

Corporate Criminal Responsibility

*Should Article 25 of the Rome Statute be
amended to grant jurisdiction to the Court
over private corporations?*

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Introduction

Context

The idea of corporate criminal responsibility¹ is not new. It was already question of it at the Nuremberg trials and since then authors have not stopped questioning it and debating. Corporations play a prominent role in our society and they become more and more involved in the commission of crimes. The report of the International Commission of Jurists Expert Legal Panel on corporate complicity in international crimes has reported in 2009 that corporations have taken part in many “gross human rights abuses”² such as enslavement.³

This paper argues that an accountability gap exists both before the International Criminal Court and in front of certain national jurisdictions, as corporations cannot currently be criminally prosecuted. It advocates that this gap could be addressed by amending Article 25 of the Rome Statute to extend the Court’s jurisdiction to include corporations.

But first of all, why is there such a gap? Could the prosecution of individuals involved in the corporation be sufficient? During the Conference in Rome, Greece has declared that “there was no criminal responsibility which could not be traced back to individuals”.⁴ This view is not the one shared by this author. Indeed, no individual can fully represent the collective will of the corporation or bear its responsibility.⁵ In the realism theory, which has been dominating corporate law for some

¹ In the context of this work, the words “liability” and “responsibility” are interchangeable.

² International Commission of Jurists, “Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes,” volume I (Expert Legal Panel on Corporate Complicity in International Crimes, International Commission of Jurists 2009) <<https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol1-publication-2009-eng.pdf>> .

³ Florian Jeßberger, “Corporate Involvement in Slavery and Criminal Responsibility under International Law” (2016) 14 *Journal of International Criminal Justice* 327 <<https://doi.org/10.1093/jicj/mqw024>> 328.

⁴ United Nations, “Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court”, Volume II (Rome, 15 June–17 July 1998) UN Doc A/CONF.183/13, <<https://digitallibrary.un.org/record/472480?v=pdf&ln=fr#files>> 136.

⁵ Joanna Kyriakakis, “Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare” (2007) 19 *Criminal Law Forum* 115 <<https://doi.org/10.1007/s10609-007-9052-7>> 121-140> 148.

time, a corporation has been defined as “an organic social reality with an existence independent of, and constituting something more than, its changing shareholders”.⁶ Indeed, corporations possess a legal personality which gives a real legal construct greater than the sum of the individuals that constitute it. This view gives rights and protection to a corporation as well as obligations.⁷ Moreover, the identification of physical perpetrators within the corporation may sometimes be laborious. All these facts point to the need for holding corporations accountable, as individual liability is not sufficient.

Another important question is whether this gap should be addressed at the international level through the ICC, or whether national legal systems are enough to provide an adequate response. This author supports the idea that the ICC should be granted jurisdiction over corporations. First of all, powerful corporations are often multinational ones which makes it difficult to regulate only on a national level as they can move their operations quite easily.⁸ Moreover, even if national prosecutions can be effective, there are cases where states may decide not to prosecute, for example, when the government is involved or gains an advantage from the situation.⁹

Research

The research question addressed by this paper is the following: “*Should Article 25 of the Rome Statute be amended to grant jurisdiction to the Court over private corporations?*”.

Given the complexity and the broadness of the subject. It is not possible to cover every aspect related to corporate criminal responsibility. Questions of modes of liability, exclusionary grounds, procedures and penalties cannot be covered. This paper is solely limited to Article 25 of the Rome Statute and the question of jurisdiction over corporations even though amending Article 25 would

⁶ Phillip Blumberg, “The Corporate Entity in an Era of Multinational Corporations” [1990] Faculty Articles and Papers <https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1057&context=law_papers>295.

⁷ Beth Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights” (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621770> 62.

⁸ Ibid 58.

⁹ Ibid 82.

probably require adjustments to other articles. The criminal responsibility of non-state armed groups or states is not analysed either.

Structure

This paper is structured as follows. It begins by explaining some essential concepts and defining the concept of a corporation by clarifying how the term is to be understood throughout the present work. It then explores the evolution of corporate criminal responsibility, focusing on the Nuremberg trials, the drafting of the Rome Statute, and the French proposal presented during the Rome Conference. The discussion then turns to the status of corporations in international law and some considerations about customary law and the general principles. This is followed by an analysis of selected treaties that include provisions on corporate criminal liability, as well as an overview of some national legal systems. Based on these findings, the paper proposes a revised formulation of Article 25 of the Rome Statute and outlines the amendment procedure. Lastly, this paper will discuss some advantages and the feasibility of such an extension before concluding with a summary of the main findings.

