ISBN 978-90-6704-361-8

Preadviezen

146

KNVIR

ASSER PRESS

Preadviezen

Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht

146

Dr A. Duval
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Living up to International Criminal Law: State of Affairs, Prospects and Mandates

ASSER PRESS November 2019 KNVIR

Koninklijke Nederlandse Vereniging voor Internationaal Recht

Nederlandse groep van de International Law Association

Opgericht 28 november 1910.
Vereniging ingeschreven in het Handelsregister van de Kamer van Koophandel onder doss.nr 40531373

Ereleden:
Prof. Mr Dr A.H.A. Soons
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Contributie € 35 per jaar; voor leden jonger dan 30 jaar € 20. Voor leden van de KNVIR staat het lidmaatschap open van de International Law Association (ILA). De contributie daarvan bedraagt £ 30; voor leden jonger dan 30 jaar £ 15. Voor academische instellingen, bibliotheken, bedrijven en instellingen gelden andere bedragen.
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Losse exemplaren van de *Preadviezen*, *Mededelingen Nr 146* zijn verkrijgbaar bij het Secretariaat en T.M.C. Asser Press: press@asser.nl

LIVING UP TO INTERNATIONAL CRIMINAL LAW: STATE OF AFFAIRS, PROSPECTS AND MANDATES

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CONTENTS

THE PAST, PRESENT AND FUTURE OF CORPORATIONS UNDER INTERNATIONAL CRIMINAL LAW*

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The authors thank Maisie Biggs, M.Sc. LL.B., for her helpful support in the preparation and editing of this preadvies. All links to websites checked on 19 August 2019.

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ABBREVIATIONS

ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
ECCHR	European Centre for Constitutional and Human Rights
HRDD	Human rights due diligence
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal of the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPT	Occupied Palestinian Territory
STL	Special Tribunal for Lebanon
UNGPs	United Nations Guiding Principles on Business and Human Rights

1. INTRODUCTION

As we write, a multitude of big and small corporations are constantly roaming the globe in search of the highest returns on their investments and the lowest prices for their inputs. Some of them,[1] blinded by the pursuit of profits, are ready to engage in Faustian bargains to improve their profitability on the back of the rights and livelihoods of those who are disenfranchised and disempowered by the crushing economic forces of modernity. At times, commercial deals are made with devilish regimes who systematically mistreat their subjects, leading to systematic exploitation and ultimately death. With the intensification of globalization and the emergence of powerful multinational enterprises able to do business almost everywhere around the globe, the involvement of corporations in international crimes has gained a lot of scholarly attention in recent years.[2] In this context, the question of corporate liability for international crimes has been a 'fiercely debated issue'.[3] For some, the 'winds are changing' and it 'no longer seems to be a matter of whether corporations are liable under international law, but rather *how* such liability would be implemented – in other words, what the material elements for liability are and what an effective penalty structure would look like'. [4] In this *preadvies*, we would like to review whether (and how) the winds have actually been changing in practice and whether the metaphor of the 'expanding web of liability for business entities implicated in international crimes'[5] reflects the legal reality on the ground. In other

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1 Others would say all of them, see Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished*, Abingdon, Routledge 2015.

2 The *Journal of International Criminal Justice* dedicated a special issue to the subject in 2010, as did the *International Criminal Law Forum* in 2018. Recent comprehensive articles on the subject include: Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities', 12 *Chinese Journal of International Law* (2013) pp. 43-77; Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project', 30(1) *Leiden Journal of International Law* (2017) pp. 221-240; and Carsten Stahn, 'Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law', 50(1) *Case Western Reserve Journal of International Law* (2018) pp. 91-125. For a socio-legal review of recent developments, see L.A. Payne and G. Pereira, 'Corporate Complicity in International Human Rights Violations', 12 *Annual Review of Law and Social Science* (2016) para. 12:20.1–20.22.

3 Wolfgang Kaleck and Miriam Saage-Maass, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes', 8(3) *Journal of lnternational Criminal Justice* (2010) pp. 699-724, at p. 700.

4 C. Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law', 49 *Geo. Wash. Int'l L. Rev.* (2016) pp. 351-403, at p. 402. This metaphor of the 'winds of change' is a recurrent theme in the literature; see also E. Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges', 6(2) *Northwestern Journal of International Human Rights* (2008) pp. 22-261, at p. 260.

5 An expression first employed in the FAFO study by Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, Fafo-report 536 (2006) and later popularised through the title of a much-cited academic piece, see Robert Thompson, Anita Ramasastry and Mark Taylor, 'Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes', 40(4) *The George Washington International Law Review* (2009) pp. 841-902,

words, has this 'expanding web' been able to capture actual corporations in its nets?

International Criminal Law (ICL)[6] emerged primarily as a response to the horrors of the 20th century. While some 'industrialists' were tried after World War II,[7] the main focus was squarely on political and military leaders. In practice, it is quite rare for a business enterprise to be primarily a criminal one and most, if not all, of the cases discussed below revolve around some type of direct or indirect contribution to international crimes committed by a specific regime or political grouping.[8] This is why the question of the standard applicable to criminal complicity has taken such a prominent place in the discussions on the intersection between ICL and corporations, leading to the emergence of 'complicity studies'.[9] More fundamentally, it has also been hotly disputed whether corporations are a suitable addressee of criminal law, or whether ICL should focus exclusively on the human beings behind the legal person.[10] Without claiming to provide definitive answers to these issues, this *preadvies* studies various legal contexts in which ICL and corporations have crossed both at the national and international level and aims to give an informed sense of the directions in which their interaction is moving. In doing so, we scrutinize first the treatment of corporate liability by international criminal courts (Section 1). Thereafter, we turn to the translation of ICL into national legal contexts and observe through a limited number of case studies how allegations of corporate involvement in international crimes have played out at the national level (Section 2). Finally, we discuss the relevance of the place of gross human rights abuses in the human rights due diligence (HRDD) approach pro-

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at p. 841. The formula even found its way in the conclusion of the Ruggie Framework, see 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5, 7 April 2008, at p. 27.

6 In the framework of this paper, we adopt a narrow understanding of ICL focusing only on international crimes enshrined in Art. 5 of the Rome Statute.

7 Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial', 8(3) *Journal of International Criminal Justice* (2010) pp. 783-802.

8 This is highlighted by many authors, such as Harmen van der Wilt, n. 2, at p. 64: 'Whereas corporations rarely directly and intentionally engage in attacks on civilians (unless they make their profits as Murder Inc. by hiring out hit men), their involvement in such war crimes is often diffuse and difficult to prove'; Stahn, *supra* n. 2 at p. 113: 'The key problem is that the primary purpose of business activity is mostly to make economic gain, rather than to commit crimes'; and Larissa van den Herik and Jernej Letnar Černič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again', 8(3) *Journal of International Criminal Justice* (2010) pp. 725-743, at p. 741: 'In most situations, corporations are not among those masterminding international crimes, but they rather benefit from a given situation and exploit the financial opportunities that these situation provide.'

9 A. Clapham, 'Corporations and criminal complicity', in G. Nystuen, A. Follesdal and O. Mestad (eds.), *Human Rights, Corporate Complicity and Disinvestment*, Cambridge, Cambridge University Press 2011, pp. 222-239, at p. 225.

10 Sceptical about corporate liability, see Thomas Weigend, 'Societas delinquere non potest?: A German Perspective', 6(5) *Journal of International Criminal Justice* (2008) pp. 927-945.

moted by the United Nations Guiding Principles on Business and Human Rights (UNGPs) unanimously endorsed by the U.N. Human Rights Council (Section 3).

2. CORPORATE RESPONSIBILITY AT INTERNATIONAL CRIMINAL COURTS

From the outset, it needs to be mentioned that there is very little evidence to support the proposition that international law, at least as it currently stands, recognises direct criminal responsibility for corporations *qua* legal entities. Both international agreements defining international crimes and treaties establishing international criminal courts and tribunals focus on questions of individual (rather than corporate) criminal responsibility. Overall, agreements defining crimes provide that individuals (as opposed to corporate entities) may be prosecuted for them.[11] The reference to 'persons' in the Convention on the Prevention and Punishment of the Crime of Genocide[12] is limited to natural persons, as only they can have the requisite *dolus specialis* for genocide.[13] With respect to war crimes, the 1949 Geneva Conventions provide for the criminal responsibility of individuals, rather than corporations[14] – a position which is also reflected in Art. 6(2)(b) of Additional Protocol II covering internal conflicts.[15] In a similar vein, neither the Convention against Torture[16] nor the Slavery Conventions[17] create any regime of corporate

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11 'Brief of *Amicus Curiae* Professor James Crawford in Support of Conditional Cross-Petitioner', *Presbyterian Church of Sudan v. Talisman Energy, Inc., cert. den.*, 131 S. Ct. 79 (2010), No. 09-1262, Brief filed 23 June 2010, p. 4.

12 See Art. 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, entered into force 12 January 1951, 78 *UNTS* 277.

13 M.A. Drumbl, 'Genocide: The Choppy Journey to Codification', in M. Bergsmo, E.J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Brussels, Torkel Opsahl Academic EPublisher 2018, pp. 609-636, at pp. 626-627.

14 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), adopted 12 August 1949, entered into force 21 October 1950, 75 *UNTS* 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), adopted 12 August 1949, entered into force 21 October 1950, 75 *UNTS* 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), adopted 12 August 1949, entered into force 21 October 1950, 75 *UNTS* 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), adopted 12 August 1949, entered into force 21 October 1950, 75 *UNTS* 287.

15 According to Art. 6(2)(b): 'No one shall be convicted of an offence except on the basis of individual penal responsibility'. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977, entered into force 7 December 1978, 1125 *UNTS* 609.

16 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 *UNTS* 85.

17 Convention to Suppress the Slave Trade and Slavery, adopted 25 September 1926, entered into force 9 March 1927, 60 *LNTS* 253. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, adopted 7 September 1956, entered into force 30 April 1957, 266 *UNTS* 3.

responsibility. Rather, they impose an obligation upon State Parties to criminalise certain acts in their domestic legislation and to provide for appropriate penalties.[18] If we turn to the constituent instruments of international criminal courts and tribunals, a useful point of departure in assessing the question of corporate liability in this context is the theoretical distinction between organisational and corporate criminality.[19] As Karavias explains: 'While the former makes the individual within a collective entity susceptible to punishment, the latter directs the punishment towards the collective entity itself.'[20] In this light, and for present purposes, the analysis here will focus on whether the relevant instruments encompass corporate criminality within their scope. The current state of the law with regard to corporate criminality has been succinctly summarised by Crawford: 'The development of a law of individual criminal responsibility has not – or not yet – been paralleled by a regime of corporate criminal responsibility.'[21] Indeed, none of the statutes of the major international criminal tribunals established to date provide for jurisdiction over legal persons.[22]

2.1 The legacy of Nuremberg

The Charter of the Nuremberg Tribunal provided for the trial and punishment of persons who committed crimes 'either as individuals or as members of organisations'.[23] In an oft-quoted passage, the International Military Tribunal at Nuremberg (IMT) stated that 'crimes against International Law are committed by men, not by abstract entities'.[24]

The subsequent trials of German industrialists[25] for their involvement in Nazi practices including slave labour and deportation at the US Military Tribunals at

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18 See Art. 4 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* n. 16. Art. 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, *supra* n. 17.

19 M. Karavias, *Corporate Obligations under International Law*, Oxford, Oxford University Press 2013, at p. 90.

20 Ibid.

21 James Crawford, *State Responsibility: The General Part*, Cambridge, Cambridge University Press 2013, at p. 80.

22 A notable exception here is the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014 not yet in force). The Protocol expressly extends criminal liability to corporations under Art. 46(C) <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

23 Art. 6 of the Charter for the Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 82 *UNTS* 279. See also Art. 5 of the International Military Tribunal for the Far East, 19 January 1946, available at <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf>.

24 IMT Judgment, 'The Trial of The German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg', Vol. 22, 1950, at p. 466.

25 See *United States v. Friedrich Flick*, *Law Reports of Trials of War Criminals (UNWCC)*, Vol. IX, London: His Majesty's Stationary Office 1949, at p. 1; *United States v. Krupp, Law Reports of Trials of War Criminals (UNWCC)*, Vol. X, London: His Majesty's Stationary

Nuremberg under Control Council Law No. 10[26] have been read as implying that the corporations themselves had committed the crimes with which their directors were charged.[27] For instance, in *I.G. Farben* the court stated:

> With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries […]. The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers or public officials of the German Reich. […] Such action on the part of Farben constituted a violation of the Hague Regulations.[28]

At first blush, the *IG Farben* judgment seems to create precedent for the proposition that international law recognizes the concept of direct corporate criminality. In this vein Clapham has argued that the *Farben* judgment 'can be read as implying that the Farben company itself had committed the relevant war crime, even though the Tribunal had no jurisdiction over Farben as such.'[29]

However, upon closer scrutiny this proposition rests on thin evidentiary grounds. Firstly, as Clapham himself acknowledges, Control Council Law No. 10 did not provide for any jurisdiction over legal persons, as its *rationae personae* jurisdiction was limited to natural persons.[30] In this light, the relevant statement merely constitutes an *obiter dictum*.[31] Secondly, this reading rests on the assumption that the

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Office 1949, at p. 69; *United States v. Krauch* (the *I.G. Farben* case), *Law Reports of Trials of War Criminals (UNWCC)*, Vol. X, London: His Majesty's Stationary Office 1949, at p. 1. For analysis, see D. Stoitchkova, *Towards Corporate Liability in International Criminal Law*, Ph.D. Thesis, University of Utrecht 2010, pp. 53-60, available at <https://dspace.library.uu.nl/handle/1874/40349?.

26 Control Council Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity', 20 December 1945, available at <http://avalon.law.yale.edu/imt/imt10.asp>.

27 See for example S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *The Yale Law Journal* (2001) pp. 443-545, at p. 477; A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M.T. Kamminga, S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague, Kluwer Law International 2000, p. 139, at pp. 166-171.

28 *United States v. Krauch* (the *I.G. Farben* case), *supra* n. 25, at pp. 49-50. See also *United States v. Krupp, supra* n. 25, at p. 139, where it was stated that: 'the confiscation of the Austin plant […] and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations […] that the Krupp firm, through defendants […], voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and the Paris property […].'

29 Clapham, *supra* n. 27, at p. 171.

30 See Art. 2 of Control Council Law No. 10, *supra* n. 26.

31 Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel et al. v. Royal Dutch Petroleum*, No. 10-1491, Brief filed 13 June 2012, p. 17, fn. 20, available

relevant international law norms were addressed to corporations *qua* legal entities; any finding of responsibility necessarily rests on the assumption that the 'responsible actor' is also the one to whom the norm is addressed.[32] This does not seem to be the case here; nowhere in the judgment is there evidence that the US Military Tribunal recognised or affirmed that, as a matter of positive international law, corporations as such were directly bound by the international law of occupation.[33] The *Flick* judgment corroborates this point. In *Flick,* in describing the scope of the Hague Regulations, the Tribunal stated that the relevant provisions: 'were written in a day when armies travelled on foot, in horse-drawn vehicles and on railroad trains […]. Concentration of industry into huge organisations transcending national boundaries had barely begun.'[34] In this light, the suggestion that *I.G. Farben* was the first judgment affirming the existence of direct corporate responsibility under international law seems exaggerated; the court clearly did not consider corporations as addressees of international law norms and, on this basis, it could also not view them as incurring responsibility. It is worth noting that the *I.G. Farben* judgment itself makes it clear that any references to the corporation itself do not equate acknowledgement of direct corporate responsibility. The Tribunal pointed out that:

> It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. *We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed.* But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution […] must establish by competent proof beyond a reasonable doubt that an individual was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand.[35]

The dictum makes it abundantly clear that individual criminal responsibility was not seen in any way as deriving from the corporation's (alleged) responsibility.[36] As Karavias stresses:

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at <https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.pdf>.

32 See by analogy commentary to Art. 2 of the Draft articles on the Responsibility of States for Internationally wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd session, (2001) *Yearbook. of the ILC* Vol II, para. 7, at p. 35. See also Karavias, *supra* n. 19, at p. 4.

33 Karavias, *supra* n. 19, at p. 96.

34 *United States v. Friedrich Flick*, *supra* n. 25, at p. 23.

35 *United States v. Krauch* (the *I.G. Farben* case), *supra* n. 25, at p. 52. [Emphasis added].

36 K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford, Oxford University Press 2011, at p. 253.

> [T]he USMT [was] called upon to pronounce on the criminal responsibility of individuals who acted in the organizational context of a group or organization or corporation. In order for these individuals to be convicted, their participation in and acquiescence to the criminal activities of the group or corporation had to be proven beyond reasonable doubt. It is only logical that reference is made to the acts of a group as a whole. The USMT […] employed language that indicated the group as having committed the crime, *as a form of legal shorthand*. [37]

In this light, it is safe to conclude that corporations were neither directly bound by ICL nor incurred responsibility for violations of ICL according to the case-law of the Nuremberg military tribunals.[38]

2.2 Post-Nuremberg developments

Post-Nuremberg developments bear out the same conclusion as the one reached above. The Statutes for the International Criminal Tribunal of the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) provide only for jurisdiction over natural persons.[39] The drafting of the Rome Statute[40] was a landmark moment for the future of the concept of corporate criminality under international law.[41] During the Diplomatic Conference at Rome (preceding the adoption of the Rome Statute), the French delegation made a sustained effort to extend the *rationae personae* jurisdiction of the (future) Court to include corporations.[42] According to the (final) French proposal the responsibility of a private corporation was linked to the individual criminal responsibility of a leading member of the corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation in the course of its activities.[43] The proposal was finally withdrawn after three weeks of negotiations.[44] There are a number of reasons why the question of corporate criminal responsibility was ultimately abandoned. The main reason was that the concept was not recognized in many national legal systems – something that would have created difficulties for the application of the principle of complementarity.[45] Fur-

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37 Karavias, *supra* n. 19, at p. 97. (Emphasis added). See also K.J. Heller, *supra* n. 36, ibid.

38 K.J. Heller, *supra* n. 36, at pp. 253-254.

39 Art. 6 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, available at <http://www.icty.org/en/documents/statute-tribunal>; Art. 5 of the Statute of the International Criminal Tribunal for Rwanda (as amended on 13 October 2006), 8 November 1994, available at <http://legal.un.org/avl/pdf/ha/ictr_EF.pdf>.

40 Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

41 For analysis see Clapham, *supra* n. 27.

42 Van der Wilt, *supra* n. 2, pp. 46-48. For the text of the (final) French proposal, see UN Doc. A/CONF.183/C.1/WGCP/L.5/Rev.2 in H. van der Wilt, ibid., pp. 46-47.

