrow.[733] The vicarious and identification liability approaches are similar in that the organisational liability is established through an individual whose culpable actions are imputed to the organisation.[734] The main difference between these two approaches is that, with vicarious liability, the actions of an individual are imputed to the organisation insofar as the individual was acting in the course of his/her employment – whereas, with identification liability, it is only the actions of those individuals said to be the directing minds that are imputed to the organisation.[735]

i. Overview of the derivative liability model

Vicarious liability

The legal theory of vicarious liability, commonly referred to as *respondeat superior*, has been developed as a matter of common law by Federal Courts in the United States.[736] To date, there are at least three hundred thousand federal offences that a corporate entity could be charged with.[737] Vicarious liability

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[733] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 198–199.

[734] See generally, Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 122–133; Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 147–152; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

[735] See generally, Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 122–133; Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 147–152; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

[736] On the evolution of corporate criminal law in the United States, see generally, William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) 3–44.

[737] Edward B Diskant, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure' (2008) 118 *Yale Law Journal* 126, 139. The

has been embraced in the US,[738] unlike the common law jurisdictions that have rejected this theory within the body of criminal law.[739]

The *respondeat superior* theory has a number of attributes that have been shaped over the last century, in particular by US Federal Courts. The theory was transplanted from tort law and applied in criminal law as early as 1909 in the matter of *New York Central & Hudson River Railroad Company v United States*.[740] New York Central & Hudson River Railroad Company brought their case before the US Supreme Court. The company challenged the constitutionality of a federal statute (the 1907 *Elkins Act*), which regulated railway rates and imposed corporate criminal liability on any corporations that violated the federal provisions.[741] This landmark decision established that a corporate entity could be held vicariously liable for an offence committed by its employee if the employee was acting within the scope of their employment – and even in circumstances where the principal had strictly forbidden that

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author lists a number of statutory instruments that contain provisions for the prosecution of corporate criminal offences including, *inter alia*: 'mail and wire fraud statutes, money laundering statutes, extortion statutes or for almost any other conduct that might fall within the purview of what is considered white-collar crime.' For an analysis on whether the sheer volume of criminal provisions have gone overboard, see Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' (Fall, 2007) 44 *American Criminal Law Review* 1503, 1506.

[738] It may be noted that in the United States, states have jurisdiction over criminal law matters. Consequently, some states adopt federal rules while others, namely those that have adopted the *Model Penal Code*, have aligned themselves with the English common law approach. See, Celia Wells, 'Corporate Criminal Responsibility', in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 150.

[739] See, A P Simester and Warren J Brookbanks, *Principles of Criminal Law* (Brookers Ltd, 2007) 197. Corporate criminal liability, on the basis of *respondeat superior*, was rejected in the leading House of Lords decision in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, HL. For further discussion on this impact see, Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481, 1495–1497.

[740] *New York Central & Hudson River Railroad Co. v United States*, 212 US 481(1909), 494.

[741] *New York Central & Hudson River Railroad Co. v United States*, 212 US 481(1909), 490–491.

particular course of action.[742] A number of policy considerations were applied in this judgment.[743] At the time the matter was decided, business entities were growing in stature and dominating industrialised society. The prospect of looming corporate criminal liability was supposed to act as an incentive for businesses to curtail illegal practices, no matter how profitable, and restrain ambitious employees that were out to increase corporate profitability.[744]

Subsequent to the *New York Central & Hudson River Railroad Company* decision, there were a number of cases brought before the US Federal Courts that, in effect, narrowed the scope of the corporate liability standard. The US Federal Courts imposed limitations on the *respondeat superior* theory when they indicated that, in order to apply the theory:

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[742] *New York Central & Hudson River Railroad Co. v United States*, 212 US 481(1909), 493–495. See detailed discussion of this case in Edward B Diskant, Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure (2008) 118 *Yale Law Journal* 126, 135–136. It should also be noted that the status of the employee within the organisation is irrelevant. See, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 56.

[743] *New York Central & Hudson River Railroad Co. v United States*, 212 US 481(1909), 494–495. For commentary, see Albert W Alschuler, 'Two Ways to Think About the Punishment of Corporations' (2009) 46 *American Criminal Law Review* 1359, 1363.

[744] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 56.

1. …that the employee must act, at least in part, for the purpose of benefitting the corporation, or with the belief that the corporation will benefit from his or her conduct;[745] and
2. …that the employee need have only apparent authority to act on behalf of the corporation; and then by underscoring that the employee's actions and mental states will be attributed to the corporation despite being in violation of corporate policy and explicit instructions to the contrary.[746]

Although vicarious liability for corporations has been developed as a matter of common law by Federal Courts in the United States, the theory has also been adopted in other domestic jurisdictions in parts of Africa and Europe.[747] For example, Section 332 of the *South African Criminal Procedure Act 51 of 1977* adopts corporate criminal liability provisions that reflect the vicarious liability theory.[748] Also, the theory is adopted in Denmark,[749] Finland,[750] and The Netherlands.[751] Additionally, vicarious liability provisions are also applied in a limited capacity in France[752] and Switzerland.[753]

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[745] *Standard Oil Co. of Texas v United States*, 307 F 2d 120, 128 (5th Circuit, 1962) and *Steere Tank Lines v United States*, 330 F 2d 719, 722–24 (5th Circuit, 1964) discussed in John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1338.

[746] *United States v Hilton Hotels Corp*., 467 F 2d 1000, 1004, 1007 (9th Circuit, 1972), discussed in John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1338.

[747] See generally, Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 155–158; also Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (February, 2008) 288–296.

[748] It is interesting to note that the South African Government has devoted considerable resources investigating and prosecuting serious economic offences by corporate entities. This is evidenced by the Governments initiative in opening 'Specialised Commercial Court Centres', see discussion on this at 4.2.1 of this thesis.

[749] Section 306 of the *Danish Criminal Code*.

[750] Section 9 of *Finland's Penal Code*.

[751] Paragraph 51 of the *Dutch Penal Code*.

[752] Article 121–122 of the *French Penal Code.*

Identification liability

Essentially, under the traditional legal theory of identification liability, organisational liability is only established through the culpability of specific individuals that act as the 'directing minds' of the organisation.[754] Hence, the responsibility for corporate conduct and fault lies with the board of directors, the managing director, or any other person that the board of directors has conferred power upon. That person is said to be acting *as* the company.[755] Literally, 'what the senior executive does and thinks in the performance of his (or her) duties is identified with, and becomes the acts and thoughts of, the company itself.' [756]

The House of Lords in the United Kingdom has developed identification liability as a matter of common law.[757] The doctrine originated in civil law matters,[758] and only found its way into criminal law in the 1940s.[759]

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[753] Article 100 of the *Swiss Penal Code*.

[754] Simon Parsons, 'The Doctrine of Identification, Causation and Corporate Liability for Manslaughter' (2003) 67 *Journal of Criminal Law* 69, 69–71.

[755] Matthew Goode, *Corporate Criminal Liability*, 3 <http://www.aic.gov.au> discussing *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, HL.

[756] Russell Heaton, *Criminal Law* (Oxford University Press, 2nd ed, 2006) 466. Gender neutral terms added.

[757] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 56.

[758] See, United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 89, discussing *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, where per Viscount Haldane, the court found that the privity of the Manager was the in fact the privity of the company.

[759] See, United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 89–92. The Law Commission point to three criminal law cases, *Director of Public Prosecutions v Kent & Sussex Contractors Ltd* [1944] KB 146, *R v ICR Haulage Ltd* [1944] KB 551, and *Moore v I Bresler Ltd* [1944] 2 All ER 515, which recognised to some extent the adoption of identification liability in criminal law. However, the Law Commission is guarded in their analysis. They remark 'we question how decisive these cases really are in establishing a generalised identification doctrine … none of them provide guidance on the extent of the identification doctrine.

Tesco Supermarkets Ltd v Nattrass[760] is widely viewed as the authoritative leading case from the United Kingdom that deals with identification liability.[761] Tesco Supermarkets, a large chain of supermarket stores, was penalised for breaching the UK *Trade Descriptions Act 1968*. The Manager of the Northwich store was responsible for ensuring that products were available for sale, as per the corporate advertisements. The Manager failed to check the availability of the products, resulting in a complaint filed against Tesco Supermarkets and the ensuing penalty. The *Trade Descriptions Act* provided a defence that would apply if the store could satisfy two requirements. First, the store had to show that the Manager was 'another person' within the meaning of the Act, as opposed to an individual with delegated authority acting on behalf of the company. Second, the store had to show that it had exercised due diligence to avoid the commission of the offence.[762] Although Tesco Supermarkets owned over a hundred stores, the board of directors and senior management were able to show that they had taken reasonable precautions and exercised due diligence by putting an elaborate system of supervision and training in place to safeguard against any of its employees violating the Act.[763] Of particular significance to this thesis is the discussion by Lord Reid in *Tesco* on the manner in which the liability of an individual is imputed to a corporate

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None of them specifically address the category of persons whose acts and states of mind may be imputed to the company in this way. Moreover, … the judges are at pains to emphasise the context-sensitive nature of a decision to attribute liability to the company for the acts of the particular agents …' (*ibid* 92).

[760] [1972] AC 153, HL.

[761] The test adopted in *Tesco* has been followed in most common law jurisdictions – for example, it was accepted by the High Court in Australia in *Hamilton v Whitehead* (1988) 161 CLR 121.

[762] [1972] AC 153, HL, 167–168.

[763] [1972] AC 153, HL, 171.

entity. According to his Lordship, so long as the individual represents 'the directing mind and will of the company, and controls what it does',[764] then that individual is not speaking or acting on behalf of the company, they are the company.[765] Lord Reid identified which individuals were said to speak and act as the directing minds of the company. These included the board of directors and senior management, as well as any other persons that were delegated authority to act or speak on behalf of the company.[766] Lord Reid concluded his judgment by applying a strict interpretation of the identification liability theory, finding that the store Manager had not acted on behalf of the company because there had been no authority delegated to the Manager.[767] In fact, as Lord Reid observed, there was actually an elaborate chain of command whereby senior management had effectively remained in control of the regional and district stores.[768]

In later years, there were significant developments which built upon the identification liability test laid down in *Tesco*. This test was seen as far too stringent in the scope of persons that it considered to be acting as the directing mind and will of the corporation. A broader interpretation of the theory began to emerge in the 1990s.[769] The Privy Council decision in *Meridian Global*

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[764] [1972] AC 153, HL, 171.

[765] [1972] AC 153, HL, 170.

[766] [1972] AC 153, HL, 171.

[767] [1972] AC 153, HL, 174–175.

[768] [1972] AC 153, HL, 174–175.

[769] See generally, Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 154.

Funds Management Asia Ltd v Securities Commission[770] is an example of such developments. This matter involved an appeal brought before the Privy Council from the Court of Appeal of New Zealand. In New Zealand, the Securities Commission had brought the company before the High Court for failing to comply with legislative provisions stipulated in the *Securities Amendment Act* of 1988. Prior to this, the company's chief investment officer and senior portfolio manager had used funds which were managed by the company to purchase a substantial security holding in a public issuer, unbeknown to the board of directors. The company had not given notice of their acquisition of shares in compliance with the legislative provisions.[771] The High Court found that the corporate personnel had acted on behalf of the company and, therefore, breached the legislative provisions. The Court of Appeal upheld the ruling on the basis that the chief investment officer had acted as the company's directing mind and will.[772] On appeal in the Privy Council, their Lordships held that, ordinarily, the actions of natural persons that were attributable to a company were determined by the company's rights and obligations. These were contained in its constitution and also pursuant to company law. However, in exceptional circumstances, particularly when dealing with statutory offences, a true construction of the relevant substantive provision would determine whose knowledge or state of mind is attributable to the company.[773] In *Meridian Global Funds Management Asia Ltd*, a true construction of the legislative provision would be that the company knew it

[770] [1995] AC 500.

[771] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500, 503–504.

[772] [1995] AC 500, 502.

[773] [1995] AC 500, 511.

had become a substantial holder when the person with authority to construct the deal knew, in this case, the chief investment officer.[774] Their Lordships were also of the view that it was not necessary to determine whether the chief investment officer had acted as the directing mind and will of the company. Suffice to say, this did not mean that the knowledge of a servant of a company who was authorised to act on its behalf was automatically attributed to the company. According to their Lordships, 'it is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.'[775]

The approach taken in *Meridian Global Funds Management Asia Ltd* has been adopted in most common law jurisdictions. There are also legislative initiatives that adopt the much broader interpretation of the theory of identification liability than the one set down in *Tesco*.[776]

In essence, identification liability is the traditional model of corporate liability applied in most Commonwealth jurisdictions. The broader interpretation of identification liability, which emerged in the 1990s, has been adopted in parts of continental Europe.[777] It had, however, been adopted earlier in the 1980s in

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[774] [1995] AC 500, 511.

[775] [1995] AC 500, 511.

[776] See, Section 12.3 *Australian Criminal Code* (Cth) and Section 22 of the *Canadian Criminal Code*.

[777] For details, see, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008) 4.

the American *Model Penal Code*.[778]

ii. Limitations of the derivative liability model

The derivative approach to corporate liability, that is, identification and vicarious liability, is derived from the culpable actions of an individual acting within the corporate entity. There are a number of limitations posed by this model.

Vicarious liability

Generally, vicarious liability has been labelled as 'indeterminate in its sweep.'[779] In the United States, in particular, leading academics generally agree that the current standard for attributing corporate criminal liability at a federal level is 'flawed'.[780] A major concern with the vicarious liability theory, stemming from the judicial precedent set down in *New York Central & Hudson River Railroad Company*, is that it is too broad in its application.[781] The criminal acts of lower-level employees, such as clerks, drivers, or manual labourers, spell the downfall of the corporate entity.[782] Also, the criminal actions of employees with apparent authority, such as middle and lower-level

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[778] See, Article 2.07 of the American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985).

[779] Celia Wells, 'Corporate Criminal Responsibility' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 154.

[780] Pamela Bucy, 'Corporate Criminal Liability: When does it Make Sense?' (2009) 46 *American Criminal Law Review* 1437, 1437.

[781] Barry J Pollack, 'Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1393, 1395. See also, William S Laufer who rejects the theory of vicarious liability, alternatively proposing constructive corporate fault, William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) 68–96.

[782] Barry J Pollack, 'Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1393, 1395.

managers, could be imputed to the corporate entity even in circumstances where the employee acted outside the scope of their actual authority.[783] Furthermore, the criminal actions of employees may be imputed to the corporate entity despite the existence of a corporate compliance program that had been put in place to safeguard against such criminal actions in the first place.[784]

The American *Model Penal Code* provides a more stringent test of the vicarious liability standard than that set down by the US Federal Courts.[785] Given that the existing vicarious liability theory is so broad in its application, the *Model Penal Code* approach seems to be favoured by leading academics and legal commentators in the United States.[786] It limits corporate criminal liability to circumstances where 'the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.'[787] The *Model*

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[783] Pamela Bucy, 'Corporate Criminal Liability: When does it Make Sense?' (2009) 46 *American Criminal Law Review* 1437, 1441.

[784] Barry J Pollack, 'Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1393, 1396.

[785] Section 2.07 of the American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985). For commentary see generally, John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1356.

[786] See generally, John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1329, 1356.

[787] Section 2.07 of the American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985). Section 2.07 of the *Model Penal Code* contains corporate criminal liability provisions for both vicarious liability and identification liability, see, ibid 32–34.

Penal Code, in its entirety, is not applied as the law in US jurisdictions.[788] However, it has influenced State penal codes and it has been cited extensively in judicial matters as persuasive authority when interpreting existing statutes and developing criminal law doctrine.[789]

Identification liability

James Gobert describes identification liability theory as both over and under-inclusive.[790] According to Gobert, the theory is over-inclusive because the company is liable for the criminal activities of its top corporate officials regardless of whether they were acting contrary to the company policy.[791] Gobert argues it is under-inclusive because in many large companies there are only a relatively small percentage of top corporate officials in comparison with the size of the company.[792] Gobert rightly points out the limitations with derivative liability. This is one of the reasons the writer favours the non-derivative liability approach in this thesis.

Another difficulty with the identification liability theory is the claim that it does not take into account the complex nature of modern corporations.[793] It could be said that the theory does not embrace the shift in corporate decision-making strategies found in modern corporations. It appears that, nowadays,

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[788] Joshua Dressler, *Understanding Criminal Law* (5th ed, 2009) 31.

[789] Joshua Dressler, *Understanding Criminal Law* (5th ed, 2009) 31. For discussion on how many States in the United States have opted instead to 'approve a less sweeping standard of liability' and adopted the Model Penal Code, see, Albert W Alschuler, 'Two Ways to Think About the Punishment of Corporations' (2009) 46 *American Criminal Law Review* 1359, 1364.

[790] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 400.

[791] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 400.

[792] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 400.

[793] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 395.

corporate policies and procedures, as opposed to individual decisions, are the force spurring the corporation forward.[794] While this is probably true of the large MNCs operating globally, it could also be that the policy or strategic decision-making in a number of the modern corporations are not always centralised. They could, in fact, take place at various regional offices rather than national ones.[795] Invariably, how an MNC operates its global business activities is driven by factors such as products, services, and the location of its business enterprises.

Furthermore, in modern corporations it is not always easy to determine what responsibility is actually attributable to a single individual due to the complex hierarchical structure of the emerging forms of corporations.[796] Identification liability hinges on imputing the culpable acts of those acting as the directing minds to the corporate entity. Celia Wells proposes that the theory of identification liability be derived on the basis of the corporate official's actual responsibility, as opposed to his/her formal duties.[797] Wells makes a valid point about the shortcomings of the theory of identification liability.

Another concern with identification liability is that corporate entities may be keen to lay blame on lower-level employees that are not the controlling

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[794] C M V Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59(4) *Modern Law Review* 557, 561.

[795] United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 105.

[796] Joseph Sanders and V Lee Hamilton, 'Distributing Responsibility for Wrongdoing inside Corporate Hierarchies: Public Judgements in Three Societies' (1997) 21 *Law and Social Inquiry* in Sally Simpson and Carole Gibbs (eds), *Corporate Crime* (Ashgate, 2007) 248. See also, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 100. For a discussion on the kinds of complex structures, see discussion, which appears in 3.2.2 of this thesis.

[797] Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 156.

officers.[798] This could occur for several reasons. One reason could be the corporation's desperate attempt to escape organisational liability.[799] In doing so, the corporation is shielded because, according to the theory of liability, only the actions of those who act as the directing minds of the corporate entity may be imputed to the corporation. This means that the culpable actions of lower-level employees who might be blamed for committing an offence would not be imputed to the corporation.

Yet another difficulty with this theory of corporate liability is that there could be no individual identified as the embodiment of the corporation whose liability is then imputed to the organisational entity itself. This was the case in *P&O European Ferries (Dover) Ltd*[800] where there was no specific individual responsible for reviewing 'safety'. The matter involved the sinking of a vessel owned by P&O, *Herald of Free Enterprise*. The vessel capsized because it sailed off with its bow doors open, resulting in the death of 192 passengers.[801] This was the first case in the United Kingdom to determine that corporate entities could, in fact, be indicted for a manslaughter offence, provided that there was an individual within the company who was in charge of controlling

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[798] For detailed discussion see, Russell Heaton, *Criminal Law* (Oxford University Press, 2nd ed, 2006) 469; see also, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 203) 42–43.

[799] See, Russell Heaton, *Criminal Law* (Oxford University Press, 2nd ed, 2006) 469; also, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 203) 42–43.

[800] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[801] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72. For detailed discussion on this case, see Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 107–111; Russell Heaton, *Criminal Law* (Oxford University Press, 2nd ed, 2006) 468; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 227.

the specific activities that resulted in those deaths.[802] Despite reaching this finding, Justice Turner dismissed the manslaughter charges against P&O. Applying the identification liability test, Justice Turner found insufficient evidence against any specific corporate official.[803]

Ultimately, some of the challenges posed by the theory of identification liability could be overcome by, instead, attributing non-derivative liability (discussed below). With non-derivative liability, one examines the corporate culture that developed.

b) Non-derivative liability model

i. Overview of the non-derivative liability model

Legal theorists who support the non-derivative liability model tend to favour the realist view of legal personality. This view suggests that corporations are real entities that exist independently and possess a separate legal personality in their own right.[804] Essentially, under the legal theory of non-derivative liability, because the corporation is treated as a separate real entity in its own right, the culpability of the corporation itself, as opposed to the culpability of its individuals, is of primary concern.

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[802] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[803] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72. For commentary see, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 103. This was an interesting finding considering the Assistant Bosun responsible for shutting the vessel doors had fallen asleep, and the Chief Officer responsible for checking that the doors were shut had not done so. Neither had the Captain verified that the doors were shut before sailing off. In addition, this was not the first time the vessel had sailed off with its doors open. See also, the findings of an inquiry conducted by the Department of Transport in Department of Transport, M V Herald of Free Enterprise Report of the Court No. 8074 (1987).

[804] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 64–65. Gobert and Punch propose the corporation reflected in the realist model possesses 'its own distinctive goals, its own distinctive culture, and its own distinctive personality.' James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 203) 38.

Eli Lederman argues that the non-derivative liability model, which he refers to as the self-identity model, could replace all other liability models because of its scope in application. Lederman suggests that each of the derivative liability models was fashioned to widen the scope of its predecessor 'when it had proven unsuitable for application in a defined set of offenses or in a particular set of situations.'[805] Following from this, Lederman proposes that, in a sense, the non-derivative liability model brings what he refers to as the 'circle of theoretical development' to completion.[806] Hence, as Lederman observes, the beauty of the non-derivative liability model is that it takes into account a basic principle of company law; that is, the corporate entity is distinct and separate from its founders and operators.[807]

There are times when the corporate form is used to avoid responsibility, either intentionally or unintentionally.[808] This could be the result of the operating method, or a complex organisational structure adopted by the corporate entity.[809] In such instances, it is difficult to locate the culpable individuals;

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[805] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imation toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 681–682.

[806] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imation toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 681–682.

[807] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imation toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 681–682. However, as the discussion showed earlier, the difficulty with this basic principle of company law is that it may become an obstacle when attributing corporate criminal liability on MNCs with respect to criminal conduct perpetrated through their subsidiaries in other jurisdictions. See discussion at 3.2 of this thesis.

[808] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 14.

[809] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 912.

hence, imposing criminal liability on the corporate entity in the first place is more favourable.[810] John Ruggie, the UNSRSG, has argued that the non-derivative liability model could help enforce a rights-respecting corporate culture because it examines the corporate 'policies, rules, and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of employees or officers.'[811]

The Australian model of non-derivative liability contained within the *Criminal Code* (Cth) is the leading corporate liability model.[812] This organisational liability model has been described by Celia Wells as 'the best known and the most comprehensive example'.[813] The organisational liability provisions found within the *Criminal Code* came about, in part, as a result of recommendations proposed by the Model Criminal Code Officers' Committee.[814] The MCCOC was created under the Standing Committee of Attorneys-General, which was tasked with drafting the model law that became the basis of the Federal *Criminal Code Act* (1995). One reason for amending the legislative provisions that dealt with organisational liability, as noted by MCCOC in its Final Report, was that the identification liability theory fell

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[810] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 912.

[811] John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UNSRSG Report, UN Doc, A/HRC/8/5 (7 April 2008), 10 <http://www.un.org>.

[812] The *Australian Criminal Code* is a Schedule to the *Crimes Act 1995.* According to section 3 of the *Crimes Act 1995* this Schedule has the same 'effect as a law of the Commonwealth'; in addition, 'the Schedule may be cited as the Criminal Code'. Part 2.5, Division 12 of the *Criminal Code* is particularly relevant to this discussion as it deals with corporate criminal responsibility.

[813] Celia Wells, 'Appendix C – Corporate Criminal Liability: Exploring Some Models' in United Kingdom, The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195 (2010) 209.

[814] Hereafter referred to as MCCOC.

short.[815] The problem lay with the emerging organisational structures found in modern corporations, where junior personnel were increasingly granted greater responsibility.[816] Therefore, the MCCOC stated its belief that:

> … the concept of 'corporate culture' … supplies the key analogy. Although the term 'corporate culture' will strike some as too diffuse, it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. There is a close analogy here to the key concept in personal responsibility-intent.[817]

Under the non-derivative liability model of the *Australian Criminal Code* (Cth) s12.1, the general principles of criminal responsibility apply to both body corporates as well as individuals.[818]

Section 12.2 of the *Criminal Code* (Cth) deals with the physical elements (*actus reus*) that constitute an offence. The provision attributes the physical element of the offence to the corporation if that offence was committed by an employee, agent, or officer of the body corporate acting within the scope of

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[815] Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2 – General Principles of Criminal Responsibility* (December 1992) 104–108.

