Corporate international criminal responsibility: oxymoron or an effective tool for 21st Century governance?

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Corporate International Criminal Responsibility: Oxymoron or an Effective Tool for 21st Century Governance?

Joris Larik

I. Introduction: Multinational Corporations and the Rise of International Criminal Law

In this contribution, two great phenomena of our times will be brought together: on the one hand globalisation and the emergence of multinational corporations and on the other hand the rapid development of international criminal law.[1] The former describes a trend through which corporate actors have gained significantly in power on the international stage and by virtue of their

> "ubiquitous presence, and consequently intrusion into many aspects of people's lives (…) can and [do] occasionally impact detrimentally on the enjoyment of internationally recognised human rights".[2]

The latter, it will be argued, can provide means to punish and prevent such a detrimental impact, at least in its most appalling forms.

It is widely recognized that corporations, and particularly the multinational corporations, have assumed an increasingly significant role on the international stage.[3] Today, the most powerful corporations by far outweigh most countries both in terms of economic leverage and political influence.[4] As the UN Special Rapporteur on the Working Methods and Activities of Transnational Corporations *El Hadji Guissé* concluded in 1998:

1 The latter development has been called, maybe somewhat confusingly, the "criminalization of international law" by T. Meron, Is International Law Moving Towards Criminalization?, in: European Journal of International Law 9 (1998), pp. 18 ff.

2 S. Joseph, Taming the Leviathans: Multinational Enterprises and Human Rights, in: Netherlands International Law Review 46 (1999), p. 172.

3 A historical account of their rise to power is provided in P. Muchlinki, Multinational Enterprises and the Law (1995), pp. 19 ff.

4 See e.g. B. Hocking/M. Smith, World Politics: An Introduction to International Relations (1996), p. 100; D. Carreau/P. Juillard, Droit International Économique (1998), pp. 31 ff.; P. Willetts, Transnational Actors and International Organizations in Global Politics, in: J. Baylis/S. Smith (eds.), The Globalization of World Politics: An Introduction to International Relations (2005), pp. 429 ff.; and C. Wells/J. Elias, Catching the Conscience of the King: Corporate Players on the International Stage, in: P. Alston (ed.), Non-State Actors and Human Rights (2005), pp. 146 ff.

> "Transnational corporations play an important part in international economic life. Of the 100 biggest concentrations of wealth in the world, 51 per cent are owned by transnational corporations and 49 per cent by States. Mitsubishi's turnover exceeds Indonesia's gross national product (GNP); Ford's turnover exceeds South Africa's GNP; and Royal Dutch Shell earns more than Norway."[5]

However, views diverge on the assessment of the consequences of the increased power of corporations: While some present a sunny image of corporations being on the whole beneficial to development, employment, and human rights[6], others paint a much gloomier picture[7]. In any case, it seems uncontroversial to state that this augmented power at least constitutes a global risk, as it inevitably entails an increased ability to create detrimental effects.[8] At various occasions, this risk materialized, often in the form of large-scale incidents.[9] All of this should therefore merit these powerful actors in international relations to be "distrusted"[10] to a heightened degree, and to have them checked more

5 United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, Working Document on the Impact of the Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights, Prepared by Mr. El Hadji Guissé, UN Doc. E/CN.4/Sub.2/1998/6 of 10 June 1998, p. 7.

6 See e.g. the seminal study of W. Meyer, Human Rights and MNCs: Theory Versus Quantitative Analysis, in: Human Rights Quarterly 18 (1996), pp. 368 ff.

7 See e.g. S. Hymer/G. Modelski, The Multinational Corporation and the Law of Uneven Development, in: G. Modelski (ed.), Transnational Corporations and World Order (1979), pp. 386-403; or J. Smith/M. Bolyard/A. Ippolito, Human Rights and the Global Economy: A Response to Meyer, in: Human Rights Quarterly 21 (1999), pp. 207 ff. For a concise general discussion see D. Shelton, Protecting Human Rights in a Globalizing World, in: C. Ku/P. Diehl (eds.), International Law: Classic and Contemporary Readings (2003), pp. 336 ff.

8 C. Vázquez, Direct vs. Indirect Obligations of Corporations Under International Law, in: Columbia Journal of Transnational Law 43 (2004/2005), p. 949.

9 Some cases including nothing less than the overthrow of government 1954 in Guatemala and 1973 in Chile with the active involvement of United Fruit and International Telephone and Telegraph (ITT) respectively, or the 1984 Bhopal disaster where 2.000 people were killed and over 200.000 injured due to the lax safety regulations at Union Carbide. For these and other examples see Wells/Elias, Catching the Conscience of the King (2005), pp. 143-146; Joseph, Taming the Leviathans (2000), p. 76; S. Agbakwa, A Line in the Sand: International Dis(Order) and the Impunity of Non-State Corporate Actors in the Developing World, in: A. Anghie *et al.* (eds.), The Third World and International Order: Law, Politics, and Globalization (2003), p. 8; see also the more recent examples of corporate involvement in human rights abuses of e.g. Shell in Nigeria, British Petroleum (BP) in Colombia, and Nike in Indonesia, N. Jägers, Corporate Human Rights Obligations: in Search of Accountability (2002), p. 9, and the literature indicated in footnotes 36, 37, and 38.

10 Thus extending the famous dictum of James Madison at the Philadelphia Convention on 11 July 1787 "that all men having power ought to be distrusted" to corporations, cited in M. Farrand, The Records of the Federal Convention of 1787 (1966), Vol. 1, p. 584.

effectively. How has the international legal framework thus far responded to this? The first observation to be made is that corporations have been granted an increased amount of legal remedies in order to protect their interests. Even though the legal personality of (multinational) corporations is disputed or even still plainly denied,[11] by virtue of legal developments in the area of trade and investment protection, corporations have in several instances been given standing before courts and arbitration tribunals on equal footing with states.[12] Hence, one could say that the international community has acknowledged the greater *de facto* weight that corporations wield by granting them possibilities to defend their rights. However, the same can by no means be said about the obligations side. In fact, it is undeniable that there is a grave imbalance, or in other words a "fundamental institutional misalignment"[13] or "regime deficit"[14], between the international rights and obligations of corporations, and *a fortiori* regarding the avenues to enforce them respectively.