43 UN Doc. A/CONF.183/C.1/WGCP/L.5/Rev.2, ibid.

44 Clapham, *supra* n. 27, at p. 150.

45 K. Ambos, 'Article 25 – Individual Criminal Responsibility', in O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court – A Commentary*, 3rd ed., Oxford, Hart

thermore, it was feared that the Court would be confronted with serious evidentiary problems when prosecuting legal entities and that introducing the concept of corporate criminality might somewhat detract from the Court's main jurisdictional focus – which is on individuals.[46]

The fact that the Rome Statute makes no reference to corporations attests to the lack of consensus on corporate criminal responsibility in the international legal system.[47] As Crawford points out: 'The episode is significant, concerning as it does the central international criminal law instrument of our time. It demonstrates the absence of any accepted rules or standards for corporate criminal responsibility in international law.'[48] A further indication of the reluctance with which States have so far approached the question of corporate criminality is that, although proposals to extend the jurisdiction of the Court to corporations were included in the Kampala Review Conference in 2010, these received only limited attention and were eventually overshadowed by the discussion on the crime of aggression.[49]

It is noteworthy that more recent international agreements, especially those targeting financial transactions, require the enactment of domestic law addressing corporate liability. These include *inter alia*: the International Convention for the Suppression of the Financing of Terrorism;[50] the UN Convention against Transnational Organized Crime;[51] the UN Convention against Corruption;[52] the Council of Europe Convention on the Prevention of Terrorism;[53] and the Convention on combating bribery of foreign public officials in international business transactions.[54]

Publishing 2016, p. 475, at p. 478; A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I, Oxford, Oxford University Press 2002, p. 767, at p. 779; Van der Wilt, *supra* n. 2, at p. 45. Clapham, *supra* n. 27, at p. 157.

46 Ambos, ibid., Eser, ibid.

47 Crawford, *supra* n. 21, at p. 81. Karavias, *supra* n. 19, at p. 100.

48 'Brief of *Amicus Curiae* Professor James Crawford in Support of Conditional Cross-Petitioner', *supra* n. 11, at p. 10; Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *supra* n. 31, at p. 18.

49 J. Wouters and A.-L. Chané, 'Multinational Corporations in International Law', in M. Noortmann, A. Reinisch and C. Ryngaert (eds.), *Non-State Actors in International Law,* Oxford, Hart Publishing 2015, p. 225, at p. 250.

50 Art. 5, para. 1 of the International Convention for the Suppression of the Financing of Terrorism, adopted 9 December 1999, entered into force 10 April 2002, available at <https://www.un.org/law/cod/finterr.htm>.

51 Art. 10, para. 2 of the UN Convention against Transnational Organized Crime, adopted 15 November 2000, entered into force 29 September 2003, available at <https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-11%20AM/Ch_XVIII_12p.pdf>.

52 Art. 26, para. 2 of UN Convention against Corruption, adopted 31 October 2003, entered into force 14 December 2005, available at <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

53 Art. 10, para. 2 of the Council of Europe Convention on the Prevention of Terrorism, adopted 16 May 2005, entered into force 1 June 2007, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016808c3f55>.

54 Art. 2 and Art. 3, para. 3 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 17 December 1997, entered into force

Even in the case of these treaties however, liability is not restricted to criminal liability alone and Member States are allowed to adopt civil or administrative measures instead. The same formula is replicated in the on-going work of the International Law Commission (ILC) on the Draft Articles on Crimes against Humanity.[55] The Special Rapporteur of the ILC on the topic, Sean Murphy, has taken note of the uneven practice in national laws with regard to the issue of criminal liability of corporations as well as of the lack of evidence supporting the existence of 'corporate criminality' as a matter of international law.[56] As a result, Draft Art. 6, para. 8 (as it currently stands) reads:

> Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.[57]

As a final note, it needs to be stressed that, while not related to international crimes as such, the Special Tribunal for Lebanon (STL) has ruled that it has jurisdiction over private corporations in the context of contempt cases.[58] More particularly, in the *New TV S.A.L* Appeal Decision, it was held that:

> While it remains true that no post-World War II International criminal court or tribunal has previously found that it had the authority to try legal persons, this singular fact does not convince the Appeals Panel that the term "person" under Rule 60 *bis* excludes legal persons when seen through the prism and nature of the Tribunal's inherent power to protect the integrity of its proceedings. Indeed, corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law. Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that, given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.[59]

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15 February 1999, available at <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

55 See <http://legal.un.org/ilc/guide/7_7.shtml>.

56 See Second Report on Crimes against Humanity by Special Rapporteur S. Murphy, UN Doc. A/CN.4/690, 21 January 2016, at paras. 42-44.

57 Fourth Report on Crimes against Humanity by Special Rapporteur S. Murphy, UN Doc. A/CN.4/725, 18 February 2019, at p. 53.

58 STL Appeals Panel, *In the case against New TV S.A.L. and AL Khayat,* Case No. STL-14-05-PT/AP/AR 126.1, F0012, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings (2 October 2014); STL Appeals Panel, *In the case against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/PT/AP/AR126.1, F004, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings (23 January 2015).

59 STL Appeals Panel, Decision 2 October 2014, *supra* n. 58, at para. 67 (footnotes omitted).

For some, the ruling has been hailed as a 'symbolic moment […] filled with historical references and normative ambition'[60] which could indicate a shifting approach towards acceptance of the notion of corporate criminal responsibility for international crimes.[61] At the same time, it needs to be noted that the decision has been vociferously criticized both in the literature[62] and by members of the Tribunal itself.[63] For instance, Dov Jacobs described it as an example of 'judicial vigilantism' which 'was reasoned in a way that will one day turn out to be a nightmare for those who genuinely are trying to promote due process and the rule of law, in ICL and beyond.'[64] Similarly, Yvonne McDermott Rees stated that 'the quality of the reasoning is questionable. This is another example of judicial activism from the Special Tribunal for Lebanon, and perhaps not its most well-reasoned decision to date.'[65] In his Dissenting Opinion, Judge Akoum pointedly stated that:

> [I]n the face of ambiguity, the majority of this Appeals Panel has, in my view, extended our jurisdiction *rationae personae* in contempt proceedings by the adoption and application of an interpretive methodology that does not accord with the highest standards of international criminal justice. There is a fine line, but a line nevertheless, between a creative interpretation of the law and a violation of the rights of the accused. In the circumstances of the present case, I believe that line has been impermissibly crossed.[66]

One must bear in mind that there are two main points that greatly weaken the value of this line of case-law as authority for the proposition that international criminal law, as it currently stands, recognizes the criminal liability of corporations. First, the finding regarding corporate criminal responsibility ultimately rests on an

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60 Stahn, *supra* n. 2, at p. 98. See also generally N. Bernaz, 'Corporate Criminal Liability under International Law: The *New TV S.A.L.* and *Akhbar Beirut S.A.L*. Cases at the Special Tribunal for Lebanon', 13(2) *Journal of International Criminal Justice* (2015) pp. 313-330.

61 Kaeb, *supra* n. 4, at pp. 364-371.

62 For a useful summary see Russell Hopkins, 'Comments on the STL's Approach to Corporate Criminal Responsibility', Corporate War Crimes, available at <https://corporatewarcrimes.com/2015/04/13/comments-on-the-stls-approach-to-corporate-criminal-liability/>.

63 STL, Contempt Judge Lettieri, *In the Case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/PT/CJ, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment (24 July 2014), at paras. 74-75. Dissenting Opinion of Judge Akoum, *In the case against New TV S.A.L. and AL Khayat*, at para. 4.

64 D. Jacobs, 'The Dream Factory Strikes Again: The Special Tribunal for Lebanon recognises International Criminate Corporate Liability', Spreading the Jam, available at <https://dovjacobs.com/2014/04/28/the-dream-factory-strikes-again-the-special-tribunal-for-lebanon-recognizes-international-criminal-corporate-liability/>.

65 Y. McDermott Rees, 'Corporate Criminal Responsibility at the Special Tribunal for Lebanon', PhD Studies in Human Rights, available at <http://humanrightsdoctorate.blogspot.com/2014/05/corporate-criminal-responsibility-at.html>.

66 Dissenting Opinion of Judge Akoum, *In the case against New TV S.A.L. and AL Khayat*, *supra* n. 63, at para. 29.

interpretation of the Tribunal's own constitutive instruments.[67] As the Appeals Panel highlighted in the *Akhbar Beirut* case, unlike other international tribunals, the STL is primarily mandated to apply Lebanese criminal law and not exclusively international criminal law.[68] According to the Appeals Panel:

> It would be an oddity for a Lebanese company to face criminal sanction in Lebanon for interfering with the administration of justice with respect to cases before Lebanese courts and at the same time enjoy impunity for similar acts before an internationalised Tribunal guided by Lebanese law in carrying out its judicial work.[69]

Secondly, the relevant finding was confined to the crime of contempt and did not extend to crimes under the Tribunal's primary jurisdiction.[70]

3. CORPORATE RESPONSIBILITY FOR INTERNATIONAL CRIMES IN THE NATIONAL CONTEXT

The previous section focused on the (lack of) international developments regarding corporate liability under ICL. In practice, not much seems to have changed since the Nuremberg trials, as corporations remain excluded from the jurisdiction of international courts (with the STL currently the exception that proves the rule). While one may lament this state of play, it does not preclude the possibility for states to uphold the liability of corporations for international crimes. In practice, national authorities have integrated this possibility in a plurality of ways.[71] In some jurisdictions (such as the Netherlands and Sweden), authorities remained focused primarily on individual corporate officers, in others (such as France) prosecutors have started to investigate and indict corporations directly for their involvement in international crimes. Finally, in the United States civil liability in the guise of the Alien Tort Statute (ATS) was used until recently to hold corporations to account for their alleged contributions to international crimes. This section will review some of the most prominent cases falling under these different approaches, in order to provide an overview of the legal strategies available to connect corporations with international crimes at the national level.

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67 M. Hakimi, *In re Akhbar Beirut & Al Amin,* STL-14-06/S/CJ, 111(1) *American Journal of International Law* (2017) pp. 132-139, at pp. 137-138.

68 STL Appeals Panel, *In the case against Akhbar Beirut S.A.L. and Al Amin*, *supra* n. 63, at paras. 57, 59.

69 Ibid., at para. 59.

70 Dissenting Opinion of Judge Akoum, *In the case against New TV S.A.L. and AL Khayat*, *supra* n. 63, at para. 4.

71 In general, on the application of national law to complicity for international crimes, see A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', 6(5) *Journal of International Criminal Justice* (2008) pp. 899-926, at pp. 912-919.

3.1 The criminal liability of corporate executives for international crimes: The lasting strength of the 'Nuremberg Paradigm'

The first set of national cases discussed follows closely what is referred to as the 'Nuremberg Paradigm';[72] in other words, the traditional approach of ICL outlined above, which disregards the corporate entity to hold the executives individually responsible for international crimes committed on behalf of the corporation. In this regard, it is not our intention to do a comprehensive comparative study of such cases. Instead, we decided to focus our attention on two countries, which in recent years witnessed (or are still witnessing) prominent criminal cases involving corporate executives: The Netherlands and Sweden.

3.1.1 *Merchants of death: The* Kouwenhoven *and* Van Anraat *cases*

In the Netherlands, two Dutch traders, one involved in selling chemicals (Van Anraat), the other in procuring weapons (Kouwenhoven), have been prosecuted, tried and convicted for international crimes related to their business activities. These two cases are regularly cited in the discussions on corporations and international crimes as they constitute a very rare occurrence in which businessmen were not only prosecuted and tried, but also convicted for their trading activities.[73]

Frans van Anraat was the main supplier of thiodiglycol, a chemical necessary to produce mustard gas, for the Iraqi government under Saddam Hussein. Hussein's armed forces deployed the mustard gas during the Iran-Iraq war as well as against the Kurdish population of Iraq, causing numerous deaths and debilitating long-term injuries to civilians. The Dutch prosecutor brought a case against Van Anraat before the District Court of The Hague in 2005. While he was acquitted of the charge of complicity to genocide, the court did conclude that Van Anraat was complicit in war crimes and sentenced him to fifteen years of imprisonment.[74] This decision was upheld by the Court of Appeals,[75] the Supreme Court of the Netherlands[76] and

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72 Referring to the 'Nuremberg Paradigm', see Cedric Ryngaert, 'Finding Remedies for Historical Injustices: Dealing with Organizations and Corporations', *Leuven Center for Global Governance Studies Working Paper No. 38* (2010) at p. 5 and Stahn, *supra* n. 2, at p. 98.

73 On these cases, see Harmen van der Wilt, *supra* n. 2, at pp. 43-77, at pp. 61-64 and Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity', 8(3) *Journal of International Criminal Justice* (2010) pp. 803-828, at pp. 810-815.

74 District Court of The Hague, *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, Case No 09751003-04, 23 December 2005. On this decision, see Harmen G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction; Reflections on the van Anraat Case', 4(2) *Journal of International Criminal Justice* (2006) pp. 239-257; L. van den Herik, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia', 9(1) *International Criminal Law Review* (2009) pp. 211-226; and Huisman and Van Sliedregt, ibid.

75 Court of Appeal of The Hague, *Public Prosecutor v. Van Anraat*, Case No. 2200050906-2, 9 May 2007. See also Van der Wilt, *supra* n. 74.

76 Supreme Court of The Netherlands, *Public Prosecutor v. Van Anraat*, Case No. 07/10742, Judgment, 30 June 2009.

the European Court of Human Rights.[77] Moreover, some of the profits made by Van Anraat from the sale of chemicals was confiscated to compensate the victims.[78] This case put Dutch traders of chemical substances on notice that selling to governments susceptible to engaging in international crimes can lead to their personal criminal liability at home. In Clapham's words, 'the Court of Appeal [went] out of its way to send a message to the corporate world, and reach out beyond the circle of individuals normally associated with war crimes'.[79]

The second case, which was concluded in 2017, concerns Guus Kouwenhoven, an owner of two logging companies (the Royal Timber Company and the Oriental Timber Company) operating in Liberia during the second civil war raging at the turn of the century. These companies were used to provide material aid to Charles Taylor's regime through, in particular, the delivery of weaponry and the provision of logistical support and even fighters. The investigation against Kouwenhoven started in 2004 and he was taken into custody in March 2005. After a first decision by the District Court of The Hague in June 2006,[80] on appeal the Court of Appeal of The Hague in March 2007 acquitted the defendant,[81] but The Supreme Court of the Netherlands quashed this decision in April 2010.[82] It was only seven years later in 2017 (and after Kouwenhoven had gone into hiding) that the Court of Appeal of 's-Hertogenbosch sentenced him to 19 years of imprisonment for illegally importing weapons and ammunition and complicity in war crimes committed by Charles Taylor's regime.[83] The court held that Kouwenhoven had made an active contribution to the war operations of the combined Liberian armed forces by providing weapons, transportation, sites and personnel.[84] Additionally, the defendant's conduct demonstrated that he must have been aware that the weapons he supplied would be used in the armed conflict and exposed himself to the significant probability that war crimes would be committed by third parties.[85] Hence, the Court concluded that the defendant had deliberately provided the means for the war crimes committed by the combined Liberian armed forces and had therefore deliberately been an accomplice to these war crimes.[86]

These two cases have much in common. They involve two individual traders with personal business ties with regimes engaging in well-known systematic human rights abuses. Moreover, both were trading in goods that had a direct potential to

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77 European Court of Human Rights, *Van Anraat v. State of The Netherlands*, Application no. 65389/09, Decision on Admissibility, 6 July 2010.

78 District Court of The Hague, *Public Prosecutor v. Van Anraat*, Case No. 09/751003-04, 16 December 2010.

79 Clapham, *supra* n. 71, at p. 912.

80 District Court of The Hague, *The Public Prosecutor v. Guus Kouwenhoven*, 7 June 2006.

81 Court of Appeal of The Hague, *The Public Prosecutor v. Guus Kouwenhoven*, 10 March 2008.

82 Supreme Court of the Netherlands, *The Public Prosecutor v. Guus Kouwenhoven*, 20 April 2010.

83 Judgment of the Court of Appeal at 's-Hertogenbosch, *The Public Prosecutor v. Guus Kouwenhoven*, 21 April 2017.

84 Ibid, at para. L.

85 Ibid, at para. L.2.5

86 Ibid, at para. M.

be used to commit international crimes. Such activities have been considered '*prima facie* "less innocent"'.[87] Both decisions were based on a joint reading of Dutch criminal law and ICL and reflect a relatively proactive approach of the Dutch authorities in tackling international crimes insofar as they have personal or territorial jurisdiction over a case.[88] Nonetheless, they remain strictly aligned on the 'Nuremberg Paradigm' of holding executives of corporations accountable for international crimes. What is innovative compared to Nuremberg is that Dutch national courts convicted Dutch nationals for international crimes committed abroad. Yet, in practice, cases 'are rarely so clear-cut as the ones of businessmen who supply poison gas or weapons to crisis regions'.[89]

3.1.2 *The price of oil: The* Lundin *case in Sweden*

Sweden provides another prominent example for the prosecution of corporate executives in relation to international crimes allegedly connected to the business activities of their enterprise. As Sweden does not allow for corporate liability under national criminal law, this case is another prominent example of the continuous strength of the 'Nuremberg Paradigm' at the national level. In October 2018, the Swedish Government authorised the prosecution of two corporate directors (the Chief Executive and the Chairman) of the Swedish oil company Lundin Petroleum.[90] Both individuals were actively involved in developing Lundin's activities in Sudan between 1998 and 2003. If the prosecutor decides to proceed they could be charged with aiding and abetting gross crimes against international law under Chapter 22, Section 6 of the Swedish Penal Code, risking up to life imprisonment. These charges are based on the alleged involvement of Lundin in the civil war raging in Sudan from 1983 to 2005. In 1997, a subsidiary of Lundin obtained the right to conduct oil exploration and production in a concession (named Block 5A) located south of Bentiu on the West Bank of the White Nile. According to reports by NGOs, the oil exploration led to collaboration with local militias and the Sudanese army that in turn triggered numerous war crimes in the vicinity of Block5A.[91] It was only after the release of these reports that, in 2010, the Swedish prosecution authority decided to open an investigation. The complexity of the

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87 Van der Wilt, *supra* n. 2, at p. 68.

88 The Netherlands even created special investigative units to deal with international crimes, see Van den Herik and Letnar Černič, *supra* n. 8, at p. 740.

89 Kai Ambos and Carsten Momsen, 'Introduction: Human Rights Compliance and Corporate Criminal Liability', 29 *Criminal Law Forum* (2018) pp. 495-497, at p. 495.

90 Miriam Ingeson and Alexandra Lily Kather, 'The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad', EJIL: Talk!, available at <https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/>. See also Maisie Biggs, 'Background Information to the Lundin Case', Doing Business Right Blog, available at <https://www.asser.nl/DoingBusinessRight/Blog/post/background-information-to-the-lundin-case-by-maisie-biggs>.

91 European Coalition on Oil in Sudan, 'The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan 1997-2003', 2010.

investigation and the difficulty to access South Sudan delayed the conclusion of the investigation until 2018.