[816] Refer to Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Discussion Draft: Chapter 2 – General Principles of Criminal Responsibility* (July 1992) 94–98; Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2 – General Principles of Criminal Responsibility* (December 1992) 107.

[817] Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2 – General Principles of Criminal Responsibility* (December 1992) 109.

[818] Section 12.1 of the *Criminal Code* (Cth) also stipulates that a body corporate may be found guilty of any offence including those that impose a term of imprisonment and notes that there are legislative provisions where a fine may be imposed for an offence that only specifies a term of imprisonment. Specifically, Section 4B(3) of the *Crimes Act 1914*. Pursuant to this provision, a single year of imprisonment would amount to the equivalent of a $33,000 fine for a corporate entity based on the pecuniary penalty unit system adopted in the Act. For commentary see, John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, Australia, 'Criminal Liability of Organisations' (Paper presented at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July–15 July 2008) 7.

his/her employment or authority.[819]

Section 12.3 of the *Criminal Code* (Cth) establishes the fault elements (*mens rea*), other than negligence, which constitute the offence.[820] Specifically, Section 12.3(1) of the *Criminal Code* (Cth) stipulates that when dealing with offences where the requisite *mens rea* is intention, knowledge, or recklessness, then the fault element attributed to the body corporate is that it authorised or permitted the offence. Furthermore, authorisation may have been express, tacit, or implied according to Section 12.3(1) of the *Criminal Code* (Cth).

In addition, Section 12.3(2) of the *Criminal Code* (Cth) stipulates the manner in which authorisation or permission for the commission of the offence could be attributed to the body corporate. Accordingly, there are four alternative means by which this may occur pursuant to Section 12.3(2)(a) to (d) of the *Criminal Code* (Cth): where the board of directors has authorised or permitted the commission of the offence;[821] where a high managerial agent authorised or permitted the commission of the offence;[822] the existence of a corporate culture

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[819] Section 12.2 of the *Criminal Code* (Cth) states: 'If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.'

[820] The fault element of negligence is dealt with pursuant to Section 12.4 of the *Criminal Code* (Cth). The fault element of negligence is not discussed further in this thesis; intent and knowledge are the *mens rea* requisites for criminal offences at the ICC (see discussion further below).

[821] Section 12.3(2)(a) of the *Criminal Code* (Cth) states: 'proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence.'

[822] Section 12.3(2)(b) of the *Criminal Code* (Cth) states: 'proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence.' However, it may be noted that Section 12.3(3) provides that Section 12.3(2)(b) 'does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.'

that directed, encouraged or tolerated the offence;[823] and, the failure to create and maintain a culture of compliance that adhered to the law.[824] This provision requires further consideration. Regarding the first two subsections, Section 12.3(2)(a) and (b) of the *Criminal Code* (Cth), these appear to take a broader approach of the identification liability test laid down in *Tesco*.[825] Clearly, the range of persons who could be said to represent the body corporate is much wider under Section 12.3(2)(a) and (b). This is evidenced by the definition of a high managerial agent, and includes an employee, an agent, or officer of the body corporate.[826] As for the remaining subsections, Section 12.3(2)(c) and (d) of the *Criminal Code* (Cth), the Explanatory Memorandum to the Bill provides that the rationale for the provisions lay in the idea that:

> … the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation.[827]

The idea of prosecuting a corporation on the basis of its corporate culture is a

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[823] Section 12.3(2)(c) of the *Criminal Code* (Cth) states: 'proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.'

[824] Section 12.3(2)(d) of the *Criminal Code* (Cth) states: 'proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.'

[825] See, John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, Australia, 'Criminal Liability of Organisations' (Paper presented at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July–15 July 2008) 8–9.

[826] The term is defined in Section 12.3(6) of the *Criminal Code* (Cth).

[827] The passage that the Explanatory Bill relied upon was from Stewart Field and Nico Jörg, 'Corporate Manslaughter and Liability: Should we be going Dutch?' [1991] *Criminal Law Review* 156, 159. See, discussion in Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 2– General Principles of Criminal Responsibility* (December 1992) 104–108.

unique feature of the non-derivative liability model. Regarding corporate culture, Section 12.3(4) (a) and (b) of the *Criminal Code* (Cth) takes into account instances where: a high managerial agent of the body corporate authorised the offence or similar conduct;[828] and, the employee, agent, or officer believed a high managerial agent had authorised the commission of the offence.[829] It could be said that Section 12.3(4)(b) catches situations where 'it was common knowledge that management would encourage or turn a blind eye to the conduct even though it was ostensibly prohibited by corporate policy'.[830] The Section also lays a both objective and subjective test by requiring that the employee, agent, or officer believed on reasonable grounds that the offence was authorised.[831]

Section 12.3(6) of the *Criminal Code* (Cth) provides definitions for what constitutes a board of directors, corporate culture, and a high managerial agent. Specifically, the phrase 'board of directors' is defined as: 'the body (by whatever name called) exercising the executive authority of the body corporate.' The phrase 'corporate culture' is defined as: 'an attitude, policy,

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[828] Section 12.3(4)(a) of the *Criminal Code* (Cth) states: 'whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate.'

[829] Section 12.3(4)(b) of the *Criminal Code* (Cth) states: 'whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.'

[830] See, John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, Australia, 'Criminal Liability of Organisations' (Paper presented at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July–15 July 2008) 10.

[831] See, John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, Australia, 'Criminal Liability of Organisations' (Paper presented at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July–15 July 2008) 10.

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.' The phrase 'high managerial agent' is defined as: 'an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.'

Switzerland also applies the theory of non-derivative liability.[832] Article 102 of the *Swiss Penal Code* reflects to some degree the kind of approach taken in the *Australian Criminal Code* (Cth). The Swiss provision generally draws from the non-derivative liability theory and the realist conception of organisational personality. However, the Swiss non-derivative liability provisions dealing with corporate criminal liability are much narrower than those contained in the *Australian Criminal Code* (Cth). Non-derivative liability is only imputed to the corporate entity if the liability of corporate individuals cannot be established.

A number of European jurisdictions have adopted the non-derivative liability model, but the tendency has been that the model is tailored to offences of negligence.[833] In the United States, non-derivate liability is applied in relation to prosecutorial discretion with respect to holding corporations accountable and in the sentencing of corporate criminal conduct for ineffective compliance

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[832] Article 102 of the *Swiss Penal Code*. For general reading on this model see, Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 113–115.

[833] Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 107–116, 155–159.

and ethics programs.[834] However, this approach rests on corporate negligence. The fault element of negligence is not discussed further in this thesis, as it is not relevant to international crimes pursuant to the *ICC Rome Statute*. Article 30(1) of the *ICC Rome Statute* stipulates that, unless otherwise provided, intent and knowledge constitute the *mens rea* requisite for criminal offences.[835]

ii. Limitations of the non-derivative liability model

Of the corporate liability models applied within domestic jurisdictions, this thesis favours the non-derivative liability model. As the discussion below shows, this is the most appropriate model to transplant internationally within the *ICC Rome Statute*. However, the model has a number of limitations that should be considered here.

Critics who strongly advocate for a truly realist approach to corporate criminal liability have criticised the *actus reus* stipulated in Section 12.2 of the *Criminal Code* (Cth). Proponents of the realist approach question the need to show that an employee, agent, or officer was acting within the scope of their employment or authority, when the provision is primarily concerned with corporate fault.[836] The reasonableness of imputing the agent's actions to the

[834] See, Chapter 8 of the United States Sentencing Guidelines Manual; also for commentary on how non-derivative liability is applied in the United States, see generally, Barry J Pollack, 'Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1393, 1396; Andrew Weismann with David Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 446; Ellen S Podgor, 'Educating Compliance' (2009) 46 *American Criminal Law Review* 1523, 1528.

[835] For further discussion on this see, Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 911.

[836] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 30–31, 43.

body corporate given the complex, formal, structure of modern corporations is also queried.[837]

Critics of the *mens rea* requisite that is established pursuant to Section 12.3(2)(a) and (b) of the *Criminal Code* (Cth) question just how realistic the provision is. For example, a board of directors (who are specifically singled out in Section 12.3(2)(a) as body corporate actors) are not likely to take a vote expressly authorising or permitting the commission of an offence. In reality, the board resolutions or minutes may tend to show tacit or implied authority or permission to commit an offence.[838] Instead, imputing the conduct of high managerial agents in such circumstances is more realistic and would likely result in corporate prosecutions.[839]

There are also opposing views regarding the manner in which Section 12.3(2)(c) and (d) of the *Criminal Code* (Cth) should apply. The legislative provision is somewhat unclear.[840] On the one hand are those who advocate that 'intention, knowledge and recklessness cannot be attributed to a corporation unless an agent acted with intention, knowledge or recklessness.'[841] Conversely, there are those who argue that 'the fault

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[837] William S Laufer, Corporate Bodies and Guilty Minds (1994) 43 *Emory Law Journal* 648, 682.

[838] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 140–141 discussing the reasoning in *Commonwealth v Beneficial Finance Co*, 275 NE 2d 33 (1971), 82–83.

[839] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267, 281.

[840] See discussion in Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481, 1499–1500.

[841] See guidance on this issued by the Commonwealth Attorney-General's Department. The AG Department's position on this is discussed further in Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481, 1499–1500.

element … can be located in the culture of the corporation even though it is not present in any individual.'[842] Of these competing views, the latter approach is preferred as a matter of policy. This is especially the case when dealing with the liability of MNCs, which often have complex organisational structures coupled with corporate personnel that frequently come and go.

Another limitation with the non-derivative liability model that is provided in the *Australian Criminal Code* (Cth) is that its application may be far too wide for offences requiring subjective fault. Pursuant to Section 12.3(2)(c) and (d), corporate culture is established on the basis of showing that the body corporate had a culture of noncompliance with the law, or the body corporate failed to develop a culture of compliance. This approach overlooks the distinctions between forms of subjective fault; consequently, it applies an equal scheme of liability to all offences.[843] This criticism should be borne in mind when identifying an appropriate organisational liability model to transplant internationally within the *ICC Rome Statute*.[844]

To illustrate, at a time when the idea of 'corporate complicity' for human rights violations was practically unheard of, Human Rights Watch adopted a policy of stigmatising corporations as a means of pressuring corporate entities to change. HRW Executive Director, Kenneth Roth, discusses HRW reports

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[842] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 35.

[843] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 38–41.

[844] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 12.

concerning corporate complicity of Enron in India[845] and Shell in Nigeria.[846] The idea that Shell, or even Enron, should have developed 'standards of behaviour' largely reflects the non-derivative approach to organisational liability. Roth states:

> Shell knew of the possibility that the Nigerian army was going to come in and start shooting; they called them nevertheless. They should not have done that. They should develop standards of behaviour, so that they do not do that in future – so that their security does not depend on that kind of abuse. In the case of Enron … [it] responded by calling Indian police, who used force against the protesters. It was not even clear that there was a crime here, but there was clearly a human rights violation and, again, to call Enron complicit in this violation because of the role it was playing was sufficient for our purposes. Both of these reports stigmatized the corporations concerned, which is what we wanted to do. People read them and said, 'this is wrongful conduct, corporations should not be doing this,' and we were thus able to apply pressure on the corporations to change, which was our aim.[847]

Within a framework of non-derivative liability, corporate liability for Shell or Enron would stem from their corporate cultures, which lacked policies, procedures, and practices that ensured their security did not depend on the kind of abuse that resulted in human rights violations. Granted, the argument could be made that they were merely negligent. This would still be sufficient for liability under the Australian non-derivative liability model. Negligence

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[845] See generally, HRW Report, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999) <http://www.hrw.org>.

[846] See generally, HRW Report, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Areas* (1999) <http://www.hrw.org>.

[847] HRW Executive Director, Kenneth Roth, 'Is Corporate Liability a Form of Complicity? What is really a Corporate Entity?' in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 961.

would also be sufficient under the UNSRSG 'Protect, Respect and Remedy' Framework, which takes into account 'a human rights due-diligence process to identify, prevent, mitigate and account for how [business enterprises] address their impacts on human rights.'[848] However, as reiterated previously, a negligence-based approach would fail under the *ICC Rome Statute*, because pursuant to Article 30(1), the *Statute* adopts intention and knowledge as the requisite *mens rea*; negligence is excluded.

Ideally, a non-derivative liability model applied at the ICC should reflect the distinctive nature of subjective fault and also the distinctions between forms of subjective fault. The liability model should incorporate forms of intention and knowledge, even though the corporate forms may differ, in some respect, from those formulated for individuals.[849]

With respect to the requisite *mens rea* form of intention, corporate policy should be considered because corporate culture alone cannot provide sufficient grounds to conclude that a corporation committed an offence intentionally (i.e. purposefully).[850] A corporate policy to commit an offence purposefully may be shown in a number of ways. Corporate policy may be identified where there are specific instructions to commit the offence.[851] Admittedly, such

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[848] UNSRSG Final Report, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc: A/HRC/17/31, [15].

[849] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 12.

[850] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 38. On discerning corporate intent in company policy, see generally, Peter French, *Collective and Corporate Responsibility* (Columbia University Press, 1984) 22.

[851] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 38.

cases will be rare; most corporations would shy away from directly ordering their personnel to commit an offence.[852] In addition, it may be difficult to isolate specific instructions in the context of a complex organisation. As James Gobert has explained, corporate 'policy, like a statute, is more likely to be the product of a multitude of inputs than the brain-child of a single individual.'[853] On this view, although an idea may be initiated by an individual within the corporate entity, the idea may only be officially seen as company policy when it has been subjected to scrutiny by a working party or committee within the entity. Also, the idea may require sanction by senior management or even ratification by a board of directors.[854]

Even where specific instructions cannot be identified, corporate policy might also be established on the basis that it provides the most rational explanation for the corporation's actions. This seems a sensible approach because presumably corporate personnel would view this as implied authorisation.[855] It has been argued that this constructive form of intention is already well-established in legal doctrine, in the concept of legislative intent.[856] The legislative intent which is routinely diagnosed by later courts is not usually the intent of the original legislators (few of whom may have read the legislation for which they voted). It is a constructive intent which is subsequently

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[852] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 43. The authors discuss circumstances where the corporate 'structures, policies, practices, rewards, procedures, ethos or culture seem almost to have precipitated or promoted the offence… '.

[853] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408.

[854] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408.

[855] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 38.

[856] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408; Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 33.

imposed by courts attempting to make sense of what the legislation said.[857] Legislative intent is the intent which provides the best explanation for what has been enacted.[858] In the same way, corporate policy can be the policy which provides the best explanation for what the corporation has done.[859]

For example, assume that Shell (in the illustration provided earlier) developed a pattern of calling the army as soon as they were faced with any civil demonstrations disrupting their oil extraction activities in Nigeria. Assume also that the army routinely arrived and responded with acts of violence violating human rights. One could argue that corporate policy was to respond to the challenge of civil demonstrations by initiating violence violating human rights. This would provide the most rational explanation for the corporation's conduct because no other explanation would make sense of the corporation repeatedly calling the army in the face of the blindingly obvious consequences which would follow.

Mens rea in the form of knowledge, rather than purpose, will mostly be the issue for corporate complicity. Arguably, it could be possible to establish corporate knowledge on the basis that the knowledge is located somewhere within the corporation. In addition, the notion of collective knowledge could be invoked where the knowledge is divided among corporate personnel.[860]

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[857] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408.

[858] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408; Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 33; also see generally, Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) 314.

[859] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 408; Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 33.

[860] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 39–40.

According to the theory of collective knowledge, the knowledge possessed by one employee may be combined with the knowledge of several other employees, i.e. aggregated, in order to construct the requisite *mens rea* form required to deal with the commission of an offence.[861]

The theory of collective knowledge is not new.[862] It has largely been developed in the United States; though, other domestic legal systems have been somewhat wary.[863] The leading case authority, which endorsed this theory, is *United States v Bank of New England.*[864] With respect to its application to a large corporation, this approach was seen as ' … not only proper, but necessary.'[865] *United States v Bank of New England* dealt with the conviction of the bank for wilfully infringing specific legislation that required it to report cash transactions, which exceeded a stipulated amount. The Court relied upon the theory of collective knowledge in order to satisfy the question of the bank's knowledge and its intent to commit the offence. Specifically, the Court held:

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[861] See generally, for example, Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1156–1157; also, Jonathan C Poling and Kimberly Murphy White, 'Corporate Criminal Liability' (2001) 38 *American Criminal Law Review* 525, 533.

[862] The term 'collective knowledge' originated as early as the 1950s. See, *Inland Freight Lines v United States*, 191 F 2d 313, 315 (10th Circuit, 1951).

[863] See discussion in Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imation toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 672. For discussion of legal systems that have rejected this model, for example, England, see, Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 155–156.

[864] *United States v Bank of New England*, 821 F 2d 844 (1st Circuit, 1987).

[865] *United States v Bank of New England*, 821 F 2d 844, 856 (1st Circuit, 1987). For detailed discussion of this case and its significance in the development of the theory of collective knowledge, see, Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imation toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 663–666.

> A collective instruction is entirely appropriate in the context of corporate criminal liability ... Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know of the specific activities of employees administering another aspect of the operation.[866]

To illustrate by reference to Shell again, collective knowledge could be shown if, for example, a corporate member had telephoned the army as soon as they were faced with civil demonstrations disrupting their oil extraction activities, while another member within the same corporate group knew that the army would respond with violence violating human rights. In such circumstances, the corporate institution as a whole would be deemed to possess the requisite *mens rea*.

Therefore, on the issue of identifying an appropriate scheme for a non-derivative liability model to transplant within the ICC, as the discussion here has shown, a model which reflects distinctions between forms of subjective fault is preferred. Though, in most instances, knowledge, not purpose, will be the *mens rea* in issue for corporate complicity in international crimes.

5.3 Organisational liability in the sphere of international criminal law: missed opportunities

International criminal law does not recognise any forms of organisational liability, let alone corporate criminal liability. Neither does international criminal law have any

[866] *United States v Bank of New England*, 821 F 2d 844, 856 (1st Circuit, 1987).

provisions in place for corporate complicity in international crimes. This is not to say that the opportunity never arose; it did. In fact, the opportunity arose on a number of occasions at the *ad hoc* tribunals and special courts. What is interesting is how the international community responded. The approach taken by the international community begs further discussion here.

5.3.1 Laying the foundations for organisational liability at the International Military Tribunals established in the aftermath of WWII

Following World War II, the international community established International Military Tribunals to prosecute major war criminals. Establishing the IMTs was a critical step in advancing the body of international criminal law. Prior to the IMTs, there had only ever been isolated incidents addressed by the international community to bring accountability for what would be seen today as international crimes.[867]

The IMTs relied upon the *Charter for the International Military Tribunal*,[868] and the *Charter for the International Military Tribunal for the Far East*[869] – created in 1945 and 1946, respectively – as well as the 1946 *Control Council Law No. 10*.[870] These instruments were significant for a number of reasons that are considered here.

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[867] See generally, Howard Ball, *War Crimes and Justice: Contemporary World Issues Series* (ABC-CLIO, Inc., 2002) xv.

[868] *International Military Tribunal Charter* (1945) annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (The London Agreement) 82 UNTS 280. Hereafter referred to as *IMT Charter*.

[869] *Charter for the International Military Tribunal for the Far East*, 1946, Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26 April, T.I.A.S, No. 1589. Hereafter referred to as *IMTFE Charter*.

[870] *Control Council Law No. 10*, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946 (hereafter referred to as *CCL 10*). *CCL 10* was signed by the World War II allies in 1945 to enable additional future trials of major defendants 'in any of the four occupational zones by one or more of the major allies.' Jonathan A Bush, 'Essay – The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094, 1114.

On the one hand, these legal instruments expanded the scope of international criminal law to include the criminal prosecution of legal entities such as groups or organisations.[871] For example, relying on Articles 9[872] and 10[873] of the *IMT Charter*, the IMT declared the following groups as criminal: the Leadership Corps of the Nazi Party, the Gestapo, the SD (*Sicherheitsdienst*), and the SS (*Schutzstaffel*).[874] Initially, simply being a member of a criminal organisation that had perpetrated international crimes was viewed as a criminal act.[875]

On the other hand, the instruments also provided the means by which to deal with the individual criminal liability of the German industrialists and Japanese government

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[871] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 82–83; see also, *Trial of the Major War Criminals Before the International Military Tribunal* ('The Blue Series') 14 November 1945–1 October 1946, Nuremberg, Vol 22, 1, 501–522.

[872] Article 9 of the *IMT Charter* states: 'At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization … After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.'

[873] Article 10 of the *IMT Charter* states: 'In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.'

[874] M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 82–83; the SD was a security intelligence service and the SS a protective squadron. For example, see, *Trial of the Major War Criminals Before the International Military Tribunal*, ('The Blue Series') 14 November 1945–1 October 1946, Nuremberg, Vol 22, 1, 501–522.

[875] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 137. Though later, jurisprudence that emerged seemed to indicate that mere membership alone was not sufficient to establish criminal liability, one would need to show that the member had knowledge about the criminal activities of the group or organisation. See also discussion in M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., 2003) 83, where the author observes that 'to impose international criminal responsibility merely for passive membership in an organization stretches the generally accepted principles of criminal responsibility found in most legal systems.'

officials who had supported the Nazi regime and Japanese government, respectively, during the war.[876] The argument is made by leading academics that the jurisprudence which emerged from the International Military Tribunals laid the foundations for the concept of corporate complicity in international crimes.[877] Although the actual companies were not prosecuted, their business activities were closely examined and their personnel were held accountable pursuant to international criminal law.[878] The *Zyklon B*[879] case is a prime example dealing with the complicity of German industrialists in the mass murder of civilians – it involved criminal charges laid against Bruno Tesch, an owner of the manufacturing company Tesch and Stabenow, as well as two other accused persons. The prosecution alleged that Bruno Tesch, working through his company, distributed gas and gassing equipment to a number of Nazi-controlled facilities, and this included supplying SS concentration camps. The prosecution further alleged that Bruno Tesch knew that the supplies would be used in the gas chambers. The company also provided technical assistance and trained the SS on how to use the gases, which included Zyklon B. Bruno Tesch was found guilty by the IMT of aiding and abetting crimes

[876] Trials of the German industrialists included Trial of Bruno Tesch and Two Others ('The Zyklon B Case') 1–8 March 1946, *Law Reports of the Trials of War Criminals*, Vol I; I G Farben Trial, Case No. 57, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of War Criminals*, Vol X; Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, US Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, *Law Reports of Trials of War Criminal*, Vol X; Trial of Friedrich Flick and Five Others, 20 April–22 December 1947, *Law Reports of the Trials of War Criminals*, Vol IX.

[877] Eric Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?' (2006) 20 *St. John's Journal of Legal Commentary* 287, 291. For extensive case analysis, see, Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon, an Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 104–112.

[878] ICJ, *Corporate Complicity in International Crimes* (2008) volume 1, 6 <http://www.icj.org>.

[879] Trial of Bruno Tesch and Two Others ('The Zyklon B Case') 1–8 March 1946, *Law Reports of the Trials of War Criminals*, Vol I.

against humanity.[880]

5.3.2 The question of organisational liability at the ad hoc international institutions

The existing *ad hoc* international institutions with jurisdiction over international crimes do not exercise jurisdiction over legal persons. Dealing solely with the individual criminal responsibility of natural persons, these *ad hoc* international institutions include the ICTR, the SCSL, the ICTY, the ECCC, and the IHT.[881] The argument should be made that a number of these *ad hoc* international institutions, created subsequent to the IMTs, should have been empowered with jurisdiction over legal persons, specifically corporations. Of the *ad hoc* institutions found in Africa, the ICTR and the SCSL are prime examples supporting this argument.

a) ICTR

Although the *ICTR Statute* contains provisions for complicit liability in international crimes, it does not include jurisdiction over complicit legal persons. It is alleged that there were a number of organisational entities involved in the Rwandan atrocities.[882] The extent of their involvement, whether as complicit perpetrators or principal perpetrators, was never fully

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[880] Trial of Bruno Tesch and Two Others ('The Zyklon B Case') 1–8 March 1946, *Law Reports of the Trials of War Criminals*, Vol I, 94–95, 101. Zyklon B was a gas used to exterminate lice; however, it is lethal in large doses.

[881] Refer to the following provisions Article 6 of the *ICTR Statute*; Article 6 of the *SCSL Statute*; Article 7 of the *ICTY Statute*; Article 29 new of the *ECCC Law*; Article 15 of the *IHT Statute*.