Key concepts

Subject of International Law

A subject of international law is an entity capable of possessing international rights and obligations. In a traditional view of international law, the sole subjects are states.¹⁰ After World War II, this position was no longer sustainable and new subjects of international law emerged, including liberation movements, individuals, and international organizations.¹¹ However, international criminal law and the Rome Statute depart from this approach by concentrating on individuals as the primary bearers of responsibility. It is contested whether corporations are subjects of international law.

International Legal Personality

The concepts of legal personality and subjects are very similar and can sometimes be misunderstood as being synonymous. However, the notion of “subject” focuses on the who, whereas the notion of personality focuses more on the capabilities.

The idea of legal personality exists in both international and municipal law¹² and is quite similar but with notable distinctions.¹³ International law, like municipal law, uses the concept of legal personality to determine the rights and duties of various entities. More specifically in international law, the concept is used to determine which social entities are considered part of the international legal framework and which are not.¹⁴ Moreover, some argue that legal personality in international law gives the competence to create legal norms.¹⁵ It is widely recognized that states are legal persons

¹⁰ Julian G Ku, “The Limits of Corporate Rights under International Law” (2012) 12 *Chicago Journal of International Law* 729 <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1627&context=cjil>>733.

¹¹ Antonio Cassese, *International Law* (as cited in Julian G Ku, “The Limits of Corporate Rights under International Law” (2012) 12 *Chicago Journal of International Law* <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1627&context=cjil>>734).

¹² Municipal law and domestic law are used synonymously.

¹³ Roland Portmann, “Legal Personality in International Law” (2010) Cambridge University Press <<https://doi.org/10.1017/cbo9780511779848>> 7.

¹⁴ *Ibid* 1.

¹⁵ Brownlie Ian, “Principles of Public International Law” (as cited in Roland Portmann, “Legal Personality in International Law” (2010) Cambridge University Press <<https://doi.org/10.1017/cbo9780511779848>> 8).

under international law, possessing the capacity to create legal norms. However, there is ongoing debate regarding whether the ability to create such norms is an essential characteristic of a legal person.¹⁶

The status regarding states is clearer. But what about other entities such as corporations? Under the majority of municipal laws, corporations are legal persons. In international law, several theories of legal personality exist, including the “states-only” theory and the “recognition” theory. The recognition theory has been vastly accepted today. Although the recognition theory maintains the primacy of state, it also acknowledges the possibility for states to recognize entities as legal persons.¹⁷ In practice this theory has mostly been used while discussing entities such as the UN or transnational corporations.¹⁸ Regarding the UN, the ICJ has ruled that it is an international person and has in the same ruling defined an international person as: “a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims”.¹⁹ In conclusion, the status of corporation as legal persons under international law is not clear and will be clarified later.

Corporations

For the past century or so, a lot has been written about what a corporation is and its essence without even being close to reaching a real consensus over a definition.²⁰ Many scholars have written on the different “organization theories”. But where does “corporation” come from? Today’s concept of a corporation within the meaning of commercial law can be traced back as far as Roman Law.²¹

¹⁶ Portmann (n°13) 9.

¹⁷ Ibid 80.

¹⁸ Ibid 99.

¹⁹ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) (1949) ICJ Rep 174.

²⁰ Stephens (n°7) 60-62.

²¹ Phillip I Blumberg, “The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality” (1993) <<http://ci.nii.ac.jp/ncid/BA19917604>>3.

However, the term is now more constrained.²² Peter Muchlinski has defined a corporation as: “an entity that is legally separate from its members, which enjoys its own personality and can hold rights and obligations in its own name”.²³ Furthermore, a corporation is often seen as engaging in economic relations.²⁴ Nowadays, core attributes of corporations have been established. One of them is that a corporation can sue but also can be sued.²⁵ Moreover, it has its own property.²⁶ Another interesting attribute is the continuation principle. The principle of continuation means that in spite of changes in the individuals that compose the corporation, it stays the same.²⁷ Indeed, corporations are real separate entities. This is the view defended by the “personification theory” and in this paper.