This case could proceed under Swedish law because the Penal Code provides that crimes against international law, including war crimes, can be prosecuted on the basis of universal jurisdiction in Chapter 2, Section 3(6). However, the authorisation of the Swedish government is explicitly required in order to prosecute crimes committed outside of the Swedish territory. Thus, the 'exercise of extraterritorial jurisdiction is inherently political'.[92] In the *Lundin* case, it is still unsure whether, in the end, the prosecutor will decide to proceed and refer the defendants to a court. Interestingly, Lundin has also been notified by the prosecutor that it faces a potential fine as well as the forfeiture of economic benefits derived from its operations in Sudan.[93] These do not constitute criminal sanctions under Swedish law, but an 'extraordinary legal remedy' of quasi-criminal nature, which blurs the distinction between corporate criminal and administrative liability.[94]

The final outcome of the *Lundin* case still is anyone's guess, but it is already remarkable that two of the key executives of a large Swedish company are at serious risk of public trial. In this regard, the case differs from the Dutch cases as it involves business deals that are not directly and exclusively aimed at supporting the military capacity of an abusive regime. Lundin was not engaging primarily in supplying the Sudanese regime with weapons or chemicals, but interested in exploring and exploiting the oil reserves of Sudan. In other words, its alleged aiding of the regimes' war crimes was an ancillary (and maybe inevitable) consequence, not a primary goal, of its business venture in Sudan. Finally, the prospect of an administrative fine levied against Lundin would come close to corporate criminal liability for its involvement in international crimes.

3.2 Intimations of corporate liability for international crimes under national criminal law

While the responsibility of corporations for international crimes has been decried for years and attempts to enshrine corporate liability in ICL have until now foundered, national criminal laws have progressively integrated the possibility of corporate liability for such crimes. For some, 'we are nowadays experiencing the end of the juridical dinosaur that *societas delinquere non potest*'.[95] There still are

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92 Ingeson and Kather, *supra* n. 90.

93 'Lundin Petroleum receives information regarding a potential corporate fine and forfeiture of economic benefits in relation to past operations in Sudan', Lundin Petroleum, available at <https://www.globenewswire.com/news-release/2018/11/01/1641420/0/en/Lundin-Petroleum-receives-information-regarding-a-potential-corporate-fine-and-forfeiture-of-economic-benefits-in-relation-to-past-operations-in-Sudan.html>.

94 Ingeson and Kather, *supra* n. 90.

95 Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra and Klaus Tiedemann, 'Regulating Corporate Criminal Liability: An Introduction', in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel, *Regulating Corporate Criminal Liability,* Heidelberg, Springer 2014, pp. 1-7, at p. 3.

prominent holdouts, most famously Germany, but in many states there is now a clear path to hold corporations accountable for international crimes under national criminal law, even in cases of extraterritorial conduct.[96] Yet, it remains to be seen whether this theoretical possibility materializes in practice through indictments and convictions. In this section, we will briefly go through some of the most prominent national cases involving corporate criminal liability for international crimes.

3.2.1 *The* Riwal *case in the Netherlands*

The Dutch *Riwal* case was triggered by a complaint of the Palestinian NGO Al-Haq in 2010 to the Dutch national prosecutor alleging that Lima Holding B.V., an entity part of the Riwal Group, contributed to war crimes and crimes against humanity.[97] More specifically, it had provided cranes and aerial working platforms that were used in the construction of multiple sections of the Wall around West Bank villages in the Occupied Palestinian Territory (OPT). The unlawful nature of the construction of the Wall under international humanitarian law was affirmed by an advisory opinion of the International Court of Justice in 2004 and relied upon by the Dutch Public Prosecutor.[98] The company had previously been warned and disciplined by the Dutch Ministries of Foreign Affairs and of Economic Affairs due its involvement in the building of the Wall. In May 2013, after three years of investigations, including the search of Riwal's offices, the Dutch Public Prosecutor decided to drop the case, as he concluded that Riwal 'only contributed on a small scale to the building of the barrier and settlements'.[99] Moreover, the Prosecutor positively referenced the fact that the company 'is ending its activities in Israel and the Occupied Territories and has already made major steps to that effect'.[100] In his communication with the complainants, the Prosecutor also flagged that the necessary 'follow-up investigations would […] consume a significant amount of resources of the police and/or the judiciary' and that 'further investigations in Israel

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96 Already in 2006, eleven out of sixteen countries surveyed applied criminal liability to legal persons, see Ramasastry and Thompson, *supra* n. 5. For a more recent overview of corporate liability for ICL breaches under national law, see J. Zerk, 'Corporate liability for gross human rights abuses', *OHCHR* (2014), available at <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf>.

97 On this case, see Valentina Azarova, 'Investigative or Political Barriers? Dutch Prosecutor Dismisses Criminal Complicity Case against Riwal', Rights as Usual, available at <http://rightsasusual.com/?p=543>, and Marya Farah and Maha Abdallah, 'Security, Business and Human Rights in the Occupied Palestinian Territory', 4(1) *Business and Human Rights Journal* (2019) pp. 7–31, at pp. 21-23.

98 *Advisory Opinion of 9 July 2004*, International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', I.C.J. Reports 2004, at p. 136. See the reference to the Advisory Opinion at page 2 of the Prosecutor's letter dismissing the case, available at <http://www.alhaq.org/images/stories/Brief_Landelijk_Parket_13-05-2013_ENG__a_Sj_crona_Van_Stigt_Advocaten.pdf>.

99 National Public Prosecutor's Office, No further investigation into crane rental company, 14 May 2013, available at <https://www.prakkendoliveira.nl/images/nieuws/2013/130514_om_no_further_investigation_into_crane_rental_company.pdf>.

100 Ibid.

would most probably not be possible due to lack of cooperation from the Israeli authorities'.[101] While this decision was met with disappointment on the side of the Palestinian NGO behind the case, it nonetheless celebrated 'the important steps taken by the Prosecution in investigating the complaint for three years and in conducting searches of corporate premises and private homes of Riwal executives'.[102] This case demonstrated that there are few theoretical obstacles under Dutch criminal law to holding corporations accountable in the Netherlands for their involvement in international crimes abroad.[103] In other words, corporate criminal liability for international crimes became a tangible possibility in the Dutch context.[104] Yet, as can be inferred from the prosecutor's letter announcing the dismissal of the complaint, other obstacles and considerations stood in the way of an indictment. In any event, the case showed the Dutch authorities ready to investigate complaints against corporations on the basis of international crimes that primarily took place on the territory of another state.

3.2.2 *The* Lafarge *case in France*

In recent years, developments in France were followed closely by those supporting corporate criminal liability in the context of international crimes. French prosecutors have had to deal with an array of cases related to alleged international crimes committed by corporations.[105] The wealth of actions lodged can be linked to the hyperactivity of Sherpa, an NGO specialised in strategic litigation in cases involving corporate crimes of all sorts (including environmental, tax, labour or war crimes).[106] The organisation is behind most of the recent cases lodged in France

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101 National Public Prosecutor's Office, Letter of Dismissal, 13 May 2013, available at <http://www.alhaq.org/images/stories/Brief_Landelijk_Parket_13-05-2013_ENG__a_Sj_crona_Van_Stigt_Advocaten.pdf>.

102 Al Haq, 'Prosecutor Dismisses War Crimes Case against Riwal', available at <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal>.

103 Some have regretted the 'political' obstacles faced by the investigation, see Azarova, *supra* n. 97.

104 Cedric Ryngaert, 'Accountability for Corporate Human Rights Abuses: Lessons from the Possible Exercise of Dutch National Criminal Jurisdiction over Multinational Corporations,' 29(1) *Criminal Law Forum* (2018) pp. 1-24. See also Emma van Gelder and Cedric Ryngaert, 'Dutch Report on Prosecuting Corporations for Violations of International Criminal Law', in S. Gless and S. Broniszewska-Emdin (eds.), *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues*, Revue Internationale de Droit Pénal 2019, at pp. 113-147.

105 See the short overview provided in Juliette Lelieur, 'French Report on Prosecuting Corporations for Violations of International Criminal Law', in S. Gless and S. Broniszewska-Emdin (eds.), *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues*, Revue Internationale de Droit Pénal 2019, at pp. 179-210.

106 Sherpa is a French association founded in 2001 'to protect and defend victims of economic crimes drawing on the power of the law and to fight against the new forms of impunity linked to globalization'. It is specialised in strategic litigation against individual and corporate human rights offenders. For more information see <https://www.asso-sherpa.org/home>.

against corporations in the context of international crimes. Its latest, much-discussed, feat is the *Lafarge* case.[107]

Under French law, there are no fundamental legal obstacles to holding corporations criminally accountable for international crimes; still, in practice, relatively few companies were investigated for such crimes.[108] Corporate criminal liability is enshrined in Art. 121-2 of the French Criminal Code, while Art. 211-1 to 212-3 integrated internationally recognised crimes against humanity into the Criminal Code. Nonetheless, the cases initiated against companies for alleged international crimes were all lodged by NGOs, as there is no example of a case triggered *ex officio* by a prosecutor.[109] The most prominent of these cases, the *Lafarge* case, started in 2016 when Sherpa and the European Centre for Constitutional and Human Rights (ECCHR) filed a complaint, jointly with former employees of Lafarge, claiming that the company was, inter alia, complicit in war crimes (Art. 461-2, French Criminal Code) and crimes against humanity (Art. 212-1s, French Criminal Code).[110] Lafarge SA, a French company, which was bought by the Swiss Group Holcim and became Lafarge Holcim in 2015, continued to operate its brand-new Syrian cement factory after the civil war had started in 2011 and until September 2014, when the Islamic State took control of the plant. In doing so, the company relied on payments to local intermediaries to secure safe passage for its employees and supplies. Yet, a French newspaper revealed that at least some of the payments were likely made to the Islamic State and thus financed its activities, which it is argued included war crimes and crimes against humanity.[111] In June 2017, the French prosecutor decided to open a judicial investigation under the supervision of three investigative judges. This first step was followed in June 2018 by the unprecedented indictment of the company for complicity in crimes against humanity. This was a significant step compared to previous cases involving corporate liability for international crimes under French law, as until then prosecutors had refused to open an investigation and complainants had to submit on their own the case to investigative judges. Furthermore, it was the first time that a company was indicted by a French judge for an international crime.[112] The most recent develop-

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107 On the case, see Sherpa, 'French company Lafarge sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity in Syria', Press release, available at <https://www.asso-sherpa.org/french-company-lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria-2>. See also Alexandru Tofan, 'The Lafarge Affair: A First Step Towards Corporate Criminal Liability for Complicity in Crimes against Humanity', Doing Business Right Blog, available at <https://www.asser.nl/DoingBusinessRight/Blog/post/the-lafarge-affair-a-first-step-towards-corporate-criminal-liability-for-complicity-in-crimes-against-humanity-by-alexandru-tofan>.

108 See in general, Lelieur, *supra* n. 105.

109 Ibid., at p. 189.

110 For more details on the case, see European Center for Constitutional and Human Rights, 'Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity', Case Report, available at <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf>.

111 Ibid, at p. 2.

112 Lelieur, *supra* n. 105, at p. 192.

ments indicate, however, that the prosecutors are requesting that the Appeal Court drop the indictment for complicity of crimes against humanity.[113] While it is impossible to predict the final outcome of the case, it already made history as the 'worldwide premiere' indictment of a company for complicity in crimes against humanity.[114] The context of the case, involving a terrorist group responsible for a string of extremely murderous attacks in France, is probably not unrelated to its exceptional fate.

None of the cases discussed above have resulted in the conviction of a corporation, and only one has resulted in an indictment. Instead, most of them were dismissed by prosecutors and are being pushed forward thanks mainly to the energetic support of NGOs, such as the Fédération Internationale des Droits de l'Homme, Sherpa and the ECCHR.[115] In other words, as emphasised by Jennifer Zerk in a report for the Office of the UN High Commissioner for Human Rights (OHCHR), 'investigation and prosecution bodies have yet to play a significant role'.[116] While in many national jurisdictions there are no insurmountable legal hurdles to holding corporations liable for international crimes, practical and political hurdles might present mighty obstacles. This is not to say that triggering criminal cases through complaints does not have transformative effects for the corporations and communities concerned. These cases can be extremely supportive of a broader cause pursued by the claimants and an eye-opener for consumers and corporations.[117] Yet, as long as criminal corporate liability remains stuck in what has been qualified an 'enforcement dilemma',[118] often paralysing national police and judicial authorities in the context of international crimes, could civil liability be a suitable alternative strategy to fill the gap?

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113 Libération, 'Lafarge en Syrie: les poursuites pour "complicité de crimes contre l'humanité" au coeur d'un bras de fer judiciaire', available at <https://www.liberation.fr/depeches/2019/06/11/lafarge-en-syrie-les-poursuites-pour-complicite-de-crimes-contre-l-humanite-au-coeur-d-un-bras-de-fe_1733089>.

114 See the celebratory press release by the ECCHR and Sherpa, 'Landmark Decision: Company Lafarge Indicted – Complicity in Crimes Against Humanity Included', available at <https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_Lafarge_Syria_Indictment_Crimes Humanity_Sherpa_ECCHR_20180628.pdf>.

115 Highlighting the fact that prosecutors can quickly turn into 'opponents' in such procedures, see Benoît Frydman and Ludovic Hennebel, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' (2009), available at SSRN: <https://ssrn.com/abstract=1922188 or http://dx.doi.org/10.2139/ssrn.1922188>, at p. 27: 'The prosecutor can thus be an ally or an opponent in the criminal procedure, and since they are traditionally reluctant to support cases related to humanitarian or human rights abuses, the fact that criminal proceedings depend upon them is by and large an obstacle.'

116 Zerk, *supra* n. 96, at p. 9.

117 Judith Schrempf-Stirling and Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies', 145(3) *Journal of Business Ethics* October (2017) pp. 545-562.

118 Stahn, *supra* n. 2, at p. 107.

3.3 Where civil liability of corporations met international crimes: The rise and fall of the Alien Tort Statute

For many years, claimants could rely only on civil litigation in U.S. courts on the basis of the Alien Tort Statute (ATS)[119] to hold corporations accountable for international crimes.[120] This litigation trend started at the end of the nineties with a set of cases, such as *Unocal*[121] and *Talisman*,[122] discussed below, which triggered interests and controversy for their reliance on ICL against corporations involved in violations of human rights. Based on this case law, the ATS was deemed 'of major importance also in the context of international criminal law'.[123] In their wake, the ATS became a beacon for those advocating corporate liability for international crimes. Yet, after twenty years of uncertainty, in 2018 the Supreme Court of the United States seemed to all but close the door on this avenue to enforce ICL against corporations.

3.3.1 *The precursors:* Unocal *and* Talisman

The ATS dates back to the Judiciary Act of 1789. It was integrated into the United States Code at Section 1350 and reads: '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'. This provision remained forgotten for almost 200 years, until it was re-discovered and activated in the early nineteen eighties by human rights activists and legal clinics.[124] At first, the ATS was primarily used against individuals accused of being connected to human rights violations abroad, such as the Paraguayan police officer at the heart of the *Filartiga* case or Radovan Karadžić,[125] but at the turn of the 21st century cases started to emerge against corporations on the basis of purported violations of ICL.

The first case of this kind was the *Unocal* case against an American oil company engaged in a joint venture with Total in Burma over the so-called Yadana gas

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119 The Alien Tort Statute is also often referred to in the literature as the Alien Tort Claims Act (ATCA).

120 Many cases were initiated under the ATS against transnational corporations, such as Daimler-Chrysler, Shell, Chiquita, Yahoo!, Chevron and Rio Tinto.

121 The main decision was rendered in 2002 by the U.S. Court of Appeals for the 9th Circuit, *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

122 The final ruling was *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2nd Cir. 2009).

123 Florian Jessberger and Julia Geneuss, 'Introduction', 8(3) *Journal of International Criminal Justice* (2010) pp. 695-697, at p. 695. In other words, 'enthusiasm for the ATS litigation became immense' amongst human rights scholars: James G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', 47(10) *New York University Journal of International Law and Politics* (2014) pp. 121-189, at p.129.

124 The first modern case was *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. 1980). For an extensive review of its 'curious history', see Beth Stephen, 'The curious history of the Alien Tort Statute', 89(4) *Notre Dame Law Review* (2014) pp. 1467-1543.

125 *Doe v. Karadzic,* 866 F. Supp. 734 (S.D.N.Y. 1994).

pipeline project.[126] In the context of this joint venture, the two companies partnered with the Burmese army, which was to provide assistance and security in the building of the pipeline. In doing so, the army committed numerous human rights violations, in particular by having systematic recourse to forced labour. In 1996, this led to a suit filed by Burmese villagers in the U.S. federal district court in Los Angeles. The court agreed to hear the cases and, importantly, found that corporations can be held liable for violations of international human rights law under the ATS.[127] However, in its final decision in 2000 it dismissed the case arguing that Unocal did not intend for the military to commit the abuses. This decision was partly reversed by the U.S. Court of Appeals for the Ninth Circuit in September 2002,[128] which later decided to rehear the appeal *en banc*.[129] On the eve of this hearing, in December 2004, the parties agreed a settlement which was finalised in 2005. This settlement led to the dismissal of the appeals, while the decision of the district court was vacated.[130] In the end, the risk of a negative decision for Unocal was deemed high enough to push it towards a settlement that entailed monetary compensation for the villagers. The rulings and the settlement were hailed as 'milestone events':[131] the case was said to have constructed 'a basis under U.S. law for victims of human rights abuses occurring abroad to bring civil actions against the offending companies themselves'.[132]

The second case worth mentioning here, which is even more directly related to ICL, is the *Talisman* case.[133] In 2001, the case was filed with the Federal District Court for the Southern District of New York by the Presbyterian Church of Sudan against the Canadian oil and gas producer Talisman Energy. The plaintiffs argued that Talisman had aided the Sudanese army in the commission of genocide, war crimes and crimes against humanity.[134] The District Court dismissed the claim, and this decision was upheld by the U.S. Court of Appeals for the Second Circuit. In doing so, the Second Circuit concluded that the appropriate standard to determine whether Talisman had aided and abetted the regime was purposeful intention instead of knowledge of the crimes committed by the Sudanese army. Henceforth, the ruling concluded that the claimants had failed to show that 'Talisman acted with

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126 The case has been abundantly commented on in the literature. For an interesting socio-legal take on the impact of the case on Burma, see J. G. Dale, 'Transnational legal conflict between peasants and corporations in Burma: Human rights and discursive ambivalence under the US Alien Tort Claims Act', in M. Goodale and S. Engle Merry (eds.), *The Practice of Human Rights: Tracking Law between the Global and the Local*, Cambridge, Cambridge University Press 2007, pp. 285-319.

127 See *Doe v. Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997), at pp. 891-892.

128 *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

129 *Doe v. Unocal Corp*., 395 F.3d 978 (9th Cir. 2003).

130 *Doe v. Unocal Corp*., 403 F.3d 708 (9th Cir. 2005).

131 Thompson, Ramasastry and Taylor, *supra* n. 5, at p.841.

132 Ibid., at p.843.

133 On the background of the case, see S. Kobrin, 'Oil and Politics: Talisman Energy and Sudan', 36 *New York University Journal of International Law and Politics* (2003) pp. 425-456.