Discussions of this imbalance and ways to rectify it have become a veritable trend in international legal scholarship as well as in civil society. Policy-makers have not remained unaffected by this, as is evidenced, for instance, by the proposition of a Global Compact between the business world and the international community by the UN Secretary-General in 1999 or the

11 M. Herdegen, Internationales Wirtschaftsrecht (2005), p. 58; see also S. Hobe/O. Kimmenich, Einführung in das Völkerrecht (2004), p. 158. At least, one might see them as "participants" in international law, to use the term coined by R. Higgins, Problems and Process: International Law and How We Use It (1994), p. 46.

12 A prominent example being the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 1, para. 2 and Art. 25. As the envisaged coronation of this corporate-friendly trend, one should also note the Negotiating Group on the Multilateral Agreement on Investment (MAI), OECD Multilateral Agreement on Investment, Draft Consolidated Text, DAFFE/MAI(98)7/REV1 of 22 April 1998, which would grant corporations wide non-reciprocal rights vis-à-vis host states (see pp. 69 ff. on "Investor-State Procedures"). However, negotiations on it were discontinued in 1998.

13 Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35 of 19 February 2007, p. 3; see also M. Kamminga/S. Zia-Zarifi, Liability of Multinational Corporations Under International Law: An Introduction, in: M. Kamminga/S. Zia-Zarifi (eds.), Liability of Multinational Corporations Under International Law (2000), pp. 5 ff.

14 Agbakwa, A Line in the Sand (2003), p. 5, who also proposes the harsher, and exaggerated term "false edifice of privileged impunity", p. 18.

appointment of *John Ruggie* as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in 2005. However, this trend has largely focussed on the general human rights framework.[15] What has so far only been addressed marginally, as a sort of by-road of the human rights regime, is the issue of international criminal responsibility of corporations.[16] This is quite astonishing, with international criminal law being one of the most remarkable developments in modern international law. It has evolved out of the understanding that holding states alone responsible for violating the "elementary considerations of mankind"[17] is insufficient.

Therefore, it seems worthwhile to explore the extent to which international criminal law has the potential to set right the imbalance outlined above. It is beyond the scope of this contribution to devise a comprehensive framework of what might be called "corporate international criminal law". Instead, what needs to be done in the first place is to overcome a number of conceptual stumbling blocks that make the attempt to sketch out such a framework appear like an improbable exercise. To this end, arguably the three most prominent of such stumbling blocks will be discussed, and shown to be surmountable. First, the intricate issue of establishing a corporation's criminal intent (*mens rea*); secondly, the increasingly important issue of corporate complicity; and thirdly, the different ways to punish a corporation.

II. Determining Corporate *Mens Rea*

The first question that needs to be answered when dealing with the legal fiction of a corporation is: How would something that has "no soul"[18] develop intent, i.e. a will of its own? This is of essential importance in view of the emphasis

15 Note e.g. Jägers, Corporate Human Rights Obligations (2002); S. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, in: Yale Law Journal 111 (2001/2002), pp. 443 ff.; or A. Clapham, Human Rights Obligations of Non-State Actors (2006). Note also that John Ruggie's precise term of mandate is "human rights and transnational corporations and other business enterprises".

16 The only prominent exception of an article fully devoting itself to this topic is that of 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. Kamminga/S. Zia-Ziarifi (eds.), Liability of Multinational Corporations Under International Law (2000), pp. 139 ff.

17 To use the expression used by the International Court of Justice, *Corfu Channel Case*, ICJ Reports (1949), p. 22.

18 Excerpt borrowed from the famous statement by Lord Chancellor Edward, First Baron Thurlow, cited in L. Dunford/A. Ridley, 'No Soul to be Damned, No Body to be Kicked'[1]: Responsibility, Blame and Corporate Punishment, in: International Journal of the Sociology of Law 21 (1996), p. 1.

international criminal law places on *mens rea*. Considering the crimes enumerated in the Rome Statute of the International Criminal Court (ICC), genocide[19] requires *dolus specialis*, i.e. "the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged"[20], namely the eradication in whole or in part of a group of people. For crimes against humanity,[21] it is necessary that, next to criminal intent for the actual crime, the perpetrator commit it "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[22] As for the yet to be defined crime of aggression,[23] it can also be assumed that

> "it must be shown that [the perpetrators] were parties to the plan or conspiracy [to wage a war of aggression], or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war".[24]

Eventually, for the category of war crimes,[25] the Rome Statute stresses the importance of a specific plan or policy[26] and requires intent for the overwhelming majority of war crimes.[27] Furthermore, regarding the complex relationship the corporation shares with its organs, an additional question that could be asked is: To which extent can, and should corporate responsibility replace individual responsibility?

Concerning these questions, different relevant approaches from both international and national law will be discussed: Historically, there is the so-called "Nuremberg construction"[28], i.e. the possibility "to prosecute membership in groups declared as criminal"[29]. An inversion of this construction can be found in the final French proposal at the Rome Conference on the ICC to include the responsibility of legal persons,[30] by virtue of which "the company

19 Rome Statute of the International Criminal Court, Art. 6.

20 International Criminal Tribunal for Rwanda, *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, para. 498.

21 Rome Statute of the International Criminal Court, Art. 7.

22 Ibid., Art. 7, para. 1.

23 Ibid., Art. 5, para. 1 (d), and para. 2.

24 United States Military Tribunal, *Trial of Carl Krauch and Twenty-Two Others (The I.G. Farben Trial)*, Case No. 57, in: Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission (1949), Vol. 10, p. 35; cp. also A. Cassese, International Criminal Law (2003), pp. 115 f.

25 Rome Statute of the International Criminal Court, Art. 8.

26 Ibid., para. 1.

27 Ibid., Art. 8, para. 2; see also Art. 30, para. 1 as the general rule.

28 Jägers, Corporate Human Rights Obligations (2002), p. 226.

29 M. Frulli, Jurisdiction *Ratione Materiae*, in: A. Cassese *et al.* (eds.), The Rome Statute of the International Criminal Court: A Commentary (2002), Vol. 1, p. 531, footnote 16.