[882] For example, according to Nina H B Jørgensen 'apart from the Interahamwe, a number of other organisations were involved: the death squads coordinated by the "Network Zero"; the Gendarmerie, which gave support and training to the Interahamwe; the Presidential Guard; the Rwandan Armed Forces; and media groupings such as the newspaper Kangura, Radio Télévision Libre des Milles Collines, Radio RTLM and Radio Rwanda.' See, Nina H B Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (2001) 12(3) *Criminal Law Forum* 371, 376.

investigated.[883]

The issue of whether or not the ICTR should have included jurisdiction over legal persons, be it complicit or principal perpetrators, continues to be controversial. For example, there was a recent panel discussion on the issue of 'Corporate Criminal Liability and the Rwandan Genocide' at the New Vistas of International Criminal Justice Conference.[884] One of the panellists, President Erik Møse, former Judge and President of the ICTR, commented on the Rwandan genocide and the role that economic actors played. Describing the situation as 'complicated', President Møse argues that there were good and bad people in both the public and private sectors.[885] Although the majority of offenders indicted were public officials, they perpetrated crimes in their personal capacities. Hence, President Møse notes, in the public sector, Prime Minister Kambanda pled guilty to genocide, several Ministers and *bourgmestres* were convicted or acquitted, and some cases were still ongoing.[886] With regards to the private sector, President Møse makes the point that some businessmen were convicted, though the majority of complaints

[883] Nina H B Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (2001) 12(3) *Criminal Law Forum* 371, 376.

[884] Panel discussion at the 'New Vistas of International Criminal Justice Conference' held in Florence, Italy (15–17 May 2008).

[885] President Erik Møse, former Judge and President of the ICTR, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 974.

[886] President Erik Møse, former Judge and President of the ICTR, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 974.

concerned state-run commercial entities.[887] Three persons were convicted from the Radio Station, RTLM, and the newspaper, *Kangura*, had ceased to operate after the genocide. President Møse concludes his arguments by stating that his views should not be seen as a reflection on whether or not there should have been corporate criminal liability. Rather, as far as President Møse is concerned, 'the ICTR has managed reasonably well without such provisions in its Statute.'[888]

Paola Gaeta and Andrew Clapham were also present at the panel discussion for the New Vistas of International Criminal Justice Conference. They differed with President Møse's position. Paola Gaeta argues, and rightly so, that if any corporation facilitated the genocide, and there was the slightest possibility of bringing a criminal case before the Rwandan national courts, then holding the corporations liable should have been of paramount importance to enable the victims to claim some kind of compensation.[889] Gaeta makes a crucial point. Given the gravity of crimes of genocide, the ICTR (not just the Rwandan national courts) should have prosecuted those corporations who were responsible for such crimes. Andrew Clapham specifically recounted the view expressed by the Tanzanian Ambassador regarding the situation in Rwanda. The Ambassador: '… referred to the fact

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[887] President Erik Møse, former Judge and President of the ICTR, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 974.

[888] President Erik Møse, former Judge and President of the ICTR, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 973–974.

[889] Paola Gaeta, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 975.

that some of the coffee companies had stored the machetes and, in addition, he mentioned the fact that some companies had been hired to use their bulldozers to dig mass graves.'[890] In light of this, Clapham suggests it would have been meaningful to the victims if they had received reparation from the corporate entities. Clapham rightly suggests that the funds for this reparation could have been the result of a corporate death penalty – a type of corporate punishment that is commonly adopted in national jurisdictions. With a corporate death penalty, the corporate charter is cancelled, the entity is dissolved, and the corporate assets are seized.[891]

b) SCSL

Although the *SCSL Statute* contains provisions for complicit liability in international crimes, it does not include jurisdiction over complicit legal persons. A major shortcoming of the SCSL's competence was that the Court did not hold corporations liable for complicit perpetration in international crimes committed by rebel forces in Sierra Leone during the civil war.[892] The United Nations Panel of Experts to Sierra Leone reported that the Revolutionary United Front sustained their military activities through income

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[890] Andrew Clapham, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 975.

[891] Andrew Clapham, *'Corporate Criminal Liability and the Rwandan Genocide'* in 'Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 975.

[892] On the issue of the complicit perpetration by corporate entities, see generally, Steven R Ratner, Corporations and Human Rights: A Theory of Legal Responsibility (2001) 111 *Yale Law Journal* 443, 528–529.

generated from the sale of rough diamonds.[893] The Panel of Experts estimated that the RUF pocketed as much as up to $125 million per annum from diamond sales alone.[894] Despite such findings, the extent of any corporate involvement in RUF's dealings in the diamond industry was never fully investigated.

5.3.3 The question of organisational liability at the ICC

The draft proposals for the *ICC Rome Statute* initially included jurisdiction over legal persons (discussed further below), though these were consequently abandoned by the Rome Statute signatories.[895] The argument should be made that the decision to exclude legal persons from the ICC's jurisdiction has had grave consequences. For example, the ICC is currently hearing cases concerning international crimes perpetrated in the Central African Republic,[896] DRC,[897] Uganda,[898] Sudan,[899] Kenya,[900] Libya,[901] and *Côte d'Ivoire*.[902] All seven countries appear on the list of Extreme- and High-Risk Countries regarding human rights violations in Africa. Had the ICC introduced organisational liability provisions, then legal persons that aided and abetted the principal perpetrators in such violations may have been held liable for their complicity in international crimes.[903]

a) Drafting process leading up to the ICC Rome Statute

i. Preliminary work of the International Law Commission

In the aftermath of the grave atrocities committed during the Second World War, the UN General Assembly mandated the International Law Commission[904] with the task of drafting provisions for a *Draft Code of*

[893] Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone (December 2000), UN Doc. S/2000/1195, 8, 16. Revolutionary United Front hereafter referred to as RUF.

[894] Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone (December 2000), UN Doc. S/2000/1195, 8, 16.

[895] For discussion on the preparatory proceedings over the Rome Statute provisions see, Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga and Saman Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000); Kathryn Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14 (1) *Australian Journal of Human Rights Law* 199; Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1; Cristina Chiomenti, 'Corporations and the International Criminal Court' in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 297–298.

[896] See, *The Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Case No. ICC-01/05-01/08, 15 June 2009).

[897] See, *The Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/06, 29 January 2007); *The Prosecutor v Bosco Ntaganda (Warrant of Arrest)* (International Criminal Court, Case No. ICC-01/04-02/06, 22 August 2006); *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/07, 30 September 2008).

[898] See, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (Decision on the Prosecutor's Application for Warrants of Arrest under Article 58)* (International Criminal Court, Case No. ICC-02/04-01/05, 8 July 2005).

[899] See, *The Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') (Warrant of Arrest)* (International Criminal Court, Case No. ICC-02/05-01/07, 27 April 2007); *The Prosecutor v Omar Hassan Ahmad Al Bashir (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Case No. ICC-02/05-01/09, 12 July 2010); *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on Issues Related to the Hearing on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-02/05-03/09, 17 November 2010.

[900] See, *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang)* (International Criminal Court, Case No ICC-01/09-01/11, 8 March 2011); *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali)* (International Criminal Court, Case No ICC-01/09-02/11, 8 March 2011).

[901] See, *The Prosecutor v Saif-Al Islam Gaddafi (Warrant of Arrest for Saif-Al Islam Gaddafi)* (International Criminal Court, Case No ICC-01/11-01/11-3, 27 June 2011); *The Prosecutor v Abdullah Al-Senussi (Warrant of Arrest for Abdullah Al-Senussi)* (International Criminal Court, Case No ICC-01/11-01/11-4, 27 June 2011).

[902] See, *The Prosecutor v Laurent Koudou Gbagbo (Decision on the 'Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo')* (International Criminal Court, Case No ICC-02/11-01/11, 30 November 2011).

[903] See, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (2002) UN Doc S/2002/1146; Human Rights Watch Report, *The Curse of Gold: Democratic Republic of Congo* (2005), 1 <http://www.hrw.org>; John K Roth, 'The Church and Complicity: Nothing Guaranteed' in Carol Rittner, et al (eds), *Genocide in Rwanda: Complicity of the Churches?* (Aegis in Association with Paragon House, 2004).

Offences against the Peace and Security of Mankind.[905] The ILC prepared Draft Codes in 1954,[906] 1991,[907] and 1996.[908] Each of their drafts contained provisions dealing with individual criminal responsibility of natural persons.

ii. Draft proposals considered by UN Plenipotentiaries at the Rome Conference

In 1994, the General Assembly tasked the ILC with the role of drafting a statute with the view to establishing the first permanent international criminal court. [909] The ILC's Working Group prepared a *Draft Statute* for the International Criminal Court that contained provisions dealing with the individual criminal responsibility for natural persons.[910]

In 1994, the General Assembly also established a Preparatory Commission to convene a Conference of Plenipotentiaries to discuss the establishment of an

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[904] International Law Commission hereafter referred to as ILC.

[905] For an overview on the drafting process, see, International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind (Part II) – including the Draft Statute for an International Criminal Court' <http://untreaty.un.org/ilc/summaries/7_4.htm >. Hereafter referred to as *Draft Codes*.

[906] ILC Report on Draft Code of Crimes against the Peace and Security of Mankind [1954] 2 *Yearbook International Commission* 150. Specifically, Article 1 states: 'Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.'

[907] Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission on its Forty-third Session, U.N. GAOR, 46th Sess., Supp. No10, 238, U.N. Doc A/46/10 (1991). Specifically, Article 3(1) states: 'An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.'

[908] ILC Report on the Draft Code of Offences against the Peace and Security of Mankind, text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly, Report (A/48/10) published in *Yearbook of the International Law Commission*, 1996, vol. II(2). Specifically, Article 2(1) states: 'A crime against the peace and security of mankind entails individual responsibility.'

[909] See, General Assembly Resolution (9 December 1994), UN Doc. A/RES/49/53.

[910] ILC Report on the Working Group on a Draft Statute for an International Criminal Court, U.N. Doc: A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Rev.2/Add.1-3 (mimeograph) – ILC Report, A/49/10.

international criminal court.[911] The Preparatory Commission relied upon the ILC's 1994 *Draft Statute* for the proposed international criminal court; however, the Preparatory Commission's own 1998 *Draft Statute*, discussed below, included legal persons within the Court's jurisdiction.

Delegates from at least 160 States, along with members of international organisations, met in Rome, Italy, for the United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court, commonly referred to as the Rome Conference.[912] The Rome Conference, held from 15 June 1998 to 17 July 1998, concluded with delegates adopting the *ICC Rome Statute*.[913]

The deliberations at the Rome Conference on whether or not the Court should exercise jurisdiction over legal persons were controversial.[914] In the first instance, the Preparatory Commission for the ICC had initially prepared a draft statute that included jurisdiction over legal persons.[915] According to

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[911] See, General Assembly Resolution (9 December 1994), UN Doc. A/RES/49/53.

[912] The Rome Conference was attended by 160 States, 17 international organisations, 14 UN specialised agencies, and 124 Observers from various non-governmental organisations. For general reading on the Rome Conference deliberations, see: Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (C.H. Beck, 2nd ed, 2008); Antonio Cassese, Paola Gaeta, and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary – Volume II* (Oxford University Press, 2002); Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999).

[913] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Italy, 15 June–17 July 1998. A/CONF.183/10*, 17 July 1998.

[914] 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* (C.H. Beck, 2nd ed, 2008) 746.

[915] This was in addition to the provisions dealing with the individual criminal responsibility of natural persons; see, Article 23(1) – (4) of the *Draft Statute of the International Criminal Court* prepared by the Preparatory Commission in 1998.

Article 23(5) and (6) of the 1998 *Draft Statute of the International Criminal Court*:

> 5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.
>
> 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.
>
> **N.B. In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).**[916]

It appears that the assumption could be made that the Preparatory Commission draft provisions apply to all forms of legal persons, as it does not define legal persons, aside from excluding States, unlike the French draft statute (discussed below) that specifically defines juridical persons.

After much deliberation, delegates at the Rome Conference rejected Article 23(5) and (6) of the *Draft Statute of the International Criminal Court*, at which time the French Delegation presented a Working Paper with a revised proposal that dealt with the Court's jurisdiction over juridical persons.[917]

The French Delegation at the Rome Conference revised the controversial Article 23(5) and (6) of the *Draft Statute of the International Criminal Court*

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[916] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *'Draft Statute for the International Criminal Court'*, Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998 (bold highlight appears in the original text).

[917] See, Douglas Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 315-316.

and submitted the following provision instead:

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

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

   (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

   (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

   (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

   (d) The natural person has been convicted of the crime charged.

   For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural and the juridical person may be jointly tried.

   If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.[918]

[918] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article*

A common feature between the French *Draft Statute* and the Preparatory Commission's draft is that both drafts consider derivative liability. However, the French draft is more detailed than the Preparatory Commission's draft in its approach. A distinguishing feature between the draft statutes is that Article 23(5) of the French *Draft Statute* provides a specific strict definition of a juridical person. This person is defined as: 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit …'.[919] Regrettably, the French withdrew their proposal before the conclusion of the Rome Conference due to lack of support.[920]

The idea of including legal persons in the jurisdiction of the impending International Criminal Court was opposed by delegates at the Rome Conference for a number of reasons. One reason was that there was a lack of consensus over the substantive law. This issue was contentious because 'governments were unable to find common legal standards for holding legal persons responsible, when different countries appraise this issue differently.'[921] Also, Kai Ambos, an observer at the Rome Conference, notes that the French proposal was not supported because the delegates felt strongly that corporate

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23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court (3 July 1998), UN Doc. A/Conf./183/WGGP/L.5/Rev.2.

[919] The difficulty with the French Delegation's definition of juridical persons is discussed further in Chapter 5 of this thesis, which deals with complicity. The chapter examines the aiding and abetting provisions stipulated in Article 25(3)(c) of the *ICC Rome Statute*; the provision provides a *mens rea* 'purpose' test and, in doing so, it would exclude the liability of juridical persons whose primary purpose is seeking profit.

[920] Douglas Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 315–316.

[921] Anita Ramasastry, Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions (2008), 4 <http://198.170.85.29/Anita-Ramasastry-commentary.pdf>.

liability was not commonly recognised in most domestic jurisdictions. This would impede upon the Court's principle of complementarity, which was already another contentious issue during the negotiations.[922] Per Saland, yet another observer at the Rome Conference, discusses these concerns as he recalls:

> … whether to include criminal responsibility of legal entities … This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency … Among the last opponents were Nordic countries, Switzerland, the Russian Federation and Japan. Some other countries opposed inclusion on procedural … grounds. Time was running out … Eventually, it was recognized that the issue could not be settled by consensus in Rome … [923]

The final outcome of the Rome Conference deliberations on the *ICC Rome Statute* provisions dealing with criminal responsibility was that delegates agreed upon a statutory provision for criminal participation, though it only allows the Court to exercise jurisdiction over natural persons. Article 25 of the *ICC Rome Statute*, in its entirety, states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with

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[922] 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* (C. H. Beck, 2nd ed, 2008) 746.

[923] Per Saland's comments appear in Douglas Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 315–316.

this Statute.

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:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (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;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

      (ii) Be made in the knowledge of the intention of the group to commit the crime;

   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

A major feature that distinguishes the final draft of Article 25 of the *ICC Rome Statute* from the Preparatory Commission and French draft statutory provisions is that it only deals with the individual criminal responsibility of natural persons. Hence, the final draft reflects no express provisions dealing with the liability of legal persons. The Rome Conference deliberations that rejected the inclusion of legal persons within the *ICC Rome Statute* were regrettable. One reason for rejecting corporate criminal liability at the Rome Conference was that this principle was not recognised in most domestic jurisdictions. Today, only thirteen years after such deliberations, corporate criminal liability is recognised in most domestic jurisdictions.[924] A number of jurisdictions – particularly civil law jurisdictions – have adopted corporate liability provisions since the Rome Conference.[925] For example, in 1999, Belgium reintroduced corporate criminal liability provisions into the *Belgian Penal Code*.[926] In 2003, Switzerland introduced corporate criminal liability provisions in its *Criminal Code*.[927] In 2006, Austria

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[924] For example, the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* opened for signature in December 1997 and entered into force in February 1999. Article 1(2) specifically criminalises corporate complicity, including aiding and abetting, and the bribery of foreign public officials. The signatories of the Convention were all required to adopt National Implementing Legislation. A number of these signatories did not have corporate liability provisions in place at the time. For a list of the Member State's National Implementing Legislation, see generally, <http://www.oecd.org>. For discussion on domestic jurisdictions and their approaches to corporate liability, see generally, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (2008); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006).

[925] For discussion on this see, Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) LVI *Netherlands International Law Review* 333, 340–342.

[926] Corporate criminal liability provisions had existed in Belgium, but were removed in 1934; see, 'Survey Response, Laws of Belgium (Bruno Demeyere), *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* Fafo AIS, [accessed 8 February 2008] 2006'.

[927] See, Article 102 of the *Swiss Penal Code*; also, Sara Sun Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 113–115.

implemented EU and OECD requirements with respect to the criminal responsibility of legal entities.[928]

5.4 Preferred model of corporate liability to transplant internationally and adopt within the ICC Rome Statute

Having examined the position on corporate liability in both domestic and international jurisdictions, the writer in this thesis is of the view that there is, indeed, a need for a doctrine of corporate liability in international criminal law. If the ICC were to respond to misconduct by multinational corporations in Africa, then this thesis proposes that the theory of non-derivative liability is the better model to transplant internationally and adopt within the *ICC Rome Statute*.

In essence, although the model of non-derivative liability found in the *Australian Criminal Code* (Cth) is not faultless, it does exemplify an ideal model.[929] With non-derivative liability, the organisation is treated as a separate real entity in its own right. Hence, the culpability of the organisation itself, as opposed to the culpability of its individuals, is of primary concern. This is because non-derivative liability is established on the basis of: 'corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate 'cultures' that tolerate or encourage criminal

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[928] See, the *Verbandsverantwortlichkeitsgesetz* (VbVG). This legislation, which was introduced in 2005 and came into effect in 2006, stipulates that a *Verband* – legal persons, partnerships, registered associations, and the European Economic Interest Group – can be held liable for offences pursuant to the *Austrian Penal Code*. For discussion, see, Gudrun Stangl, 'Corporate Criminal Liability' (2005) 24(11) *International Financial Law Review* 75, 75–76; Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008) 6.

[929] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267, 299.

offences.'[930] Non-derivative liability is established in sharp contrast to derivative liability. With derivative liability, it is the culpable actions of individuals within the corporation that are imputed to the corporate entity. This approach is not desirable. Multinational corporations are peculiar in their nature.[931] Large modern MNCs have a high turnover of corporate personnel who can be replaced with ease. MNCs are multi-layered complex corporate entities that operate globally.[932] At times, it is challenging to prove the specific actions of specific corporate personnel in such turbid business structures.[933] Furthermore, MNCs operate through complex networks that establish contractual relationships and create separate legal entities, which go on to form other business entities.[934] Hence, non-derivative liability is preferred in this thesis.

5.5 Chapter conclusion

To reiterate briefly, this chapter commenced the discussion on *how* an organisational entity that is complicit in international crimes could be prosecuted. The writer examined the corporate liability models applied in most domestic jurisdictions. This chapter also discussed how international criminal law missed opportunities for what could have been the attribution of organisational liability over the last sixty years. Finally, the writer argued for the theory of non-derivative liability as the preferred liability model to

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[930] Allens Arthur Robinson *'Corporate Culture' as a Basis for the Criminal Liability of Corporations,* (2008) 4. See also, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1.

[931] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 2.

[932] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 395.

[933] Wolfgang Kaleck and Miriam Saage-Maaβ, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8(3) *Journal of International Criminal Justice* 699, 716.

[934] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 824.

transplant internationally and adopt within the *ICC Rome Statute*.

The next chapter continues the discussion on *how* to prosecute an organisational entity; and the writer discusses organisational complicity doctrine.

CHAPTER 6

Scope of Liability for Organisational Complicity: Organisational Complicity Doctrine

> *'The impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons, thereby prolonging and intensifying the fighting and the suffering of civilians.'*[935]

6.1 Chapter introduction

The previous chapter discussed organisational liability doctrine by examining forms of corporate liability that may be suitable with respect to multinational corporations for the commission of international crimes.

Corporations are not ordinarily the principal perpetrators of the kinds of crimes discussed in this thesis. Instead, they tend to be complicit perpetrators in egregious human rights violations.[936] Complicit perpetration in international crimes by multinational businesses is alleged to have included the provision of finance, infrastructure, materials, and logistical support.[937]

In this chapter, the writer continues the discussion on *how* such an organisational entity could be prosecuted. Specifically, this chapter discusses organisational complicity

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[935] 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' (30 March 2001) UN Doc. S/2001/331, [61].

[936] FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 12.

[937] See generally, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19 <http://www.icj.org>.

doctrine. The writer provides a brief overview of the complicit modes of participation in international crimes. MNCs are often accused of aiding and abetting crimes; hence, the writer generally traces the historical development of complicity by aiding and abetting in international criminal law in comparison with the *ICC Rome Statute* provisions. The writer also examines complicity by contributing to a crime by a group of persons acting with a common purpose.

6.2 Complicit modes of participation in international crimes

Complicity in crimes committed by others is widely recognised in international criminal law as well as national criminal law.[938] International and domestic jurisdictions have identified modes of participation in criminal activities that incur individual criminal responsibility. Used interchangeably, these modes of participation amount to 'complicity', when spoken of in a strict legal sense,[939] and have grown expansively to include, *inter alia*: ordering, instigating, soliciting, inducing, inciting, aiding and abetting, joint criminal enterprise, planning, preparing, attempting, and conspiracy. These modes of participation, summarised in Table 3 (further below), are all prohibited in international criminal law.[940]

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[938] For comparative analysis see, Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (2006) 17–22; Markus D Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5(4) *Journal of International Criminal Justice* 977, 979–944.

[939] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 2, <http://www.icj.org>. See also, William A Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (June, 2001) 83(842) *International Review of the Red Cross* 439; 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.

[940] See, Article 6 of the *IMT Charter*, Article 2 of the *CCL 10*, Article 5 of *the IMTFE Charter*, Article 7 of the *ICTY Statute*, Article 6 of the *ICTR Statute*, Article 25 of the *ICC Rome Statute*, Section 14, *Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor* (hereafter referred to as *Regulation*

The *IMT Charter* was among the earlier international instruments to expressly criminalise complicit modes of participation in international crimes.[941] Although viewed as containing archaic-sounding provisions criminalising complicit perpetration,[942] the Charter laid the foundations for the development of a doctrine that is now widely recognised in international criminal law.

Article 25(3) of the *ICC Rome Statute* is the first international criminal law treaty to provide detailed provisions on modes of criminal liability,[943] though most of these modes of participation already existed in domestic criminal law.[944] Article 25(3) of the *ICC 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:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (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;
>
> (d) In any other way contributes to the commission or attempted commission of

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2000/15); Article 29 new of the *ECCC Law*, Article 6 of the *SCSL Statute* and Article 15 of the *IHT Statute*.

[941] See, Article 6 of the *IMT Charter*.

[942] Albin Eser, 'Individual Criminal Responsibility' in A Cassese, P Gaeta and J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) volume 1, 784.

[943] Robert Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005) 312. See also, Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10(1) *European Journal of International Law* 144, 150.

[944] See for example, A P Simester and W J Brookbanks, *Principles of Criminal Law* (Brookers Ltd, 2007) 166.

such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Table 3 – Summary of modes prohibited in international criminal law

Mode of Participation	IMT Charter *Article 6*	CCL 10 *Article 2*	IMTFE Charter *Article 5*	ICTY Statute *Articles 4 & 7*	ICTR Statute *Articles 2 & 6*	ICC Rome Statute *Article 25*	Regulation 2000/15 *Section 14*	ECCC Law *Article 29new*	SCSL Statute *Article 6*	IHT Statute *Article 15*
Ordering		✓		✓	✓	✓	✓	✓	✓	✓
Instigating	✓		✓	✓	✓			✓	✓	
Soliciting						✓	✓			✓
Inducing						✓	✓			✓
Inciting genocide				✓	✓	✓	✓			✓
Common purpose (joint criminal enterprise)						✓	✓			✓
Planning (formulating)	✓		✓	✓	✓			✓	✓	
Preparation				✓	✓				✓	
Attempting						✓	✓			✓
Attempting genocide				✓	✓			✓		
Conspiracy	✓		✓							
Conspiracy to commit genocide				✓	✓			✓		
Aiding and abetting		✓		✓	✓	✓	✓	✓	✓	✓
Complicity in genocide				✓	✓					
Other terminology:										
- Providing means						✓	✓			✓
- Otherwise assists						✓	✓			✓
- Organisers	✓		✓							
- Accomplices/accessories	✓	✓	✓							
- Participation in genocide								✓		

Key: ICTY – International Military Tribunal; CCL 10 – Control Council Law No. 10; IMTFE – International Military Tribunal for the Far East; ICTY- International Criminal Tribunal for the Former Yugoslavia; ICTR – International Criminal Tribunal for Rwanda; ICC – International Criminal Court, Regulation 2000/15 – Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor; ECCC – Extraordinary Chambers in the Courts of Cambodia; ECCC Law – The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; SCSL – Sierra Leone Special Court; and IHT – Iraq High Tribunal.