In order to become a separate “legal unit”, at national level, a recognition by a state is necessary.²⁸ This recognition is the act that gives certain rights and duties to the entity and which define its legal contours.²⁹ This recognition, at national level, that gives rights and duties is in fact the legal personality of the corporation mentioned previously.³⁰

This legal personality of the corporation allows, for the appearance of a “corporate veil” in corporate law which means a limited liability for the shareholders.³¹ However, this veil is sometimes “pierced” and the shareholders can be liable for the corporation’s actions.³² However, in international criminal law, the issue of the veil is irrelevant as individuals are the only ones liable before the ICC.

²² Jeffrey Patterson, “THE DEVELOPMENT OF THE CONCEPT OF CORPORATION FROM EARLIEST ROMAN TIMES TO A.D. 476” (1983) 10 *The Accounting Historians Journal* <<https://www.jstor.org/stable/40697762>> 90.

²³ Peter Muchlinski, “Corporations in International Law” [2014] Oxford University Press <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1513>> 1.

²⁴ James Crawford, “Brownlie’s Principles of Public International Law” (9th edn, Oxford University Press 2019) <<https://academic.oup.com/book/58822?login=true>> 112.

²⁵ Blumberg (n^o21) 4-5.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* 206-211.

²⁹ *Ibid.*

³⁰ Saif-Alden Wattad, “NATURAL PERSONS, LEGAL ENTITIES, AND CORPORATE CRIMINAL LIABILITY UNDER THE ROME STATUTE” (1984) 20 *UCLA Journal of International Law and Foreign Affairs* <<https://www.jstor.org/stable/45302257>> 395.

³¹ *Ibid* 396.

³² *Ibid.*

For the sake of clarity and consistency, the definition of corporation used in this work is one similar to the one proposed by the French delegation during the Rome conference. A corporation here has to be understood as: *a legal person one of whose objectives is the pursuit of economic gain, and is neither a State or other public body.*

Evolution towards corporate responsibility

Nuremberg

This section discusses some cases related to the Nuremberg trials which indicate how corporations are involved in international crimes. Nuremberg is seen as the beginning of international criminal court for crimes against peace, crimes against humanity and war crimes.³³

The Nuremberg Charter included some provisions on criminal organizations.³⁴ Article 9 of the Charter of the International Military Tribunal (IMT) does not directly establish corporate criminal liability. Rather, it empowers the Tribunal to declare an organization, of which an individual is a member, to be criminal.³⁵ The principle is that abstract entities cannot commit crimes. The provisions on criminal organizations are only a way to hold liable members of such organizations. The entity itself cannot be put to trial.³⁶ The tribunal only declared as criminal the following organizations: the leadership of the Nazi Party, along with the Gestapo, the SD, and the SS.³⁷ Moreover, Article 10 deals with the eventuality of the organization being declared a criminal one in accordance with Article 9. It states that in the case of the organization being declared criminal by the IMT, “the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts”.³⁸ Furthermore, Article 11 of the IMT charter allows for the possibility of additional prosecution and punishment beyond what has been imposed by the IMT.³⁹ Those provisions would subsequently allow prosecution at the subsequent trials

³³ Charter of the International Military Tribunal (8 August 1945) art 6.

³⁴ Article 9 to 11.

³⁵ Charter of the International Military Tribunal (8 August 1945) art 9.

³⁶ Harmen Van Der Wilt, “Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities” (2013) 12 Chinese Journal of International Law <<https://doi.org/10.1093/chinesejil/jmt010>> 51.

³⁷ Andrew Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court,” *Liability of Multinational Corporations Under International Law* (Kluwer 2000) <https://www.researchgate.net/profile/Andrew-Clapham/publication/301350477_The_Question_of_Jurisdiction_Under_International_Criminal_Law_Over_Legal_Persons_Lessons_from_the_Rome_Conference_on_an_International_Criminal_Court/links/5714b29608ae4ef745291376/The-Question-of-Jurisdiction-Under-International-Criminal-Law-Over-Legal-Persons-Lessons-from-the-Rome-Conference-on-an-International-Criminal-Court.pdf> 163.

³⁸ Charter of the International Military Tribunal (8 August 1945) art 10.

³⁹ Charter of the International Military Tribunal (8 August 1945) art 11.