30 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of

would have been tried as a sort of 'accessory' to the individual's crime"[31], thus "implicat[ing] the legal person, once the natural had been convicted of a crime"[32]. From a domestic-comparative viewpoint, there is "no single, broadly accepted theory of corporate blameworthiness"[33] yet. However, there are four main approaches discernible, namely the "agency", the "identification", the "aggregation", and the "holistic" theory.

Under the Charter of the International Military Tribunal at Nuremberg[34] (IMT) it was possible to implicate individual responsibility from membership in an organisation that was declared criminal. The obvious doctrinal shortcomings of this approach were that it both excluded the liability of the corporation as such and allowed for the indiscriminate punishment of large numbers of members, without taking note of their specific intentions to join and their acts within the organisation. As was demonstrated by the marginal use of this principle by the IMT itself,[35] this model appears on the whole not purposeful.

During the negotiations leading up to the Rome Statute, however, the "Nuremberg construction" was turned upside down in a French proposal, according to which legal persons could be held criminally liable for crimes of which a natural person had already been convicted and if that natural person had acted on behalf of and with the explicit consent of the corporation in question – as well as in the course of its activities – and, on top of that, if that person had been in a position of control within the corporation (as defined in the domestic law of the state of registration).[36] It already becomes clear from this range of cumulative requirements that this would constitute a rather restrictive approach. Criminal responsibility of corporations is inseparably linked to that of a natural

an International Criminal Court, Committee of the Whole, Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2 of 3 July 1998, Draft Art. 23, paras. 5 and 6.

31 Clapham, The Question of Jurisdiction Under International Criminal Law Over Legal Persons (2000), p. 153.

32 Jägers, Corporate Human Rights Obligations (2002), p. 229.

33 Anonymous, Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions, in: Harvard Law Review 92 (1978/1979), p. 1241; also C. Wells, Corporations and Criminal Responsibility (2001), p. 84.

34 Charter of the International Military Tribunal, Art. 9.

35 The Nuremberg Judgement excludes such members of criminal organisations "who had no knowledge of the criminal purposes or acts of the organization [...], unless they were personally implicated in the commission of acts declared criminal by Article 6 of the [IMT] Charter as members of the organization". International Military Tribunal (Nuremberg), Judgement and Sentences, October 1, 1946, in: American Journal of International Law 41 (1947), p. 251.

36 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2 of 3 July 1998, Draft Art. 23, paras. 5 and 6.

person, rendering the former a by-product of individual responsibility. Although it is not explicitly mentioned, it is to be assumed that the *mens rea* of that natural person can thus be transferred onto the legal one. This is supported by the requirement that the natural person had to be in a directing position.

The last mentioned point distinguishes this approach from the "agency" theory (also known as *respondeat superior* in the United States), which "is based on the principle whereby a corporation is taken to be the agent of all its employees".[37] Thus, by "imputing to the corporation (...) the mental state of any employee"[38] a corporation is rendered "blameworthy even when a single agent commits a crime for the benefit of the corporation."[39] In fact, it is as unjust as the Nuremberg construction: Instead of punishing individuals just for joining an organisation, it punishes companies just for employing somebody. Furthermore, since this approach is predominantly used for regulatory offences,[40] and not for graver offences requiring *mens rea*, it seems utterly inappropriate to be applied to international crimes.

Actually, the reversed Nuremberg construction is much closer to the theory of "identification" (sometimes also called "directing mind" or "*alter ego*" theory),[41] which appears to be the most common approach in modern national legislation that provides for criminal responsibility of legal persons.[42] This theory "identifies a limited layer of senior officers within the company as its 'brains' and renders the company liable for their culpable transgressions, not for those of other workers".[43] It is important to note that "the person who acts is not speaking or acting for the company. He is speaking as the company and his mind which directs his acts is the mind of the company."[44] For our purposes, the "identification" theory is of particular interest, since its introduction "marked the first recognition of corporations as capable of committing serious non-regulatory offences"[45], i.e. offences requiring *mens rea*. At least in theory, this would render it possible for a corporation to commit even international crimes with an extremely high threshold such as genocide, since individuals can be, and indeed have been, convicted for this crime.

37 Wells, Corporations and Criminal Responsibility (2001), p. 85.

38 Anonymous, Corporate Crime (1978/1979), p. 1242.

39 Ibid.

40 Wells, Corporations and Criminal Responsibility (2001), p. 85, concerning England.

41 D. Stuart, Canadian Criminal Law: A Treatise (1995), pp. 576 f.

42 The fact that French criminal law also employs the identification theory shows that it is not only suitable for common law countries. See the French Code Pénal, Art. 121-2, para. 1; and J. Pradel, Manuel de droit pénal général (2004), p. 478.

43 Wells, Corporations and Criminal Responsibility (2001), p. 85.

44 As expressed by Lord Reid in the leading English case on the matter, House of Lords, *Tesco Supermarkets Ltd. vs. Nattrass*, AC 153, 1972, p. 170 (emphasis added).

45 Ibid., p. 101.

However, it poses certain difficulties. First of all, since corporate responsibility remains a derivative of certain cases of individual responsibility, it is imperative to establish the radius of this inner circle of directing minds within a corporation. In other words: Where to draw the borderline between what constitutes the "brain" and the "hands" of a company.[46] Presumably, the "mind" includes "directors, the managing director, the company secretary and other superior officers responsible for managing the affairs of the corporation".[47] Moreover, employees that have been delegated the power from these to act independently are also to be included.[48] The final French proposal at the Rome Conference avoided this problem by leaving this question to be determined by "the national law of the State where the juridical person was registered at the time the crime was committed".[49] In any case, this circle of persons with such extensive powers is bound to be rather limited, which has a very unfortunate consequence: The "identification" theory makes it "particularly difficult to convict larger companies".[50] The larger the corporation, the more complex and wide-spread, the more difficult it becomes to determine one of the limited few "directing minds" at the top who intended the commission of a specific crime. Therefore, while the narrow "identification" theory facilitates the conviction of smaller businesses, it shields larger, i.e. more powerful (multinational) corporations, which eventually contradicts the very rationale of this undertaking, namely to bring actual power and legal restraints into a fair balance.