Of these forms, the mode of complicity most often alleged against multinational corporations is aiding and abetting.[945]

6.3 Complicity by aiding and abetting

Liability for aiding and abetting is well established in international criminal law.[946] This mode of complicit perpetration in crimes is not a new concept; however, 'there have been, and remain, greater controversies about its precise ambit rather than its existence.'[947]

The *actus reus* constituting this mode of participation in crimes is well established by customary international law emerging from the *ad hoc* international tribunals and special courts. Aiding and abetting primarily involves the provision of practical assistance, encouragement, or moral support for the perpetration of a crime or the underlying offence.[948] Furthermore, it must be shown that the provision of such had a substantial effect on the crime.[949] The customary international law requirement for a substantial

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[945] ICJ, *Corporate Complicity in International Crimes* (2008) volume 1, 27 <http://www.icj.org>.

[946] For example, see, Article 2(2) of *Control Council Law No.10*, Article 7(1) of the *ICTY Statute*, Article 6(1) of the *ICTR Statute*, Article 29 new of the *ECCC Law*, Article 6(1) of the *SCSL Statute*, Article 25(3)(c) of the *ICC Rome Statute*, Section 14(3)(c) of *Regulation 2000/15*, and Article 15(2)(c) of the *IHT Statute*. The law on complicity by aiding and abetting is also well established in domestic jurisdictions; see generally, Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

[947] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374.

[948] For discussion on underlying offences see 4.2.1 of this thesis. Essentially, an underlying offence for crimes against humanity includes, for example, murder. See generally, Gideon Boas, James L Bischoff and Natalie L Reid, *Elements of Crimes under International Law: International Criminal Law Practitioner Library, Volume 2* (Cambridge University Press, 2009) 57.

[949] See, *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [249].

effect has been read into the *ICC Rome Statute*.[950]

The *mens rea* standards in the international institutions have differed.[951] The ICTY, the ICTR, the SCSL, and the ECCC all apply a 'knowledge' test when assessing the liability of an aider and abettor.[952] Accordingly, the complicit perpetrators must have knowledge that their actions would assist the commission of the offence. In contrast, Article 25(3)(c) of the *ICC Rome Statute* applies a 'purpose' test to establish the liability of an aider and abettor. Here, the complicit perpetrator must have acted 'for the purpose of facilitating the commission of such a crime.'[953] The *mens rea* purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting – which appear in the legal instruments of the East Timor Panels of Judges[954] and the IHT[955] – substantially mirror

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[950] See, *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [279].

[951] For discussion on this see, Douglas Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 308.

[952] See, Article 7(1) of the *ICTY Statute*, Article 6(1) of the *ICTR Statute*, Article 29 new of the *ECCC Law*, and Article 6(1) of the *SCSL Statute*. There was no uniform case law applied by the IMTs immediately after the WWII when assessing the *mens rea* standard for the liability of an aider or abettor; the IMTs applied either a 'knowledge' or a 'purpose' test, see Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 13 and *United States v von Weizsaecker* (The Ministries Case) 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, 308, 622, respectively. Hence, the ICTY rejected what it regarded as a high standard imposed by the 'purpose' test and instead opted to apply a 'knowledge' test; see *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [243], [249], discussed further below. This 'knowledge' test has since been applied by the ICTR, the ECCC, and the SCSL. For detailed discussion on the lack of uniform case law on this issue, see, Douglas Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 308–309.

[953] Article 25(3)(c) of the *ICC Rome Statute*.

[954] Section 14(3)(c) of *Regulation 2000/15*. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia's withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave

those provided in the *ICC Rome Statute*. Also, a similar purpose test is applied in a number of domestic jurisdictions.[956] Moreover, the wording for the purpose test was inspired by the *Model Penal Code* of the American Law Institute.[957]

A major criticism of the 'purpose' test, further discussed below, is that it poses a major barrier to the prosecution of the corporate entities through which individual business persons commonly operate. MNCs could simply argue that whatever assistance they provided the principal perpetrators was in the normal course of their business activities, and done for the purpose of making a profit, not to perpetrate crimes.[958] Article 25(3)(c) of the *ICC Rome Statute* should be amended to accommodate the characteristic forms of corporate involvement in international crimes.

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violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor <http://www.un.org>). The Special Panels for Serious Crimes ceased working in mid 2005. They completed 55 trials during their mandate. For information on the work of the Panels of Judges see the official website created by special agreement with the Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center <http://socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/default.html>.

[955] Article 15(2)(c) of the *IHT Statute*.

[956] See, Canada's Section 21(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46 and New Zealand's Section 66(1) *Crimes Act 1961*.

[957] See, American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985). Also, on this issue 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* (C. H. Beck, 2nd ed, 2008) 757.

[958] The arguments regarding how best to interpret the purpose test have generated much debate among leading academics and international criminal law practitioners; see generally, Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 312; Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 862.

6.3.1 Tracing historical developments of aiding and abetting in customary international law

a) Aiding and abetting at the IMTs established immediately after WWII

The International Military Tribunals established immediately after WWII relied upon the *IMT Charter*, the *CCL 10* and the *IMTFE Charter*. Specifically, Article 6 of the *IMT Charter*, Article 2(2) of *CCL 10* and Article 5 of the *IMTFE Charter* all prohibited the complicit perpetration of crimes committed during WWII. The precise wording adopted in these provisions appears in Table 4 below.

Table 4 – Complicity provisions applied by the IMTs

IMT Charter (1945) *Article 6*	CCL 10 (1945) *Article 2(2)*	IMTFE Charter (1946) *Article 5*
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.	Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he … was an accessory to the commission of any such crime or ordered or abetted the same …	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 person in execution of such plan.

Key: IMT – International Military Tribunal; CCL 10 – Control Council Law No. 10; IMTFE – International Military Tribunal for the Far East

The *IMT Charter*, commonly referred to as the *Nuremburg Charter*, did not expressly prohibit aiding and abetting.[959] The prohibition on aiding and abetting international crimes emerged from jurisprudence established during the Nuremburg trials.[960] The Trial of Martin Gottfried Weiss and Thirty-nine

[959] For discussion on the implications of this see, William A Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (June, 2001) 83(842) *International Review of the Red Cross* 439, 441–446.

[960] William A Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (June, 2001) 83(842) *International Review of the Red Cross* 439, 441.

Others ('Dachau Concentration Camp Trial')[961] is an example of such a case. The Prosecution in the Dachau Concentration Camp Trial argued that the accused persons had wrongfully, wilfully, and deliberately aided and abetted the cruelties and mistreatments that took place at Dachau.[962] Incidentally, this was the first concentration camp established in Germany.[963] The Tribunal found all forty accused guilty, of whom thirty-six were sentenced to death, reflecting the gravity of the crimes.[964] In discussing the evidentiary burden required to show common design in a criminal activity, the Tribunal indicated that this included liability for aiding and abetting.[965] The Tribunal applied a knowledge test in assessing the liability of the accomplices. Specifically, the Tribunal held:

> To establish a case against each accused the prosecution had to show (1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct 'encouraged, aided and abetted or participated' in enforcing this system.[966]

Likewise, Article 5 of the *IMTFE Charter* did not expressly prohibit aiding and abetting international crimes. The prohibition emerged from the

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[961] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5.

[962] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 5.

[963] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 5.

[964] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 8.

[965] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 13.

[966] Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 13.

Tribunal's trial judgements. For example, two financial leaders, Naoki Hoshino and Okinori Kaya, along with twenty-six other accused persons were brought before the IMTFE in the matter of *United States, et al v Araki, et al*.[967] The IMTFE examined the liability of the accused persons for aiding and conspiring in the waging of wars of aggression.[968] The IMTFE took into account the fact that Naoki Hoshino had previously worked with the Japanese government where he had taken up various financial positions. The IMFTE found that 'in these positions he was able to exercise a profound influence upon the economy of Manchukuo and did exert that influence towards Japanese domination of the commercial and industrial development of that country.'[969] Okinori Kaya had previously been appointed as Finance Minister on at least two separate occasions, and even advised the Japanese government in other financial roles. The IMTFE found that 'in these positions he took part in the formulation of aggressive policies of Japan and in the financial, economic and industrial preparation of Japan for the execution of those

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[967] *United States, et al v Araki, et al*, 48414, International Military Tribunal of the Far East (1948) reprinted in, R John Pritchard (ed), *The Tokyo Major War Crimes Trial: The Judgement, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East* (Edwin Mellen Press, 1998). See also, the English translation of the Trial Judgment available from the University of North Carolina's Public Library and Digital Archive <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html>.

[968] For commentary on *United States, et al v Araki, et al*, see, Neil Boister, 'The Tokyo Trial' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge, Taylor & Francis Group, 2011) 17–29; Kyle Rex Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity' (2005) 56 *The Air Force Law Review* 167, 196.

[969] *United States, et al v Araki, et al*, 49793, International Military Tribunal of the Far East (1948) reprinted in, R John Pritchard (ed), *The Tokyo Major War Crimes Trial: The Judgement, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East* (Edwin Mellen Press, 1998) 103.

policies.' [970] Both Hoshino and Kaya were found guilty of aiding and conspiring in the waging of wars of aggression and sentenced to life imprisonment.

In contrast to the *IMT* and *IMTFE Charters*, Article 2(2) of the *CCL 10* expressly dealt with accomplice liability for abetting, though it was silent on complicity by aiding. [971] The Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case')[972] is an example of a case dealing with accomplice liability. The Einsatzgruppen Case is significant to the discussion here, because it established what the Tribunals, such as the ICTY, have considered amounts to a 'substantial effect' test. The substantial effect test delineates the *actus reus* for aiding and abetting at the *ad hoc* international institutions. In essence, with this test it must be shown that whatever assistance the accomplice provided to the principal perpetrator, it bore a substantial effect on the commission of the crime. This test has been adopted by the ICTY (and followed later by other *ad hoc* tribunals.)[973] In the Einsatzgruppen Case, there were twenty-two accused persons who appeared before a United States Military Tribunal seated in Nuremberg. They were charged with war crimes and crimes against humanity pursuant to the *CCL 10* provisions. The IMT

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[970] *United States, et al v Araki, et al*, 49801, International Military Tribunal of the Far East (1948), reprinted in, R John Pritchard (ed), *The Tokyo Major War Crimes Trial: The Judgement, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East* (Edwin Mellen Press, 1998) 103.

[971] For definitions of the terms 'aiding' and 'abetting' see customary international law discussion, which appears further below.

[972] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV.

[973] See, *Prosecutor v Furundžija*, *(Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [217] – [221] for how the ICTY adopted the 'Einsatzgruppen Case' as precedent for the 'substantial effect' test.

reasoning in the judgments of Klingelhoefer, Fendler, Ruehl, and Graf are particularly relevant here, as they discuss to what extent the actions of the accomplices had a substantial effect on the crimes committed by the principal perpetrators. The Tribunal observed that although Klingelhoefer was an interpreter, his actions were vital in the commission of crimes. More than anything, his role as interpreter did not 'exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive of his organisation he was aware that the people listed would be executed when found.'[974] As for Fendler, the Tribunal opined that he held a position of authority as the second highest-ranking officer in the *Kommando*, and yet he failed to object to or do anything about the summary executions that he knew were being carried out.[975] In contrast, although Ruehl had knowledge about the criminal aspirations of the organisation, he was not in a position to 'control, prevent, or modify the severity of the program.'[976] The Tribunal commented that Ruehl's low rank did not 'place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation.'[977] Similarly, the Tribunal concluded that there was no evidence to suggest that Graf was in a position to object to the criminal activities of the perpetrators and, therefore, could not be found guilty

[974] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 569.

[975] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 572.

[976] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 580.

[977] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 581.

as an accessory to the crimes.[978]

b) Aiding and abetting provisions at the ad hoc *international tribunals and special courts which apply the 'knowledge'* mens rea *test*

Aiding and abetting provisions are contained in Article 7(1) of the *ICTY Statute*, Article 6(1) of the *ICTR Statute*, Article 29 new of the *ECCC Law*, and Article 6(1) of the *SCSL Statute*. The precise wording of these provisions appears in Table 5 below. These provisions are substantially the same.

Table 5 – Aiding and abetting at the *ad hoc* international tribunals and special courts

ICTY Statute *Article 7(1)*	ICTR Statute *Article 6(1)*	ECCC Law *Article 29new*	SCSL Statute *Article 6(1)*
A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.	A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.	Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.	A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

Key: ICTY- International Criminal Tribunal for the Former Yugoslavia; ICTR – International Criminal Tribunal for Rwanda; ECCC – Extraordinary Chambers in the Courts of Cambodia; SCSL – Sierra Leone Special Court.

i. Article 7(1) of the ICTY Statute

Prosecutor v Tadić[979] is the first case that was heard before the ICTY Trial Chamber. *Tadić* dealt with the terms 'aiding' and 'abetting' as collective rather than disjunctive terms. The Trial Chamber describes the aiding and abetting modality as one that includes verbal or physical assistance that

[978] Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946-April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 585.

[979] *Prosecutor v Tadić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997).

encourages or supports the commission of crimes, provided the requisite intent is shown.[980] Since then, the ICTY has also recognised instances where aiding and abetting were dealt with disjunctively. Specifically, the ICTY has found that the term 'aiding' refers to the act of 'giving practical assistance to the physical perpetrator or intermediary perpetrator';[981] while the term 'abetting', is said to consist of '"facilitating the commission of an act by being sympathetic thereto"—in other words, giving encouragement or moral support to the physical perpetrator or intermediary perpetrator.'[982]

Customary international law that has emerged from the ICTY has established that the *actus reus* for aiding and abetting the commission of a crime occurs when an accused person provides practical assistance, encouragement, or moral support for the perpetration of such crime.[983] Furthermore, it is necessary to show that the provision of such practical assistance, encouragement, or moral support bore a substantial effect on the crime.[984]

Also, the accused could be held liable for aiding and abetting at any point during the planning, preparation or execution of the crime or the underlying

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[980] *Prosecutor v Tadić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997) [689].

[981] *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [89] footnote 107.

[982] *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [89] footnote 107.

[983] *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [89]; see also, *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [45] – [46].

[984] *Prosecutor v Kvočka, et al (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-30/1-A, 28 February 2005) [90].

offence.[985] Provision of practical assistance, encouragement, or moral support could incur criminal liability if provided before, during or after the crime is committed.[986] There is no requirement to show that the aider and abettor and the principal perpetrator had a plan or an agreement in place to commit the crime.[987]

As for the mental element required to establish liability for aiding and abetting crimes, the ICTY Trial Chamber has established that the aider and abettor must know that their actions are assisting the commission of an offence.[988] This mental element does not have to be overtly expressed, but may be inferred from the surrounding circumstances.[989]

ii. Article 6(1) of the ICTR Statute

The ICTR Trial Chamber notes that the terms 'aiding' and 'abetting' are often

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[985] Pursuant to Section 7(1) of the *ICTY Statute*; see, discussion in *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [91].

[986] *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [48]; although, aiding and abetting by omission after the crime would lack the 'substantial effect' requisite if it took place far too long afterwards, see discussion in *Prosecutor v Strugar (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-01-42-T, 31 January 2005) [355].

[987] *Prosecutor v Simić, et al (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-9-T, 17 October 2003) [162].

[988] *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [249]; reasoning upheld in most ICTY chamber decisions, e.g. *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [229]; *Prosecutor v Vasiljević (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-32-A, 25 February 2004) [102]; *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [45]; *Prosecutor v Blagojević and Jokić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-02-60-T, 17 January 2005) [727].

[989] *Prosecutor v Strugar (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-01-42-T, 31 January 2005) [350].

referred to conjunctively.[990] The ICTR has dealt with these terms as distinct concepts that are anything but synonymous.[991] The ICTR Chambers define the term 'aiding' as: 'assisting another to commit a crime';[992] they define 'abetting' as: 'facilitating, encouraging, or advising the commission of a crime.'[993]

According to the ICTR Appeals Chamber, the aider and abettor may assist the principal actor in a number of ways such as: providing material support; encouraging with verbal statements;[994] or, even by their mere presence.[995] Such assistance need not be an indispensible element required for the commission of the crime.[996] Like the ICTY, the ICTR Chambers were of the view that the aider and abettor may incur liability before, during, or after the commission of the crime.[997] The aider and abettor may also be held liable for his/her participation during the planning, preparation, or execution stage of the

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[990] *Prosecutor v Bisengimana (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-00-60-T, 13 April 2006) [32].

[991] *Prosecutor v Muvunyi (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2000-55A-T, 11 February 2010) [470]; see also, *Prosecutor v Semanza (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-97-20-T, 15 May 2003) [384]; *Prosecutor v Muhimana (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-95-1B-T, 28 April 2005) [507].

[992] *Prosecutor v Bisengimana (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-00-60-T, 13 April 2006) [32]; see also, *Prosecutor v Akayesu (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, 2 September 1998) [484].

[993] *Prosecutor v Muvunyi (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2000-55A-T, 11 February 2010) [470] – [471]; see also, *Prosecutor v Muhimana (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-95-1B-T, 28 April 2005) [507].

[994] *Prosecutor v Seromba (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-66-T, 13 December 2006) [307].

[995] *Prosecutor v Ndindabahizi (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-71-I, 15 July 2004) [457].

[996] *Prosecutor v Seromba (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-66-T, 13 December 2006) [307].

[997] *Prosecutor v Nahimana, et al (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-96-11-A, 28 November 2007) [482].

crime.[998] Moreover, it is also not necessary to show that the aider and abettor exercised authority over the principal perpetrator.[999]

Regarding the *mens rea* requisite, the ICTR has adopted a similar approach to that of the ICTY, finding that the aider and abettor must know that their actions are assisting the commission of a crime. The accomplice need not be aware of the precise crime that the principal perpetrator intends to commit, or which has been committed; however, the accomplice must be aware of the essential elements of the crime.[1000]

iii. Article 29 new of the ECCC Law

To date, there are only four cases pending before the ECCC.[1001] Of these cases, the ECCC has only delivered one judgment. In *Co-Prosecutors v The Kaing Guek Eav, alias Duch,*[1002] the Trial Chamber relied upon jurisprudence from the ICTY and ICTR concerning complicity by aiding and abetting. The ECCC upheld customary international law that aiding and abetting consisted of the perpetrator providing practical assistance, encouragement, or moral support that had a substantial effect on the perpetration of the crime.[1003] The ECCC adopted the definitions for the terms aiding and abetting that were applied by

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[998] *Prosecutor v Nzabirinda (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-77-T, 23 February 2007) [16].

[999] *Prosecutor v Muhimana (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-95-1B-A, 21 May 2007) [189].

[1000] *Prosecutor v Zigiranyirazo (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-01-73-T, 18 December 2008) [387]; the Chamber referred to *Prosecutor v Orić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-03-68-A, 3 July 2008) [43]; see also, *Prosecutor v Nahimana, et al (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-96-11-A, 28 November 2007) [482]; *Prosecutor v Seromba (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-66-A, 12 March 2008) [56].

the ICTY and ICTR.[1004] The ECCC also adopted for the *mens rea* requirement, the knowledge test applied by the ICTY and the ICTR. According to the ECCC, it must be shown that the accomplice was aware that there was a probability that a crime would be committed, or that a crime was actually committed. The accomplice must also know that his/her actions assisted in the commission of a crime. The accomplice's knowledge may be inferred from the circumstances.[1005]

iv. Article 6(1) of the SCSL Statute

The first trial judgment delivered at the SCSL, the *AFRC Case*, relied upon jurisprudence from the ICTY and ICTR. The SCSL Tribunal applied a similar

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[1001] *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Closing Order of Co-Investigating Judges Indicting Kaing Guek Eav alias Duch)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 2 August 2008); *Co-Prosecutors v Nuon Chea and others (Case No. 2) (Closing Order of Co-Investigating Judges Indicting Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007/ECCC-PTC, 15 September 2010); the International Co-Prosecutor has since lodged two Introductory Submissions (Case File 003/20-11-2008-ECCC/OCIJ and 004/20-11-2008-ECCC/OCIJ) in which he requests the Co-Investigating Judges to investigate additional suspected persons who should appear before the ECCC.

[1002] *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010).

[1003] *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [533].

[1004] See, *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [533]. The ECCC relied upon the 'aiding' definition applied in *Prosecutor v Gacumbitsi, (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-2001-64-A, 7 July 2006) [140], and the 'abetting' definition in *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [89], footnote 107.

[1005] *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [535]; the ECCC relied upon *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [49] – [50]; *Prosecutor v Milutinović (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-T, volume 1 of 4, 26 February 2009) [94]; *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009) [280].

approach to the aiding and abetting modality as that formulated by the ICTY and ICTR:[1006] the accomplice's actions must have a substantial effect on the commission of the crime,[1007] and the accomplice may be held liable for his/her role in aiding and abetting the planning, preparation or execution of a crime.[1008] Furthermore, 'such contribution may be provided directly or through an intermediary and irrespective of whether the participant was present or removed both in time and place from the actual commission of the crime.'[1009]

The Tribunal held that it was necessary to show that the accused knew he was assisting in the perpetration of a crime – thus, it applied the *mens rea* knowledge test to establish aiding and abetting.[1010] The Tribunal was also of the view that the accused did not need to know about the specific crime, just that a crime would probably be committed as a result of the practical assistance provided.[1011]

[1006] The Tribunal relied upon: *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-A, 29 July 2004) [45] – [46], [48]; *Prosecutor v Orić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-03-68-T, 30 June 2006) [282] – [283]; *Prosecutor v Limaj, et al (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-03-66-T, 30 November 2005) [516]; *Prosecutor v Kamuhanda (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-99-54A-T, 22 January 2004) [597].

[1007] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [775].

[1008] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [775].

[1009] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [775].

[1010] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [776].

[1011] *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [776].

The applicable law on aiding and abetting in the *AFRC Case* has essentially been upheld in the majority of the SCSL decisions.[1012]

6.3.2 Aiding and abetting provisions pursuant to Article 25(3)(c) of the ICC Rome Statute

Prior to the aiding and abetting provisions provided in Article 25(3)(c) of the *ICC Rome Statute*, there were a number of developments during the drafting process leading up to the current *ICC Rome Statute* provisions – these included initiatives by the International Law Commission and the Preparatory Commission.

a) Preliminary work of the International Law Commission

The ILC prepared *Draft Codes of Offences against the Peace and Security of Mankind* in 1954,[1013] 1991,[1014] and 1996.[1015] The ILC also prepared a *Draft Statute for an International Criminal Court* in 1994.[1016] The 1954 *Draft Code* does not contain any express provisions prohibiting the aiding and abetting of crimes, neither does the 1994 *Draft Statute*. However, there are a handful of provisions dealing with aiding and abetting prohibitions that appear in the

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[1012] See, *The Prosecutor v Fofana and Kondewa (CDF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007) [227] – [231]; *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009) [276] – [280].

[1013] Report of the International Law Commission at its Sixth Session (1954) submitted to the General Assembly. See, also, *Yearbook of the International Law Commission*, 1954, vol. II.

[1014] Report of the International Law Commission on the Work of its Forty-third Session (29 April–19 July 1991) Official Record of the General Assembly, Forty-sixth Session, Supplement No. 10, UN Doc. A/46/10.

[1015] Report of the International Law Commission on the Work of its Forty-eighth Session (1996), UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

[1016] ILC Report on the Working Group on a Draft Statute for an International Criminal Court, U.N. Doc: A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Rev.2/Add.1-3 (mimeograph) – ILC Report, A/49/10.

appendices to the 1994 *Draft Statute*.[1017] Only the 1991 and 1996 *Draft Codes* deal with complicity by aiding and abetting.