(NMTs) which took place in the continuity of the IMT. In some instances, business leaders were prosecuted for complicity in crimes against peace, war crimes, and crimes against humanity by the military tribunals of the Allied forces under Allied Control Council Law (CCL) No. 10. Article II, Section 1(d) of CCL No. 10 states that "Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal" is recognized as a crime. However, in the cases involving business leaders, most of the charges were not based on their membership in criminal organizations.⁴⁰ Corporations were merely mentioned as instruments through which crimes were committed and were not declared as "criminal organizations". Indeed, Article 9 did not play a central role in the prosecution of business leaders. However, the existence and the role of corporations, as instruments, were still acknowledged in a criminal context which is of interest for this paper.

In each and every case at the NMTs, the principle of individual responsibility has been maintained. However, according to Jonathan Bush, this decision to exclude corporate criminal liability at Nuremberg was a political decision and not a legal one. However, this claim from Bush cannot be verified through reports from that time. Moreover, he stated that "corporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal ...".⁴¹

Three cases are going to be addressed.⁴² They show how the corporate responsibility was not brought into being and how corporations contribute to the commission of international crimes. These trials established the principle of individual responsibility for business leaders before a court, recognizing the corporation as the instrument through which crimes were committed and addressing acts carried

⁴⁰ In Fick, one count is the membership to the SS.

⁴¹ Jonathan Bush, "ESSAY THE PREHISTORY OF CORPORATIONS AND CONSPIRACY IN INTERNATIONAL CRIMINAL LAW: WHAT NUREMBERG REALLY SAID" (2009) 109:1094 *Colombia Law Review* <https://annalindh.primo.exlibrisgroup.com/discovery/fulldisplay?docid=cdi_proquest_miscellaneous_37176980&context=PC&vid=46LIBRIS_ALB_INST:46ALB_VU1&lang=en&search_scope=MyInst_and_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,The%20prehistory%20of%20corporations%20and%20conspiracy%20in%20international%20criminal%20law:%20What%20Nuremberg%20really%20said&offset=0> 1239.

⁴² *Ibid* 52.

out by the corporation.⁴³ Moreover, those trials are relevant in the topic at hand because, at the time, it was completely new to even put to trial business leaders.⁴⁴

IG Farben⁴⁵

IG Farben was a very important German chemical and pharmaceutical group responsible for producing synthetic fuels, rubber, and other essential materials for the German military machine. IG Farben in itself was not indicted. However, the prosecution claimed that Krauch and the 22 other officials of the company committed crimes against peace, war crimes and crimes against humanity by "acting through the instrumentality of Farben and otherwise".⁴⁶

This judgment made it clear that only individuals were prosecuted. It has been stated 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, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it".⁴⁷

The indictment contained five different counts, such as crimes against peace, conspiracy, war crimes, crimes against humanity through participation in the Slave Labour Programme, and spoliation and

⁴³ Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *The Yale Law Journal* <<https://doi.org/10.2307/797542>> 477.

⁴⁴ Clémentine Méténier, "In Nuremberg, 'We Started to Judge Company Executives and Managers'" *JusticeInfo.net* (September 12, 2022) <<https://www.justiceinfo.net/en/106304-nuremberg-judge-company-executives-managers.html>>.

⁴⁵ Interessen-Gemeinschaft Farbenindustrie Aktiengesellschaft.

⁴⁶ *The United States of America v Carl Krauch et al*, US Military Tribunal Nuremberg, Judgment of 30 July 1948, <https://www.worldcourts.com/imt/eng/decisions/1948.07.29_United_States_v_Krauch.pdf> 3.

⁴⁷ *Ibid* 52.

plunder, and membership to the SS. They were charged of participating in crimes against peace on the basis that the company had provided material indispensable for the war.⁴⁸ However, in order to be convicted the knowledge of the accused is important and they were acquitted due to a lack of knowledge of Hitler's plan. Count II deals with plunder and spoliation of public and private property in countries under the Nazi regime's belligerent occupation. In that matter, it has been proven that properties had been seized and that this was beneficial to Farben. However, to be convicted, it must be proven that the accused was a participant in the act or that they authorized or approved it. In this case, it has been proven that the offences have been committed and were connected to the German Plan. Moreover, most "acquisitions" have been from Farben's own initiative.⁴⁹ On count III, they are accused of providing toxic gas and drugs used on inmates and of taking part in the Slave Labour Programme.⁵⁰ In this case, the defendants were not convicted due to the fact that Farben was not the direct supplier of gas. Indeed, it was supplied by another company in which Farben held 42.4% of the shares. Moreover, the board was not involved in the other company's daily operations and exerted no influence over its management.⁵¹

Thirteen of the defendants in the Farben case were found guilty and received prison time between 1.5 and 8 years in prison.⁵² Farben does not exist as such anymore. However, some companies which were part of the Farben conglomerate still operate today such as Bayer.⁵³

Krupp

Krupp was an armament and steel company. Krupp was the main supplier of steel and weapons to the Reich.⁵⁴ This case involves twelve defendants, all officials of the Krupp Concern. The indictment

⁴⁸ Ibid 4-6.