Some relief could be provided by a broader definition of "identification". According to Canadian jurisprudence, for instance, it suffices that the acts in question be "performed by the manager within the sector of corporation operation assigned to him by the corporation".[51] The assigned sector can be either geographical or functional.[52] Interestingly, this was specifically done in view of the fact that in Canada "corporate operations are frequently geographically widespread".[53] As clarified in a later Canadian judgement,

46 To use the image provided by Lord Justice Denning in House of Lords, *H.L. Bolton (Engineering) Co. Ltd. vs. T.J. Graham & Sons Ltd.*, 1 QB 159, 1957, p. 172.
47 M. Allen, Textbook on Criminal Law (2005), p. 231.
48 Ibid.; similarly Pradel, Manuel de droit pénal général (2004), pp. 484 f.
49 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2 of 3 July 1998, Draft Art. 23, para. 5 (c).
50 Stuart, Canadian Criminal Law (1995), p. 580.
51 Taken from the leading decision by the Supreme Court of Canada, *Canadian Dredge & Dock Co. vs. The Queen*, 1 SCR 662 (1985), p. 21.
52 Ibid.
53 Ibid, p. 32.

> "[t]he key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea".[54]

This is inspirational, *a fortiori*, when dealing with multinational corporations that operate in a multitude of countries.

Another approach for broadening the possibilities for corporate criminal responsibility is the so-called "aggregation" theory. According to this approach "corporate culpability does not have to be contingent on one individual employee's satisfying the relevant culpability criterion".[55] Here, the "fragmented knowledge of a number of individuals is fitted together to make one culpable one".[56] It underlines the fact that corporations indeed have a separate personality and that aggregation would clarify that "it is the whole which is judged, not the parts".[57]

Both theoretically and practically, however, it appears quite problematic to "add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind".[58] In view of the special emphasis on *mens rea* and knowledge required for most international crimes, it is hardly conceivable how a systematic plan for genocide or persecution could be patched together from different individual wills not being aware themselves of this. This is not to be confused with the approach taken by the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case, namely that "intent can be inferred from a certain number of presumptions of fact".[59] Whereas the Tribunal put together a number of pertinent facts to construe a *mens rea*, the "aggregation" theory aims at putting together different mindsets to add up to one, which separately do not constitute a *mens rea*. All the same, this problem disappears when the threshold is merely (gross) negligence.[60] For "at least some limited categories

54 Supreme Court of Canada, *The "Rhône" vs. The "Peter A.B. Widener"*, 1 SCR 497 (1993), p. 526.
55 Wells, Corporations and Criminal Responsibility (2001), p. 156.
56 Ibid.
57 Ibid.
58 As it has been brought to the point in House of Lords, *Armstrong vs. Strain*, 1 KB 232, 1952, p. 246; also sceptical J. Smith/B. Hogan, Criminal Law (2005), p. 239; in other jurisdictions, this is severely criticised, too, see e.g. G. Stratenwerth, Schweizerisches Strafrecht (2005), p. 413.
59 International Criminal Tribunal for Rwanda, *Prosecutor vs. Akayesu* (1998), p. 523.
60 Smith/Hogan, Criminal Law (2005), pp. 239 f.; also Allen, Textbook on Criminal Law (2005), pp. 232 f., with more case law on the matter. Note also Dutch practice, see S. Field/N. Jorg, Corporate Liability and Manslaughter: Should we be Going Dutch?, Criminal Law Review 156 (1991), pp. 156 ff.

of war crimes"[61] where "gross or culpable negligence (*culpa gravis*) may be sufficient"[62] it remains an appealing option.

Finally, the most progressive approach is the so-called "holistic" theory, which "locates corporate blame in the procedures, operating systems, or culture of a company".[63] The most prominent example of this in national law is Section 12.3 of the Australian criminal code,[64] featuring "a broader conception of corporate responsibility than any other common law models".[65] It was introduced especially in order to remedy the fact that only few acts of large, multinational corporations would be covered under the "identification" theory.[66] Taking it further than the "aggregation" theory, it appreciates the fact that "[c]orporate behaviour is not just the sum of individual employee behaviour but must be considered in the context of the organization's structure and culture".[67] In stark contrast to the "agency" and "identification" theories, it endeavours to separate also in criminal law the legal person from the natural one, arguing that "responsibility can flow both from the individual to the corporations and can be found in the corporation's structures themselves".[68]

However intriguing or modern one might find this approach, one eventually remains stuck with the same problem as with "aggregation". True, it is not beyond imagination to construe some form of collective negligence. However, it appears inapt for *mens rea* offences. For it is virtually impossible to find in such vague terms as corporate "ethos", "culture" or "structure" the specific intent to commit a war crime, let alone plans for, say, systematic extermination. Furthermore, such terms are prone to subjectivism and finding an internationally accepted definition for them will doubtlessly prove to be very difficult. This is of course without prejudice to the to-be-welcomed possibility to expose structures which are favourable to the commission of such crimes. This, however, will not suffice to prove the existence of intent.[69]

In conclusion, this discussion shows that there are indeed workable conceptual approaches available to determine the criminal intent of a corporation. These different theories show great potential, especially when

61 Cassese, International Criminal Law (2003), p. 58.

62 Ibid. Cassese names certain cases of superior responsibility and wanton destruction of private property as possible examples, pp. 58 f. (emphasis in the original).

63 Wells, Corporations and Criminal Responsibility (2001), p. 85.

64 Australian Criminal Code Act 1995, Sec. 12.3.

65 Wells, Corporations and Criminal Responsibility (2001), p. 138.

66 Ibid., p. 137; see also A. Rose, 1995 Australian Criminal Code Act: Corporate Criminal Provisions, in: Criminal Law Forum 6 (1995), pp. 129 ff.