According to Article 3(2) of the 1991 *Draft Code*, 'an individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind … is liable to punishment.' The ILC commentary on the 1991 *Draft Code* indicates that the majority of members agreed that obvious cases of complicity (by aiding, abetting, or the provision of means) included those acts carried out before or during the commission of a crime.[1018] However, the ILC was deeply divided as to whether this mode of complicity extended to acts *ex post facto* (after the fact). The dilemma was resolved by agreement that *ex post facto* acts only constituted aiding, abetting, or the provision of means *if* such acts had previously been agreed upon.[1019]

Article 2(3)(d) of the 1996 *Draft Code* attributes individual criminal responsibility where the complicit perpetrator 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.' The ILC commentary on the 1996 *Draft Code* made it clear that an individual who aided, abetted, or otherwise assisted without knowing that they were facilitating the commission

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[1017] See for example, Appendix II, Relevant Treaty Provisions Mentioned in the Annex pursuant to Article 20(e). Appendices to the ILC Report on the Working Group on a Draft Statute for an International Criminal Court, U.N. Doc: A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Rev.2/Add.1-3 (mimeograph) – ILC Report, A/49/10.

[1018] Report of the International Law Commission on the Work of its Forty-third Session (29 April–19 July 1991) Official Record of the General Assembly, Forty-sixth Session, Supplement No. 10, UN Doc. A/46/10, 98[3].

[1019] Report of the International Law Commission on the Work of its Forty-third Session (29 April–19 July 1991) Official Record of the General Assembly, Forty-sixth Session, Supplement No. 10, UN Doc. A/46/10, 98[3].

of a crime would not be liable under the *Draft Code* provisions.[1020] This requisite *mens rea* standard was consistent with customary international law established pursuant to the IMTs.[1021] Regarding the kind of assistance, the ILC commented that it must significantly facilitate the perpetration of the crime.[1022] Also, the ILC maintained the view, previously stipulated in the 1991 *Draft Code*, that complicity by aiding and abetting included *ex post facto* acts, but only if previously agreed upon.[1023] Since the 1996 *Draft Code*, emerging jurisprudence from the *ad hoc* international tribunals indicates that there is *no* requirement to show that the aider and abettor and the principal perpetrator had a plan or an agreement in place to commit the crime.[1024] With respect to jurisprudence emerging from the ICC, Pre-Trial Chamber I was recently of the opinion that *ex post facto* acts could, indeed, incur liability if such acts had been previously agreed upon.[1025] Though, when the Chamber made these statements, it was generally commenting on the ILC and Preparatory Commission's draft provisions on *ex post facto* acts.[1026]

[1020] Report of the International Law Commission on the Work of its Forty-eighth Session (1996), UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), 21[11].

[1021] See generally, Trial of Martin Gottfried Weiss and Thirty-nine Others ('Dachau Concentration Camp Trial'), 15 November–13 December 1945, *Law Reports of the Trials of War Criminals*, Vol XI, 5, 13; Trial of Otto Ohlendorf and Others ('Einsatzgruppen Case'), October 1946–April 1949, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol IV, 580.

[1022] Report of the International Law Commission on the Work of its Forty-eighth Session (1996), UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), 21[11].

[1023] Report of the International Law Commission on the Work of its Forty-eighth Session (1996), UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), 21[12].

[1024] See generally, *Prosecutor v Simić, et al (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-9-T, 17 October 2003) [162].

[1025] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [286] – [287].

[1026] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [286] – [287].

b) Preliminary work of the Preparatory Commission

The 1998 *Draft Statute* prepared by the Preparatory Committee to establish an international criminal court[1027] is particularly relevant to the discussion here. The Committee presented the 1998 *Draft Statute* at the Rome Conference.[1028] Article 23(7)(d) of the Statute dealt with individual criminal responsibility where the perpetrator aids or abets an international crime. Specifically, Article 23(7)(d) of the 1998 *Draft Statute* states:

> 7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:
>
> (d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission.

Initially, the Preparatory Committee was unable to agree upon the Article 23(7)(d), as evidenced by the words that appear in brackets.[1029] On the one hand were those who favoured a *mens rea* requisite based on an 'intent test', while those opposed to this approach opted for a 'knowledge test'. A compromise was reached at the Rome Conference, which resulted in a

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[1027] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *'Draft Statute for the International Criminal Court'*, Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.

[1028] For general reading on the Rome Conference deliberations, see: Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (C. H. Beck, 2nd ed, 2008); A Cassese, P Gaeta, and J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) volume 1; Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999).

[1029] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 310.

'purpose test'[1030] being adopted from the *Model Penal Code* of the American Law Institute.[1031] Professor Cherif Bassiouni, the Chair of the Drafting Committee, attributed the disparity to 'differences between civil law and common law lawyers and different understandings of language.'[1032] Hence, the purpose test that was adopted seemed the ideal compromise in both English and French.[1033] Proponents of the intent test would have welcomed this outcome as a victory. Generally, international criminal law applies a narrow meaning to the term 'intent'; it equates the term with 'purpose'.[1034]

The final fruits of the Rome Conference treaty negotiating process prohibiting the aiding and abetting of crimes are reflected in Article 25(3)(c) of the *ICC Rome Statute*:

> 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.

[1030] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 310–311. According to Professor Cherif Bassiouni, the decision to adopt the purpose test was reached by the Working Group on General Principles of Criminal Law, which was chaired by Per Saland.

[1031] 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* (C. H. Beck, 2nd ed, 2008) 757; Professor Kai Ambos was an Observer at the Rome Conference deliberations.

[1032] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 311.

[1033] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 311.

[1034] See generally, Julia Geneuss, *et al*, 'Core Crimes Inc.: Panel Discussion Reports from the Conference on "Transnational Business and International Criminal Law", held at Humboldt University, Berlin, 15–16 May 2009' (2010) 8(3) *Journal of International Criminal Justice* 957, 964–965; see also, Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 862.

Article 25(3)(c) of the *ICC Rome Statute* deals with aiding and abetting as a 'facilitation-type of complicity'.[1035] This treatment distinguishes the aiding and abetting modality from the other modes of participation found in the rest of Article 25(3).[1036] In addition, the aiding and abetting modality pursuant to the *ICC Rome Statute* is differentiated from the same modality at the ICTY, the ICTR, the ECCC and the SCSL. These 'seem to consider "counselling" and "procuring" as subsumed under aiding and abetting.'[1037]

c) Article 25(3)(c) of the ICC Rome Statute: the actus reus

The Rome Statute provision does not expressly state what material acts are required to show aiding and abetting;[1038] however, Article 25(3)(c) of the *ICC Rome Statute* does indicate that 'providing means' for the commission of a crime could typically be considered a form of assisting.[1039] Provision of practical assistance, encouragement, or moral support, constitute aiding and abetting pursuant to customary international law. The International Commission of Jurists has identified that forms of assisting include, *inter alia*:

- the provision of goods or services used in the commission of crimes;
- the provision of information which leads to the commission of crimes;

[1035] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 93.

[1036] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 93.

[1037] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 93. For example, see generally, *Prosecutor v Aleksovski (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. 95-14/1-T, 25 June 1999 [58] – [65].

[1038] William A Schabas, *An Introduction to the International Criminal Court*, (Cambridge University Press, 3rd ed, 2007) 213.

[1039] Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 968.

- the provision of personnel to commit crimes;
- the provision of logistical assistance to commit crimes;
- the procurement and use of products or resources (including labour) in the knowledge that the supply of these resources involves the commission of crimes; and
- the provision of banking facilities so that the proceeds of crimes can be deposited.[1040]

Article 25(3)(c) of the *ICC Rome Statute* does not expressly adopt the 'substantial effect' requisite.[1041] However, jurisprudence emerging from the ICC in the matter, *The Prosecutor v Callixte Mbarushimana*,[1042] seems to indicate that the Court has adopted this test.[1043] Incidentally, at the time of the Rome Conference treaty negotiations for the *ICC Rome Statute*, the 'substantial effect' requisite had been established as customary international law.[1044]

In *The Prosecutor v Callixte Mbarushimana*, the ICC Pre-Trial Chamber I noted that there had been much speculation among academics as to what

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[1040] See generally discussion in ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 19, <http://www.icj.org>.

[1041] Neither do the *ICTY* or the *ICTR Statutes*, the test has been 'read into the relevant Statutes' so to speak; see, Albin Eser, 'Individual Criminal Responsibility' in A Cassese, P Gaeta and J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) volume 1, 800.

[1042] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011).

[1043] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [279]. In adopting the test, the Court generally discussed the *ICC Rome Statute's* aiding and abetting as well as common purpose liability provisions.

[1044] See for example, *Prosecutor v Tadić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997) [688], discussing the customary international law established by the IMTs and the International Law Commission's *Draft Code of Offences against the Peace and Security of Mankind*.

approach the ICC would take.[1045] Generally, there were those academics of the view that the ICC would adopt the ICTY and the ICTR approach. For example, Gerhard Werle argued, and rightly so, that 'within the ICC Statute's framework of modes of participation, it is reasonable to interpret the *actus reus* of assistance in this way.'[1046] In contrast, William Schabas argued that the ICC could be taken to have specifically rejected the 'substantial effect' test when it was not expressly included in the words of the final Statute. Schabas suggested that the fact the 'substantial effect' test was not expressed in the *ICC Rome Statute*, despite it having appeared in the ILC Draft Codes and jurisprudence from the ICTY and ICTR, perhaps indicated that delegates at the Rome Conference deliberately rejected this test.[1047] However, from a purely practical standpoint, it would be difficult to imagine that this was the intention. It would certainly make a difference whether or not a 'substantial effect' test is required at the ICC in relation to the characteristic modes of corporate complicity by aiding and abetting. By way of illustration, if a coffee supplier provided a perpetrator with coffee and that perpetrator went on to commit crimes, unless it could be shown that the consumption of the coffee significantly facilitated the commission of the crime (which would be highly unlikely under normal circumstances) then the coffee supplier would not be

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[1045] See, *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [281].

[1046] Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 969; see also, 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* (C. H. Beck, 2nd ed, 2008) 756.

[1047] William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 3rd ed, 2007) 213; the ILC's 1996 *Draft Code* had attributed individual criminal responsibility where the complicit perpetrator 'knowingly aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime, including providing the means for its commission.' (Emphasis added).

considered complicit in the perpetrator's crimes. Failure to read some kind of substantial effect test into the ICC Rome Statute aiding and abetting provisions would cast the net of liability far too wide; it would trivialise the notion of aiding and abetting.

d) Article 25(3)(c) of the ICC Rome Statute: the mens rea *'purpose test'*

Article 25(3)(c) of the *ICC Rome Statute* adopts the phrase 'for the purpose of facilitating the commission of such a crime'. The *ICC Rome Statute* does not explain this phrase further and, to date, those who have appeared before the Court have not been charged with complicity by aiding and abetting pursuant to Article 25(3)(c) of the *ICC Rome Statute*. However, the ICC Pre-Trial Chamber I in *The Prosecutor v Callixte Mbarushimana*, made comments in passing on the provisions provided in Article 25(3)(c) of the *ICC Rome Statute*. The Chamber noted that '…unlike the jurisprudence of the *ad hoc* tribunals, article 25(3)(c) of the Statute requires that the person act with the *purpose* to facilitate the crime; knowledge is not enough for responsibility under this article.'[1048] In another part of its Judgement, the Chamber distinguished the *mens rea* for aiding and abetting from that required for common purpose liability. The Chamber was of the view that:

> Differently from aiding and abetting under article 25(3)(c) of the Statute, for which intent is always required, knowledge is sufficient to incur liability for contributing to a group of persons acting with a common purpose, under article 25(3)(d) of the Statute.[1049]

[1048] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [274].

[1049] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [289].

From these brief comments passed by the ICC Pre-Trial Chamber, on the face of it, it would appear that purpose is synonymous with intent.

This is consistent with ordinary language:

> My purpose in doing something is my reason for it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things *with* an intention, but *for* a purpose, since the intention may only accompany the action, whereas the purpose must be a reason for it. We do not naturally speak of "the reason or intention" and "the point or intention" in the way that we do speak of "the reason or purpose" and "the point or purpose" of an action.[1050]

However, there are differing interpretations about what this purpose provision actually means. The *mens rea* purpose test has been debated widely by academics and international criminal law practitioners.[1051] There is still no clear consensus. There are a number of domestic jurisdictions that provide a similar *mens rea* purpose test for aiding and abetting the commission of crimes, and these may assist our understanding. These include accomplice liability provisions applied in the United States,[1052] Canada,[1053] and New Zealand,[1054] these are examined further below.

[1050] Alan R White, 'Intention, Purpose, Foresight and Desire' (1976) 92 *Law Quarterly Review* 569, 574.

[1051] See, for example, 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* (C. H. Beck, 2nd ed, 2008) 757.

[1052] See, American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985).

[1053] See, Canada's Section 21(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[1054] See, New Zealand's Section 66(1) *Crimes Act 1961*.

i. General observations about the mens rea *purpose test by academics and international criminal law practitioners*

Academics and international criminal law practitioners have made several attempts to explain the *mens rea* purpose test that is provided in Article 25(3)(c) of the *ICC Rome Statute*. For example, Doug Cassel applies a very broad interpretation of the *ICC Rome Statute* provision. Cassel proposes that the term 'purpose' does not necessarily refer to an exclusive or primary purpose.[1055] Cassel suggests that 'a secondary purpose, including one inferred from knowledge of the likely consequences, should suffice.'[1056] For example, in the *Zyklon B* case (discussed earlier), the defendant was a businessman who sold gas to the Nazi regime; he did so for the purpose of making a profit, despite knowing that the gas would be used to eliminate Jews. Cassel argues that a secondary purpose may be inferred that the businessman encouraged the killing of the Jews in order to sell the gas so as to make a profit.[1057] According to Cassel, this approach appears to be the only rational manner to interpret the *mens rea* requisite of Article 25(3)(c) of the *ICC Rome Statute*.[1058] He is of the view that it is hard to imagine it was the intention of those who drafted the *ICC Rome Statute* that the accomplices who knowingly supplied gas for the

[1055] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 312.

[1056] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 312.

[1057] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 312.

[1058] For an opposing view, see, Hans Vest who asks what if the businessman was to show that his intention was not to make a profit but, in fact, to keep his company running profitably to sustain his business operations through the war; and, that by supplying the gas, he was able to attain his ultimate goal, which was keeping the doors of his business open during that time? Though, Hans Vest concludes that, in his view, the businessman would not have escaped liability anyway; Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 862.

gas chambers should not be held liable simply because they did so purely to make a profit.[1059] This interpretation would result in an inability to punish most serious crimes of concern to the international community – and that would go against the purpose of the *ICC Rome Statute*.[1060] Indeed, purpose is not refuted in circumstances where an accomplice sees it fit to bring about an outcome as a result of seeking some other objective.[1061] However, when considered in light of business dealings, a concern here is that this approach requires circumstances where there is an on-going relationship, whereby profits are generated from a series of business transactions. This is because, although driven by a need to make a profit, once-off business transactions are not reliant on the manner by which the commercial items are used; the business person still acquires a profit even if those items are discarded anyway.[1062]

The present writer is of the view that the circumstances where a secondary purpose can be identified will be rare. In most cases of corporate complicity, the purpose of making a profit is all that will be in issue. Robert Cryer takes a similar view with respect to a strict reading of the aiding and abetting provisions in Article 25(3)(c) of the *ICC Rome Statute*. Cryer adopts a narrow

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[1059] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 313.

[1060] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 313.

[1061] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 16.

[1062] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 16–17.

approach to the interpretation of the *mens rea* requisite standard provided in Article 25(3)(c). He argues that an arms dealer who supplies weapons knowing that they would be used in the commission of international crimes would escape liability if the dealer's sole purpose were to make a profit.[1063] In all likelihood, if the ICC applied the purpose proviso as it currently stands, it would adopt a narrow interpretation similar to Cryer's. This would exclude most corporate actors from the Court's jurisdiction. Indeed, the harsh reality seems to be that if the ICC does not interpret the purpose proviso broadly, then it will most certainly dismiss cases that involve business actors who behave solely for economic purposes.[1064] This line of thought only emphasises the need to amend the Statute's aiding and abetting provisions to accommodate characteristic forms of corporate involvement in international crimes – especially in light of the passing comments made by the Pre-Trial Chamber in *The Prosecutor v Callixte Mbarushimana*.

Norman Farrell queries the interpretation of the *mens rea* provision provided in Article 25(3)(c). He suggests that there are two possible interpretations. Either an aider and abettor must actually share the principal perpetrator's intent[1065] – for example, a corporation which assists in the forcible transfer of civilians by providing the principal perpetrator with weapons or equipment,

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[1063] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 377.

[1064] See generally, Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 862–863.

[1065] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 882.

must intend to forcibly transfer the civilians.[1066] Farrell observes that this approach is inconsistent with the customary international law emerging from the *ad hoc* tribunals.[1067] Or, another way to interpret the provision could be that an aider and abettor must intend to assist in the commission of the crime. This interpretation looks at the motive of the aider and abettor who must have acted with the specific purpose of assisting the crime, but need not share the principal perpetrator's intention.[1068] For example, if a corporation were to assist in the forcible transfer of civilians by providing the principal perpetrator with weapons or equipment, the corporation must not only have known that their actions would assist the perpetrator, but it must have acted for the purpose of assisting the principal perpetrator in the forcible transfer of civilians.[1069] Farrell's approach here seems to be in keeping with the brief observations made by the Pre-Trial Chamber in *The Prosecutor v Callixte Mbarushimana*,[1070] and also the manner in which the Panels of Judges attributed accomplice liability in East Timor (discussed below).[1071] The aiding and abetting provisions applied by the Panels of Judges in East Timor are

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[1066] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 882.

[1067] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 882.

[1068] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 882.

[1069] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 882–883.

[1070] See, *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [281], where the Chamber noted that 'the jurisprudence of the *ad hoc* tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime.'

[1071] See, Section 14(3)(c) of *Regulation 2000/15*.

substantially the same as those stipulated in Article 25(3)(c) of the *ICC Rome Statute*.

Farrell concludes that, regardless of how the provision is interpreted, it would be less challenging to simply apply the knowledge *mens rea* standard, such as the one adopted by the ICTY, ICTR and SCSL.[1072] This could practically be achieved if the purpose provision were removed. The existing aiding and abetting provisions pose a major barrier to the prosecution of corporations and their executives.

The International Commission of Jurists adopts an entirely different approach and argues that it actually does not make any 'practical difference' whether one applies a *mens rea* standard construed on purpose or knowledge.[1073] According to the ICJ:

> … practically speaking, if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the official knowingly aided a crime in order to make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime 'on purpose'. Accordingly, whilst there may be an apparent difference in the *mens rea* standard, there may well be very little practical difference.[1074]

The manner by which the ICJ diagnoses the purpose requirements results in two explanations of the term. On the one hand, when an action is done 'on purpose', ordinarily, there is an assumption that the action was done

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[1072] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) *Journal of International Criminal Justice* 873, 883.

[1073] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 22, <http://www.icj.org>.

[1074] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 22, <http://www.icj.org>.

deliberately rather than accidentally; an assertion of this kind has nothing to do with what the purpose actually was. On the other hand, an action which is done 'for the purpose of' bringing about a specific result makes an assertion about the nature of the purpose.[1075] Hence, the ICJ approach ignores the specific wording of Article 25(3)(c) of the *ICC Rome Statute*. This provision does not assert criminal responsibility for a person who *acts on purpose*, but rather for a person who acts *'for the purpose of facilitating the commission of such a crime'*.[1076]

ii. Customary international law

It is clear that the wording of Section 14(3)(c) of *Regulation 2000/15* and Article 15(2)(c) of the *IHT Statute*[1077] substantially mirrors that found in Article 25(3)(c) of the *ICC Rome Statute*. The precise wording of these provisions appears in Table 6 below. These provisions apply the *mens rea* purpose test to establish criminal liability for aiding and abetting crimes. The discussion which follows on the *mens rea* requisite shows that, to a large extent, the Panels of Judges and the IHT dealt with this issue by examining whether the aider and abettor knew that their actions would assist the commission of crimes.

[1075] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 18–19.

[1076] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 19.

[1077] The *IHT Statute* was translated on 12 April 2006, from Arabic to English by the International Center for Transitional Justice <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>.

Table 6 – Aiding and abetting at the ICC, the Panel of Judges, and the IHT

ICC Rome Statute *Article 25(3)(c)*	Regulation 2000/15 *Section 14(3)(c)*	IHT Statute *Article 15(2)(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.	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.	For the purpose of facilitating the commission of such a crime, aids, abets or by any other means assists in its commission or its attempted commission, including providing the means for its commission.

Key: ICC – International Criminal Court, Regulation 2000/15 – Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor, and IHT – Iraq High Tribunal.

Section 14(3)(c) of Regulation 2000/15

It appears from examining the cases that appeared before the Panels of Judges[1078] that, in most instances, they simply restated the law on individual criminal responsibility and did not provide analysis or discussion of the legal principles.[1079] Occasionally, they simply adopted the definition of aiding and abetting developed by the ICTY and ICTR without further explanation.[1080] In other instances, the Panels of Judges explained that it was necessary to show that the aider and abettor knew his/her actions would assist the commission of

[1078] For a detailed discussion on jurisprudence from the Panels of Judges see, Judicial System Monitoring Program Report, *Digest of the Jurisprudence of the Special Panels for Serious Crimes* (April 2007) <http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf>.

[1079] See, for example, *The Public Prosecutor v Joao Franca da Silva Alias Jhoni Franca (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 04a/2001, 5 December 2002) [121] – [125]; *The Public Prosecutor v Sabino Gouveia Leite (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 04b/2001, 7 December 2002) [106] – [108].

[1080] *The Prosecutor for Serious Crimes v Jose Cardoso (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 04c/2001, 5 April 2003) [456] – [457]; see also generally, *The Deputy Prosecutor-General for Serious Crimes v Francisco Pedro (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 1/2001, 14 April 2005) [11]; the Panels of Judges relied upon *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [229] and *Prosecutor v Akayesu (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, 2 September 1998) [484].

a crime. For example, in *The Prosecutor for Serious Crimes v Jose Cardoso*, the accused was charged with aiding and abetting the rape of two victims.[1081] The Panels of Judges held:

> To establish the *mens rea* of aiding and abetting under Section 14.3(c), it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.[1082]

The approach taken by the Panels of Judges attributed accomplice liability for aiding and abetting where the perpetrator was aware that his actions assisted the commission of the crime. This approach stops short of the IHT interpretation of the purpose proviso (discussed below), which not only required that the accomplice knew that their actions assisted the commission of a crime, but that the accomplice should also have wanted to bring about the desired outcome.

Article 15(2)(c) of the IHT Statute

The *Dujail Case*[1083] was the first matter heard before the IHT.[1084] The trial proceedings were highly publicised and heavily criticised for procedural flaws,

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[1081] *The Prosecutor for Serious Crimes v Jose Cardoso (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 04c/2001, 5 April 2003) [453].

[1082] *The Prosecutor for Serious Crimes v Jose Cardoso (Trial Judgment)* (District Court of Dili, UN Special Panel for Serious Crimes, Case No. 04c/2001, 5 April 2003) [457] – [458].

[1083] *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006). The English translation of the Judgment was commissioned by HRW and is available at the following website: <http://www.hrw.org/legacy/pub/2007/ij/dujail_judgement_web.pdf>.

[1084] Since then, the IHT has only heard a handful of cases. It has been difficult to keep track of their decisions. The IHT does not have an official website. The Iraqi Ministry of Foreign Affairs posts occasional updates on their own website about the legal proceedings of the IHT.

as well as a trial judgment premised on assumptions rather than actual facts introduced into evidence.[1085] The *Dujail Case* involved eight defendants including Saddam Hussein. The case concerned crimes committed in Dujail following an assassination attempt on Saddam Hussein, the then President of Iraq. Three of the accused persons in the *Dujail Case* were deemed lower-level defendants, and were charged with aiding and abetting the more senior defendants.[1086] On the issue of the requisite *mens rea* for aiding and abetting crimes, the Trial Chamber inferred knowledge on the part of the lower-level defendants.[1087] According to the Trial Chamber, the defendants were well aware that there would have been reprisals meted out on the people of Dujail in the aftermath of the failed assassination.[1088] They surmised that the defendants were members of the Ba'ath Party – and, as far as the Chamber was concerned, party membership, in effect, meant that the defendants would have been 'familiar with the nature of that party, especially as regards matters concerning its survival and rule under its leader, defendant Saddam Hussein.'[1089] Additionally, the Trial Chamber inferred what has been described as a 'common knowledge' concerning the character of the

[1085] For critical analysis of the legal proceedings see, Nehal Bhuta, 'The Trial and Appeal Judgments in the *Dujail* Case' (2008) 6(1) *Journal of International Criminal Justice* 39, 42-56, 56-61; Human Rights Watch Report, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (November 2006) Volume 18, No. 9(E) <http://www.hrw.org>; Michael Scharf and Salem Chalabi, '*The Iraqi Tribunal: The Post-Saddam Cases',* Summary of the Chatham House International Law Discussion Group Meeting, 4 December 2008 <http://www.chathamhouse.org.uk>; Ānī Abd al-Haqq, *The Trial of Saddam Hussein* (Clarity Press, 2008) 301–350.