134 The facts are extremely similar to those discussed in the context of the *Lundin* case above.

the purpose to assist the Government's violations of customary international law'.[135] At the time, ICL scholars strongly criticised the choice of this standard by the court.[136] Nonetheless, the case demonstrated, once again, that recourse to the ATS could offer a potential avenue to claim compensation from corporations for violations of ICL, even though in this particular instance the burden of proof proved too difficult to match for the claimants.

In general, after these cases, the ATS was perceived as a powerful *ersatz* for corporate criminal liability at the international level. It was 'by far the most robust civil legal mechanism by which to hold corporate entities accountable for their egregious activities committed abroad'.[137] In 2006, it led Jaykumar Menon to conclude that the main 'lessons' drawn from the ATS cases were that '[v]iolators of international law need not be tried in international fora' and '[c]riminal offences need not be adjudicated in criminal proceedings'.[138] The ATS was said to have 'furthered the debate about the scope of obligations of corporations under international law and sharpened the questions related to the enforcement of such obligations'.[139] Hence, it was not unusual to consider that this 'legal strategy represents one of the most significant efforts of the past century to reign in the power of transnational corporations'.[140] This optimism with regard to the impact and influence of this line of cases on broader international and comparative legal developments was to be confronted with the progressive narrowing of the scope of application of the ATS pushed by the U.S. Supreme Court.

3.3.2 *Back to the future for corporate liability under the ATS:* Kiobel *and* Jesner

While none of the ATS cases led to a corporation being held liable by a U.S. court, some did conclude with favourable settlements for the claimants.[141] Nonetheless, a range of other cases went up the judicial ladder and some reached the U.S. Supreme Court, which was asked whether the ATS should be read as accommodating

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135 *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009), at 263.

136 Kevin John Heller, 'Talisman Energy – Amateur Hour at the International Law Improv', Opinio Juris, at <http://opiniojuris.org/2009/10/06/talisman-energy-amateur-hour-at-the-international-law-improv/>. See also Clapham critically engaging with this dimension of the *Talisman* decision in Clapham, *supra* n. 9, at pp. 235-238.

137 Executive Summary, 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law', Fafo report 467 (2004), at p. 25.

138 Jaykumar A. Menon, 'The Alien Tort Statute: Blackstone and Criminal/Tort Law Hybridities', 4(2) *Journal of International Criminal Justice* (2006) pp. 372-386, at p. 372.

139 Katherine Gallagher, 'Civil Litigation and Transnational Business: An Alien Tort Statute Primer', 8(3) *Journal of International Criminal Justice* (2010) pp. 745-767, at p. 747.

140 Dale, *supra* n. 126, at p. 315: 'The case of Doe v. Unocal dramatically demonstrates the potential for using transnational legal action to challenge neo-liberal understandings of globalization.' Similarly, Katherine Gallagher, ibid.: 'ATS lawsuits further empower affected communities to challenge corporate practices, by providing a legal forum that otherwise might not exist and – arguably – forcing companies to examine the way that they operate across borders'.

141 Such as in the *Unocal* case discussed above or the much-publicised *Saro-Wiwa* case against Shell.

so-called 'foreign cubed'[142] cases or corporate liability of foreign corporations. These culminated in two recent decisions: *Kiobel v. Royal Dutch Petroleum Co*[143] in 2013 and *Jesner v. Arab Bank*[144] in 2018.

The Kiobel decision followed a ruling of the U.S. Second Circuit, which rejected the possibility of corporate liability under the ATS.[145] The case involved a long-standing dispute over the liability of Royal Dutch Petroleum Company for the support provided by its Nigerian subsidiary to the Nigerian military during the repression of a local mobilisation against oil exploitation in the Ogoni region of Nigeria. This repression involved the killing in 1995 of nine leaders of the protest. The case lodged by twelve Nigerian individuals was spearheaded by Esther Kiobel, the widow of one of the 'Ogoni nine', who sought compensation from Royal Dutch for aiding and abetting crimes against humanity (e.g. torture and arbitrary arrest and detention). While the District Court for the Southern District of New York partially upheld the claims,[146] the Court of Appeals for the Second Circuit (in) famously and controversially found that corporate liability is not a norm of customary international law and therefore concluded that the ATS does not apply to corporations.[147] The plaintiffs filed a petition for a writ of certiorari with the U.S. Supreme Court, which accepted to hear the case. However, instead of focusing on corporate liability it directed the parties to discuss the issue of the extraterritorial effect of the ATS. In their final decision, the judges concluded that lower courts are competent to hear cases under the ATS only in so far as the claims 'touch and concern' the territory of the U.S. with sufficient force.[148] The decision substantially curtailed the availability of the ATS in extraterritorial cases with minimum effects on the U.S.[149] However, unlike the prior decision of the circuit court, it left open the possibility to hold corporations liable for international crimes under the ATS.[150]

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142 On 'foreign cubed' cases, see Doug Cassel, 'Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open', 89(4) *Notre Dame L. Rev.* (2014) pp. 1773-1812, at p. 1775.

143 *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

144 *Jesner v. Arab Bank*, PLC, No. 16-499, 584 U.S. ___ (2018).

145 *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2nd Cir. 2010). Critically reviewing the decision of the circuit court, see D. Shelton, 'Normative Evolution in Corporate Liability for Violations of Human Rights and Humanitarian Law', 15 *Austrian Review of International and European Law* (2010) pp. 45-88, at pp. 63-72.

146 *Kiobel v. Royal Dutch Petroleum Co*., 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

147 *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2nd Cir. 2010), at 131-145.

148 *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

149 On the impact of the *Kiobel* decision on ATS litigation against corporations involved in the apartheid regime in South Africa, see Mia Swart, 'Requiem for a Dream? The Impact of Kiobel on Apartheid Reparations in South Africa', 13(2) *Journal of International Criminal Justice* (2015) pp. 353-371, at p. 371. She concludes that: '[t]he hopes of international law scholars that ATS could 'revive the Nuremberg ideal' by expanding norms of accountability to encompass violations by US-based corporations, have been dashed by Kiobel.'

150 Some even argued for a relatively wide reading of the 'touch and concern test'; see Sarah H. Cleveland, 'After Kiobel', 12(3) *Journal of International Criminal Justice* (2014) pp. 551-577.

The *coup de grâce* to corporate liability under the ATS came with the *Jesner* decision in 2018. The case involved a group of petitioners alleging that Arab Bank (a Jordanian bank) contributed to the financing of terrorism through its banking activities. It had the potential to fulfil the 'touch and concern' test introduced in *Kiobel*, as it involved the provision of financial services in the U.S.[151] However, the U.S. Court of Appeals for the Second Circuit decided to uphold its own *Kiobel* decision, which had denied the existence of corporate liability under customary international law and therefore dismissed the possibility to use the ATS against a corporation.[152] Faced again with a request on this question, the U.S. Supreme Court granted *certiorari*. An Opinion drafted by Justice Kennedy concluded that 'that foreign corporations may not be defendants in suits brought under the ATS',[153] putting an abrupt end to the ability of the U.S. federal courts to hold foreign corporations liable for international crimes under the ATS.[154] The story of the evolution of ATS litigation as a strategy to hold foreign corporations accountable for their involvement in international crimes ironically ended by the U.S. Supreme Court invoking the lack of corporate liability under ICL to foreclose its use.[155] Even though ATS litigation never led to a negative decision for a corporation, it was deemed too broad and out-of-sync with ICL and the foreign policy interests of the U.S. Over the last ten years, under the impetus of the Supreme Court, the U.S. shifted from an exceptional position of audacity to one of conservatism with regard to the civil liability of corporations for their implications in international crimes.

This section has shown that ICL and corporations are connected in a plurality of ways at the national level, with each national context providing for a different local translation of the application of ICL to corporate behaviour through specific civil, criminal or administrative processes.[156] However, if there is such a thing as a 'web of liability', its nets have very different shapes and sizes depending on the

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151 On this dimension of the case, see John Bellinger and Andy Wang, 'Jesner v. Arab Bank: The Supreme Court Should Not Miss the Opportunity to Clarify the "Touch and Concern" Test', Lawfare Blog, available at <https://www.lawfareblog.com/jesner-v-arab-bank-supreme-court-should-not-miss-opportunity-clarify-touch-and-concern-test>.

152 *In Re: Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2nd Cir. 2015), at pp. 151-158.

153 *Jesner v. Arab Bank, PLC*, No. 16-499, 584 U.S. ___ (2018) at p. 27.

154 However, the question of corporate liability in suits against U.S. corporations remains open, as argued by William S. Dodge, 'Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits against U.S. Corporations', Just Security, 26 April 2018, available at <https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/>. See in greater detail, William S. Dodge, 'Corporate Liability under the US Alien Tort Statute: A Comment on Jesner v Arab Bank', 4(1) *Business and Human Rights Journal* (January 2019) pp. 131-137.

155 An irony foreseen in 2010 in Katherine Gallagher, *supra* n. 139, at p. 767: 'It will therefore be ironic if corporate defendants are successful in their efforts to defeat cases alleging corporate complicity in serious international law violations by invoking the ICC Statute.'

156 Relying on the metaphor of the translation to study comparatively national approaches, see Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations', 27(1) *Yale Journal of Interna-*

local legal context. In some countries, the focus is still primarily on individual business executives. In others, we perceive an emerging – but until now rather toothless – possibility of criminal proceedings against corporations connected to international crimes. While in the U.S. ATS litigation was touted as a fruitful strategy to hold companies accountable for international crimes, in recent years it was curtailed to the point of irrelevance by the Supreme Court. The evolution of the intersection between ICL and corporations at the national level is thus all but linear and uniform. In order to properly grasp it, one must take into account local specificities and beware of the gap between law in books and law in action.[157] In fact, proactive inquiries by prosecutors have been extremely rare until now. In other words, 'domestic criminal law systems are largely untested as a means of providing legal redress in cases where business enterprises have caused or contributed to gross human rights abuses'[158] and it seems '[s]tates are not engaging with the problem of corporate involvement in gross human rights abuses at all proactively'.[159] Hence, the use of the metaphor of the growing web of liability might have been too optimistic, as the (civil and criminal) liability of corporations for international crimes remains in practice a far-flung prospect even at the national level.[160] This is not to say that there are no isolated cases, but they remain exceptional rather than representative of a new normal.[161] While one should not underestimate the impacts of litigation and criminal investigations regardless of their being successful, it is interesting to note that much attention in the business and human rights discourse has pivoted from litigation and criminal enforcement towards the idea of HRDD. In this regard, the unanimous adoption by the U.N. Human Rights Council of the UNGPs might provide a new window on the intersection between ICL and corporations.

4. FROM REPRESSION TO PREVENTION: THE TURN TO HRDD AND INTERNATIONAL CRIMES

As international and national authorities remain reluctant to go after corporations (or even corporate executives) for their involvement in international crimes, the overall discussion in the field of business and human rights has pivoted towards

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tional Law (2002) pp. 1-57 and Thompson, Ramasastry and Taylor, *supra* n. 5, and Frydman and Hennebel, *supra* n. 115.

157 In this regard, it is interesting to note that the 'potential' of ICL to 'ensnare corporations and their representatives who become involved in international crimes' is still to materialise more than ten years after it was identified in Thompson, Ramasastry and Taylor, *supra* n. 5, at p. 894.

158 Zerk, *supra* n. 96, p. 40.

159 Ibid. at p. 52.

160 For a very sceptical Marxist approach to the mere possibility of such a web to materialise, see Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy*, Leiden, Brill 2019.

161 Argentina might prove an academic blind spot in this regard, see Payne and Pereira, *supra* n. 2, paras. 12:20.1–20.22.

the HRDD process advocated by John Ruggie throughout his work as Special Representative on human rights and transnational corporations. As we will see, HRDD is not disconnected from ICL and might offer in the future an interesting overture to tackle the involvement of corporations in international crimes.

4.1 The UNGPs and the rise of the concept of HRDD

In recent years, the discussion on the human rights responsibilities of businesses has been guided mostly by the analytical lens of John Ruggie enshrined in his Protect, Respect and Remedy Framework[162] and its operationalisation via the UNGPs. Compared to the stillborn Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, it proposes to steer away from an exclusive focus on legally binding obligations for corporations under international law and to move to a softer, yet arguably more effective (and politically palatable) approach structured around three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedy.[163] The second pillar of the framework dedicated to corporate responsibility is built around two core requirements enshrined in Principle 13 UNGPs, that businesses ought to:

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

In order to meet these requirements businesses are expected to introduce a 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[164] This is to be materialized through the introduction of internal processes that aim at mapping adverse human rights impacts connected to a specific enterprise (through its own activities or which may be directly linked to its operations, products or services by its business relationships). Each enterprise is expected to act upon the findings of this mapping exercise to prevent and mitigate the adverse human rights impacts identified and if it fails to

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162 U.N. Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', A/HRC/8/5, 7 April 2008.

163 This shift in the strategy pursued by Ruggie is theorised in John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101(4) *The American Journal of International Law* (October 2007) pp. 819-840.

164 Principle 15 UNGPs. For an interesting conceptual discussion on HRDD, see Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 28(3) *European Journal of International Law* (2017) pp. 899-919 and the reply by John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale', 28(3) *European Journal of International Law*, (2017) pp. 921–928.

do so to provide access to a remedy. While the UNGPs and the second pillar are not legally binding for corporations, HRDD is being incorporated in instruments with differing levels of strictness, such as the OECD Guidelines for Multinational Enterprises or the recently adopted French law on the *devoir de vigilance*. In parallel, civil society organisations are lobbying strongly for the integration of a binding obligation to introduce HRDD into European Union law.[165]

In this regard, it is clear that any involvement in international crimes constitutes a negative human rights impact of great magnitude, the prevention of which should be at the heart of any legitimate process of HRDD. In other words, the Ruggie framework and the UNGPs will necessarily intersect with ICL by integrating the prevention of international crimes at the core of HRDD.

4.2 Where HRDD meets ICL: Gross human rights abuses

Ruggie's UNGPs are not blind to what are referred to as 'gross human rights abuses', a notion which overlaps largely with international crimes. In particular, through the emphasis on the severity of a risk, these abuses are incorporated as modulation criteria for the operation of the HRDD process. Indeed, Principle 14 provides that 'the scale and complexity of the means through which enterprises meet that responsibility may vary […] with the severity of the enterprise's adverse human rights impacts'. The commentary below Principle 14 provides further that '[s]everity of impacts will be judged by their scale, scope and irremediable character'. Moreover, Principle 17 stipulates that HRDD will 'vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations'. The severity of the abuse is also a factor to be taken into account in determining the appropriate action to be taken in case an enterprise is directly linked to an adverse human rights impact through a business relationship.[166] In fact, 'the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship'.[167] Finally, as a general principle, 'business enterprises should first seek to prevent and mitigate those [adverse human rights impacts] that are most severe or where delayed response would make them irremediable.'[168] In parallel, Principle 23 also urges corporations to '[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate'. There is not much additional information provided in the text of the UNGPs to flesh out the concepts of gross human rights abuses and severity. However, from the *Interpretive Guide*[169] (the Guide) on the corporate responsibility to respect

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165 On these developments in general, see 'Evidence for mandatory Human Rights Due Diligence legislation in Europe', ECCJ, available at <http://corporatejustice.org/news/9189-evidence-for-mandatory-human-rights-due-diligence-legislation-in-europe>.

166 Commentary below Principle 19 UNGPs.

167 Ibid.

168 Principle 24 UNGPs.

169 OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02, 2012. Zerk also references the Guide for the interpretation of the notion of

human rights produced by the Office of the High Commissioner for Human Rights in 'full collaboration' with John Ruggie one can derive that they are closely linked with ICL.

Indeed, regarding gross human rights abuses the Guide insists that

> [t]here is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination.[170]

The overlap with international crimes enshrined amongst others in the Statute of the ICC is unmistakable. Furthermore, in its commentary on Principle 23, the Guide mentions 'gross abuses of human rights such as international crimes'.[171] The concept of gross human rights abuse is thus intimately linked with ICL and refers primarily (but probably not exclusively) to international crimes. Ruggie acknowledged this link in some of his writings connected to the UNGPs, in which he referred to international crimes as typical gross human rights abuses.[172] Further, when considering what would count as a severe impact, the Guide highlights 'impact on the right to life and health of individuals or which fundamentally affects the welfare of entire groups or communities'.[173] Additionally, it states, 'in cases where an enterprise has identified that it risks being involved in gross human rights abuse addressing this risk should always be given priority.'[174] Thus, international crimes, many of which are directly related to the right to life and the health of individuals or aimed at the welfare of groups and communities, overlap not only with the idea of gross human rights abuses, but are also to be prioritised under the operation of a due diligence system based on the need to prioritise severe impacts. Hence, the notions of severity and gross human rights abuses work in tandem to integrate by stealth ICL into the HRDD construct. Causing, contributing or just being directly

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gross human rights abuses in Zerk, *supra* n. 96, at p. 28.

170 Ibid., at p. 6. This link between gross human rights abuses and ICL is also highlighted in academic literature, see Menno T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23 *Human Rights Quarterly* (2001) pp. 940-974, at p. 942: 'The term "gross human rights offences" is employed as shorthand for certain serious violations of international humanitarian law and international human rights law that qualify as crimes under international law'. See also, 'Corporate Complicity and Legal Accountability', 2 *International Commission of Jurists* (2008) at p. 3 '[…] international criminal law includes as crimes many activities that are also gross human rights abuses and conduct that gives rise to a gross human rights abuse will also often involve crimes under international law'.

171 Ibid., at pp. 79 and 81.

172 See for example in John Gerard Ruggie, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises', in César Rodriguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning*, Cambridge, Cambridge University Press 2017, pp. 46-61, at p. 60.

173 OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02, 2012, at p. 83.

174 Ibid.

linked to international crimes triggers a higher responsibility under the HRDD framework, which materialises with heightened expectations in terms of the actions to be taken when such involvement is identified. In fact, Principle 23 even calls upon corporations at risk of causing or contributing to gross abuses of human rights to consider them as a matter of legal compliance. In other words, even though in practice the risk of a corporation being held legally accountable, under criminal or civil law, remains extremely low (and an impossibility before international courts), as we have seen in the previous sections, Principle 23 insists that corporations must operate as if it were a likely outcome.

All this, however, matters only if the UNGPs have actual effects on the way corporations operate. If they were to remain an instrument with no practical consequences, then they would simply add another loose thread to the quite ineffective existing web of liability. Instead, the various local implementations of the UNGPs could help bypass the rigid requirements of criminal law by tasking business enterprises with a heightened responsibility to identify and tackle the risks of being involved (directly or indirectly) in severe adverse human rights impacts. In fact, as the soft expectation that corporations conduct HRDD is progressively transformed into a hard duty through binding regulations, corporations can increasingly be faced with administrative sanctions and even civil liability if they fail to introduce and conduct proper HRDD processes.[175] Hence, a new duty to identify and act upon the risk of being involved in international crimes (not necessarily amounting to complicity in the sense of ICL) seems to be emerging out of the UNGPs, one which could prove a valuable complement to the extremely rare application of ICL to corporations.