67 Stuart, Canadian Criminal Law (1995), p. 588.

68 Wells, Corporations and Criminal Responsibility (2001), p. 157 (emphasis added).

69 Except, of course, one were to accept such unconventional concepts as "reactive corporate fault", see B. Fisse/J. Braithwaite, Corporations, Crime and Accountability (1993), pp. 44 ff.

it comes to offences with a negligence requirement. However, in the realm of international criminal law, where crimes tend to have a high threshold, the overwhelming majority requiring specific intent, only a resort to the "identification" theory seems viable. It remains the most workable basis for three main reasons: Firstly, in comparison to the more daring approaches, it would definitely constitute a more acceptable compromise to the international community and in particular the parties of the Rome Statute. Secondly, it would not require a far-reaching remodelling and therefore questioning of the Rome Statute, or the drafting of some special corporate crimes statute, the success of which is highly doubtful. Thirdly, it would more easily connect with the previous jurisprudence of the war crimes tribunals of the Second World War, since the people convicted in the German industrialist cases were mostly in a position that would plainly qualify as "directing mind".[70] Its main disadvantage, the difficult applicability to multinational corporations, could be mitigated through a more flexible approach modelled after Canadian criminal law. This would allow expanding the circle of "directing minds" in order to include regional or functional bearers of responsibility. Finally, having reached this conclusion, the question whether there should be concurrent or alternative convictions of the legal and natural person is also answered, since individual guilt is a precondition for corporate guilt under "identification".

III. Addressing Corporate Complicity

When moving on to the second conceptual stumbling block, it is important to recall a corporation's true *raison d'être*, which is to conduct business in a profitable way. Therefore, even though it is by no means excluded that a company might engage directly in criminal conduct, it is much more likely to assist indirectly in the commission of a crime while pursuing its commercial purposes. This raises the important issue of "corporate complicity", the roots of which go back as far as Nuremberg.[71] In recent years, it has received heightened

70 See e.g. United States Military Tribunal, *Trial of Carl Krauch and Twenty-Two Others* (1949), pp. 1 ff.; also United States Military Tribunal, *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, Case No. 58, in: Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission (1949), Vol. 10, pp. 1 ff.; also United States Military Tribunal, *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others* (1949), Vol. 10, pp. 69 ff.; and British Military Court, *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, Case No. 9, in: Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission (1949), Vol. 1, pp. 93 ff.

71 See for a detailed assessment of the industrialist cases with regard to complicity W. Schabas, Enforcing International Humanitarian Law: Catching the Accomplices, in: International Review of the Red Cross 83 (2001), pp. 441 ff.

attention,[72] which is motivated by the massive investment of multinational corporations in countries with repressive regimes, or at least countries more readily willing to sacrifice the protection of their citizens in the increasingly fierce competition for foreign investment (a phenomenon that has come to be known as "race to the bottom").[73] This constitutes a certain historical turn: After the generally opposite positions of developing countries and multinational corporations during the 1970s and 1980s,[74] we are now facing the prospect of their acting increasingly hand in hand, also to the detriment of their citizens. The bleak bottom line is that

> "[m]any if not most of the humanitarian law violations committed in Kosovo, Sierra Leone, East Timor, Chechnya and the numerous other theatres of conflict in today's world could not take place without the assistance of arms dealers, diamond traders, bankers and financiers"[75],

in short, the corporate world. Therefore, it is imperative that acts of "corporate complicity" should also find their legal counterpart in order to repress and punish them. In international criminal law, the concept of "complicity" is firmly established when used to describe individual conduct. Both the statutes of the Nuremberg and Tokyo Tribunals included provisions on complicity,[76] as did the ensuing Nuremberg Principles[77] and the later Draft Code of Crimes against the Peace and Security of Mankind[78]. Also, all the modern statutes of international tribunals include provisions on complicity.[79] According to the International

72 A. Ramasastry, Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations, in: Berkeley Journal of International Law 20 (2002), p. 91.

73 Jägers, Corporate Human Rights Obligations (2002), pp. 8 f.

74 This opposition manifested itself in the call for a "New International Economic Order" on part of the developing countries, see United Nations General Assembly, Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3201 of 1 May 1974; see also Muchlinki, Multinational Enterprises and the Law (1995), pp. 3 ff.

75 Schabas, Enforcing International Humanitarian Law (2001), p. 441.

76 Charter of the International Military Tribunal, Art. 6; and Charter of the International Military Tribunal for the Far East, Art. 5.

77 International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, in: Yearbook of the International Law Commission (1950), Vol. 2, principle VII.

78 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, in: Yearbook of the International Law Commission (1996), Vol. 2 (Part 2), pp. 17 ff., Art. 2, para. 3 (d).

79 Rome Statute of the International Criminal Court, Art. 25, para. 3 (b) on soliciting and inducing the (attempted) commission of a crime, para. 3 (c) on aiding, abetting, or otherwise assisting in the (attempted) commission of a crime, and para. 3 (d) on contribution the (attempted) commission of a rime by a group with a common purpose; see also Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 7, para. 1; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para.1.

Criminal Tribunal for the Former Yugoslavia (ICTY), individual complicity also has "a basis in customary international law".[80]

We will now turn to the contents of individual complicity. As for the objective element, terms such as "to solicit" or "to induce" are "applicable to cases in which a person is influenced by another to commit a crime".[81] This influence is "normally of a psychological nature but may also take the form of physical pressure within the meaning of vis compulsiva"[82]. If this cannot be proved, the threshold for at least aiding, abetting or otherwise assisting might still be reached. A distinction has occasionally been brought forward between "aiding" and "abetting".[83] However, a general definition for both is "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".[84] Under the Rome Statute, however, there is no reference to the contribution having to be "substantial", which might be seen as indicating a lower objective threshold.[85] Under certain exceptional circumstances, the mere "presence" of a person can amount to complicity as well, "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect"[86] or "a significant legitimising or encouraging effect on the principal offender"[87]. Concerning the subjective element, unlike stronger forms such as soliciting and inducing, which require a *mens rea* to commit the crime in question, in regard of aiding, abetting and otherwise assisting, the ICTY ruled that it is only necessary that the person

80 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor vs. Tadić*, Case No. IT-94-1, Trial Chamber Opinion and Judgement of 7 May 1997, para. 666.