[1086] Specifically, 'Ali Dayeh 'Ali al– Zubaidi, 'Abdullah Kadhim Ruwayid al-Mashaikh, and Mizher 'Abdullah Kadhim Ruwayid al– Mashaikh. For an-depth discussion of the case background, see *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006), 8–11.

[1087] See, *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006) [255].

[1088] *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006) [239], [253], [265].

[1089] *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006) [239].

regime.[1090] The Chamber opined, 'Iraqis, especially if they were members of that party, were well aware of the actions committed by party leaders since they came to power in 1968.'[1091] Ultimately, the Trial Chamber held:

> … the intentional involvement in the crime, which is the psychological element that must be present for complicity to occur, rests on the volition of the accomplice to be involved in realizing the conduct that constitutes the crime. It rests also on the cognizance of the nature of the acts in which the accomplice participates as well as his volition to bring about the outcome that the principal actor wants.[1092]

It appears that the IHT required that the accomplices not only know that they were assisting the commission of a crime, but that they had to also desire that criminal outcome. The IHT approach goes further than the Panels of Judges, but it closely reflects how the *Model Penal Code*, which is discussed below, interprets the term 'purposely'.

iii. Domestic jurisdictions that adopt a similar approach to the 'purpose' mens rea *test provided in Article 25(3)(c) of the ICC Rome Statute*

There are a number of domestic jurisdictions that adopt a similar approach to the 'purpose' *mens rea* test provided in Article 25(3)(c) of the *ICC Rome Statute*. The ICC provisions on aiding and abetting were adopted from the

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[1090] Nehal Bhuta, 'The Trial and Appeal Judgments in the *Dujail* Case' (2008) 6(1) *Journal of International Criminal Justice* 39, 55. Nehal Bhuta is highly critical of the IHT's reasoning regarding common knowledge about the nature of the regime. According to Bhuta, this aspect should have been introduced as evidence subject to judicial notice. However, this procedure was sidestepped altogether.

[1091] *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006) [265].

[1092] *Dujail Case (Trial Judgment)* (Iraq High Tribunal, Case No. 1/C1/2005, 11 May 2006) [240], [254], [266].

Model Penal Code of the American Law Institute.[1093] Additionally, a number of domestic jurisdictions have a similar purpose test as the basis of their accomplice liability provisions: for example, Canada[1094] and New Zealand.[1095] The approaches taken by these domestic jurisdictions with respect to the 'purpose' *mens rea* test are discussed below.

United States

The Model Penal Code[1096]

Article 2.06(3) of the *Model Penal Code* deals with accomplice liability; it applies a purpose test to the *mens rea* requisite. Specifically, Article 2.06(3)(a)(ii) deals with aiding and abetting criminal offences. The provision states:

> (3) A person is an accomplice of another person in the commission of an offense if:
>
> (a) with the purpose of promoting or facilitating the commission of the offense, he
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it …

According to Section 1.13(12) of the *Model Penal Code*, the terms 'intentionally' or 'with intent' mean: 'purposely'. Additionally, criminal offences that are carried out *purposely* are defined in Section 2.02(2)(a) of the *Model Penal Code* as:

[1093] 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* (C. H. Beck, 2nd ed, 2008) 757.

[1094] Section 21(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[1095] Section 66(1) *Crimes Act 1961*.

[1096] American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes*, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985).

> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

The *Model Penal Code* provisions on accomplice liability were modelled upon the approach laid down in *United States v Peoni*,[1097] where the Court held:

> All the words used – even the most colourless, 'abet' – carry an implication of purposive attitude towards it. [T]hey all demand that [the accessory] in some sort associate himself with the venture, that he participate in it as in something that he *wishes* to bring about, that he seek by his action *to make it to succeed*.[1098]

The approach taken in the first limb of *Model Penal Code* – Section 2.02(2)(a)(i) – and *Peoni* concerning how 'purpose' is interpreted with respect to the aiding and abetting modality reflects the ordinary use of the term. In essence, purpose refers to the accomplice's reasons for their actions.

With respect to this, an accomplice's purpose may be to engage in certain criminal activity. If the possibility of its occurrence exists, this may have determined whether or not the accomplice would act. In such circumstances, a 'but-for' connection may be found to exist between the accomplice's purpose,

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[1097] *United States v Peoni* (1938) 100 F 2d 401.

[1098] *United States v Peoni* (1938) 100 F 2d 401, 402 (italic emphasis added); for detailed discussion on this matter, see, 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, 940.

and the actual result; therefore, the argument could be made that the accomplice's purpose was the sole purpose.[1099] In contrast, a number of purposes may exist, whereby only one of these would need to be identified in order to establish criminal liability.[1100]

Furthermore, the second limb of the *Model Penal Code* definition with respect to criminal offences that are carried out *purposely* – Section 2.02(2)(a)(ii) – introduces an element of recklessness.

Canada

In Canada, Section 21(1)(b) of the *Criminal Code* adopts a purpose test that is similar to that adopted in Article 25(3)(c) of the *ICC Rome Statute*. Section 21(1)(b) of the *Criminal Code* provides:

> (1) Every one is a party to an offence who
>
> *(b)* does or omits to do anything for the purpose of aiding any person to commit it …

Section 21(1)(b) of the *Canadian Criminal Code* was considered by the Canadian Supreme Court in *R v Hibbert*.[1101] The central issue on appeal was the applicability of the duress defence in relation to criminal charges laid against Hibbert. However, of particular relevance to the discussion in this thesis was the Supreme Court's lengthy discussion on *mens rea*, more precisely the Supreme Court's analysis of the term 'purpose'. *R v Hibbert* involved the shooting of a victim (Fitzroy Cohen) in the presence of Lawrence

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[1099] Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 181.

[1100] Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 181.

[1101] *R v Hibbert*, 1995 CanLII 110 (S.C.C.).

Hibbert, the accused. Hibbert had assisted the principal perpetrator, Mark Bailey, to gain access to the victim. Hibbert claimed that the only reason he had done so was because he feared for his life and felt that he had no choice in the matter.[1102] Hibbert was charged with aiding the criminal offence that resulted in the victim's death. The Supreme Court considered the wording of Section 21(1)(b) of the *Canadian Criminal Code*, and opined that, ordinarily, the term 'purpose' had two distinct meanings. Purpose could refer to a person who does something on purpose, not accidentally; hence, the immediate intention to do that thing. Alternatively, purpose could also denote a person who does an act desiring to achieve a specific result.[1103] Bearing in mind the two distinct meanings of purpose, the Supreme Court considered the Canadian Parliament's intention when it drafted the *Criminal Code* provision with respect to aiding the commission of criminal offences. The Supreme Court found that equating purpose with intention best reflected the Parliament's objective.[1104] The Court held that the term 'purpose' provided in Section 21(1)(b) of the *Canadian Criminal Code* 'should not be seen as incorporating the notion of "desire" into the mental state for party liability, and that the word should instead be understood as being essentially synonymous with "intention".'[1105]

The Supreme Court's finding that purpose was synonymous with intention is

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[1102] For further details, see factual background *R v Hibbert*, 1995 CanLII 110 (S.C.C.), 9–13.

[1103] *R v Hibbert*, 1995 CanLII 110 (S.C.C.), 25–26.

[1104] *R v Hibbert*, 1995 CanLII 110 (S.C.C.), 28.

[1105] *R v Hibbert*, 1995 CanLII 110 (S.C.C.), 32.

radical.[1106] However, it is similar to the approach taken by the International Commission of Jurists (discussed earlier) and Section 66(1)(b)-(d) of the New Zealand *Crimes Act 1961* (discussed below) concerning the accomplice liability provisions.

New Zealand

New Zealand has the same accomplice liability provisions as those adopted in Canada. Section 66(1) of the *Crimes Act 1961* provides modes of participation in crimes. Specifically, Section 66(1)(b) adopts a purpose test that is similar to the one provided in Article 25(3)(c) of the *ICC Rome Statute*. According to Section 66(1)(b) of the *Crimes Act 1961*:

> (1) Every one is a party to and guilty of an offence who –
>
> (b) Does or omits an act for the purpose of aiding any person to commit the offence …

In New Zealand, intention is the *mens rea* standard that has been read into the accomplice liability provisions provided in Section 66(1)(b)-(d) of the *Crimes Act 1961*.[1107] The accomplice must intend to participate in the crime perpetrated by the principal.[1108] Hence, as Andrew Simester and Warren Brookbanks in their summation of the mental element for accomplice liability show, purpose is synonymous with intention. Simester and Brookbanks summarise the *mens rea* requisite as follows:

> (i) S must intend his own contribution (i.e. to aid, abet, incite, counsel, or

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[1106] See generally, Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 17.

[1107] A P Simester and W J Brookbanks, *Principles of Criminal Law* (Brookers Ltd, 2007) 175. For case authority on this issue, see, *R v Samuels* [1985] 1 NZLR 350 (CA).

[1108] A P Simester and W J Brookbanks, *Principles of Criminal Law* (Brookers Ltd, 2007) 175.

procure P); and

(ii) S must know the nature of P's actions. That is, S must know the 'essential matters' relating to P's actions which make those actions an offence.[1109]

iv. What should be the correct interpretation of the mens rea *purpose test provided in Article 25(3)(c) of the ICC Rome Statute?*

It appears from the previous discussion that there are competing views regarding the formulation of the *mens rea* purpose test for aiding and abetting the commission of crimes. Academics and international criminal law practitioners have posed different interpretations with respect to meaning of the purpose proviso provided in Article 25(3)(c) of the *ICC Rome Statute*. Differing interpretations are also found in domestic jurisdictions that adopt a similar approach with respect to the *mens rea* purpose test for the aiding and abetting modality.

The writer supports the view that the term 'purpose' should really be interpreted by its ordinary meaning. In the broad sense of the term, purpose ordinarily refers to the reason for doing the act. However, taking this strict approach to the *ICC Rome Statute* aiding and abetting provisions poses a number of difficulties. For example, MNCs may be engaged in their normal course of business but, in doing so, happen to aid crimes while carrying out their business activities. This is typically the case with MNCs that are accused of complicity in the commission of crimes.[1110] For another example,

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[1109] A P Simester and W J Brookbanks, *Principles of Criminal Law* (Brookers Ltd, 2007) 175.

[1110] See generally, Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 15.

corporations may aid principal perpetrators in the commission of crimes, but do so only for the purpose of making profit. This too is typical of MNCs operating in the extractive industries. It stands to reason that corporate offenders in the scenarios provided would fall outside the scope of Article 25(3)(c) of the *ICC Rome Statute* if the purpose proviso were read strictly. These difficulties will arise depending on how the ICC interprets the existing purpose *mens rea* test provided in Article 25(3)(c). This will be the case if Pre-Trial Chamber's comments in *The Prosecutor v Callixte Mbarushimana* are indicative of the Court's position on this.[1111] A strict reading of the aiding and abetting provision poses a major barrier to the prosecution of the corporate entities. Therefore, it is for this reason that Article 25(3)(c) should be amended in order to accommodate the characteristic forms of corporate involvement in international crimes. This thesis proposes the removal of the purpose provision from Article 25(3)(c) to overcome this barrier.

The discussion in Chapter 7, which deals with draft legislation, shows that by removing the purpose provision, the *ICC Rome Statute* provisions on aiding and abetting would be brought in line with customary international law.[1112] Also, the purpose provision creates a test that imposes a subjective threshold

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[1111] Granted, *The Prosecutor v Callixte Mbarushimana* primarily concerned common purpose liability and not aiding and abetting. See discussion earlier in this thesis with respect to the comments made by the ICC Pre-Trial Chamber I on this issue.

[1112] See for example, *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/I-T, 10 December 1998) [249]; *Prosecutor v Zigiranyirazo (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No. ICTR-01-73-T, 18 December 2008) [387]; *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [535]; *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007) [776].

that far outweighs the ordinary *mens rea* provided in Article 30 of the *ICC Rome Statute*.[1113] Removal of the purpose provision would mean that Article 30 of the *ICC Rome Statute* would apply instead.[1114] In essence, the revised provisions would catch complicit perpetrators that either knowingly or intentionally aid or abet the commission of crimes.

6.4 Complicity by contributing to a crime by a group of persons acting with a common purpose

Some academics and international criminal law practitioners argue that complicity by contributing to a crime by a group of persons acting with a common purpose is the preferred mode of participation in crimes to address businesses that are complicit in international crimes.[1115] In this chapter, the writer discusses customary international law and the provisions of the *ICC Rome Statute* relating to this mode of participation in crimes. The writer is of the view that it seems doubtful this approach would succeed. The challenges that lie with applying this modality to MNCs are discussed further below.

6.4.1 Overview of customary international law dealing with this mode of participation

The ICTY, the ICTR, the SCSL, and the ECCC legal instruments do not expressly provide for joint criminal enterprise or common purpose liability in international crimes.[1116] However, this mode of criminal liability has been developed extensively in

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[1113] 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* (C. H. Beck, 2nd ed, 2008) 757.

[1114] Article 30(1) of the *ICC Rome Statute* prohibits the commission of crimes that are perpetrated with intent and knowledge.

[1115] Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 865.

[1116] The joint criminal enterprise doctrine, also commonly known as the common purpose doctrine, is akin to the *ICC Rome Statute* prohibition on crimes committed by a group of persons acting with a common purpose. See, Andrew Clapham, 'Extending International Criminal Law beyond the

the jurisprudence emerging from these *ad hoc* international tribunals and special courts.[1117]

Three variations of joint criminal enterprise have been identified.[1118] The leading case discussing JCE from the ICTY Tribunal is the *Tadić* Appeal Judgment. According to the *Tadić* Appeal Chamber, the first variation, JCE 1, is a 'basic' form of liability in which the co-perpetrators of a common purpose possess the same criminal intention.[1119] JCE 2, the 'systemic' form, involves a common system of ill-treatment that the Appeal Chamber likens to the concentration camp cases.[1120] JCE 3, the 'extended' form, comprises acts that arise as a natural and foreseeable consequence outside the common plan of criminal activity.[1121]

The *Tadić* Appeal Chamber further found that all 3 JCE variations share the same elements of crime required to establish JCE.[1122] These entail:

Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899, 908; Héctor Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 347.

[1117] For example, *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [220], where the Appeal Chamber held 'the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal'; see also, *Prosecutor v Ntakirutimana (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004) [461] – [468].

[1118] Joint criminal enterprise hereafter referred to as JCE.

[1119] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [220].

[1120] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [220].

[1121] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [220].

[1122] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [227]; for further discussion of the elements of crime, see also, *Prosecutor v Krajišnik (Appeal Judgment)* (International Criminal Tribunal for the Former

a) Plurality of persons;[1123]

b) Existence of a common purpose amounting to or involving the commission of a crime;[1124] and

c) Contribution to a common plan by the accused in violation of a crime prohibited in the Statute.[1125]

It is the *mens rea* elements for the three JCE variations that differ. JCE 1 requires intent to perpetrate the crimes.[1126] JCE 2 requires knowledge of the ill-treatment system in place as well as intent to further that system of ill-treatment.[1127] JCE 3 requires intention to participate or further the criminal activity. In addition, JCE 3 requires that the:

> … responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[1128]

The three JCE variations discussed in the *Tadić* Appeal Judgment have subsequently

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Yugoslavia, Case No. IT-00-39-A, 17 March 2009) [57] – [102], [163], [206] – [251]; *Prosecutor v Kvočka, et al, (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-30/1-A, 28 February 2005) [96], [112] – [113], [421].

[1123] The *Tadić* Appeal Chamber was of the opinion that to show plurality of persons 'they need not be organised in a military, political or administrative structure …'; *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [227].

[1124] The *Tadić* Appeal Chamber found that to show the existence of this plan 'there is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;' *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [227].

[1125] The *Tadić* Appeal Chamber held 'this participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose;' *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [227].

[1126] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [228].

[1127] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [228].

[1128] *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A, 15 July 1999) [228].

been affirmed in a number of cases brought before the ICTY, the ICTR, the SCSL, and the ECCC.[1129]

In contrast, the *ICC Rome Statute* expressly deals with common purpose liability. Common purpose is also referred to as common design or joint enterprise.[1130] The *ICC Rome Statute* distinguishes between the actions of the principal perpetrators and their accessories.[1131] Principal perpetrators are dealt with pursuant to Article 25(3)(a) of the *ICC Rome Statute*.[1132] The accessory's liability is dealt with in Article 25(3)(d),[1133] which refers to this mode of liability as contributing to a crime by a group of persons acting with a common purpose. The provision states that a person is criminally responsible when that person:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

[1129] For further analysis of these three JCE variations see, *Prosecutor v Ntakirutimana (Appeal Judgement)* (International Criminal Tribunal for Rwanda, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004) [463] – [464]; *The Prosecutor v Fofana and Kondewa (CDF Case) (Trial Judgement)* (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007) [223]; *Co-Prosecutors v Nuon Chea and others (Case No. 2) (Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007/ECCC-OCIJ, 8 December 2009) [12] – [17]; *Co-Prosecutors v Kaing Guek Eav alias Duch (Case No. 1) (Trial Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007/ECCC-TC, 26 July 2010) [506].

[1130] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 95.

[1131] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 29, <http://www.icj.org>.

[1132] Principal perpetrators are held liable if they commit a crime 'jointly with another or through another.' The ICC Pre-Trial Chambers have indicated that this form of participation amounts to co-perpetration. See, *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/06, 29 January 2007) [322]. The provision requires a higher qualitative standard of contribution on the part of the principal perpetrator who is seen as exercising joint control over the crime; see, ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 29–30, <http://www.icj.org>.

[1133] The wording of the *ICC Rome Statute* provisions provided in Article 25(3)(d) substantially mirrored in the wording found in the legal instruments of the Panels of Judges and the IHT; see, Section 14(3)(d) of *Regulation 2000/15*; Article 15(2)(d) of the *IHT Statute*, respectively.

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.

The drafting of Article 25(3)(d) was somewhat controversial. At that time, a number of the Rome Conference delegates relied upon the Anglo-American concept of conspiracy that had been applied during the IMT trials. The notion of conspiracy had not only been problematic among civil law delegates at Nuremberg, but it was equally as controversial during the Rome Statute negotiations.[1134] The notion of conspiracy largely influenced the ILC's 1996 *Draft Code*, which is partly reflected in Article 25(3)(d).[1135] The Statute provision does not expressly use the term 'conspiracy'; however, it was adopted in earlier drafts.[1136] Article 25(3)(d) makes use of the phrase 'common purpose', and the text was adopted from the *International Convention for the Suppression of Terrorist Bombings*.[1137]

The final text of Article 25(3)(d) is riddled with complexities. The provision is difficult to interpret.[1138] This has been attributed by some to the outcome of the drafting process,

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[1134] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 94.

[1135] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 94. Article 2(3) of the 1996 Draft Code put forward a 'conspiracy-complicity concept generating liability only when a person "directly participates in planning or conspiring to commit such *which in fact occurs*".' (*ibid* 95, italic emphasis appears in author's text.)

[1136] See, Report of the ad hoc Committee on the Establishment of an International Criminal Court, (6 September 1995) UN Doc., A/50/22.

[1137] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T. M. C. Asser Press, 2003) 95.

[1138] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374. Albin Eser comments that the drafting of Article 25(3)(d) of the ICC Rome Statute 'can hardly hide the lack of expertise in criminal theory.' Albin Eser, 'Individual

which was seen as 'more compromise than craftsmanship.'[1139] At most, Article 25(3)(d) creates liability that is comparable to the *ad hoc* tribunals JCE 1 variation and perhaps, in part, JCE 2.[1140] Article 25(3)(d) appears to overlook the third variation of JCE recognised under customary international law. The chapeau to Article 25(3)(d) poses another difficulty. It adopts the phrase 'in any other way contributes to the commission or attempted commission of such crime.' This phraseology seems to establish a low level of participation.[1141] In doing so, 'the requirement of a group with a purpose that is at least known to the defendant limits the ambit of liability.'[1142] The manner in which the common purpose liability provision is interpreted is another cause for concern as it may depend on how the indefinite and definite articles will be interpreted.[1143] These appear in Article 25(3)(d)(i)[1144] and Article 25(3)(d)(ii)[1145] of the *ICC Rome Statute*, respectively.

With respect to this modality, the ICC Pre-Trial Chamber I, observed that in order to find a contribution to the commission of a crime pursuant to Article 25(3)(d) of the *ICC*

Criminal Responsibility' in A Cassese, P Gaeta and J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) volume 1, 803.

[1139] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374.

[1140] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374.

[1141] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374.

[1142] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374.

[1143] Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed, 2010) 374. See also discussion in, 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, 944.

[1144] This provision applies the indefinite article 'a'.

[1145] This provision applies the definite article 'the'.

Rome Statute, there must be a 'significant contribution' on the part of the accomplice.[1146] As for what amounts to significant contribution, this would be determined on a case-by-case basis.[1147]

In reality, the ICC have tended to rely upon the provisions of Article 25(3)(a) of the *ICC Rome Statute* as opposed to Article 25(3)(d) of the *ICC Rome Statute* to establish a theory of co-perpetration.[1148] With respect to how Article 25(3)(d) of the *ICC Rome Statute* will operate at the ICC, the ICC Pre-Trial Chamber has indicated that provision will serve as a residual form of accessory liability.[1149] The Chamber attributes this to the chapeau that is provided in Article 25(3)(d) of the *ICC Rome Statute* which adopts the phraseology 'in any other way contributes to the commission or attempted commission of such crime.' According to the Chamber, this 'makes it possible to criminalise those contributions to a crime which *cannot* be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of

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[1146] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [283].

[1147] *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [284]. Relying upon customary international law from the *ad hoc* Tribunals, the Chamber stated that some of these factors included: '(i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.' [284].

[1148] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 436.

[1149] *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/06, 29 January 2007) [337]; confirmed in *The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [278].

the Statute …'[1150]

6.4.2 Mode of participation and its application to complicit multinational corporations

Hans Vest is of the view that businesses are likely to be held liable pursuant to the second limb of Article 25(3)(d) of the *ICC Rome Statute*, whereby 'knowledge of the intention of the group to commit the crime' satisfies the *mens rea* requisite.[1151] Vest makes the argument that this mode of participation may be relied upon as 'a rescue clause' to overcome the difficulties posed by Article 25(3)(c).[1152] However, this raises a few concerns. Firstly, Article 25(3)(d) contains a provision that limits its application. The words, 'in any other way contributes', which appear in the chapeau to Article 25(3)(d) of the *ICC Rome Statute* seem to create a supplementary form of liability as opposed to a form of liability that could be applied as a way of getting around the difficulties of Article 25(3)(c).[1153] Consequently, Article 25(3)(d) seems to deal with contributions that may be seen as far too remote (for example, assisting with the arrangements for group meetings) to actually amount to assisting the commission of crime.[1154] Secondly, the two limbs of Article 25(3)(d) of the *ICC Rome Statute* contain different standards of *mens rea* requisites which amount to having contributed to the

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[1150] *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/06, 29 January 2007) [336] – [337] (emphasis added).

[1151] Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 865.

[1152] Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) *Journal of International Criminal Justice* 851, 865.

[1153] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 19. Though, see arguments in *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/06, 29 January 2007) [336] – [337].

[1154] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 20.

commission of a crime by a group of persons.[1155] Pursuant to Article 25(3)(d)(i), the first limb, the aider of the crime is acting to further the group's criminal activities or criminal purposes. This requires a specific intent on the aider's part to engage in activities that advance the group's criminal activities and ideological objectives.[1156] With respect to business persons, it is unlikely they would aim to further, by their contributions, the core criminal activities and purposes of a group; though they may accept this as a consequence of attaining their business interests.[1157] Pursuant to Article 25(3)(d)(ii), the second limb, this requires 'knowledge of the intent of the group to commit – not a, but clearly – *the* crime'[1158] prohibited in the chapeau to Article 25(3)(d). This would mean that the aider needs to have specific knowledge about the crime intended by the group.[1159] Indeed, it is unlikely that a business aider, albeit a financier, supplier, or beneficiary of a core crime, would be a member of the criminal group or possess specific knowledge of the group's intention to commit the crime.[1160]

[1155] See generally, Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 20.