⁴⁹ Ibid 19.

⁵⁰ Ibid 23-28.

⁵¹ Ibid 24.

⁵² Ibid 63.

⁵³ "Bayer" (Holocaust Encyclopedia, 2019) <<https://encyclopedia.ushmm.org/content/en/article/bayer>>.

⁵⁴ "Krupp Trial | Nürnberg Krupp Trial Papers of Judge Hu C. Anderson" <<https://krupp.library.vanderbilt.edu/trial>>.

consists of four counts: Planning, preparation, initiation, and waging aggressive war; Plunder and spoliation; Crimes involving prisoner of war (POW) and slave labour; Common plan or conspiracy to commit crimes against peace. However, only count II and III were examined due to a lack of evidence concerning the count I and IV. Under count II, the accused were charged with actively orchestrating and executing plunder by coercively seizing valuable properties in German-occupied territories for themselves, Krupp, and affiliated enterprises. Count III, charges them for war crimes and crimes against humanity. The defendants victimized and committed offences against civilians and PoW. They recruited PoW but also foreign civilians who were forced to work. It was thought that under the Slave Labour Programme, Krupp put to work over 55,000 foreign workers, including children⁵⁵, over 18,000 PoW and over 5,000 concentration camp inmates.⁵⁶

Six of the defendants were convicted under count II and eleven were convicted under count III. They received prison sentences from 2 to 12 years.⁵⁷ In 1951, most of the sentences pronounced against Krupp's officials were commuted to time served and all of Alfried Krupp's properties were reinstated.

Flick

In the Flick case there were six defendants, all being officials in the Flick Concern. Flick Concern was a major corporation in the sector of steel and mining.

The indictment contained 5 counts: Use of slave labour and deportation for labour and the use of PoW; Plunder and spoliation; Participation in the persecution of individuals based on their race, etc; Participation in the murder, torture, and atrocities; Membership to the SS⁵⁸. On the count of plunder

⁵⁵ Ibid.

⁵⁶ Trial of Alfried Felix Alwyn Krupp Von Bohlen und Halbach and Eleven Others (Krupp trial), United States Military Tribunal, Nuremberg, 17 November 1947–30 June 1948 <https://www.worldcourts.com/imt/eng/decisions/1948.06.30_United_States_v_Krupp.pdf> 69-76.

⁵⁷ Ibid 158-159.

⁵⁸ Trial of Friedrich Flick and Five Others, United States Military Tribunal, Nuremberg 20 April—22 December 1947 <https://www.worldcourts.com/imt/eng/decisions/1947.12.22_United_States_v_Flick2.pdf>2-5.

and spoliation, it was argued that Flick violated Article 46 of the Hague Regulations, by operating a French owned plant, the Rombach Plant, without the consent of the French company. Flick was condemned on this charge but with mitigating circumstances due to the fact that there were no personal advantages to Flick and a lack of awareness of the bigger plan. An interesting outcome of this case is the admission of the plea of necessity, for some defendants, regarding the charges of enslavement and forced labour.⁵⁹ The judgement states that it was clear that the accused had no intention of engaging foreign labour or PoW. Moreover, they were aware that refusing to employ such labour could be seen as sabotage as it would slow down the plans of the Reich.⁶⁰

Flick was condemned to 7 years in prison while two other defendants were condemned to 5 and 2.5 years.⁶¹

Conclusion

The IMT and the subsequent NMTs represent a pivotal moment in the development of international criminal law. Neither tribunal established corporate criminal responsibility. Nevertheless, the IMT Charter gives the Tribunal the possibility to declare an organization criminal. Furthermore, article 10 of the Charter allows the subsequent tribunals to prosecute natural persons as a result of their membership. With regards to the NMTs, business leaders were notably prosecuted for their involvement in the commission of international crimes but their corporations were never qualified as criminal. In these proceedings, corporations were acknowledged as key instruments through which individuals carried out criminal acts, rather than as entities bearing responsibility themselves. While these tribunals maintained a strict adherence to individual criminal responsibility, they can be considered as a foundation for debates on corporate criminal responsibility. In this sense, Nuremberg

⁵⁹ Van der Wilt (n°36), 55-59.