81 K. Ambos, Article 25: Individual Criminal Responsibility, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999), p. 481.

82 Ibid.

83 International Criminal Tribunal for Rwanda, *Prosecutor vs. Akayesu* (1998), para. 484: "Aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto".

84 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor vs. Furunzija*, Case No. IT-95-17/1, Judgement of 10 December 1998, p. 249. This is also in line with the residual clause of the Rome Statute of the International Criminal Court, Art. 25, para. 3 (c) of "otherwise assists".

85 A. Clapham, On Complicity, in: M. Henzelin/R. Roth (eds.), Le droit pénal à l'épreuve de l'internationalisation (2002), pp. 254 f.

86 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor vs. Tadić* (1997), para. 689.

87 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor vs. Krnojelac*, Case No. IT-97-25, Trial Chamber Judgement of 25 March 2002, para. 89.

> "knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's mens rea"[88].

However, concerning the wording of the Rome Statute (viz. "For the purpose of facilitating"[89]), it has been argued that this "implies a specific subjective requirement stricter than mere knowledge".[90] In any case, "it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime."[91] Interestingly, it has been suggested that this knowledge may not only be derived from official or specialized documents, but also through mass media coverage.[92] On top of this, "a person may very well be tried as an accomplice, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, the latter's guilt can not be proven".[93]

When we now attempt to extend international criminal jurisdiction to corporations, the concept of complicity harbours some interesting potential due to its special features. Firstly, the different degree of intent, which can be detached from the *mens rea* of the perpetrator, and which could also be inferred from a factual situation,[94] would make it remarkably easier to convict a corporation. Whereas it is rather unlikely, for instance, to find a leading

88 Ibid., para. 90.

89 Rome Statute of the International Criminal Court, Art. 25, para. 3 (c).

90 Ambos, Article 25 (1999), p. 483.

91 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor vs. Furunzija* (1998), para. 245; see also International Criminal Tribunal for Rwanda, *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, para. 531.

92 Referring to the Sierra Leone conflict and its coverage by the media, William Schabas noted that "a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers and so on have knowledge of their contribution to the conflict and to the offences being committed". Schabas, Enforcing International Humanitarian Law (2001), p. 451.

93 International Criminal Tribunal for Rwanda, *Prosecutor vs. Musema*, Case No. ICTR-96-4-T, Judgement and Sentence of 27 January 2007, para. 174.

94 Note British Military Court, *Trial of Bruno Tesch and Two Others* (1949), pp. 100 ff., where two of the accused individuals were convicted because they must have known from the mere quantity of poison gas that was supplied, that it did not serve a legitimate purpose; note also the dictum by the International Criminal Tribunal for Rwanda that "in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact", International Criminal Tribunal for Rwanda, *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, para. 523, even for the crime of genocide (as was the case here); for complicity to genocide see International Criminal Tribunal for Rwanda, *Prosecutor vs. Musema*, Case No. ICTR-96-4-T, Judgement and Sentence of 27 January 2007, paras. 884-936.

individual within a corporation with the intent to commit genocide or crimes against humanity on behalf of that corporation, it seems much more easily conceivable to find one who could reasonably have been expected to be aware that his or her company is contributing to the commission of such crimes (in accordance with the theory of "identification", as outlined in the preceding section).

Secondly, there are different forms of typical corporate behaviour discernible that might be covered by the legal notion of complicity. For instance, a company might provide active assistance to a crime while rendering its services to the actual perpetrators. Such cases might involve construction companies covering up mass graves, warehouses providing storage room for arms later used for massacres, or radio stations broadcasting hate speech in order to incite genocide or other grave crimes, as well as the financing, for instance, of security forces that are likely to abuse protestors.[95] It is to be stressed once more that the activity in question need not be a crime *per se*. It is through knowingly assisting in the crime of the other that it becomes criminal conduct.[96] Moreover, joint ventures, undertaken by a corporation and a government that are likely to lead to abuses in pursuing its part of the deal, might be seen as active assistance or at least as substantial encouragement.[97]

Finally, the fact that mere presence can amount to complicity if it can reasonably be assumed to lend significant legitimacy or moral support to abuses has also great potential. If a large multinational corporation, which obviously has the choice of location, decided to continue its presence, production, and tax paying in a certain host country, despite the fact that massive atrocities are taking place there, this might in extreme circumstances make this corporation an accomplice to the country's regime. This would constitute a remarkable advancement, namely rendering the (laudable) voluntary decision of a company to disinvest in the face of massive human rights violations[98] into an obligation sustained by criminal sanctions. Especially in view of the above-mentioned ever-fiercer competition for foreign investment, this seems an intriguing remedy.

95 International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (2002), p. 126.

96 According to the concept of "borrowed criminality" ("criminalité d'emprunt"), see International Criminal Tribunal for Rwanda, *The Prosecutor v. Akayesu* (1998), para. 528.

97 International Council on Human Rights Policy, Beyond Voluntarism (2002), pp. 128 f.

98 A rare example being Levi Strauss' withdrawal from Burma (Myanmar) in 1992 due to the military government's bad human rights record, see C. Avery, Business and Human Rights in a Time of Change, in: M. Kamminga/S. Zia-Ziarifi (eds.), Liability of Multinational Corporations under International Law (2000), p. 54.

IV. Forms of Punishment for Corporations

As the third big conceptual stumbling block to be moved out of the way, the question of the forms of punishment applicable to a corporation should be addressed. Evidently, contrary to natural persons, a corporation is a discarnate fiction with "[n]o body to be kicked"[99], or alternatively, to be put in prison. This is regrettable, for it is true that "incarceration is one cost of business that you [cannot] pass to the consumer"[100], but remains an unalterable fact.