[1156] 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* (C.H. Beck, 2nd ed, 2008) marginal no. 28.

[1157] Christopher Burchard, 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute' (2010) 8(3) *Journal of International Criminal Justice* 919, 944.

[1158] Christopher Burchard, 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute' (2010) 8(3) *Journal of International Criminal Justice* 919, 944.

[1159] 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* (C.H. Beck, 2nd ed, 2008) marginal no. 30.

[1160] Christopher Burchard, 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute' (2010) 8(3) *Journal of International Criminal Justice* 919, 944.

6.5 Chapter conclusion

This chapter continued the discussion on *how* an organisation that is complicit in international crimes could be prosecuted. Specifically, the writer discussed organisational complicity doctrine. The chapter provided a brief overview of the complicit modes of participation in international crimes, and examined several forms of corporate complicity in the commission of crimes. In particular, the writer examined aiding and abetting as well as contributing to a crime by a group of persons acting with a common purpose. Of these modes of participation, multinational corporations are most often accused of complicity by aiding and abetting. However, the current aiding and abetting provisions provided in the *ICC Rome Statute* pose a major barrier to the prosecution of corporate actors.

The next chapter concludes the discussion on *how* an organisational entity could be prosecuted for the commission of international crimes by proposing draft legislation to amend the *ICC Rome Statute*.

CHAPTER 7

Scope of Liability for Organisational Complicity: Draft Legislation

'... the architecture and plumbing of the ICC is taking shape and becoming effective. However, the main structure has to be consistently and effectively maintained, supported and improved. That will require political will on the part of the major nations that support the Court.'[1161]

7.1 Chapter introduction

The previous chapter discussed organisational complicity doctrine. In this chapter, the writer concludes the discussion on *how* an organisation that is complicit in international crimes could be prosecuted. This thesis recommends that the ICC is the preferred forum to deal with complicit organisational liability where domestic jurisdictions are unwilling or unable to address the research problem. Hence, this thesis recommends that the ICC State Parties should revisit the *ICC Rome Statute* in order to amend its provisions to include jurisdiction over complicit legal persons, and the writer provides draft legislation to address this issue. Finally, this chapter also examines how the State Parties to the *ICC Rome Statute* could go about amending its provisions.

The draft provisions generally discussed here would apply to accomplices. This is not to say principals would be excluded; aspects of these draft provisions would have a wider application and catch both modes of participation in international crimes. Furthermore, with respect to the *mens rea* requisite for complicit perpetration in the commission of international crimes, indeed there might be conflict where these draft provisions pose

[1161] Justice Richard Goldstone, 'Foreword' in Aegis, *The Enforcement of International Criminal Law* (January 2009) 2.

challenges for some State Parties to the *ICC Rome Statute*. So be it. Those State Parties would need to revisit their legislation implementing the Rome statutory provisions and amend it accordingly.

7.2 Draft legislation dealing with organisational liability

7.2.1 Discussion on the proposed provision – Article 25B

The organisational liability provisions proposed here could be included in the *ICC Rome Statute* as Article 25B. These proposed provisions would only deal with perpetration, while the general provisions on complicity (discussed further below) would apply to those legal persons accused of complicity in international crimes.

There are a number of factors that should be considered regarding the drafting of the proposed Article 25B provision. These are discussed here:

Jurisdiction of the Court

At present, Article 25 of the *ICC Rome Statute* deals solely with individual criminal responsibility. The Court's limited jurisdiction poses a major barrier to the prosecution of organisational entities. This is a major concern, especially when allegations of corporate complicity in international crimes are increasing. For this reason, the writer proposes draft legislation (Article 25B) to enable the ICC to exercise jurisdiction over legal persons.

Prohibition, punishment, and penalties

The writer proposes that, in Article 25B, a legal person who commits a crime within the jurisdiction of this Court shall be responsible and liable for punishment in accordance with Article 77B of this Statute. Similar wording prohibiting the commission of crimes by legal or juristic persons is expressed in Article 23(6) of the Preparatory Commission's

1998 *Draft Statute*[1162] and Article 23(6) of the French Delegation's draft corporate liability provisions,[1163] which were both presented at the Rome Conference.

Regarding the commission of crimes, Article 5 of the *ICC Rome Statute* stipulates which crimes fall within the jurisdiction of the ICC. Specifically, Article 5(1) prohibits the crime of genocide, crimes against humanity, and war crimes. These crimes are defined in Articles 6, 7, and 8 of the *ICC Rome Statute*, respectively. Article 5(1) also prohibits the crime of aggression, which is yet to be defined by ICC State Parties.[1164] In essence, the proposed provision for Article 25B would prohibit a multinational corporation and its related business enterprises from committing any crimes that fall within the jurisdiction of the Court.

Regarding the applicable punishments and penalties meted out against legal persons who commit crimes pursuant to Article 25B, the proposed provision would stipulate that Article 77B would apply. Article 77B is an additional statutory provision which the writer adopts in this thesis. The proposed provision is addressed later in this Chapter.

Liability model applied

Earlier in this thesis, the writer examined the competing models of corporate criminal

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[1162] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *'Draft Statute for the International Criminal Court'*, Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.

[1163] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court* (3 July 1998), UN Doc. A/Conf./183/WGGP/L.5/Rev.2.

[1164] Recently, participants at the Review Conference of the Rome Statute held in Kampala, Uganda in 2010 engaged in deliberations over a definition for the crime of aggression. See generally, ICC, Assembly of State Parties, *Review Conference of the Rome Statute*, <http://www.icc-cpi.int>.

liability that are applied in domestic jurisdictions.[1165] Of these, the writer identified that the theory of non-derivative liability is the appropriate model to transplant internationally within the *ICC Rome Statute*. Australia currently boasts the leading model for non-derivative liability.[1166] As shown previously, the organisation is treated as a separate real entity in its own right with non-derivative liability. Hence, the culpability of the organisation itself, as opposed to the culpability of its individuals, is of primary concern. This is because non-derivative liability is established on the basis of 'corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate "cultures" that tolerate or encourage criminal offences.'[1167] However, a major concern with the Australian non-derivative liability model is that it overlooks the distinctions between forms of subjective fault. The result of this is that the model applies an equal scheme of liability to all offences.[1168] The difficulty with this approach is that intention and knowledge are the only requisite subjective elements pursuant to Article 30(1) of the *ICC Rome Statute*. Negligence and recklessness are not subjective fault elements required to establish individual criminal responsibility for crimes that fall within the jurisdiction of the ICC. Therefore, an ideal non-derivative liability model to transplant internationally within the *ICC Rome Statute* is one which best reflects corporate intention and corporate knowledge.[1169] As the discussion earlier in this thesis has shown, corporate policy to commit an offence intentionally (i.e. purposefully) may

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[1165] See, 5.2 of this thesis.

[1166] See, Part 2.5, Division 12 of the Australian *Criminal Code* (Cth).

[1167] Allens Arthur Robinson *'Corporate Culture' as a Basis for the Criminal Liability of Corporations,* (2008) 4; see also, Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1.

[1168] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 38–41.

[1169] See earlier discussion on this at 5.2.3 of this thesis.

be considered where there are specific instructions issued to personnel to commit an offence; though, this is likely to be rare. Corporate policy may also be shown where it provides the most rational explanation for the corporation's actions. However, with respect to corporate complicity in international crimes, the *mens rea* form that is more likely to be in issue will be knowledge, not purpose. On this, the notion of collective knowledge could be invoked; this includes knowledge divided among corporate personnel. This could be surmised as follows:

> (1) (a) Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to commit the offence.
>
> (b) A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
>
> (2) (a) 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.
>
> (b) Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.[1170]

Legal persons defined

The writer provides a definition of a legal person in Article 25B. The definition is somewhat specific simply because this thesis has been concerned with the liability of multinational corporations in particular. This is not to say that the proposed provisions should not apply to other legal persons. Hence, a definition of a legal person proposed in Article 25B is: 'For the purpose of this Statute, a legal person shall include, but not be limited to, a publicly or privately owned multinational corporation and its related

[1170] Eric Colvin and Jessie Chella, 'Multinational Corporate Complicity: A Challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012, forthcoming) 13.

business enterprises whether incorporated or not.' This is a practical approach given that MNCs that operate in the extractive industries largely do so through a number of business forms, such as joint ventures, partnerships and no-liability companies. The Court will find 'piercing the veil', a basic tenet of company law, an indispensible tool in dealing with the doctrine of limited liability when faced with MNCs trying to escape liability by hiding behind complex organisational structures and superficial business forms.

Liability of natural persons not excluded

The writer proposes that Article 25B should stipulate that the criminal liability of natural persons who are perpetrators or accomplices in the same crimes should not be excluded. Similar wording dealing with the liability of natural persons is expressed in Article 23(5) of the Preparatory Commission's 1998 *Draft Statute*,[1171] and Article 23(5) of the French Delegation's draft corporate liability provisions.[1172]

The term 'natural persons' could generally include corporate actors such as: members of the board of directors, managers, employees, and agents of multinational businesses or other related business associates. It stands to reason that natural persons who aid and abet crimes should be dealt with pursuant to the existing provisions provided in Article 25(3)(c) of the *ICC Rome Statute*. However, the current *mens rea* purpose test provided in Article 25(3)(c) of the *ICC Rome Statute* poses a major barrier to prosecuting

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[1171] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *'Draft Statute for the International Criminal Court'*, Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.

[1172] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court* (3 July 1998), UN Doc. A/Conf./183/WGGP/L.5/Rev.2.

individual corporate actors (as well as corporate entities). Hence, the purpose test should be removed to overcome this difficulty. The proposed amendments to Article 25(3)(c) of the *ICC Rome Statute* are dealt with further below.

Joint or separate trials

The writer also recommends that the legal person and the natural person may be charged and tried jointly or separately. Similar wording on joint or separate trials is expressed in Article 23(6) of the French Delegation's draft corporate liability provisions.[1173]

This is a practical approach. A joint trial of a corporate offender and its corporate actors would be cost effective and timely; especially if the charges relate to the same offence and the Court is dealing with the same evidence. Alternatively, the Court could order separate trials in the interests of justice if a joint trial would be prejudicial to the accused,[1174] whether the legal or natural person.

7.2.2 Proposed provisions for organisational liability

Taking all the factors that have been discussed here into consideration, this thesis proposes the following provision for inclusion in the *ICC Rome Statute*:

[1173] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court* (3 July 1998), UN Doc. A/Conf./183/WGGP/L.5/Rev.2.

[1174] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 136.

Article 25B

Organisational liability

1. The Court shall have jurisdiction over legal persons pursuant to this Statute.
2. A legal person who commits a crime within the jurisdiction of this Court shall be responsible and liable for punishment in accordance with Article 77B of this Statute.
3. Where the requisite subjective element for the commission of a crime is intention or knowledge:

   (a) (i) Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to commit the offence.

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

   (b) (i) 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.

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

4. For the purpose of this Statute, a legal person shall include, but not be limited to, a publicly or privately owned multinational corporation and its related business enterprises whether incorporated or not.
5. The criminal responsibility of a legal person shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.
6. The legal person and the natural person may be charged and tried jointly or separately.

7.3 Draft legislation dealing with complicity by aiding and abetting crimes

7.3.1 Discussion on the proposed amendments to Article 25(3)(c) of the ICC Rome Statute

The writer in this thesis proposes the removal of the *mens rea* purpose test provided in

Article 25(3)(c) of the *ICC Rome Statute*. This approach would accommodate the characteristic forms of corporate involvement in international crimes.

There are a number of factors to consider regarding the proposed amendments to Article 25(3)(c) of the *ICC Rome Statute*. These are discussed here.

The effect of removing the purpose test means that, unless otherwise provided, the subjective element stipulated in Article 30 of the *ICC Rome Statute* would apply. Article 30 codifies the subjective element required to establish individual criminal responsibility for crimes that fall within the jurisdiction of the Court.[1175] According to Article 30(1), intent and knowledge are the subjective elements by which a person shall be criminally responsible and liable for punishment of a crime.[1176]

Article 30(1) adopts the conjunctive use of the term 'and' – that is, the provision prohibits the commission of crimes perpetrated with intent *and* knowledge (these subjective terms are defined below). Read strictly, the assumption could be made that the statutory provision requires both intent and knowledge to satisfy the subjective element. However, a strict reading of the provision raises some concerns.[1177] For instance, what would become of a complicit perpetrator who knowingly aided and abetted crimes but did not intend the consequences, i.e., purposefully? Assuming that the *ICC Rome Statute* provision were read strictly, that complicit perpetrator would fall outside the statutory provision because both subjective elements, that is, intent *and*

[1175] See generally, *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Case No. ICC-01/05-01/08, 15 June 2009) [353].

[1176] This would also bring the *ICC Rome Statute* provisions in line with customary international law established by the *ad hoc* international institutions. See discussion on this at 6.3 of this thesis.

[1177] For detailed discussion on this, see, Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 73.

knowledge, were not present. One could argue that such concerns may be overcome by relying upon Paragraph 2 of the *General Introduction to the Elements of the Crimes*. This provision provides some insight into what the drafters of the *ICC Rome Statute* had in mind. Paragraph 2 takes a broad approach; it provides for intent, knowledge, or both. According to the provision:

> Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., *intent, knowledge or both*, set out in article 30 applies.[1178]

Therefore, it would appear upon reading Paragraph 2 that the intention of those who drafted the Rome Statute provisions was to deal with these subjective mental elements disjunctively rather than conjunctively. Moreover, Antonio Cassese argues that the term 'and' could be construed as including the word 'or'.[1179] Cassese attributes this to the international law principle of effectiveness, *ut res magis valeat quam pereat*, whereby the grammatical interpretation gives way to effective interpretation.[1180] Hence, Cassese rationalises that the subjective elements of Article 30 of the *ICC Rome Statute* should be read as intention or knowledge, or even both.

These *mens rea* standards, intent and knowledge, are defined in Article 30 of the *ICC Rome Statute*. Specifically, Article 30(2) defines the term 'intent' as:

a) In relation to conduct, that person means to engage in the conduct;
b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

[1178] Paragraph 2 of the General Introduction to the Elements of Crimes, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes* (13–31 March and 12–30 June) 1 (italic emphasis added).

[1179] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 73.

[1180] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 73.

This means that pursuant to Article 30(2)(a) of the *ICC Rome Statute*, the *mens rea* standard for accused persons who aid and abet crimes is that they must mean to engage in such conduct. The accused person must mean to provide the principal perpetrator with, for example, transportation for the commission of the crime. Additionally, pursuant to Article 30(2)(b), the accused person must mean to cause that consequence, or be aware that it would occur in the ordinary course of events. So, an accused person who provides transportation in order to cause the perpetration of the crime, or is aware that the crime will be perpetrated in the ordinary course of events as a result of the provision of such transportation, will be liable.

Article 30(3) of the *ICC Rome Statute* defines the term 'knowledge' as: 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'[1181] This means that pursuant to Article 30(3), the *mens rea* standard for accused persons who aid and abet crimes is that they must be aware that a circumstance exists, or a consequence will occur, in the ordinary course of events. So, an accused person who knowingly provides a principal perpetrator with transportation that enables the perpetrator to commit crimes, or knowing the consequence of such will occur, will be liable.

It would appear that Article 30(3) requires a lower fault element than that prescribed in Article 30(2). The former requires an awareness that a circumstance exists, or its consequence; whereas the latter requires not only the intent to engage in such conduct, but also intent to cause the consequence, or awareness that the consequence will occur.

[1181] Furthermore, Article 30(3) of the *ICC Rome Statute* provides that '"know" and "knowingly" shall be construed accordingly.'

Additionally, Paragraph 3 of the *General Introduction to the Elements of the Crimes* provides that 'existence of intent and knowledge can be inferred from the relevant facts and circumstances.'[1182]

Proving what the aider and abettor knew about the criminal activities of the principal perpetrator may not be so easy.[1183] With respect to this, the International Commission of Jurists proposes that evidence relating to the relevant state of mind (of the corporate actors) may be shown by the following:

- Information readily available to the company representative at the time the company provided assistance.
- Specific information provided to company officials to the effect that the company's products or services were being used to commit crimes, could be relevant.
- There could be widespread knowledge that crimes are being committed using a company's goods or services, which could also be relevant to the question of whether company officials knew their acts were facilitating crimes.
- The context of the business transaction would also be relevant.
- The past behaviour of the principal perpetrator, and the duration and nature of the business relationship between the principal perpetrator and the company official may also be relevant.
- Knowledge can also be imputed from the position and experience of the accomplice in the company.[1184]

7.3.2 Proposed provisions for complicity by aiding and abetting

Having taken all these factors into account, this thesis proposes the following amendments to Article 25(3)(c) of the *ICC Rome Statute*:

[1182] Paragraph 3 of the General Introduction to the Elements of Crimes, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes* (13–31 March and 12–30 June) 1.

[1183] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 23, <http://www.icj.org>.

[1184] ICJ, *Corporate Complicity in International Crimes* (2008) volume 2, 23–24, <http://www.icj.org>.

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.

Therefore, the reworded provision would read:

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) Aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

7.4 Draft legislation dealing with punishments and penalties for legal persons

7.4.1 Discussion of the proposed provision – Article 77B

The writer proposes the inclusion of an Article 77B in the *ICC Rome Statute*. The proposed provision would stipulate the appropriate punishments and penalties meted out on legal persons, and extend the scope of the existing provision provided in Article 77, which deals with the applicable penalties meted out on natural persons.

Most domestic jurisdictions have corporate punishments and penalties in place. These criminal sanctions include measures such as: fines; imprisonment of senior management or members of the board of directors; corporate probation; and, corporate capital punishment.[1185] In more recent years, there have been additional measures adopted in domestic jurisdictions to penalise corporations, such as: instructing a convicted

[1185] See generally, Allens Arthur Robinson, *Brief on Corporations and Human Rights in the Asia-Pacific Region* (2006); Lex Mundi Business Crimes and Compliance Practice Group, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008); Anita Ramasastry and Robert C Thompson (eds), *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

corporation to substitute its directors, or change its senior management; execute corporate compliance plans; carry out community service; and, engagement of corporate monitors.[1186]

The idea of corporate punishments is not a new concept in international criminal law. The Preparatory Commission, which was tasked with drafting a statute for the establishment of an international criminal court, actually considered corporate punishments.[1187] Its 1998 *Draft Statute* included proposals for penalties that were applicable to legal persons, and reflected the corporate punishments already meted out in most domestic jurisdictions today. Article 76 of the 1998 *Draft Statute* states:

> A legal person shall incur one or more of the following penalties:
>
> (i) fines;
>
> [(ii) dissolution;]
>
> [(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]
>
> [(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]
>
> [(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
>
> [(vi) appropriate forms of reparation.]
>
> **N.B. Subparagraph (vi) should be examined in the context of reparation to victims.**[1188]

It appears that the Rome Conference delegates were unable to reach an agreement concerning the provisions in Article 76, and this dissention is evidenced by the words in

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[1186] See generally, Pamela H Bucy, 'Corporate Criminal Liability: When Does it Make Sense?' (Fall, 2007) 44 *American Criminal Law Review* 1437, 1439.

[1187] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *'Draft Statute for the International Criminal Court'*, Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.

[1188] Bold emphasis and brackets appear in the original text.

brackets.[1189] Interestingly, the only penalty that seems to have won accord was fines.

Regarding the enforcement of fines and forfeiture measures, Article 99 of the Preparatory Commission's 1998 *Draft Statute* addressed this issue. Articles 99(1) and (2) state:

> 1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] as fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] rendered by their national authorities.
>
>   [For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.]
>
>   [Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.
>
>   [The provisions of this article shall apply to legal persons.]]
> 2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 79 [paragraph 5 of article 54].]

The kinds of enforcement measures proposed in the 1998 *Draft Statute* are largely reflected today in the existing *ICC Rome Statute* provisions,[1190] as well as the *ICC Rules of Procedure and Evidence*.[1191] Suffice to say that the provisions dealing with these

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[1189] The Preparatory Committee was also unable to agree upon a number of provisions in the Draft Statute. For example, Article 23(7)(d), again evidenced by the words in brackets. See generally, Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (Spring 2008) 6(2) *Northwestern Journal of International Human Rights* 304, 310.

[1190] See, Part X of the *ICC Rome Statute*, which deals with Enforcement.

[1191] See, Section IV of the Rules of Procedure and Evidence which deals with Enforcement of Fines, Forfeiture Measures and Reparation Orders; International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002).

enforcement measures are applicable to what the *ICC Rome Statute* and the *Rules of Procedure and Evidence* commonly refer to as the 'sentenced person'. If the ICC were to exercise jurisdiction over legal persons, then the provisions dealing with these enforcement measures would also apply to MNCs. With regards to prison sentences, the ICC could follow the lead of domestic jurisdictions where a legal person is fined for an offence that only specifies a term of imprisonment.[1192]

7.4.2 Proposed provisions for punishments and penalties

Bearing all the factors discussed here in mind, this thesis adopts Article 76 of the *Preparatory Commission's 1998 Draft Statute*. The provision is amended in the following manner:

> **Article 77B**
>
> **Punishments and penalties**
>
> A legal person shall incur one or more of the following penalties:
>
> (i) Fines;
> (ii) Dissolution;
> (iii) Prohibition, for such period as determined by the Court, of the exercise of activities of any kind;
> (iv) Closure, for such a period as determined by the Court, of the premises used in the commission of the crime;
> (v) Forfeiture of instrumentalities of crime and proceeds, property and assets obtained by criminal conduct; and

[1192] As stated previously, for example, Section 12.1 of the *Australian Criminal Code* (Cth) stipulates that a body corporate may be found guilty of any offence including those that impose a term of imprisonment and notes that there are legislative provisions where a fine may be imposed for an offence that only specifies a term of imprisonment. Specifically, Section 4B(3) of the *Crimes Act 1914*. Pursuant to this provision, a single year of imprisonment would amount to the equivalent of a $33,000 fine for a corporate entity based on the pecuniary penalty unit system adopted in the Act. For commentary see, John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, Australia, 'Criminal Liability of Organisations' (Paper presented at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July–15 July 2008) 7.

(vi) Appropriate forms of reparation examined in the context of reparation to victims.

7.5 Amending the ICC Rome Statute provisions

State Parties to the *ICC Rome Statute* are well positioned to revisit the international treaty and negotiate amendments to its provisions. The *ICC Rome Statute* may be amended in the future to allow the Court to exercise jurisdiction over legal persons that are complicit in international crimes.

Article 123 of the *ICC Rome Statute* contains enabling provisions that set out the procedure to be followed by any State Parties considering amending the *ICC Rome Statute*. The Statute provides that at the initial stage, a Review Conference would be convened to consider proposed amendments to it. Pursuant to Article 123(1), a Review Conference could only take place seven years after the Statute had entered into force. The first of such review conferences was held in Kampala, Uganda, in 2010.[1193] Prior to the 2010 Review Conference, academics had speculated that the Assembly of State Parties would discuss the inclusion of corporate offenders in the Rome Statutory provisions, as well as the expansion of the Court's inherent jurisdiction over core crimes at the Review Conference.[1194] Regrettably, the 2010 Review Conference did not consider

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[1193] See generally, ICC, Assembly of State Parties, *Review Conference of the Rome Statute*, <http://www.icc-cpi.int>.

[1194] See discussions by The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, (3rd ed, March 2008), 110 <http://www.iccnow.org>; Astrid Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but Out of the Reach of the International Criminal Court' (2008) 21(3) *Leiden Journal of International Law* 699, 709–710; also, James Podgers, 'Corporations in the Line of Fire' (January 2004) *American Bar Association Journal* 13; see also, John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'*, UNSRSG Report, UN DOC: A/HRC/8/16 (15 May 2008) 10.

corporate crime; however, the issue could still be raised in the near future.[1195]

Article 121 of the *ICC Rome Statute* provides further clarification on the procedure that should be followed by any State Party that desires to amend it. Specifically, Article 121(1) states that seven years after the Statute enters into force, a State Party need only submit the text of any proposed amendments to the Rome Statute to the UN Secretary-General. The Secretary-General is then required to promptly distribute the proposed amendments to State Parties. Article 121(2) stipulates that the Assembly of State Parties may either vote at an Assembly meeting, or convene a Review Conference to determine whether or not to take up the proposed amendments. Furthermore, Article 121(3)–(7) provides details on the voting procedures for any proposed amendments and the entry into force regarding such amendments.[1196]

On the whole, complaints about the complicity of multinational corporations in human

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[1195] According to Article 123(2) of the *ICC Rome Statute* Review Conferences may be held in the future at any time after the first one, effectively removing the seven year waiting period from future conferences.