5. PAST, PRESENT AND FUTURE OF CORPORATIONS UNDER ICL

This *preadvies*' primary aim was to retrace the intertwinements of corporations and ICL and to draw realistic anticipations of future developments. In doing so, we have summarily charted the existing modes of corporate (civil and criminal) liability for international crimes. Three core findings deserve to be highlighted in this conclusion:

(1) The resilience of the 'Nuremberg Paradigm' at the international level;
(2) The intimations of corporate criminal liability for international crimes at the national level; and
(3) The emergence of HRDD as a new legal paradigm to deal with corporate involvement in international crimes.

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175 This hardening of the UNGPs would bring them in line with social science deterrence theory, which was perceived as a weak point of purely voluntary soft law mechanisms, see Payne and Pereira, *supra* n. 2, at para. 20.6: 'Deterrence theory would suggest therefore that the credible threat of judicial action against firms that commit abuses would signal to the business community the heightened cost of human rights violations, thus curbing such behavior.'

5.1 The 'Nuremberg Paradigm': an insurmountable horizon for ICL at the international level?

The 'Nuremberg Paradigm' prioritises the accountability of corporate executives for their involvement in international crimes and constitutes a solid tradition that state delegates failed to topple during the negotiations of the Rome Statute. It is a positive fact that no single corporation was ever tried by an international criminal tribunal and 'the question of whether transnational business corporations are bound by international criminal law appears to be easily answered in the negative'.[176] Indeed, despite insisting calls from academics, corporate liability has not yet been introduced in the Rome Statute.[177] Many respectable arguments were advanced to support such a change,[178] but the political turbulences faced currently by the ICC are not likely to trigger winds of change on this front. Ironically, it is from the African continent that the first move beyond the 'Nuremberg Paradigm' has come, through the integration of corporate liability for international crimes in the Malabo Protocol, which will potentially extend the jurisdiction of the criminal section of the African Court of Justice and Human Rights to business enterprises.[179] African states are sometimes portrayed in the business and human rights literature as lawless spaces, but they have marshalled the political will to symbolically enshrine the criminal liability of corporations for international crimes. One might quibble with their romanticism,[180] but in the grand scheme of things it constitutes an indictment of the global North's at times dogmatic unwillingness to go down this road. The introduction of corporate liability into the Rome Statute would certainly not be a panacea, nor can it be expected that corporations would thereafter

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176 Volker Nerlich, 'Core Crimes and Transnational Business Corporations', 8(3) *Journal of International Criminal Justice* (2010) pp. 895-908, at p. 897.

177 More hopeful in this regard, see Kaeb, *supra* n. 4, at p. 402: '[…] there may exist accelerating pressures within the international community to achieve under the Rome Statute what cannot be achieved in domestic courts […]'. Supporting such a change of the ICC Statute as the 'most opportune solution', see J. Aparac, 'Which International Jurisdiction for Corporate Crimes in Armed Conflicts?', 57 *Harvard International Law Journal* (2016) pp. 40-43, at p. 42: 'Although the option to prosecute corporate executives exists within article 25 of the Rome Statute, the modification of the Statute to include corporations would provide the most opportune solution for both victims and international justice.'

178 Kyriakakis argues convincingly that doing so could 'invite a re-investment of faith in the international criminal justice project', Kyriakakis, *supra* n. 2, at p. 240. See also the plea by Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', 8(3) *Journal of International Criminal Justice* (2010) pp. 909-918. For a pragmatic approach to making this case, see James G Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity', 16(2) *New Criminal Law Review: An International and Interdisciplinary Journal* (2013) pp. 261-299.

179 Amissi Melchiade Manirabona, 'La compétence de la future Cour pénale africaine à l'égard des personnes morales: propositions en vue du renforcement de ce régime inédit', 55 *Annuaire canadien de droit international* (2017) pp. 293-329.

180 See Stahn, *supra* n. 2, at p. 125; 'The Malabo moved to the other extreme. It disassociates corporate criminal responsibility fully from individual criminal responsibility.'

become 'the prime focus of the ICC Prosecutor',[181] still it would have a symbolic value and highlight the importance to account for the occasional lethality of corporations,[182] as well as become a reference point in many debates on the scope of corporate liability at the national level. Many obstacles couched in material or doctrinal terms have been invoked to justify the exclusion of corporations from the Rome Statute, yet it seems that the main hindrance is political. The lack of willingness of states in overcoming these issues at the international level is fundamental in sustaining the 'Nuremberg Paradigm'. Finally, it is also highly doubtful that this paradigm could be superseded by judicial fiat only, as the backlash against the narrow judgment of the Special Tribunal for Lebanon has shown. Hence, in the short run, it seems safe to anticipate that national authorities will remain the only institutions in a position to initiate criminal proceedings against corporations for their involvement in international crimes.[183]

5.2 Intimations of corporate criminal liability for international crimes at the national level

As we have seen, on paper many states have formally stepped in to cover the gap in the jurisdiction of the ICC and other international tribunals.[184] In other words, 'some of the important limitations that the Rome Statute places on the jurisdiction of the International Criminal Court (ICC) have been eliminated by domestic ICL legislation'.[185] Thus, ten years ago it was possible for a variety of commentators to observe a 'growing web of liability'. Yet, with the benefit of hindsight, we are in a position to relativise the impact of this growing web. The two Dutch cases discussed above, the only ones which led to criminal sanctions for international crimes committed in the context of business activities, were decided under the old 'Nuremberg Paradigm'. Meanwhile the few criminal complaints lodged against corporations by civil society organisations before prosecutors in France or the Netherlands have foundered or are still pending. It is exemplary that the most celebrated case to date, the *Lafarge* case, concerns the first (and only) indictment by a prosecutor of a corporation for its alleged involvement in an international

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181 Van den Herik and Letnar Černič, *supra* n. 8, at p. 741.

182 On this lethality, see Maurice Punch, 'Why corporations kill and get away with it: the failure of law to cope with crime in organizations', in André Nollkaemper and Harmen van der Wilt (eds.), *System Criminality in International Law*, Cambridge, Cambridge University Press 2009, pp. 42-68.

183 This is also the view of Clapham, *supra* n. 71, at p. 919: 'For the moment the field is likely to develop according to those national jurisdictions which are among the first to try corporations for international crimes.' and Stahn, *supra* n. 2, at p. 125; 'Its [of the concept of corporate criminal responsibility] role at the international level is likely to remain modest.'

184 Interestingly, Art. 6(7) of the Revised Draft of the 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', published on 16 July 2019, provides that State Parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal person for international crimes.

185 Ramasastry and Thompson, *supra* n. 5 at p. 16.

crime. We are still far from a conviction. In the meantime, the web of liability has also been shrinking (compared to fifteen years ago) with the almost complete closure of the civil liability route provided by the ATS.[186]

In a way, this discussion exemplifies the gap between law in books and law in action. Certainly, and that is a crucial difference with the Rome Statute, there are laws in place in many countries that could allow for prosecution of international crimes by corporations. Yet, in practice, the legal, material and political obstacles to such prosecutions have been so colossal that there is no example of a conviction.[187] In terms of legal obstacles, assuming that in most cases jurisdiction would be a relatively easy hurdle to pass,[188] the challenges of satisfying the burden of proving both *actus reus* and *mens rea* remain the principle hurdles. The most likely configuration will be a case in which a corporation is allegedly complicit of an international crime and the prosecution will have to show (under the dominant interpretation of ICL) that it had a substantial effect on the crime and, in addition, that it had knowledge of the crime intended by the perpetrator.[189] However, not unlike claimants in civil liability cases, in order to do so a prosecutor will often be faced with the fragmented transnational legal structure of the corporation and will be at pains to attribute knowledge or substantial contribution to the mother corporation, which is usually the end beneficiary of the profits derived from the contribution of its subsidiary (or its suppliers) to international crimes. Legal standards built originally to fit the complicity of individuals are difficult to translate to the context of a division of labour and responsibility across a long transnational value chain in which the simple imposition of low prices through sheer market power can have mortal consequences.[190] Thus, as it stands corporations have a very low risk of being held accountable for international crimes; only a close proximity through the provision of specific services (e.g. security or financial services) or specific goods (e.g. weapons, chemicals or surveillance systems) in particular contexts (e.g. during an armed conflict) could realistically lead to a successful indictment. Yet, even then, there are further obstacles that would stand in its way, such as the lack of resources of prosecutors dealing with such cases.[191] Indeed, in order to build a successful case against a corporation a prosecutor would have to spend considerable resources to collect the necessary evidence. This evidence, unlike in tradi-

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186 In fact, for some 'court venues seem to be shrinking, rather than expanding, in number and scope', see Payne and Pereira, *supra* n. 2, at para. 20.16.

187 Considering these material and political obstacles as structural impediments to the prospect of corporate liability, see Baars, *supra* n. 160.

188 Making this case for the Netherlands, see Ryngaert, *supra* n. 104.

189 There are intense debates on the level of *mens rea* required (whether it is shared intent, knowledge or *dolus eventualis*), see Ramasastry and Thompson, *supra* n. 5, at pp. 19-20. See also the discussion of the matter in International Commission of Jurists, 'Corporate Complicity and Legal Accountability', 2 (2008) at pp. 17-24.

190 On this widespread unfitness of criminal law to tackle corporations see Punch, *supra* n. 182, at pp. 42-68.

191 For an account of these obstacles nourished by first-hand experience, see Kaleck and Saage-Maass, *supra* n. 3, at p. 722.

tional criminal cases, will usually be located at great distance in unstable territories whose political regimes might be overtly hostile to the inquiry. Moreover, the prosecuting team will often have to interrogate people whose language and culture it does not master. In short, any such case is bound to remain a rare exception due to the extent of resources needed to effectively pursue them. Even where the web of liability exists, it will by necessity be deployed parsimoniously. Finally, prosecutors might face political headwind when trying to obtain a decision to investigate a particular corporation. The incentives of local politicians are strongly aligned with the protection of local economic interests and jobs. This means that any investigation of an international crime committed abroad which risks resulting in a competitive economic disadvantage for a local business will be most likely unwelcome and disincentivised.[192] All these factors coalesce to loosen the web of responsibility faced by corporations involved in international crimes.

From a pragmatic perspective, one can therefore safely assert that corporations are currently facing a very low risk of being prosecuted and convicted for international crimes. Nonetheless, one should not underestimate the potential of national cases for eliciting 'transnational pressure'[193] on transnational corporations. Researchers have identified, even in the context of systematically failing litigation, positive effects in terms of a corporation's *prise de conscience* of its human rights impacts and responsibilities.[194] The current value of opening up national legal frameworks to corporate criminal liability might not be in the number of convictions achieved, but rather in the negative publicity generated by civil society organisations prompting cases and consequent behavioural changes by corporations.[195] In a way, specialised repeat players from civil society, such as Sherpa in France or the ECCHR in Germany, supplement the work of prosecutors by both leading transnational private investigations and activating public authorities through their complaints.[196] In other words, they are acting as transnational prosecutors on behalf of an emerging transnational public. Hence, if the objective is to reinforce the scrutiny of corporations under ICL at the national level, their work must be strong-

192 For a similar point, see Ryngaert, *supra* n. 104, at p. 21.

193 Dale, *supra* n. 126, at p. 314.

194 Schrempf-Stirling and Wettstein, *supra* n. 117.

195 Kaleck and Saage-Maass, *supra* n. 3, at p. 724: 'Even unsuccessful court cases can trigger a significant public debate and lead to law reforms and other social changes, illustrating that the consequences of this strategic litigation can transcend a specific case.'

196 Already identifying that crucial role played by NGOs, see Thompson, Ramasastry and Taylor, *supra* n. 5, at p. 895: '[…] human rights organizations will need to continue to play a central role in informing domestic prosecutors of their authority, assisting in the gathering of evidence, and otherwise advocating for greater prosecution of international crimes.' See also Kaleck and Saage-Maass, *supra* n. 3, at p. 723: 'Due to the passive role state agencies often assume in both home and host states, these civil groups and organizations have been forced to take the necessary steps themselves to reveal, investigate and litigate the majority of cases in which corporate actors were held accountable for their involvement in international crimes. Furthermore, they collected evidence when authorities were still reluctant to do so and initiated legal proceedings.'

ly supported and the capacity of national prosecutors strengthened in order to help them commit to these highly complex, costly and political investigations.

Corporations, if they are to face justice for their contribution or commission of international crimes, will currently do so at the national level. However, this is not true across the board for all states; some have been more welcoming than others and the evolution of the national legal environments in this regard can be understood only in context. While it is tempting to see this evolution as a linear trend, the fate of the ATS reminds us that the sands might be shifting in different directions depending on the jurisdiction and its interpretation of ICL.[197] It is also quite doubtful whether ICL is well placed to 'transcend'[198] the ATS, as the current doctrinal, material and political obstacles to its widespread use in practice remain daunting. Hence, even where states have endorsed corporate criminal liability for international crimes, such a liability remains a faint prospect and to date a wholly incomplete response to the many instances in which corporations are 'only' linked to international crimes.

5.3 A turn to binding HRDD to tackle corporate involvement in international crimes

The involvement of corporations in international crimes is often indirect and diffuse. While the economic support provided to a particular abusive regime might be essential to its endurance, it rarely amounts to a direct contribution to a specific crime. In other cases, corporations trade with local partners, who might be directly involved in international crimes, but they have no evident knowledge of this involvement (and are often careful enough to avoid gaining knowledge about it). In this context, the conditions set for the recognition of complicity under ICL might be too stringent for a prosecutor to proceed or for a judge to convict.[199] In other words, there is an overwhelming majority of situations in which corporations contribute to international crimes while being highly likely to fall through the cracks of criminal law at both international and national level. It is for this overwhelming majority of cases that HRDD could become a relevant legal innovation

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197 The idea of shifting sands of corporate liability is often mobilised to reflect an (optimistic) evolution towards greater corporate accountability, see Kaeb, *supra* n. 4.

198 James G Stewart, *supra* n. 123.

199 See Van der Wilt, *supra* n. 2, at p. 71: 'First, in cases where business companies are remote from the centres of decision making, they are not likely to know much about international crimes, especially not if the power holders have strong incentives to cover up their plans. Secondly, in case of trade in apparently innocent, multi-purpose goods or cash payments (money being multi-purpose by definition) the mens rea threshold is considerably heightened, as a finding of guilt requires special knowledge of the employment of the goods or money. And thirdly, the intervention of subcontractors dilutes the knowledge of the principal company. In all these cases, an acquittal of the legal entity would have been the only feasible outcome, had the corporation itself been charged.'

– the 'changing face of corporate liability'[200] – especially if it is coupled with a system of administrative or civil liability.

As discussed above, HRDD is focused on preventing human rights abuses connected to the activities of businesses. The notion is progressively seeping through a variety of regulatory mechanisms, such as the OECD Guidelines for Multinational Enterprises or the French Law on the *devoir de vigilance*, and seems bound to have an even broader relevance in the coming years. The emphasis in the HRDD process on the severity of the risks and on gross human rights abuses provides for an interesting overlap with ICL and opens another front to scrutinise and potentially hold accountable the corporations whose activities are linked to international crimes, while overcoming proximity and evidentiary barriers to holding them criminally liable. Indeed, a type of civil or administrative liability connected to the failure of a specific corporation to conduct proper HRDD when linked to an international crime could prove a more potent deterrent for corporations and an easier road to remedy for rights-holders than criminal law. Moreover, a serious HRDD process (e.g. one that is subjected to independent checks by national administrations or courts) would force a corporation to acquire knowledge of the local contexts in which it does business, thus also potentially facilitating traditional indictments under criminal law. Hence, a new duty to identify and act upon the risk of being involved (but not necessarily complicit in the sense of ICL) in international crimes could usefully complement the rare direct application of ICL to corporations.

In the end, ICL may not 'provide the best framework for determining blameworthiness in the context of corporate conduct'.[201] Instead, it 'should perhaps be seen as part of the story of corporate complicity, rather than the last word'.[202]

6. PROPOSITIONS AND POINTS FOR DISCUSSION

As a final step in our *preadvies*, we would like to make five concrete proposals aimed at increasing the accountability of corporations for their complicity (in a wide sense) in international crimes:

1. A State Party (for example the Netherlands) should call for the review of the Rome Statute (as provided under Art. 123(2)) in order to finally subject corporations to the jurisdiction of the ICC. In light of the current workload and priorities of the ICC, this is unlikely to trigger a flood of international cases in the short run, but it would be a symbolic development with a potentially transformative impact for corporate liability under ICL, which would trickle down into the national law of the State Parties.

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200 Carsten Momsen and Mathis Schwarze, 'The Changing Face of Corporate Liability – New Hard Law and the Increasing Influence of Soft Law', 29(4) *Criminal Law Forum* (2018) pp. 567-593.

201 Clapham, *supra* n. 9, at p. 222.

202 Ibid.

2. In any event, States should provide, through their national criminal law, for the liability of corporations for international crimes.

3. The *mens rea* requirement in the context of corporate complicity for international crimes should move towards a test focused on recklessness or negligence. The application of such standards could be tied to the size and resources of the corporation concerned.

4. States should work towards reducing the important material obstacles hindering investigations into the involvement of corporations in international crimes. In particular, they should constitute specialised investigatory units with sufficient resources to effectively pursue transnational investigations. Furthermore, we believe it is important to shore up the independence of prosecutors tasked with the supervision of these investigations.

5. Finally, criminal liability will always be too narrow to capture the many instances in which a corporation's involvement in international crimes is indirect or distant. In order to tackle these instances, States should introduce mandatory HRDD laws connected to a form of civil or administrative liability. These would force corporations to account for and tackle the risk of being connected to international crimes as well as open an avenue to engage their liability if they fail to properly do so.

TWENTY-FIVE YEARS OF CONTEMPORARY INTERNATIONAL CRIMINAL JUSTICE*

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This publication is part of the VICI-Research Project 'Rethinking the Outer Limits of Secondary Liability for International Crimes', funded by the Dutch Research Council (NWO) (see website rethinkingslic.org).

All links to websites were checked on 25 July 2019.

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ABBREVIATIONS

ASP	Assembly of States Parties
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JCE	Joint Criminal Enterprise
SCSL	Special Court for Sierra Leone
UNSC	United Nations Security Council

1. INTRODUCTION

There is much to be said for the contention that 2019 marks the twenty-five years period of contemporary practice of international criminal justice. In 1994 the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was established in 1993, became operational with its first case, Tadić and in 1994 the International Criminal Tribunal for Rwanda (ICTR) was set up following the extreme horrors of the genocide in Rwanda in the Spring of 1994. The creation of these two UN Tribunals has spurred unprecedented developments in respect of international criminal accountability in legislation and practice, at both the national and international level. A quarter of a century later the landscape in this area of criminal accountability for mass atrocities appears both impressive and utterly complex, with the proliferation of numerous initiatives to end impunity for the commission of international crimes.

Twenty-five years is a significant period of time and a good moment to look back and to look ahead. I will do so through the prism of the overarching and unwithering goal of international criminal justice: to end impunity for the most serious crimes known to mankind, and in doing so seek to ensure an optimal balance between efficiency and fairness. This paper is not about celebrating the known successes, but reflects on two major issues and challenges for contemporary international criminal justice: the scope of criminal accountability and the nature and organization of the model of criminal procedure applied by international criminal tribunals. These two matters are not only in and of themselves essential for the success, or even survival, of the system of international criminal justice, but we also should not underestimate their importance, as intended or unintended role models for various national initiatives to investigate and prosecute international crimes.