However, this is no insurmountable obstacle for prosecuting corporations, since there is a variety of other sanctions conceivable. It is interesting to note that the Draft Statute of the ICC used to include a special provision for penalties applicable to legal persons, reading:

> "A legal person shall incur one or more of the following penalties:
> (i) fines;
> [(ii) dissolution;]
> [(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]
> [(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]
> [(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and] [(vi) appropriate forms of reparation.]"[101]

An even wider range was spelled out in a Council of Europe recommendation on corporate liability dating from 1988, which included:

> "- warning, reprimand, recognisance;
> - a decision declaratory of responsibility, but no sanction;
> - fine or other pecuniary sanction;
> - confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
> - prohibition of certain activities, in particular exclusion from doing business with public authorities;

99 Lord Chancellor Edward, First Baron Thurlow, cited in Dunford/Ridley, "No Soul to be Damned, No Body to be Kicked" (1996), p. 1.

100 Quoting the Chief Executive of the Environmental Crimes Division of the United States Department of Justice, cited in N. Smith, No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Conservation and Recovery Act, in: Louisiana Law Review 53 (1992/1993), p. 126.

101 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court: Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1 of 14 April 1998, Draft Art. 76 (footnotes omitted, the square brackets indicate that these were propositions and not consolidated draft provisions).

> - exclusion from fiscal advantages and subsidies;
> - prohibition upon advertising goods or services;
> - annulment of licences;
> - removal of managers;
> - appointment of a provisional caretaker management by the judicial authority;
> - closure of the enterprise;
> - winding-up of the enterprise;
> - compensation and/or restitution to the victim;
> - restoration of the former state;
> - publication of the decision imposing a sanction or measure.
>
> These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders."[102]

The most common sanction in domestic law seems to be the fine. In some national systems, this is the only penalty applicable to corporations.[103] Its obvious advantages are that it is easy to administer and that it directly addresses the basic corporate rationale, namely profitability. If thus certain conduct incurs sensitive additional costs in the form of a fine, the rational company will adjust its behaviour according to basic economic theory.[104] However, the effects can be rather limited, since the costs can be passed on to the shareholders, employees or consumers. Apart from that, especially with regard to large multinational corporations, fines tend to be so small in relation to their overall turnovers and profits that they will not have any effect at all.[105] Close to a fine, but more appealing, seems the possibility to order punitive reparations to the victims, which combines mere punishment with relief for those affected by corporate criminal conduct. It should be stressed that this was one of the major arguments in favour of the French proposal at the Rome Conference, since corporations are much more likely to actually have sufficient funds at their disposal than

102 Council of Europe Committee of Ministers, Recommendation No. R (88) 18 of the Committee of Minister of Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities of 20 October 1988, Appendix to Recommendation No. R (88) 18, p. 7.

103 E.g. in Switzerland (Swiss Strafgesetzbuch, Art. 102); in Germany for regulatory offences, since there is no criminal corporate responsibility (Gesetz über Ordnungswidrigkeiten, § 30); or in England and Wales for most violations (see M. Jefferson, Corporate Criminal Liability: The Problem of Sanctions, in: Journal of Criminal Law 65 (2001), p. 236).

104 Jefferson, Corporate Criminal Liability (2001), pp. 238 ff.

105 See Wells, Corporations and Criminal Responsibility (2001), pp. 32 f. E.g., a comparatively large fine of £750.00 was imposed on British Petroleum (BP) in 1987, but which represented only 0.05 percent of the corporation's after tax profits alone (i.e. not turnover!); ibid., p. 33. See also extensively B. Fisse, Sentencing Options against Corporations, in: Criminal Law Forum 1 (1990), pp. 214 ff.

individuals in order to provide for an appropriate amount of reparations.[106] One downside of this measure, however, is that "the dividing line between civil and criminal action may be becoming blurred".[107]

The general problem with monetary penalties can also be seen from a moral view-point, since they do not necessarily "convey the message that serious corporate offences are socially intolerable"[108]. Instead, "they create the impression that corporate crime is permissible provided the offender merely pays the going price".[109] Therefore, it is imperative to move beyond a purely monetary approach to sanctions and provide for forms of punishment that might have both greater punitive and deterrent effects on companies, such as dissolution, suspension of certain activities etc., as they have been elaborated in the above-mentioned documents.[110] Arguably the most effective, and also relatively easy to administer penalty is adverse publicity. Whereas the Council of Europe recommendation included its modest version, namely "publication of the decision imposing a sanction or measure", its more sophisticated version might "take the form of advertising in the media or sending newsletters to shareholders and consumers"[111] at the expense of the convicted corporation. This approach is interesting for several reasons. First, it is a well-known fact that prestige and image are of remarkable importance in the modern business world.[112] This is not least true for globally acting multinational corporations.[113] For instance, the opening words of Shell's corporate code of conduct are telling

106 See also Schabas, Enforcing International Humanitarian Law (2001), p. 453.

107 Meron, Is International Law Moving towards Criminalization? (1998), p. 20. Note in this context also the U.S. Alien Tort Claims Act and the jurisprudence connected with it, which has received much attention in literature (see e.g. Clapham, Human Rights Obligations of Non-State Actors (2006), pp. 252 ff.; and B. Stephens, Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts, in: M. Kamminga/S. Zia-Ziarifi (eds.), Liability of Multinational Corporations under International Law (2000), pp. 209 ff.).

108 Fisse, Sentencing Options against Corporations (1990), p. 220.

109 Ibid.

110 See on alternative punishments in a domestic context Wells, Corporations and Criminal Responsibility (2001), pp. 37 ff.; Jefferson, Corporate Criminal Liability (2001), pp. 244 ff., as well as Fisse, Sentencing Options against Corporations (1990), pp. 229 ff.

111 Jefferson, Corporate Criminal Liability (2001), p. 256. See generally the extensive study of B. Fisse/J. Braithwaite, The Impact of Publicity on Corporate Offenders (1983).

112 See generally C. Fombrun, Reputation: Realizing Value from the Corporate Image (1996); also Avery, Business and Human Rights in a Time of Change (2000), pp. 25 f.