⁶⁰ Flick (n°58) 8-9.

⁶¹ Ibid 30.

remains highly relevant to ongoing discussions about the inclusion of corporate criminal responsibility within international criminal law and the Rome Statute.

Regarding the sentencing, all the sentences received could be perceived as quite light considering the important role and implication of corporations in the Nazi regime. According to Méténier, the reason behind this is that those trials took place at a time where the Cold War was setting in and the interest in punishing the Nazis was reduced. Moreover, the focus at the time was on the economic reconstruction and establishment of West Germany as a part of the “West bloc”.⁶²

Drafting of the Rome Statute

After WWII, a sentiment of impunity emerged and the desire for a “never again” grew stronger even though the Nuremberg trials set a precedent for international justice. To establish and maintain lasting peace, it is imperative to combat impunity through legal accountability and the enforcement of international justice. Over the years, international law has generated many rules. However, what are rules without a mechanism of enforcement and accountability? At the end of the 1940s, the General Assembly (GA) of the United Nations (UN) worked on three projects: “*A universal declaration of Human Rights (HR), a convention to prevent genocides and an international criminal court (ICC)*”.⁶³

In 1948, the GA mandated the International Law Commission (ILC) to work on the possibility and desirability of the establishment of the ICC. The Assembly subsequently set up another committee to work on the drafting. However, the drafting and adoption of the Statute required a significant amount of time. In 1990, the GA instructed one more time the ILC to look into this affair. In 1993, the drafting of the Statute of the ICC was finally prioritized by the Assembly. The drafting by the Commission

⁶² Méténier (n°44).

⁶³ Roy S Lee, “The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results” (Martinus Nijhoff Publishers 1999) <https://books.google.fr/books?id=UsX7EAAAQBAJ&pg=PA1&dq=rome+statute+of+the+icc+drafting&lr=&hl=fr&source=gbs_toc_r&cad=2#v=onepage&q=rome%20statute%20of%20the%20icc%20drafting&f=false> 1.

was finalized in 1994. Afterwards, two ad hoc committees were brought into being in order to analyse the drafting and resolve apparent issues. In December 1995, a Preparatory committee was established by resolution 50/46 of the GA. They resolved issues by means of concessions and compromises. After six meetings, the preparatory committee submitted a draft to the Conference in Rome which contained various alternatives.⁶⁴ The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court took place from the 15th of June to the 17th of July 1998 in Rome with 160 states.⁶⁵ In the final draft of the Preparatory Committee, Article 23 included a fifth and sixth parts written as such: “The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators”.⁶⁶ This portion of the article was not included in the text approved at the conference, but the issue of corporate responsibility was discussed in greater depth within the French proposal, which will be detailed in the next section.

Finally, on the 17th of July, the Rome Statute was adopted at the final plenary of the Conference by a vote of 120 in favour, 7 against and 21 abstentions. The ICC was ultimately established 50 years after the UN first introduced the idea.⁶⁷ The ICC was formally established in 2002 after the RS entered into force on the 1st of July 2002. In accordance with the Statute voted in 1998, the ICC is the first permanent international tribunal with jurisdiction to try individuals for genocide, war crimes, crimes against humanity, and the crime of aggression. Article 25 (1) of the RS establishes that: “The Court shall have jurisdiction over natural persons pursuant to this Statute”⁶⁸. The ICC has been granted jurisdiction by the States Parties only over individuals and not legal persons such as corporations as

⁶⁴ Ibid.

⁶⁵ United Nations (ed), *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, vol Volume I (2002).

⁶⁶ United Nations, “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court” (2002) Volume III <https://legal.un.org/icc/rome/proceedings/e/rome%20proceedings_v3_e.pdf>.

⁶⁷ Lee (n°63) 22-25.

⁶⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 25.

Article 25 does not mention them.⁶⁹ However, during the Rome Conference, the French delegation made a proposal that is still relevant to this day and is worth explaining more in detail.