The reflections that this paper offers will reveal on the first point that the scope of accountability for international crimes appears to be in constant development, and is at present an element of uncertainty and instability in international criminal practice. Why is that and how can it be improved?

The second chosen focus of my reflections is the nature and development of international criminal procedure. Over the last twenty-five years hopes were high to witness a process of maturing and improvement in both efficiency and quality of proceedings. However, it seems that procedures have only become more complex, and there are serious doubts as to their longer-term quality and sustainability. What are some of the main problems and how can we do better in the future?

2. SCOPE OF CRIMINAL ACCOUNTABILITY

2.1 **Some initial thoughts on the principle of legality**

Substantive international criminal law can be found in treaties and, especially, customary international law. The focus in these sources of international law is on

the definition of the crimes. With the exception of the Genocide Convention,[1] there are hardly any specified modes of criminal liability under international law. In the older sources of substantive international criminal law, such as the Geneva Conventions and their Additional Protocols, reference is made to the 'commission' of certain prohibited conduct,[2] but we do not know what is meant by commission and whether liability on the basis of other modes, such as attempt or complicity is also envisaged by States. An exception is made for a mode of liability which is unique to international crimes, and which developed in the context of military structures and operations: command responsibility.[3] I will get back to the issue of command responsibility later.Faced with this lack of attention for modes of liability in applicable treaties codifying international crimes, international criminal tribunals were tasked to determine how far individual criminal responsibility for these crimes should go under international law. Regrettably, it has resulted in a significant degree of uncertainty as to what the scope of individual criminal responsibility should be. International criminal tribunals are clearly torn between adhering to the principle of legality on the one hand, and developing the law, based on the principle of fair labelling,[4] on the other.

In case there is strict adherence to the principle of legality and only instances of direct commission would eventually be criminalized and prosecuted, there will be criticism that important suspects will escape criminal liability and that the overarching aim of ending impunity is not sufficiently respected and that the law does not live up to its protective object and purpose. At times, judges can be quite frank about their ambitions to develop and improve the law, instead of merely applying existing law. The following was said by the *Milutinović et al.* trial chamber of the ICTY:

> In order to give full effect to the object and purpose of customary international law prohibiting crimes against humanity, it is necessary to adopt a broad definition of the key terms that extends as much protection as possible.[5]

Although this relates to the definition of a crime, a similar approach may also be detected in relation to modes of liability.

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1 UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951, 78 UNTS 277. In Art. 3, the Genocide Convention criminalizes the following modes of liability: direct perpetration, conspiracy, direct and public incitement, attempt, and complicity.

2 Geneva Conventions I, Art. 50, II, Art. 51, III, Art. 130, IV, Art. 147, and Additional Protocol I, Art. 85. All provisions refer to grave breaches 'if *committed* against persons…'.

3 First codified in 1977 in Art. 86(2) of Additional Protocol I to the Geneva Conventions.

4 The principle of fair labelling requires that the 'label' of an offence corresponds with the nature and gravity of the offender's criminality, see T. de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law', 18(5) *International Criminal Law Review* (2018) pp. 788-821.

5 ICTY, *Prosecutor v. Milutinović et al.*, Judgment, T. Ch., Case No. IT-05-87-T., 26 February 2009, at para. 147.

In case the law will be developed to meet the aim of increased protection and will thus generate new or expanded individual criminal liability under international law, there will be criticism that the fundamental principle of legality is not sufficiently respected.

This dilemma is hanging as a cloud over practices of international criminal tribunals, and in their slipstream also of national courts investigating and prosecuting international crimes. Over the last twenty-five years a wave motion can be discerned between the urge to develop the law and respecting the principle of legality.

Looking back on the history of individual criminal responsibility under international law, one witnesses the development, or rather expansion, of modes of criminal liability in especially the case law of the WW II international criminal tribunals and at the ICTY and ICTR. The underlying rationale for this expansion seems to be the fact that national criminal justice systems generally provide for the same, or similar, modes of liability that have subsequently been developed in international criminal law by judges. In addition, one encounters a desire, sometimes openly articulated, to fit the modes of liability to individuals who are considered to be the leaders, or masterminds, behind international crimes, but who are generally not present at the scene of the crime.[6] This is not a development that is unique to the international criminal justice system; also at the national level, especially in respect of organized crime, modes of liability have been developed, or refined, with a view to holding leaders, bystanders and facilitators criminally accountable.[7] The question arises, however, where to draw the line between criminal liability, in whatever form, and non-liability.[8]

In terms of the principle of legality, the interpretation and application of modes of liability tends to be justified with reference to customary international law. This is rather unhelpful. It has been argued that the highly uncertain nature of customary international law is by definition unsuitable to satisfy the principles of legality and legal certainty. In this regard, Fletcher and Ohlin have argued, from a criminal law background, that in the law on international criminal responsibility there is a 'legality deficit' and they have strongly criticized the use of customary international law by the ICTY and ICTR:

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6 Leaders operating at a distance are often held accountable as principals under the doctrine of Joint Criminal Enterprise (JCE), see e.g. E. van Sliedregt, 'The Curious Case of International Criminal Liability', 10(5) *Journal of International Criminal Justice* (2012) pp. 1171-1188.

7 In the Netherlands, for instance, participating in a criminal organization is criminalized under Art. 140(1) of the Dutch Penal Code; the concept of the 'functional perpetrator' has been developed in case law to assign responsibility to those who have control over the acts of others, and the preparation of certain crimes has also been prohibited under Art. 46(1) of the Dutch Penal Code.

8 For the Netherlands, this question has been raised by De Hullu in his inaugural lecture: J. de Hullu, *Zijn er grenzen aan de strafrechtelijke aansprakelijkheid?* [*Are there limits to criminal responsibility?*], Gouda, Quint 1993.

> […] customary international law has no role in international criminal law, except perhaps to increase the options for the defence. To use custom to enhance the prospects of conviction is to violate the fundamental assumptions of modern criminal law. 'Customary law' is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority. The Rome Statute represents public standards of that sort but the rules of customary international law – whether real or imagined – do not.[9]

The criticism from international lawyers is of a different nature and concentrates on the methods used for determining rules of customary international law. It has been said that the *ad hoc* Tribunals tend to directly translate their policy objectives into customary international law.[10] Thus, at times one has the impression that the determination of rules of customary international law in the case law of the ICTY and ICTR rather represents a choice as to what is right and/or logical, instead of having a solid basis in State practice and *opinio iuris*. This raises the question whether the method to find, interpret and apply modes of criminal liability in the international criminal justice system should be based on general principles of substantive criminal law, rather than on customary international law. Similar problems arise here. General principles of criminal law may diverge too much among criminal justice systems in order to be useful as sources of applicable law for modes of individual criminal responsibility under international law. Many scholars believe that general principles as sources for international law ought to be truly general and, in the words of the ICJ Statute, 'recognized by civilized nations'.[11]

The uncertainty and dilemma as to the scope of individual criminal responsibility were in a way exemplified by the choice for modes of liability in the ICTY and ICTR Statutes. The UN Secretary-General, and his legal team, provided the ICTY and ICTR with the following modes of liability in 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.'[12]

Command responsibility is provided for in Article 7(3) of the Statute and in respect of genocide, the modes of liability as we find them in the Genocide Convention are copied into Article 4(3) of the ICTY Statute (commission, conspiracy, direct and public incitement, attempt and complicity).

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9 G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3(3) *Journal of International Criminal Justice* (2005) pp. 539-561 at p. 559.

10 A. Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia', in T. Vandamme and J. Reestman (eds.), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems*, Groningen, Europa Law Publishing 2001 at p. 19.

11 J. Ohlin, 'Co-Perpetration – German Dogmatik or German Invasion?', in C. Stahn (ed.), *The Law and Practice of the ICC*, Oxford, Oxford University Press, 2015 at p. 525.

12 Art. 6(1) of the ICTR Statute has identical language.

The choice for modes of liability in Article 7(1) was hardly explained by the Secretary-General in the report accompanying the ICTY Statute. All that was said is that '[t]he Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible'.[13] We do not know why these modes of criminal liability in particular were selected, what is their basis – if at all – in international law and how they should be interpreted. Nor is there any attention to the issue why certain modes of liability, conspiracy, incitement, attempt and complicity, as they apply to genocide, do not apply also to other crimes in the ICTY Statute.

What we do read in the report of the Secretary-General is the importance of not creating new law, but to adhere strictly to the principle of legality – or *nullum crimen sine lege*.[14] Although this applies first and foremost to the definition of crimes, arguably it is also relevant to the interpretation and application of modes of criminal liability.

2.2 Some examples of – expanded – criminal liability

It was thus up to the judges of the ICTY to ultimately determine the scope of individual criminal liability, in a way that is suitable to end impunity and to fair labelling and also respects the principle of legality. It has become clear that especially in the early years of the ICTY's existence the scope of individual criminal responsibility has been considerably developed, or rather expanded. This is best exemplified by the introduction of a mode of liability that has not been provided for in the Statute, but is read into it, namely joint criminal enterprise (JCE). This mode of liability was developed as a form of co-perpetration, with a view to cover a large group of suspects in the widespread commission of crimes and, especially, to hold criminally accountable leaders and planners who are far away

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13 UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), at para. 54.

14 *Ibid.*, at para. 29: 'It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.' and at para. 34: 'In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.' For a detailed study on the scope of the *nullum crimen* rule in international criminal law, see M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerp, Intersentia 2002.

from the physical perpetration.[15] It has three categories.[16] JCE has been both welcomed and criticized in the literature.[17]

The ICTY Appeals Chamber in the *Tadić* case ruled that JCE is both part of customary international law and has been implicitly adopted in the ICTY Statute.[18] The better view is, however, that it is the result of judicial lawmaking. JCE's popularity is nevertheless significant; it has been the basis for many convictions at the ICTY and ICTR and has been incorporated in the law and practice of other *ad hoc* tribunals, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). But, JCE was not incorporated in the International Criminal Court (ICC) Statute and at the ECCC the third category of JCE was declared to be not part of customary international law.[19] This goes to show that (judicial) expansion of individual criminal liability is not without bounds and a stricter orientation on the principle of legality in the future would not be unexpected.

Another example which demonstrates the fluctuating views on the scope of individual criminal liability relates to the requirement of 'specific directions', as part of aiding and abetting. Aiding and abetting is about attaching criminal liability for those who have helped others in the commission of crimes. In the *Perišić* case, the ICTY Appeals Chamber introduced 'specific directions' as a requirement for aiding and abetting;[20] this element required the accused to not only substantially assist, but also to specifically direct such assistance towards the aiding or abetting of a crime. Especially when the accused has provided assistance remote from the scene of the crime there needs to be convincing evidence that this assistance has been 'specifically directed' at the commission of crimes.[21] This lays the bar significantly higher for obtaining a conviction. Not only must the assistance of the aider and abettor be substantial, it also must be specifically directed towards the commission of a crime. This development has met with much criticism, and the specific directions requirement has been rejected by the SCSL[22] and later on the ICTY also came back on it.[23]

Similar uncertainty applies with regard to the element of causation in aiding and abetting. For the scope of aiding and abetting liability it matters much what

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15 ICTY, *Prosecutor v. Tadić*, Judgment, A. Ch., Case No. IT-94-1-A, 15 July 1999.

16 *Ibid.*, at para. 220.

17 See e.g. J. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5(1) *Journal of International Criminal Justice* (2007) pp. 69-90; A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5(1) *Journal of International Criminal Justice* (2007) pp. 109-133.

18 ICTY, *Prosecutor v. Tadić*, Judgment, A. Ch., *supra* n. 15, at para. 220.

19 ECCC, Case 002/01, Judgment, Supreme Court Ch., 23 November 2016, at paras. 791-810.

20 ICTY, *Prosecutor v. Perišić*, Judgment, A. Ch., Case No. IT-04-81-A, 28 February 2013, at paras. 25-36.

21 *Ibid*., at para. 39.

22 SCSL, *Prosecutor v. Taylor*, Judgment, A. Ch., Case No. SCSL-03-01-A, 26 September 2013, at paras. 473-480.

23 ICTY, *Prosecutor v. Šainović et al*., Judgment, A. Ch., Case No. IT-05-87-A, 23 January 2014, at paras. 1618-1650.

effect the assistance has on the crimes. One notices that the initial case law of the ICTY has maintained a pretty high standard of substantive effect of assistance on the main crime.[24] What this means is that an act of assistance is substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role the accused in fact assumed.'[25] The ICC's case law on the degree of effect in case of aiding and abetting has initially followed the ICTY's standard of 'substantial effect'.[26] But gradually case law of the ICC has moved in the direction of being satisfied with no effect at all on the main crime; as was said in the *Ongwen* confirmation of charges decision:

> It is nowhere required, contrary to the Defence argument, that the assistance be "substantial" or anyhow qualified other than by the required specific intent to facilitate the commission of the crime.[27]

This relaxation of the criminal liability-threshold in the ICC context has found justification, in part, in a high *mens rea* threshold for aiding and abetting under the ICC Statute.[28] Indeed, the ICC requires that the aider or abettor must have provided his or her assistance for the purpose of facilitating the main crime,[29] a requirement that is not applied by other international criminal tribunals.

A final example of fluctuation in the scope of liability relates to command responsibility. The scope of this mode of liability for both civilian and military commanders has been developed further in the case law of the ICTY and ICTR.[30] It

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24 See ICTY, *Prosecutor v. Tadić*, Judgment, T. Ch., Case No. IT-94-1-T, 7 May 1997, at para. 688; ICTY, *Prosecutor v. Furundzija*, Judgment, T. Ch., Case No. IT-95-17/1-T, 10 December 1998, at para. 234, followed by the ICTR in e.g. *Prosecutor v. Kayishema & Ruzindana*, Judgment, A. Ch., Case No. ICTR-95-1-A, 1 June 2001, at para. 201; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Judgment, A. Ch., Case Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, at para. 530: 'This support must have a substantial effect upon the perpetration of the crime.'

25 ICTY, *Prosecutor v. Tadić*, Judgment, T. Ch., Case No. IT-94-1-T, 7 May 1997, at para. 688.

26 ICC, *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, PTC I, Case No. ICC-01/04-01/10, 16 December 2011, at para. 280; ICC, *Prosecutor v. Lubanga*, Judgment, T. Ch. I, Case No. ICC-01/04-01/06, 14 March 2012, at para. 997.

27 ICC, *Prosecutor v. Ongwen*, Decision on the confirmation of charges, PTC II, Case No. ICC-02/04-01/15, 23 March 2016, at para. 43. See also the *Bemba et al*. appeals judgment: 'Whether a certain conduct amounts to "assistance in the commission of the crime" within the meaning of article 25(3)(c) of the Statute even without the showing of such an effect can only be determined in light of the facts of each case.' ICC, *Prosecutor v. Bemba et al*., Judgment, A. Ch., Case No. ICC-01/05-01/13, 8 March 2018, at para. 1327.

28 ICC, *Prosecutor v. Bemba et al.,* Judgment, T. Ch. III, Case No. ICC-01/05-01/08, 21 March 2016, at para. 94.

29 Rome Statute Art. 25(3)(c). For a discussion of the purpose requirement, see M. Ventura, 'Aiding and Abetting', in J. de Hemptinne, R. Roth, E. van Sliedregt, M. Cupido, M. Ventura and L. Yanev (eds.), *Modes of Liability in International Criminal Law*, Cambridge, Cambridge University Press, forthcoming; available at SSRN: <https://ssrn.com/abstract=3160960>, at pp. 52-8.

30 For a detailed analysis of this case law and the scope of command responsibility as a *sui generis* mode of liability: G. Mettraux, *The Law of Command Responsibility*, Oxford, Oxford Univer-

has been codified in Article 28 of the ICC Statute, for both military and civilian superiors. The three main elements of command responsibility in the law and practice of the ICC remain the same: effective control over subordinates, knowledge of the commission of international crimes by subordinates and the failure to either prevent these crimes or to punish the perpetrators (power, knowledge, duty). In the ICC's *Bemba* case the issue was to what degree a commander can be said to be in effective control in case of being remote from his forces and sharing command over his forces with another commander, and whether he has failed in his duty to take reasonable measures. The Trial Chamber found that Mr. Bemba was in effective control and had failed to take reasonable measures, and therefore convicted him on account of command responsibility.[31] Recently, however, the ICC Appeals Chamber ruled in the *Bemba* case that command responsibility only requires commanders to do what is necessary and reasonable under the circumstances,[32] and that command responsibility is not a form of strict liability.[33] Clearly with the aim of not attaching liability too quickly, the Appeals Chamber said:

> There is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight. Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time.[34]

Within the limitations of Mr. Bemba being a remote commander, the Appeals Chamber concluded that the measures taken by him were reasonable:

> Indeed, in faulting the results of measures taken by Mr Bemba, the Trial Chamber failed to appreciate that, as a remote commander, Mr Bemba was not part of the investigations and was not responsible for the results generated. Had it done so, the Trial Chamber's assessment of the measures Mr Bemba had taken would have been necessarily different. It must also be noted that the 2002-2003 CAR Operation was conducted within the short space of a few months, which notwithstanding, Mr Bemba took numerous measures in response to crimes committed by MLC troops. In this regard, the Appeals Chamber recalls that the Trial Chamber failed to properly establish how many crimes had been committed.[35]

And in their separate opinion Judges Van den Wyngaert and Morrison said:

> In short, what the law expects from commanders depends on where they find themselves on the hierarchical ladder. Article 28 of the Statute is broad and flexible

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sity Press 2009.

31 ICC, *Prosecutor v. Bemba*, Judgment, T. Ch., Case No. ICC-01/05-01/08, 21 March 2016.

32 ICC, *Prosecutor v. Bemba*, Judgment, A. Ch., Case No. ICC-01/05-01/08 A, 8 June 2018, at para. 169.

33 *Ibid*., at para. 170.

34 *Ibid*.

35 ICC, *Prosecutor v. Bemba,* Judgment, A. Ch., ICC-01/05-01/08 A, 8 June 2018, at para. 192.

> enough to apply to commanders in different positions. However, in applying the test ((i) effective control, (ii) knowledge or should have known, and (iii) necessary and reasonable measures) the Court should abide by the principle that command responsibility is not strict liability and that we do not ask the impossible of the military commander. The Court should therefore resist the reflex of always holding the most senior commander criminally responsible, regardless of how proximate the superior-subordinate relationship actually was.[36]

This is a clear message of criticism directed towards fellow judges, past and present, who, according to these judges, too easily may have held the most senior commander criminally responsible.