113 See e.g. the massive publicity campaign launched by PanAm after the Lockerbie incident, by P&O after the Herald of Free Enterprise disaster (see Wells, Corporations and Criminal Responsibility (2001), p. 38), or by Union Carbide after the Bhopal tragedy (see Jefferson, Corporate Criminal Liability (2001), p. 259).

in this regard: "Reputations are hard won and easily lost. We can all play a part in protecting and building Shell's reputation. Be sure."[114] Doubtlessly, one can be even surer when using the stigma generally attached to a criminal conviction to this end, and which would be significantly amplified when pronounced by an international tribunal, due to its authoritativeness and global exposure. It has been argued that this may well have a significant deterrent effect on corporations,[115] thus fulfilling one of the fundamental functions of criminal justice.

Furthermore, while multinational corporations might try to avoid enforcement of sanctions through their complex structure of a network of subsidiaries in different countries, adverse publicity targets the entity as whole, leaving little possibility for avoidance.[116]

Moreover, consideration might be given to the contents of the adverse publicity. It does not necessarily need to be limited to a statement that the corporation was convicted of certain crimes. For example, victims of corporate criminal conduct "may be alerted to the possibility of bringing civil claims [domestically], and shareholders may be encouraged to assert control over the wrongdoers".[117] Finally, it could also raise awareness of the general problem complex. Illuminating is in this respect the example of an American corporation convicted of unlawful disposal of toxic waste that was sentenced to put an advert in a large newspaper, addressing pollution and environmental protection.[118] This would have great potential when applied to gross human rights violations. Here again, it is the multinational corporations that could actually afford launching regional or even global media campaigns.

Moreover, this point might also have further implications with regard to complicity: Since such publicity actions would greatly contribute in raising general "knowledge" and "awareness" among the public, fewer persons, both natural and legal, could hide behind a veil of ignorance while further contributing to the perpetuation of certain grievances. Adverse publicity might thus create a sort of "snowball effect" to the benefit of fundamental human rights.

In sum, it can plainly be stated that there is a wide variety of sanctions available for corporations. Which sanction, or which combination of sanctions, will be most appropriate will depend on the case at hand.

114 Shell Code of Conduct: How to Live by the Shell General Business Principles, www.static.shell.com/static/aboutshell/downloads/who_we_are/code_of_conduct/english.pdf (last accessed: 8 June 2009), p. 3.

115 Jefferson, Corporate Criminal Liability (2001), p. 258.

116 Fisse, Sentencing Options against Corporations (1990), p. 243.

117 Jefferson, Corporate Criminal Liability (2001), p. 258.

118 Fisse, Sentencing Options against Corporations (1990), p. 242.

V. Concluding Observations

Following the discussion of these major questions, which would need to be answered in order to enable the application of international criminal law to corporate actors, the following main conclusion can be drawn: None of these conceptual stumbling blocks proved to be insuperable. First, it could be shown that today there exists a number of interesting, and workable theories to determine corporate *mens rea*. For international criminal law, however, a broad, functional version of the "identification" theory seems most advisable for both doctrinal and practical reasons. Second, the rising problem of corporate complicity in international crimes can also be addressed by drawing on the existing international criminal framework for individual complicity. Third, both on the international and national levels, a great number of different forms of punishment for the convicted corporation are available, ranging from mere fines to dissolution, from which judges could select a combination most suitable to prevent further misconduct, as well as to guarantee redress for the victims. Of particular potential would be the penalty of "adverse advertising".

Hence, there seem to be no cogent reasons to prevent the use of the fast-expanding framework of international criminal law to rectify the regime deficit in terms of corporate accountability commensurate with corporate power on the international stage. To the contrary, it can be argued that international criminal law has a vast potential to fill, at least partially, the gap that traditional approaches such as classic state responsibility, the international human rights regime and so-called corporate self-regulation have failed to close.

Of course, it ultimately will become, as it is often the case in international affairs, a question of political will to bring about this extension of international criminal jurisdiction to corporate actors. In this regard, this final consideration might serve as a source of motivation. We should ask ourselves: What is the principal reason for having international criminal law? Is it solely there to punish, or not rather to protect? I prefer to choose the latter option, for although a corporation "[h]as no soul to be damned, no body to be kicked"[119], the actual and potential human victims of its power certainly do.

119 Once again quoting Lord Chancellor Edward, First Baron Thurlow, cited in Dunford/Ridley, 'No Soul to be Damned, No Body to be Kicked' (1996), p. 1.

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Democracy in the WTO – The Limits of the Legitimacy Debate

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I. Introduction

Ever since the widely publicised protests at the Seattle Ministerial in 1999 brought the World Trade Organization's (WTO) legitimacy crisis into sharp relief, trade lawyers and international relations scholars have been debating ways to enhance the legitimacy of WTO law. While there are sharp disagreements on the merits of the question, the debate has largely taken place within a legitimacy-to-power paradigm, i.e. the argument is about what power the WTO exercises and how that power could be legitimised. As I will argue, this discursive structure furthers a limited view of what would be required to make WTO law legitimate: First, it largely restricts the discussion to the passive dimension of self-determination, i.e. the need to secure states' freedom from imposed constraint by ensuring the accountability of whoever exercises power. Second, the focus on the need to legitimise the law that emanates from the existing power constellations promotes the assumption that steps to enhance the legitimacy of WTO law would, would have to, and indeed could leave these power constellations essentially unaffected. In short, the current debate attempts to legitimise lawmaking in the WTO in a way that accommodates current power relations, instead of interrogating and de-legitimising the practices that sustain these power relations with a view to opening up space for legitimate lawmaking in the first place.

In the present paper, I seek to counter this legitimacy-to-power paradigm with two arguments. First, I argue that for an international organisation such as the WTO to be considered legitimate, it is not sufficient for it not to constrain states in unjustifiable ways. The organisation must also enable its members to regulate globalisation effectively and thus to recover and preserve their political autonomy under circumstances of increasing interconnectedness and (inter) dependence. This active dimension of self-determination, however, has been largely ignored in the current legitimacy debate. Second, I argue that attempts to enhance the legitimacy of WTO law will remain superficial to the extent that they do not contribute to a reconfiguration of power relations in the WTO. By this I do not mean the redistribution of coercive power to some states at

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