[1196] Specifically, Article 121(3)–(7) of the *ICC Rome Statute* states:

> (3) The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
>
> (4) Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
>
> (5) Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
>
> (6) If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
>
> (7) The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

rights violations are increasing. In theory, it seems inevitable that the *ICC Rome Statute* will need to be revisited to deal with this impunity gap.

7.6 Chapter conclusion

To reiterate briefly, this chapter concluded the discussion on *how* an organisation that is complicit in international crimes could be prosecuted. The writer in this thesis recommended draft legislation to amend the *ICC Rome Statute* provisions in order for the Court to exercise jurisdiction over complicit legal persons.

In the next Chapter, the writer provides the thesis conclusion.

CHAPTER 8

Thesis Conclusion

'Businesses have a legal responsibility and a moral responsibility, but if you want to cut to the chase, it's good for the bottom line, … where human rights are respected and defended, businesses flourish. Having two-thirds of the world's population living in poverty is not good for business. That's a huge market of potential customers, staff, shareholders and investors.'[1197]

8.1 Chapter introduction

The aim of this thesis was to examine the need for a doctrine of corporate liability in international criminal law that could serve as a response to misconduct by multinational corporations in Africa. The thesis also investigated the jurisdictional forums that would be appropriate for the prosecution of MNCs for conduct occurring in Africa. Additionally, this thesis set out to examine the forms of corporate liability and complicity that may be suitable, particularly with respect to the operations of MNCs. Finally, the thesis discussed the amendments that may be needed to the *ICC Rome Statute* to accommodate the characteristic forms of corporate involvement in international crimes.

8.2 Thesis summary of chapters

8.2.1 Criminal liability for business complicity in international crimes

Chapter 2 examined the issue of whether there should be criminal liability for business complicity in international crimes.

[1197] Interview: Claire Mallinson, Director, Amnesty International Australia, in Agnes King, 'Put People First' (August 20–26, 2009) *Business Review Weekly*, 46.

The writer discussed what it meant to allege business complicity in international crimes. The international community is dealing with powerful economic multinational businesses operating in environments where they face various socio-legal challenges. These businesses have, at times, carried out activities that have inflicted harm upon communities within which they operate. In more recent years, there has been a global push to hold such businesses criminally liable, particularly with respect to those aiding and abetting international crimes.

The writer examined what is currently being done to regulate the business activities of multinational businesses. The writer examined regulatory initiatives initiated by multi-stakeholders in the international community. These included: the OECD *Guidelines for Multinational Enterprises*; the *Equator Principles*; the UN *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*; the UN *Global Compact*; the EITI *Principles*; the *Voluntary Principles on Security and Human Rights*; and, the *Kimberley Process*.

Finally, the writer discussed whether the current regulatory approach was sufficient. In assessing these initiatives, it became apparent that there was a need for tougher measures to regulate the activities of multinational businesses. There are a number of limitations to the regulatory initiatives introduced and relied upon by the international community. Of particular concern is the fact that these initiatives are soft law; they do not place any enforceable legal obligations directly on the MNCs. The effectiveness of these initiatives is further prejudiced by the fact that they are voluntary. This has created a need for a doctrine of corporate liability in international criminal law whose sole aim would be to address the criminal liability of MNCs found to be complicit in international crimes.

8.2.2 Rationale for corporate criminal liability

Chapter 3 discussed the rationale for corporate criminal liability, and why criminal liability should extend to the corporate entity and not be confined to the corporate personnel of business enterprises.

Critics of corporate criminal liability have tended to query what the point of such a move would be. On this issue, the writer identified a number of reasons why liability should extend to the corporate entity and not be limited to its personnel. Imposing liability on MNCs would serve as an explicit prohibition against corporate wrongdoing. This would also serve to deter corporations from engaging in criminal activities. In addition, imposing liability would allow for the imposition of sanctions against corporate assets; thus, allowing for a means to provide redress for victims. Finally, extending liability to the corporate entity would be beneficial where culpable individuals are not easily identifiable.

The writer also discussed some of the practical difficulties that stem from the corporate structure of MNCs. The writer identified characteristic features of multinational corporations that pose challenges with respect to imposing liability on corporate individuals as well as culpable enterprises within the same corporate group. The writer examined the challenges posed by the cross-border activities of multinational businesses. By definition, these businesses typically operate in more than one State. MNCs exercise tremendous economic influence by operating globally through various business forms, such as joint ventures, partnerships, and no-liability companies. MNCs and their business enterprises also tend to adopt complex organisational structures and internal control systems which make it difficult to identify ultimate decision-makers or the real controllers of subsidiaries and their personnel.

The writer examined the issue of whether it was unfair to impose criminal liability through acts such as sanctions on corporate assets. Critics of corporate criminal liability have tended to argue that the shareholder's role in the business enterprise is a passive one; therefore, liability punishes blameless shareholders. However, such criticism overlooks the critical role that shareholders can, and should, play in actually monitoring the activities of the corporate entities that they choose to invest in. Also, it overlooks the benefits enjoyed by shareholders and ignores the fact that if they profit from successful corporate activities, it is only reasonable that they bear some of the costs resulting from corporate wrongdoing.

In Chapter 3, the writer also examined fundamental objections to corporate criminal responsibility arising from the nature of criminal law. The issue of corporate criminal responsibility has been controversial. Critics of corporate criminal responsibility argue that corporate entities are incapable of possessing the requisite *mens rea*, and consequently are legal fictions, which cannot be punished *per se*. With respect to these objections, the writer discussed models of corporate liability that have been adopted in most domestic law. These address the issue of how corporate entities can possess the requisite *mens rea*; they include: derivative and non-derivative liability. Also, corporations are not legal fictions. Of the competing theories of legal personality, the realist theory of legal personality advocates that corporations are, in fact, real entities that exist independently. With regards to international legal personality, States and individuals are subject to international law. However, there is still much debate as to whether this also extends to corporations, let alone multinational corporations. Leading academics argue that this concept should be applied to MNCs because, as the discussion demonstrated, these already possess rights and duties under international law. Finally, the writer examined how corporate entities could be punished. This discussion showed

that domestic jurisdictions already apply a wide range of criminal sanctions, which address corporate misconduct. Fines were the most common form of corporate punishment.

8.2.3 Jurisdictional forums

Chapter 4 examined a number of existing forums with jurisdiction over international criminal offences. This included a discussion of domestic, regional, and international forums. Of these forums, only domestic forums exercise jurisdiction over corporate complicit liability for the commission of international crimes.

The writer identified that domestic forums generally had criminal and tort legislative provisions in place to deal with the problem of complicit organisational liability for international crimes. The writer also examined some of the traditional principles of jurisdiction that trigger criminal liability for international crimes – namely: the territorial principle, the nationality principle, the protective principle, the passive personality principle, and the universality principle. Generally, there is a *prima facie* argument that these traditional principles of jurisdiction could be applied with respect to the criminal activities of multinational corporations wherever they operate. The writer discussed the many challenges with respect to the suitability of domestic forums, and concluded that where domestic jurisdictions prove inadequate, legal persons should be held criminally responsible for their complicit role in the commission of international crimes at an international forum such as the ICC.

The discussion on regional forums examined the three regional courts: the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights. However, the difficulty with these courts is that they only deal with cases brought against the State Parties of each of the respective Courts –

thus, corporate criminal liability falls outside the scope of the Courts' jurisdiction. Furthermore, the regional courts are not empowered with the jurisdiction to prosecute complicit persons.

The discussion on international forums included the ICC as well as the ICTR, the SCSL, the ICTY, the IHT, and the ECCC. Apart from the ICC, the difficulty with these forums is that they are limited in their jurisdiction. These *ad hoc* tribunals and special courts were created to deal with specific crimes committed during a specific time in a specific conflict that was perpetrated in a specific region.

Finally, the writer identified that the ICC was the preferred forum for addressing the problem of complicit organisational liability. The writer also noted that the competence of the Court was limited to natural persons. The ICC Rome Statute provisions dealing with individual criminal responsibility would need to be amended for the Court to be able to exercise jurisdiction over organisational liability, and thereby address this impunity gap. Also, the aiding and abetting provisions of the *ICC Rome Statute* would need to be amended to accommodate the characteristic forms of corporate involvement in international crimes.

8.2.4 Organisational liability doctrine

In Chapter 5, the writer examined the models of corporate liability that are applicable to the business operations of MNCs. In doing so, the writer commenced the discussion on *how* organisational complicity in international crimes could be prosecuted by discussing organisational liability doctrine.

The writer addressed the issue of attributing corporate criminal liability in domestic jurisdictions. The thesis traced the historic origins of the corporation – the earliest registered company emerged in common law jurisdictions during the sixteenth century.

The manner in which companies emerged hugely impacted upon the development of company law, and in turn the way that the resulting law treated these companies.

The writer provided a brief historical overview of the emerging nature of corporate criminal liability, before examining two competing theories of corporate liability models found within most domestic jurisdictions. The derivative liability model is comprised of two approaches. The first is 'vicarious liability', where the corporation is liable for the actions of its individuals where those individual actions fall within the ambit of their employment or authority. The culpability of an individual is then imputed to the corporation. Vicarious liability is criticised for being too broad in its application. A more practical approach to this theory was discussed in relation to the US *Model Penal Code*, which takes a more stringent approach. With the second approach of derivative liability, 'identification liability', only the culpability of specific individuals, those seen as the directing minds of the corporation, will be imputed to the corporation. This theory is criticised for being too narrow in its application and out of touch with the emerging complex structures of modern corporations, which make it difficult to attribute responsibility to specific individuals. A broader approach of this theory, which widens the pool of those seen as the directing minds of the corporation, has been identified in some jurisdictions and applied in statutory instruments. In contrast, with the non-derivative liability model, the body corporate is seen as a separate legal entity in its own right and the culpability of the corporate entity is of primary concern. Under the Australian approach, this is established by the existence of a corporate culture that directed, encouraged, or tolerated the offence, or the failure to create a corporate culture of compliance that follows established laws. A difficulty with the Australian approach to this model is that it overlooks the distinctions between forms of subjective fault and applies an equal scheme of liability to all offences. Because knowledge and intention

are the only *mens rea* requisites considered before the ICC, an ideal non-derivative liability model to transplant internationally within the ICC would be one that reflects this.

In Chapter 5, the writer also discussed opportunities that the international community has missed in developing a system for organisational liability. The International Military Tribunals established in the aftermath of WWII laid the foundation for organisational liability, but the *ad hoc* international institutions that were created almost fifty years later did not build on this any further. Neither were they adopted at the *ICC Rome Statute* deliberations, as the State Parties failed to agree on the inclusion of corporate criminal liability provisions.

Finally, this thesis identified that the theory of non-derivative liability is the preferred model of corporate liability to transplant internationally; a model that is easily adoptable with the *ICC Rome Statute*.

8.2.5 Organisational complicity doctrine

The writer continued the discussion on *how* organisational complicity in international crimes could be prosecuted by discussing organisational complicity doctrine in Chapter 6.

Briefly, this thesis provided an overview of the complicit modes of participation in international crimes. Specifically, the writer examined two modes of complicity in the commission of crimes in Chapter 6: aiding and abetting; and, contributing to a crime by a group of persons with a common purpose.

Aiding and abetting is the mode of complicity most often alleged of multinational corporations. This thesis traced the historical development of complicity by aiding and abetting in international criminal law. Additionally, the writer analysed the specific

provisions on aiding and abetting pursuant to Article 25(3)(c) of the *ICC Rome Statute*. This mode of participation is distinguished in international criminal law by the *mens rea* standard applied by the international institutions. The ICTY, the ICTR, the SCSL, and the ECCC all apply a *mens rea* 'knowledge' test, whereas the legal instruments of the ICC, the Panels of Judges, and the IHT apply a 'purpose' test. This thesis examined how academics and international criminal law practitioners have interpreted the purpose provision, and examined how this *mens rea* standard has been interpreted pursuant to customary international law, as well as domestic jurisdictions that adopt a similar test. There is no consensus as to what the 'purpose' test entails. However, the examination showed that purpose is either synonymous with intention or knowledge. Jurisprudence emerging from the ICC Pre-Trial Chamber seems to indicate that purpose is synonymous with intention; however these were remarks made in passing by the Chamber. The 'purpose' test, as it appears in Article 25(3)(c) of the *ICC Rome Statute*, narrows the scope of the aiding and abetting provisions. Hence, corporate actors would fall outside the purview of Article 25(3)(c) if the purpose provision were read strictly. The writer is of the view that the provision should be removed so as to allow the ICC to address organisational complicit liability.

This thesis also examined 'complicity by contributing to a crime by a group of persons with a common purpose'. This mode of participation in the commission of crimes has developed differently through the decisions of *ad hoc* tribunals and special courts. Contributing to a crime by a group of persons, commonly referred to as 'joint criminal enterprise' at the *ad hoc* institutions, is not expressly included in statutory instruments, but it has emerged from their jurisprudence. In contrast, the *ICC Rome Statute* expressly deals with what it refers to as common purpose liability in Article 25(3)(d). The *Statute* provisions on this mode of participation are complex and have been debated widely.

Although there are those who favour this mode over aiding and abetting, it seems doubtful that the common purpose liability approach would succeed with respect to the criminal liability of business complicity in international crimes – most MNCs are often accused of aiding and abetting crimes instead. Also, multinational businesses are unlikely to be a member of the kind of criminal group prohibited under Article 25(3)(d) of the *ICC Rome Statute*, let alone possess specific knowledge of the group's intention to commit the crime pursuant to the provisions of Article 25(3)(d)(ii).

8.2.6 Draft legislation

Chapter 7 concluded the discussion on *how* an organisation complicit in international crimes could be prosecuted, and discussed the required amendments to the *ICC Rome Statute* that would be necessary to allow the Court to address organisational complicity. The writer proposed draft legislation that dealt with the liability of legal persons, amendments to the existing aiding and abetting provisions, as well as applicable criminal sanctions and penalties for legal persons.

Regarding the proposed provisions, the thesis proposed that legal persons who commit criminal offences should be held liable to punishment pursuant to Article 25B. The writer is of the view that non-derivative liability is the preferred model to transplant internationally within the *ICC Rome Statute*. Hence, the provision in Article 25B treats the legal person as a separate entity in its own right. The provision also provides that the criminal liability of natural persons who are accomplices in the same criminal offences should not be excluded.

The thesis proposed amendments to the existing *ICC Rome Statute* provisions that deal with complicity for international crimes. The 'purpose' test currently provided in Article 25(3)(c) poses a major barrier to the prosecution of MNCs that aid and abet the

commission of crimes. The existing statutory provision does not take into account the characteristic forms of corporate involvement in international crimes. Removing the *mens rea* purpose test would mean that, unless otherwise provided, the subjective fault elements of Article 30 would apply – that is, intent and/or knowledge.

This thesis discussed corporate punishments and penalties applied in most domestic jurisdictions, and criminal sanctions which were also considered during the 1998 Rome Conference deliberations. The writer examined Article 76 of the Preparatory Commission's 1998 *Draft Statute*, which addressed this issue, and the provisions of which largely reflect a number of the measures already applied in domestic jurisdictions, such as corporate fines, forfeitures, and closures. This thesis proposed inclusion of an Article 77B in the *ICC Rome Statute* to extend the existing Article 77 that currently deals with the applicable penalties for natural persons. In essence, the proposed Article 77B adopts the wording stipulated in Article 76 of the 1998 *Draft Statute* provision.

8.3 Thesis concluding remarks

Multinational corporations need to seriously consider how to manage the risk of complicity in egregious human rights violations.[1198] Any MNC working with State or non-State actors in either Extreme-Risk or High-Risk Countries should be mindful of this – especially since the risk of complicity with human rights abuses is prevalent in countries where good governance is most challenged.[1199] Granted, international criminal law does not presently recognise the complicit liability of corporations or any other legal persons. Nevertheless, there is still a real possibility that this may change given the

[1198] HRW Report, *On the Margins of Profit: Rights at Risk in the Global Economy* (2008) 4–5 <http://www.hrw.org>.

[1199] John G Ruggie, UNSRSG, 'Next Steps in Business and Human Rights' (Speech delivered at the Royal Institute of International Affairs, Chatham House, London, 22 May 2008).

growing number of allegations of grave human rights violations levelled against business enterprises operating in the extractive industries.

APPENDIX 1: MAP OF EXTREME- AND HIGH-RISK COUNTRIES IN AFRICA [2011–2012]

Key:
Extreme Risk countries appear in bold
High Risk countries appear in italics

Adapted from Maplecroft

APPENDIX 2:
EXAMPLES OF NATURAL RESOURCES FOUND IN EXTREME-RISK COUNTRIES IN AFRICA

Extreme-Risk Country 2009–2010	Natural Resource as of 2010
Chad	Oil, gold, lime, limestone, salt, soda ash, stone, uranium, clay, sand
Central African Republic	Diamonds, oil, gold
DR Congo	Coltan, copper, diamonds, cobalt, gold, zinc
Nigeria	Oil, tin, columbite, iron ore
Somalia	Uranium
Sudan	Oil, iron ore, copper
Uganda	Copper, cobalt
Zimbabwe	Diamonds, coal, chromium, asbestos, gold

Adapted from: United Nations Environmental Programme <http:www.unep.org> and World Reach/ Exploring Africa, Agricultural and Mineral Resources: African Countries <http://exploringafrica.matrix.msu.edu>.

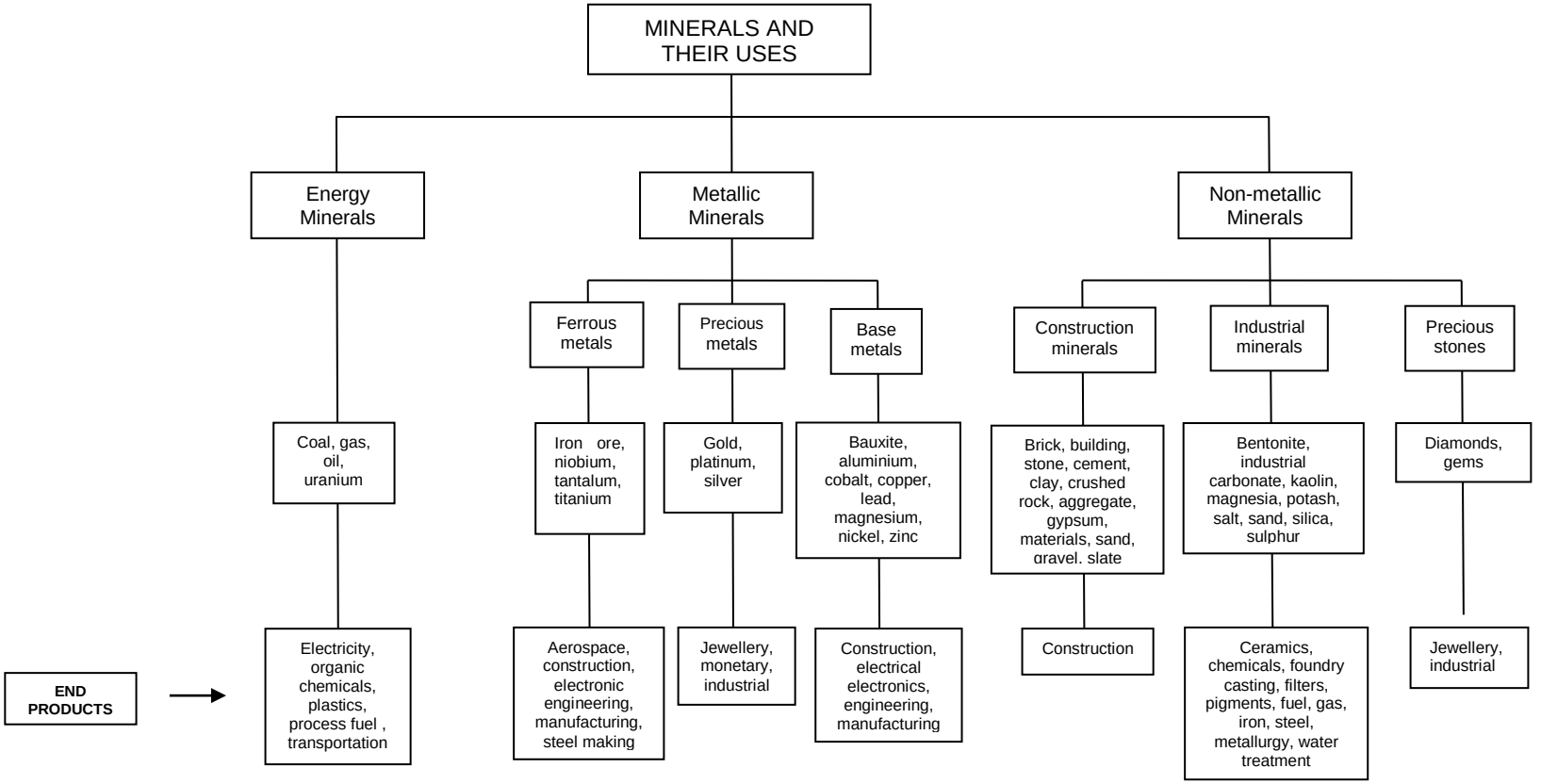
APPENDIX 3:
EXAMPLES OF NATURAL RESOURCES FOUND IN HIGH-RISK COUNTRIES IN AFRICA

High-Risk Country 2009–2010	Natural Resource as of 2010
Algeria	Oil
Burkina Faso	Gold, copper, manganese, zinc, limestone
Burundi	Gold
Cameroon	Oil, aluminium, gold
Côte D'Ivoire	Oil, diamonds, manganese
Egypt	Oil, iron ore, phosphates
Ghana	Oil, gold, diamonds, bauxite, manganese
Guinea	Bauxite, diamonds, iron ore, uranium, gold
Kenya	Limestone, soda ash, rubies
Liberia	Iron ore, diamonds, gold, timber, rubber

High-Risk Country 2009–2010	Natural Resource as of 2010
Libya	Oil, gypsum
Madagascar	Ilmenite, graphite, chromite, coal, bauxite, uranium, cobalt
Malawi	Limestone
Morocco	Phosphates, manganese, iron ore
Niger	Uranium, gold, oil, coal, iron ore
Senegal	Phosphates, iron ore
Sierra Leone	Diamonds, bauxite, iron ore, gold, rutile
Tanzania	Tin, phosphates, iron ore, diamonds, gold
Zambia	Copper, cobalt, zinc, lead, gold

Adapted from: United Nations Environmental Programme <http:www.unep.org> and World Reach/ Exploring Africa, Agricultural and Mineral Resources: African Countries <http://exploringafrica.matrix.msu.edu>.

APPENDIX 4: EXAMPLES OF NATURAL RESOURCES FOUND THROUGHOUT AFRICA AND THEIR USES



(Source: UNCTAD, *World Investment Report (2007): Transnational Corporation, Extractive Industries and Development*)

APPENDIX 5:
STATE PARTIES TO THE ICC ROME STATUTE

Afghanistan
Albania
Andorra
Antigua and Barbuda
Argentina
Australia
Austria
Bangladesh
Barbados
Belgium
Belize
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Bulgaria
Burkina Faso
Burundi
Cambodia
Canada
Cape Verde
Central African Republic
Chad
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Colombia
Comoros
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Cook Islands
Costa Rica
Croatia
Cyprus
Czech Republic
Democratic Republic of Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Estonia
Fiji
Finland
France
Gabon
Gambia
Georgia
Germany
Ghana
Greece
Grenada
Guinea
Guyana
Honduras
Hungary
Iceland
Ireland
Italy
Japan
Jordan
Kenya
Latvia
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malawi
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Nauru
Netherlands
New Zealand
Niger
Nigeria
Norway
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Republic of Korea
Republic of Moldavia
Romania
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Samoa
San Marino
Senegal
Serbia
Seychelles
Sierra Leone
Slovakia
Slovenia
South Africa
Spain
Suriname
Sweden
Switzerland
Tajikistan
The Former Yugoslav Republic of Macedonia
Timor-Leste
Trinidad and Tobago
Tunisia
Uganda
United Kingdom
United Republic of Tanzania
Uruguay
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Zambia

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