The *Bemba* judgment's controversial nature was demonstrated by a joint dissenting opinion of two Appeals Chamber judges who strongly believed that the measures taken by Bemba were clearly not sufficient and that he should have been convicted.[37] In the end, five of the eight judges (three Trial Chamber, five Appeals Chamber), having to pronounce themselves on the guilt or innocence of Mr Bemba, considered he was guilty and he was within the scope of command responsibility as they thought it should be interpreted. The Bemba appeals judgment also has been critically assessed by experts and scholars.[38]

2.3 Interim conclusion

The above are just a handful of examples on the uncertain scope of individual criminal responsibility and some – tentative – conclusions can be drawn at this point.

Firstly, it can be safely said that even after twenty-five years of law and practice the scope of criminal liability under international law is still uncertain and controversial. Judges fundamentally disagree and over twenty-five years we have seen moments of both significant expansion of the scope of liability, followed by some sort of correction of this previous expansion. At times, these developments occurred with only a small margin of majority and without convincing reasoning or persuasive basis in both positive law and legal theory. It is furthermore not uncommon that the scope of liability differs significantly between international criminal tribunals. For example, whereas the ICTY has embraced JCE as a mode of liability, this same mode of liability has been rejected in part by the ECCC (rejecting JCE III) and in full by the ICC. It seems that we are thus still very far away from a unitary and theoretically solid *Dogmatik* of modes of liability in international criminal law.

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36 ICC, *Prosecutor v. Bemba*, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, A. Ch., ICC-01/05-01/08 A, 8 June 2018, at para. 36.

37 ICC, *Prosecutor v. Bemba*, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, A. Ch., ICC-01/05-01/08 A, 8 June 2018.

38 See D. Amann, M. Jackson, M. Newton, N. Poutou and L. Sadat, 'What Does the Bemba Appeal Judgment Say about Superior Responsibility under Article 28 of the Rome Statute?', *ICC Forum*, available at <https://iccforum.com/responsibility>.

Secondly, and related to the previous point, the question arises whether this state of continuing uncertainty as to the scope of individual criminal responsibility is such a bad thing. One can argue that it is inevitable that views and case law on the scope of criminal liability are in constant development. In a way, national law and case law on individual criminal responsibility also can trigger some degree of uncertainty. However, national criminal justice systems are generally endowed with a solid theoretical and dogmatic framework, with which development of the law has to be in conformity; as a result, the uncertainty on modes of liability at the national level generally is within acceptable bounds. It is my view that the uncertainty as to the scope of individual criminal responsibility in the international criminal justice system as a whole has exceeded what is reasonable and acceptable. Who really knows at present how far liability goes? This is not only a problem for the legitimacy and authority of the international criminal justice system as such, but also has broader ramifications. It must be borne in mind that to a very large degree the future of ending impunity for international crimes lies in national criminal justice systems. These national systems, when setting up or refining their laws and policies on the prosecution of international crimes, may increasingly look for guidance in the laws and practices of international criminal tribunals. When doing so at present, however, that guidance is hardly there, in light of the diverging, even conflicting, views on modes of liability, both within and between international criminal tribunals. In my view it is also a responsibility of the international criminal justice system to consider their impact on and legacy for national justice systems and also, for that reason, to work towards a unitary and coherent *Dogmatik* of modes of individual criminal responsibility.

3. INTERNATIONAL CRIMINAL PROCEDURE

Contrary to substantive international criminal law, prior to the creation of international criminal tribunals there existed no international rules that directly concern the organization and content of criminal procedure.[39] Of course, there are international rules protecting the right to a fair trial, which need to be observed by international criminal tribunals, but as minimum standards they still leave considerable freedom of choice for a certain procedural approach. This raises the question what considerations underlie the design, object and purpose of present day international criminal procedure. In principle, there appears to be no difference with national criminal justice systems, in that the international criminal tribunals also seem to seek to find the optimal equilibrium between efficiency and fairness.[40]

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39 G. Sluiter, *Het internationaal strafprocesrecht: de geboorte van een rechtsgebied*, Amsterdam, Vossiuspers 2007, at pp. 6-10.

40 The continuing search for this optimal equilibrium has best been portrayed in the literature by Herbert Packer's classical work on the crime control and due process models of criminal procedure. None of today's models of criminal procedure in justice systems based on the rule of law are fully crime control or due process, but rather tend to find a balance between both models.

However, with the emphasis being put on ending impunity for international crimes,[41] one would expect that the element of efficiency in international criminal proceedings would carry even greater weight than at the national level. This does not seem to be the case. Compared to national justice systems, international criminal tribunals have limited capacity. In addition, they do not have exclusive jurisdiction; they supplement existing national criminal justice systems, and are not under a similar degree of external expectations or pressure to achieve a certain output, such as may be exerted by parliaments or the public at the national level. This leads to the rather surreal situation that many extremely serious crimes, even murders and rapes, are not investigated and prosecuted by international criminal tribunals, whereas such crimes practically always would be investigated and prosecuted by national criminal justice systems.

That having been said, the contemporary generation of international criminal tribunals is receiving increasing attention over the last twenty-five years as far as the quality of their procedures is concerned. Both fairness and efficiency are under increasing scrutiny and in need of continuing improvement. Two major aspects of international criminal procedure are singled out here and their developments over the last twenty-five years will be subjected to a brief evaluation. Firstly, some observations will be made on the question how the procedural law of the ICC should respond to problems in the investigation, notably witness interference. Secondly, it will be briefly examined whether the law and practice on cooperation at the ICC suffices to ensure its effective operation.

3.1 Common law v. civil law and the problem of witness interference

World-wide, criminal procedure can be divided into two major systems. One is generally referred to as the common law or adversarial model and prevails in Anglo-Saxon countries, including their former colonies. It is characterized by being driven by two equal parties, with emphasis on the (oral) presentation of evidence at trial and the presence of lay triers of fact (jury). The other is known as the inquisitorial or civil law system and can be found in Continental Europe, including former colonies. In these countries, criminal procedure is seen as a State inquest for the truth, making the procedure judge-controlled; the emphasis lies on the pretrial phase with the collection of evidence in written form, which will be made part of the case file. The aforementioned simplifications do not do justice to the many differences among national procedural approaches, also within one family, but I gladly refer to others who have written in more detail on the nature and cause of

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See H. Packer, 'Two Models of the Criminal Process', 113(1) *University of Pennsylvania Law Review* (1964) pp. 1-68.

41 See part of the Preamble to the ICC Statute: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

the differences between the common law and civil law approaches to criminal procedure.[42]

It can be said that since the creation of all international criminal tribunals, including the post-WW II-tribunals, the choice of a procedural model appears to have been quite arbitrary. There is no clear underlying theory or rationale that justifies the choice of a predominantly adversarial model of criminal procedure for the overwhelming majority of international criminal tribunals. Yet, the reality is that since the post-WW II-tribunals, the Anglo-Saxon countries, especially the US, and judges from these countries were quite successful in 'selling' the adversarial model to international criminal tribunals, from the Nuremberg International Military Tribunal up to and including the ICTY and the ICTR. Occasionally, this choice has been defended by arguing that the adversarial, party-driven, model of procedure is better suited to protect the right to a fair trial.[43] However, there is no clear proof for the assertion that the adversarial model would better ensure the protection of fair trial rights. Likewise, there is also no proof of the inquisitorial or adversarial model being better equipped for more efficient proceedings. It is true that, on average, full inquisitorial criminal proceedings are more efficient than full adversarial criminal proceedings, but this overlooks the fact that plea bargaining in the adversarial system significantly reduces the need to organize these full criminal proceedings. A good case can be made for the -frequent- use of plea bargaining also in international criminal justice, as an important tool to improve efficiency, and to contribute to ending impunity, for the procedure as a whole.[44]

Gradually, with the proliferation of international criminal tribunals since the creation of the ICTY, more and more elements of the inquisitorial, judge centred, model of criminal procedure have found their way into the law and practice of international criminal proceedings. In this regard, one can mention the absence of technical rules of evidence (on such matters as admissibility of evidence), more and more powers for the judges to collect evidence or to question witnesses called by the parties, and the participation of victims in international criminal proceedings. However, in spite of these developments, the prevailing approach in international criminal proceedings remains a party-driven criminal procedure, in which the collection of evidence and control over the proceedings befalls essentially to the parties. There has been one experiment in which a full inquisitorial procedure has been adopted, including judicial investigations, and that is the ECCC.[45] This

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42 The most important work here is M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven, Yale University Press 1986.

43 See the observations of the first ICTY President, Antonio Cassese: '[…] it was perhaps felt that […] the adversarial system better safeguarded the rights of the accused', in A. Cassese, *International Criminal Law*, Oxford, Oxford University Press 2003 at p. 384.

44 For a convincing analysis on this matter, see J. Iontcheva Turner and T. Weigend, 'Negotiated Justice', in G. Sluiter *et al.* (eds.), *International Criminal Procedure – Principles and Rules*, Oxford, Oxford University Press 2013 at pp. 1375-1414.

45 On the procedure of the ECCC, see G. Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', 4(2) *Journal of International Criminal Justice* (2006) pp. 314-326.

is an ad hoc and internationalized criminal tribunal, where the choice for a procedural model was very much imposed by national, Cambodian, procedural law, which was based on the French, inquisitorial, approach towards criminal justice. Consequently, this was also not a choice based on sound theory or rationales, especially as regards the considerations what would best suit the object and purpose of the tribunal concerned.

In another publication I have addressed the question whether the inquisitorial procedure, including a stronger role for judges in the investigations, should not be given more of a chance in light of current problems in international criminal proceedings.[46] The position I took was based on the consideration whether a certain procedural system would be better equipped to tackle today's serious challenges in international criminal proceedings. One of the most important problems these days, in my opinion, is the serious risk of witness interference in international criminal proceedings. We see – especially in the context of the ICC – that there are serious complaints and concerns that witnesses in their proceedings are the object of interference, either by bribes or through threats and intimidation. This is, for example, what the ICC Prosecutor said about the problem of witness interference in the *Kenya* case of the ICC:

> The Office's independent and impartial investigations and prosecutions in the Kenya situation have been methodically undermined by a relentless campaign that has targeted individuals who are perceived to be Prosecution witnesses, with threats or offers of bribes, to dissuade them from testifying or persuade witnesses to recant their prior testimony. As a result, potential witnesses have been too scared to come forward, while others who gave statements have subsequently sought to withdraw from the process, citing intimidation. Indeed, the Chamber of Judges presiding over the ongoing trial of Messrs Ruto and Sang, recently noted the systematic nature of the interference of several witnesses in that case.[47]

It seems to me that from a procedural perspective there are two factors which cause or aggravate the problem of witness interference. Firstly, the investigations stretch out too long before the commencement of the trial, resulting in too long a timespan in which witnesses can be 'targeted', and, secondly, the parties have a partisan, non-objective approach towards their collection of evidence, and engage in fact-finding without judicial supervision. Both factors could be taken away, or mitigated, with giving the judiciary more powers during the pre-trial phase. A stronger role for the judge in the pre-trial investigations could serve to ensure that the period of time between first contacting the witness and taking testimony in court is

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46 G. Sluiter, 'Key Reforms for the Next Decade of the ICC-Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation', *ICC Forum*, <https://iccforum.com/anniversary#Sluiter>. The thoughts and analysis that follow are based on that paper>.

47 F. Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation', 10 September 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>.

limited as much as possible and that the investigations of the parties are under 'judicial supervision' in a broader sense.

The role of the judge in pre-trial investigations is a matter that divides criminal justice systems. In the continental European tradition – notably in a country like France – judge-led investigations excluding the parties is the norm, at least in more serious cases. In French, this investigating judge is called the *juge d'instruction*. This approach to investigations serves to ensure objective and comprehensive fact-finding without the risk of investigations being distorted by a partisan approach. In adversarial criminal justice systems, such as in the US or the UK, the judge has only a small role in fact-finding, limited to issuing the warrants that may be necessary for certain investigative activities.

Between the extremes of either exclusive judicial investigations, or investigations only by the parties, there are more flexible options. In the Netherlands, for example, the pre-trial judge has a supervisory function in pre-trial investigations, which, depending on the needs of the investigation, may result in a greater or more marginal role.[48]

It seems to me that the system of the ICC, with the creation of the Pre-Trial Chamber and bearing in mind some of its powers, is flexible enough to give the judge a stronger role in the investigations. We have already witnessed some developments which point towards a more active Pre-Trial Chamber and a stronger judicial role in the investigations, precisely with the aim of dealing with the problem of (potential) interference with witnesses.

In the *Ongwen* case, for example, the Pre-Trial Chamber used Article 56, dealing with a unique investigative opportunity, to prevent instances of witness interference, by calling certain witnesses to give evidence prior to trial:

> The PTC Single Judge specified the Article 56(2) measures enabling him to take the Witnesses' testimony. Pursuant to Article 56(1)(a) of the *Statute*, he found a unique investigative opportunity to take the Witnesses' testimony in light of a risk that it may not be available subsequently for the purposes of a trial. In so finding, he considered specific meetings, publications and other events with the potential to taint the Witnesses' evidence, in conjunction with the risks inherent in the passage of time, in particular, the possible recurrence of events with the potential to taint the Witnesses' evidence.[49]

Besides Article 56, another provision in the ICC Statute could also have been used to deal with the problems pertaining to witness interference. Article 57(3)(c) of the ICC *Statute* empowers the Pre-Trial Chamber, without requiring an application from the parties, to protect witnesses and also to preserve evidence. Arguably, this *proprio motu* power in the preservation of evidence could open the door to a more active judicial involvement in the pre-trial collection of evidence, which might

48 See Arts. 181-184 of the Dutch Code of Criminal Procedure.

49 ICC, *Prosecutor v. Dominic Ongwen*, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, Case No. ICC-02/04-01/15-520, T. Ch., 10 August 2016, at para. 8 (footnotes omitted).

even go as far as conducting judicial investigations, if so required by the circumstances of a particular case.

Looking at the idea behind having a Pre-Trial Chamber at the ICC to start with, namely ensuring the preservation of evidence, there does not seem to be that much against having a stronger role of the Pre-Trial Chamber in the investigations. And that was even without the drafters having anticipated rather widespread and structural problems regarding the interference with witnesses.

It is my opinion, therefore, that a flexible – and thus at times strong – role for the Pre-Trial Chamber in the collection of evidence can improve the quality of fact-finding and has the potential of reducing instances of witness interference. When the Pre-Trial Chamber considers it to be in the interests of justice – or necessary – Article 57(3)(c) of the ICC *Statute* empowers the Chamber to take a variety of steps and measures to ensure the preservation of evidence. For example, on the basis of Article 57(3)(c) of the ICC *Statute*, the Pre-Trial Chamber could require to be kept informed about the existence and nature of contacts with the parties' witnesses. It could also deal with all possible interference risks, including by ordering additional protective measures, which is mentioned as a separate power in Article 57(3)(c) of the ICC *Statute*.

Obviously, such a potentially far-reaching role for the Pre-Trial Chamber in certain investigations is not without problems. It raises the structural question whether the emphasis may gradually shift from the trial to the pre-trial phase and thereby risks threatening the external publicity of international criminal proceedings. Especially in international criminal trials, justice must be seen to be done. It is not helpful in this regard if there is a development which contributes to evidence not always being presented at a public trial. But, that said, it does not have to be a consistent development in all cases; the law is flexible enough to adjust the role of the Pre-Trial Chamber to the needs and threats in a particular investigation. In investigations where the risks of witness interference are minimal, there is clearly less need for judicial supervision of the pre-trial investigations and the procedure can keep its essentially adversarial character.

Taking this focus on the ICC, and the example of witness interference, one step further, twenty-five years of international criminal procedure teach us the lesson of retaining flexibility and keeping a close eye on the clear and present threats to the quality and fairness of proceedings. In this regard, the reader may indeed detect a certain paradox here in relation to the previous section in which I argued in favour of more certainty and uniformity in respect of substantive criminal law, focusing on the scope of individual criminal responsibility. It is less problematic, however, to advocate more flexibility in procedural criminal law than in substantive criminal law. In fact, the principles of legality, *nullum crimen sine lege* and certainty, as, for example, they find protection in international human rights law,[50] are first and foremost concerned with substantive criminal law. This is not to say that interna-

[50] See Art. 15 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 7 of the European Convention on Human Rights (ECHR).

tional criminal procedure can develop randomly and can do without legal certainty; on the contrary. Also from a procedural perspective legal certainty is essential. For example, human rights law demands that interference with the right to privacy, as it occurs in criminal proceedings with for example wiretaps and search and seizure operations, take place in accordance with the law, and must be accessible and foreseeable.[51] But within a stable framework of procedural rules, flexibility can still be built in when it comes to the role judges can play in investigations and when the investigations may call for more (judicial) supervision. This is perfectly in keeping with the principle of (procedural) legality.

3.2 Responding to non-cooperation

Compared to national criminal proceedings, international criminal proceedings have the unique and highly complicating feature of almost full reliance on cooperation from (national) authorities.[52] Both for the arrest of persons and the collection of evidence, international criminal tribunals depend on others, especially States, but sometimes also peacekeeping forces.

In this regard the contemporary generation of international criminal tribunals marks a rupture with the post WW II-tribunals, which were basically 'occupation tribunals' and could rely fully on cooperation and had practically all suspects in detention and all evidence at their disposal. Since the creation of the ICTY in 1993, cooperation problems have always been hanging as a shadow over the operation of all international criminal tribunals. Looking back on the ICTY and ICTR, one notices that they have been quite successful in completing their mandates with virtually all accused having been arrested and tried. It goes too far to deal in detail with cooperation-issues that internationalized courts, such as the SCSL, ECCC or STL, have faced – or are facing still -; suffice it to say that, all things considered, any lack of or difficulty with cooperation has appeared manageable.[53]

As far as the ICTY and ICTR are concerned, the fact that they have been relatively very successful in obtaining the cooperation they needed is only in part a legal matter. It is true that in the ICTY's case law a so-called vertical system of cooperation was developed by the Judges, which enabled the *ad hoc* tribunals

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51 See – critical – on the procedural legality deficit in international criminal proceedings, K. de Meester, *The Investigation Phase in International Criminal Procedure – In Search of Common Rules*, Antwerp, Intersentia 2015 at pp. 105-111.

52 For a comprehensive analysis as to how the law and practice on cooperation has impacted on criminal procedure, see A. Reisinger-Coracini, 'Cooperation from States and Other Entities', in G. Sluiter *et al*. (eds.), *supra* n. 44, at pp. 95-116.

53 On cooperation with internationalized courts, see G. Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals', in C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, Oxford University Press 2004 at pp. 379-406 and G. Sluiter, 'Responding to Cooperation Problems at the STL', in A. Alamuddin, N. Nabil Jurdi, D. Tolbert (eds.), *The Special Tribunal for Lebanon – Law and Practice*, Oxford, Oxford University Press 2014 at pp. 134-152.

legally to request the cooperation they needed.[54] However, political developments and timing have also been very important. The Dayton Peace Agreement, which ended the war in the former Yugoslavia in 1995, paved the way for arrests of a considerable number of suspects by NATO peacekeeping forces. In addition, both the US and the EU continued to put great political pressure on the States of the former Yugoslavia to improve cooperation, which eventually resulted in the arrest and surrender of major suspects such as Milošević, Karadžić and Mladić.[55]

Compared to the ICTY and ICTR, the ICC is in a far more difficult position. It suffers at present from three major problems in securing effective cooperation.