The French Proposal

Article 23 of the original draft and the question of jurisdiction over companies were examined by the Working Group on General Principles and the French delegation was organizing consultations in order to work on a generally accepted formulation. The reasoning behind the inclusion of corporate responsibility was a financial one at first. Indeed, an individual may not have enough resources to compensate the victims whereas a corporation usually has more assets. This could also ensure greater deterrence.⁷⁰ On July 3rd 1998, the French delegation made an interesting proposal to include jurisdiction over “juridical persons”. This proposition was to add a fifth point to Article 25 formulated as such:

“5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

- (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
- (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
- (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

⁶⁹ International Criminal Court, “Understanding the International Criminal Court” (2020) <<https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>>.

⁷⁰ Clapham (n°37) 146-158.

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, “juridical person” means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organisation registered, and acting under the national law of a State as a non-profit organization”.⁷¹

Firstly, the text is designed in a manner that maintains the basic principle of individual prosecution. It requires that a natural person would be convicted which highlights and accentuates that a “judicial person” can only act through a “natural person”. Moreover, the mens rea must be attributed to the entity due to the requirement of “acting on behalf” and “consent”. The requirement that the natural person acted on behalf serves as a link between the natural and the judicial persons. However, this needs to be balanced by the notion of “course of activities” in order to exclude sub-contractors and to limit the criminal responsibility. The crime must be related to the “raison d’être”⁷² of the corporation and the actus reus should be performed in the course of the corporation’s activities. Then, the condition of “position of control” does not allow the prosecution of every member of the organization. This notion of control was seen to be defined by the national law of the company.⁷³ All those conditions are cumulative, in order to prosecute a juridical person.⁷⁴

Some authors⁷⁵ have tried to raise an important issue stating that including corporate criminal responsibility would contradict the principle of complementarity. The issue can be explained by the fact that, at the time of the Rome Conference, a majority of states did not include corporate criminal responsibility in their national legislations. Those authors are claiming that the incorporation of

⁷¹ Working Paper on Article 23, paras 5–6, A/CONF.183/C.1/WGGP/L.5/Rev.2 (3 July 1998) <<https://digitallibrary.un.org/record/259755?ln=fr&v=pdf>>.

⁷² Which is often linked to profit and economical gains.

⁷³ Clapham (n°37) 154.

⁷⁴ Van der Wilt (n°36) 46-49.

⁷⁵ Such as Micaela Frulli, Leila Sadat Wexler, Albin Eser, Kai Ambos, ...

corporate criminal liability would therefore have posed a challenge under the principle of complementarity implemented by Article 17 RS.⁷⁶ According to this article, a case is inadmissible in front of the ICC when “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.⁷⁷ This ensures that the international court serves as a complementary mechanism to domestic justice systems.⁷⁸ The complementarity principle is the result of a compromise between state sovereignty, which gives states the right to exercise jurisdiction, and an effective international justice.⁷⁹ According to Scheffer, the principle of complementarity relies on the existence of compatible criminal laws within the national legislation of States Parties.⁸⁰ Moreover, once again according to some authors, it would not be adequate or fair to include, at the time, jurisdiction over corporations as it would, in practice, not have been applicable to the States Parties who did not render corporations criminally responsible under their national legislations.⁸¹ They allege that states that do not have corporate criminal responsibility in their national legislations would automatically be seen as unable and forfeiting their right to exercise primary jurisdiction which would then create inequality in application of international law, and could weaken legitimacy or compliance.⁸²

However, the author of this paper disagrees with the claim that the incorporation of corporate criminal responsibility would have led or lead now to a complementarity problem. Indeed, as stated in Article 17 RS an issue arises when the state is either unable or unwilling. Article 17 (3) RS states that “In order to determine inability in a particular case, the Court shall consider whether, due to a total or

⁷⁶ Article 17 read with articles 18, 19, 20 and 86 to 102 establish the principle of complementarity.

⁷⁷ Rome Statute, art 17 (1) (a).

⁷⁸ International Criminal Court Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> 3.

⁷⁹ Joanna Kyriakakis, “Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare” (2007) 19 Criminal Law Forum 115 <<https://doi.org/10.1007/s10609-007-9052-7>> 121-140.

⁸⁰ David Scheffer, “Corporate Liability under the Rome Statute” [2016] Harvard ILJ <<https://journals.law.harvard.edu/ilj/2016/07/corporate-liability-under-the-rome-statute/>>.