First of all, its applicable law is the result of a compromise and is weaker in obliging States parties to cooperate than the law of the ICTY.[56] In addition, a considerable number of States, including very important States, such as the US or Russia, are not parties to the ICC and therefore have no obligation to cooperate with the Court at all. Last but not least, even when States have obligations under the ICC Statute, enforcing them is highly problematic. Unfortunately, at present, the ICC is going through a period in which States parties can refuse to cooperate without suffering any consequences. It is on this last problematic aspect of coop-

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54 The vertical model of cooperation was developed in the so-called Blaškić subpoena case, *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108*bis*, A. Ch., 29 October 1997; see for an analysis of the essential features of the vertical model of cooperation G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia 2002 at pp. 75-89.

55 This is what ICTY Prosecutor Brammertz had to say about the importance of continuing political support in a recent public speech: 'At the same time, you correctly recognized that continued diplomatic and political support was needed if we were to achieve our mandate. The greatest challenge my Office faced was obtaining the cooperation of the States of the former Yugoslavia, particularly in access to evidence and the arrest of fugitives. For many years, the governments of Bosnia and Herzegovina, Croatia and particularly Serbia refused to provide cooperation, hindering our investigations and delaying our trials. Yet with bi-partisan commitment across multiple administrations, the United States government's support was decisive to achieving justice. To take the most dramatic example, the 106th Congress in coordination with the George W. Bush Administration successfully secured the arrest of Slobodan Milošević. By conditioning foreign aid on full cooperation with the ICTY, Congress ensured that authorities in Belgrade adhered to their international legal obligations by arresting Milošević and transferring him to the Tribunal's custody. This conditionality policy was then continued by the European Union. Linking progress in the EU accession process and Euro-Atlantic integration to cooperation with my Office, conditionality policies resulted in the arrest of all remaining fugitives, most notably Radovan Karadžić and Ratko Mladić. The lesson is clear: if there is a clear political agenda in support of justice, and if the international community speaks with one voice, those most responsible for atrocity crimes can be held accountable.' (Remarks by Chief Prosecutor Serge Brammertz, United Nations International Criminal Tribunal for the former Yugoslavia, 'The International Tribunal and Beyond: Pursuing Justice for Atrocities in the Western Balkans', Joint briefing of 12 December 2017, available at <http://www.icty.org/sites/icty.org/files/articles/attachments/2017/171212-prosecutor-brammertz-remarks-washington_1.pdf>.

56 For an analysis of the ICC being less vertical, and thus less effective, in the set-up of its law on cooperation see G. Sluiter, *supra* n. 54, at pp. 79-89.

eration that I wish to offer some observations, in an adapted version of arguments I submitted elsewhere.[57]

It is common knowledge that the ICC is under increasing criticism, also from its States parties. The African Union's increasingly critical stance towards the ICC, on account of the ICC concentrating too much on African States and their political leaders, is well known. Be that as it may, one would still expect these States to comply with their obligations under the ICC Statute, and voice any criticism through other channels. Nevertheless, this is not the case and a number of especially African States parties, which all voluntarily joined the ICC, and accepted therefore all the obligations in the Statute, have refused to cooperate with the Court. What is more, they appear to get away with it.

There is already quite some jurisprudence of the ICC dealing with States that have failed to cooperate with the Court, using the mechanism under Article 87(7) of the Statute. In almost all cases this concerns the failure to arrest the indicted Al Bashir, former President of Sudan.[58] It is remarkable that not all instances of non-cooperation have been referred to the Assembly of States Parties (ASP) for further action. The two most recent cases dealing with South-Africa and Jordan have both not resulted in referral for further enforcement action.[59] With these instances of non-referral, and considering the situations where, following a referral, the ASP has not taken any real enforcement measures to speak of, we have arrived at a critical phase in the Court's life when it comes to dealing with non-cooperation. The worst thing that could happen to the effective functioning and authority of the Court is that non-cooperation is increasingly considered to be business as usual.

It is my view that a number of reforms are necessary to restore the authority of the Court towards non-cooperating States-parties. Even with the limitations of the law in mind, a solid legal framework regarding non-cooperation remains an im-

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57 G. Sluiter, 'Key Reforms for the Next Decade of the ICC-Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation', available at <https://iccforum.com/anniversary#Sluiter>.

58 The following States have been the object of Art. 87(7)-proceedings, which is the mechanism to (a) determine non-compliance, and (b) to enforce cooperation by referring the non-compliance to either the UN Security Council or the ASP: Sudan (State non-party, but cooperation obligations under UNSC Resolution 1593), Chad, Kenya, Djibouti, Malawi, Democratic Republic of Congo, Nigeria, Libya (State non-party, but cooperation obligations under UNSC Resolution 1970), South Africa and Jordan. For an overview and analysis of this case law, see G. Sluiter and S. Talontsi, 'Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court', in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court – Perspectives from Theory and Practice*, Leiden, Brill Nijhoff 2015, pp. 80-113.

59 See ICC, *Prosecutor v. Al Bashir*, Decision under Art. 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, PTC II, Case No. ICC-02/05-01/09, 6 July 2017 and see especially the conclusion in para. 139: 'the Chamber is not convinced that a referral to the Assembly of States Parties and/or the Security Council of the United Nations would be warranted in order to achieve cooperation from South Africa […]'; and see ICC, *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, A. Ch., Case No. ICC-02/05-01/09 OA2, 6 May 2019.

portant pre-requisite for subsequent effective enforcement measures. A number of problems have arisen in the Court's practice until now.

A first problem relates to the Court's case law under Article 87(7) of the Statute. The procedure under this provision is aimed at establishing a judicial finding of non-compliance, which is the condition for subsequent measures by the ASP or the United Nations Security Council (UNSC). The litigation under Article 87(7) has not always been of sufficient quality, and also has come to mix too much law with politics. One essential shortcoming of the case law is the discretion that was granted to the Judges not to refer a situation of non-compliance to the ASP, following a decision by the Appeals Chamber to decline to refer Kenya's non-compliance to the ASP.[60] It was said that:

> the Appeals Chamber is of the view that these interpretations are supported by the wording of article 87 of the Statute and holds therefore that an automatic referral to external actors is not required as a matter of law. Furthermore, the Appeals Chamber is not persuaded that such automatic referral would be beneficial as a matter of policy as contended by the Prosecutor.[61]

And later on:

> A refusal to refer a matter of non-cooperation to the ASP or the UNSC does not necessarily imply acceptance of non-cooperation, but may be based on the Chamber's conclusion that such a referral may not be an effective means to address the lack of cooperation in the specific context of the case.[62]

These considerations raise the question what criteria should guide the Chamber in referring non-compliance to the ASP. Rather, one would expect that when the non-compliance is considered serious enough to trigger Article 87(7) proceedings, referral to the ASP should be automatic. It would then be up to the ASP, as a political organ, to take appropriate action. This was also the – wise – position of the ICTY Appeals Chamber in the *Blaškić* case, which wished to stay out of subsequent enforcement measures, considering this a political matter.[63] The exercise of non-

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60 ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's Appeal Against Trial Chamber V(B)'s 'Decision on Prosecution's Application for a Finding of Non-compliance under Article 87(7) of the Statute', A. Ch., Case No. ICC-01/09-02/11 OA 5, 19 August 2015.

61 *Ibid*., at para. 49.

62 *Ibid*., at para. 52.

63 See *Blaškić* subpoena judgment, *supra* note 54, especially at paras. 35 and 36: "It is appropriate at this juncture to illustrate the power of the International Tribunal to make such a judicial finding. When faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber or the President must be satisfied that the State has clearly failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition,

referral discretion by ICC Chambers has already resulted in a number of unsatisfactory decisions. A few States, such as Nigeria and recently South Africa and Jordan, have been spared the referral of their non-compliance to the ASP, whereas other States in identical situations have been referred to the ASP for their non-compliance.[64] Moreover, the reason why some non-cooperation has not been referred to the ASP has led to some remarkable observations. For example, the non-referral of South Africa was based, in part, on the view that subsequent action by the ASP was unlikely to be effective in obtaining the requested cooperation. Literally, the Chamber applied the test whether, in the circumstances of the case, engaging external actors would be an effective way of obtaining cooperation.[65] This is an unfortunate sign of lack of confidence in the effectiveness of ASP-action. I do not think the message should be sent to non-cooperative States that the Judges themselves doubt whether engaging external actors is likely to be effective.

In addition to the problematic case law of various ICC Chambers in the enforcement of cooperation, we should also look at the role of the ASP in enforcing cooperation. One must admit that the mandate of the ASP in terms of dealing with non-cooperation is not based on very strong and detailed language. Pursuant to Article 112(f) of the Statute, the ASP is empowered to consider any question relating to non-cooperation. 'To consider' does not appear to endow the ASP directly with specific powers, but is broad enough to develop a robust and active approach by the ASP towards non-cooperation, if there was the political will to do this. What we see in practice, however, is quite disappointing. Over the years, the ASP has taken a great variety of initiatives in its dealings with non-cooperation. On the basis of the ASP's internal documents on procedures on non-cooperation, the following measures appear available at present to react against non-cooperation:

- Emergency Bureau meeting, at which it can be decided what further action can be taken;
- Open letter from the President of the ASP, on behalf of the Bureau, to the State concerned, reminding that State of the obligation to cooperate and requesting its view on the matter;
- A meeting of the Bureau, at which a representative of the State concerned would be invited to present its views on how it would cooperate with the Court in the future;

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the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal. […] Furthermore, *the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding. As already mentioned, the International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter*." (emphasis added) (footnote omitted).

64 See the overview of referrals of non-compliance in Sluiter and Talontsi, *supra* n. 58, at pp. 82-83.

65 South Africa decision, *supra* n. 59, at para. 135.

- Holding a public meeting on the matter to allow for an open dialogue with the requested State;
- Submission of a Bureau report on the outcome of the aforementioned dialogue to the plenary session of the ASP, including a recommendation as to whether the matters require action by the Assembly;
- Appointment in the plenary session of the ASP of a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.[66]

In my view, none of these measures can be considered to be an effective or serious sanction for non-cooperation, and they are unlikely to have any general or specific deterrent and preventive effect. A possible improved framework for enforcing non-cooperation within the ASP could consist of a number of measures, or administrative sanctions, which can be imposed against the non-cooperating State. If an administrative sanction is appropriate, the type of sanction that would be necessary and proportionate under the circumstances should depend on a number of factors, including the degree to which the non-cooperation has undermined the functioning of the Court and whether the cooperation was provided at a later stage. Clearly, failure to execute an arrest warrant, knowing that there probably is no likely later opportunity to provide the requested assistance, should rank as a serious instance of non-cooperation which substantially undermines the functioning of the Court. It justifies a more severe reaction compared to other forms of non-cooperation. Another relevant factor could be whether or not the non-cooperating State is a 'first offender' or has failed to cooperate with the Court in the past.

Applying the aforementioned factors, the ASP, or rather a specialized Committee within the ASP, could then impose a range of measures and administrative sanctions which, in order of severity and bearing in mind the particular context of the Court, could consist of the following: (a) a formal warning; (b) losing the right to present nationals as candidates for elected ICC positions; (c) losing the right to vote within the ASP for a specified period of time; or (d) an administrative fine, for example in the form of increase in the annual contribution to the Court.

4. CONCLUDING OBSERVATIONS

Twenty-five years of contemporary international criminal justice has given us a lot. Since the creation of the ICTY, we have witnessed many developments which not long before the key years 1993-1994 many considered impossible. The proliferation of international criminal tribunals, including the creation of a permanent International Criminal Court, has marked the beginning of an era in which impu-

[66] Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/10/Res.5, at Annex para. 14, 21 December 2011.

nity for the most serious crimes no longer reigns. There is indeed much to be thankful for.

However, this paper has not been about celebrating the known successes but to reflect on past and present challenges for an effective and authoritative system of international criminal justice. Realizing that a selection of such challenges is always a bit of an arbitrary exercise, this paper has focused on the scope of individual criminal responsibility for international crimes and the quality of international criminal procedure. I have tried to have an analysis of the issues followed by some recommendations.

On the matter of substantive criminal law, a number of examples show that over the last twenty-five years there have been quite some fluctuations in the scope of individual criminal responsibility. Initial expansion of liability has been corrected, or reduced, later on. It is also worth noting that a mode of liability, JCE, that has been embraced by one international criminal tribunal (or two: ICTY and ICTR) as clearly being part of customary international law, has been rejected in part (ECCC) or in whole (ICC) by other courts. Until this very day, the high degree of uncertainty as to the scope of individual criminal liability subsists, as judges are not only utterly divided between international criminal tribunals, but also within a single court; the latter is demonstrated by a strongly divided ICC Appeals Chamber over the scope of command responsibility in the recent *Bemba* case. I have argued that we are increasingly in need of a theoretically sound and unitary approach towards the nature and scope of individual criminal liability. This is not only necessary for the authority and legitimacy of the international criminal justice system as such, but it is also essential as legacy and guidance for national justice systems, which are increasingly getting serious about the investigation and prosecution of international crimes.

In the realm of international criminal procedure, I have focused on the adversarial-inquisitorial dichotomy in light of the problem of witness interference and on the problem of dealing with instances of non-cooperation which over the years have become increasingly frequent at the ICC.

The adversarial-inquisitorial dichotomy has long dominated the analysis of the procedural law of international criminal tribunals. For long, the criminal procedure of international criminal tribunals was modelled upon the adversarial criminal justice systems, and this is still the prevailing approach until this day. However, I have argued that the problems the ICC is facing at present in the investigation phase, such as witness interference, would benefit from a stronger judicial involvement in the investigation. The procedural law of the ICC is flexible enough for such a stronger judicial role, if the interests of the quality of the investigations in a given case would so require. Instead of adhering to either an adversarial or inquisitorial procedure, in my view it is advisable to build in a degree of flexibility in the applicable law of procedure and to adjust the nature and organization of proceedings depending on the actual needs and challenges in a given investigation.

Finally, in the area of cooperation, the ICC is facing huge challenges at present. An increasing number of States-parties have violated their obligations towards the

Court, notably by refusing to arrest and surrender to the Court former Sudanese president Al Bashir. This is highly problematic in and of itself, because it seriously impedes the effective functioning of the Court. To make matters worse, the political organ of the Court, the ASP, has failed to develop a robust enforcement mechanism for dealing with the various instances of non-compliance. Therefore, non-cooperation risks to become – or already has become – 'business as usual'. I have argued that, to reverse that trend the ASP should develop a credible and authoritative mechanism of sanctions, which will show that non-cooperation is an extremely serious matter and which will enhance the authority and legitimacy of the Court.

5. PROPOSITIONS AND POINTS FOR DISCUSSION

1. In spite of an increasing amount of case law on the matter, the precise scope of international individual criminal responsibility remains an area of uncertainty and instability. Both within and between international criminal tribunals there is diverging case law as to what is the scope of criminal liability for co-perpetration, aiding and abetting or command responsibility. It is submitted that this situation must be improved, also with a view to assisting national justice systems which are increasingly active in the investigation and prosecution of international crimes. The way forward consists of better engaging with the primary sources of law (i.e. the existence of customary international law in the relevant period), the law and case law of other international criminal tribunals (e.g. justifying departures of ICTY/R law and case law at the ICC), and take collegiate decision-making seriously, reducing the amount of confusing and also conflicting individual opinions.

2. The law and practice of international criminal procedure has long been dictated by the adversarial-inquisitorial dichotomy, with a clear preference for the adversarial model. The time has come to move away from this, and to apply and adjust procedural rules in light of the problems that plague international criminal investigations. Contrary to substantive international criminal law, such as that on individual criminal responsibility, it is recommendable to maintain some degree of flexibility in procedural designs. For example, the – ongoing – problem of witness interference may justify stronger judicial involvement in investigations than has been the case until now in the by and large adversarial design of the ICC's procedure. Such flexibility, when in compliance with international human rights law, may increase the quality and authority of international criminal investigations and prosecutions.

3. It cannot have gone unnoticed that especially in the recent years the functioning of the ICC has been seriously frustrated by a lack of cooperation. This did not only concern States which are not parties to the Court – and thus in

principle have no obligations towards it -, but also States parties have failed the Court, for example by not arresting now former Head of State of Sudan and ICC-indictee, Mr. Al Bashir. The law and practice of the ICC on enforcing cooperation (or dealing with instances of non-cooperation) appears very much politicized and, simply, ineffective. It is suggested that the ASP develops a credible and authoritative mechanism of sanctions, which will show that non-cooperation is an extremely serious matter and which will enhance the authority and legitimacy of the Court.

TRANSITIONAL JUSTICE: REFRAMING INTERNATIONAL LAW IN TIMES OF VIOLENT CONFLICT*

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SUMMARY[1]

The last three decades have witnessed the emergence of many new institutions at the national and international level to explicitly deal with serious human rights violations and international crimes committed in the past, i.e. under a previous regime. Since the 1980s, and particularly after the fall of the Berlin Wall in 1989, the world has witnessed many examples of such conflicts and the ensuing challenges to address the horrors of the past, including the restoration of democracy in Latin America, the post-communist period in Central Europe, post-Apartheid South Africa and post-genocide Rwanda, several Asian countries after armed conflict, and the Arab Spring. As a result, international courts and tribunals were set up to try individual perpetrators, such as the ad hoc ex-Yugoslavia and Rwanda tribunals in the 1990s, and the more recent and permanent International Criminal Court accompanied by its Trust Fund for Victims. In addition, many national courts have 'discovered' the category of international crimes and have undertaken prosecutions and trials. Moreover, dozens of truth commissions have been established in order to provide a general overview of past human rights violations and create common ground for the future. Furthermore, many victim reparations programmes have emerged to redress the harm inflicted upon direct and indirect victims of serious human rights violations and international crimes.

These institutions, and their underlying rationales, are commonly grouped together under the new concept of 'transitional justice' that saw the light of day in the mid-1990s and has become a booming field of study since then. No current-day treatise on international law would be complete without at least a succinct overview and debate about transitional justice, and the broader context of research and policy-making within which this legal and political regime originated and is operating. Hence the importance of focusing on some central questions. What exactly is transitional justice, where did it come from and how did it develop? What is the role of law, particularly international law, in the establishment and operation of the many new national and international institutions? And how does law operate in its wider political and social context?

The structure of this contribution largely follows these central questions. We first explain the origins and content of the concept of transitional justice, before going into its four main components: criminal prosecutions, truth commissions, victim reparations and institutional reforms. Along the way, we mention specific types of mechanisms and illustrate them through concrete examples. And we finish with some critiques and challenges for transitional justice.

In presenting this overview of transitional justice, we do not take the perspective of classical international lawyers, who are versed in all sources and technicalities of their discipline, but rather that of socio-legal scholars who apply their knowledge and expertise to the area of international law. This implies that our attention will

[1] The full text of this article is available at: <https://www.knvir.org/documents/>.

not be limited to ‘positive’ law and its operation, but will also cover aspects relating to the genesis of law on the one hand and the effects of law on the other hand, all situated within their general social and political context.