⁸¹ William A Schabas, “An Introduction to the International Criminal Court” (2001) <<https://doi.org/10.1017/cbo9781139164818>> 81.

⁸² Kyriakakis (n^o79) 117.

substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”. According to this author, the mere lack of legislation does not demonstrate inability as inability has to be understood as a total or substantial collapse of the legal system. Moreover, stating that the absence of national legislation raises a complementarity issue would, in my opinion, shift the “complementarity balance” in favour of state sovereignty at the expense of international criminal justice. Furthermore, it is worth noting that the Rome Statute already contains provisions that are not uniformly reflected in all national criminal legislations⁸³, which further supports the argument that complementarity does not inherently preclude the inclusion of corporate criminal liability. From other standpoints, such as the one of Cassese, a legislative impediment can demonstrate inability as the national judge would not be able to prosecute.⁸⁴ This position is highly debated. However, irrespective of the position one adopts, this work aims to show that complementarity has never posed a genuine problem and to the extent that it is perceived as one, the issue is either minimal or currently negligible as national legislations have evolved.

Additionally, another fear from states was that this addition would allow the indirect prosecution of states by the prosecution of public companies, mixed ventures and companies linked to the states in any way whatsoever.⁸⁵ However, the definition of corporation in this work is clear on the exclusion of states and any other public bodies.

According to Clapham, the French proposal was ultimately excluded because, within the final two weeks of the Conference, it was not feasible to accommodate the concerns of all delegations in a manner that would satisfactorily resolve the complexities surrounding this innovative application of

⁸³ Ibid 131-132.

⁸⁴ Antonio Cassese, “INTERNATIONAL CRIMINAL LAW” (2nd edn, Oxford University Press 2008) <<http://ndl.ethernet.edu.et/bitstream/123456789/62239/1/Antonio%20Cassese.pdf>> 344.

⁸⁵ Clapham (n°37) 191.

criminal law.⁸⁶ France ultimately retracted the proposal after it became evident that reaching a consensus on an acceptable formulation within the limited timeframe of the Conference was not feasible.⁸⁷ This does not mean that the article as formulated in this proposal should be completely disregarded. It seems to form a useful initial foundation for current debate on this issue and will be used later in a new formulation of Article 25.

⁸⁶ Clapham (n°37) 157.

⁸⁷ Ibid.

Corporate criminal responsibility in international law

Corporations as subject/ legal person of international law

The topic of subjectivity and legal personality was discussed in general terms in chapter II. As stated previously, in a state-centred approach and traditional view of international law, states are the only subjects of international law and are the only ones capable of having responsibilities and obligations. Nevertheless, international criminal law is special when it comes to this. Indeed, the criminal form of State responsibility has been rejected and only individual responsibility exists.

Corporations do not possess a legal personality, in the classical view of international law, which is essential for the law to be able to impose obligations onto them. Moreover, states are not willing to grant corporations international legal personality fearing that doing so would undermine their authority and enable corporate interference in their political and economic affairs⁸⁸. However, regarding individuals, the LaGrand Case of 2001 of the ICJ⁸⁹ affirmed that they are subjects of international law. Coming back to corporations, according to Alexandra Garcia, it is widely accepted that corporations possess international legal personality and are bound by jus cogens norms.⁹⁰ Moreover, some scholars have argued that developments in international law provide evidence that corporations are now international legal persons, for example through the establishment of various international mechanisms such as investment treaties and others developed subsequently which demonstrate this possession.⁹¹ The ICJ has also affirmed the separate legal personality of corporations in the context of diplomatic protection.⁹²

⁸⁸ Photeine Lambridis, “Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity” (May 24, 2021) <<https://nyujilp.org/corporate-accountability-prosecuting-corporations-for-the-commission-of-international-crimes-of-atrocity/>> 146 and Andrew Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press 2006) <<https://doi.org/10.1093/acprof:oso/9780199288465.003.0003>>.

⁸⁹ *LaGrand* (Germany v United States of America) (Judgment) [2001] ICJ Rep 466.

⁹⁰ Alexandra Garcia, “Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg” (2015) 24 Tulane Journal of International and Comparative Law <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/tulicj24&div=7&id=&page=>>> 123.

⁹¹ Lambris (n°88) 145.

⁹² Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ <<https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>> para 39-44

Moreover, the amendment of Article 25 to grant jurisdiction over corporations would according to this author, at the very least, implicitly call for recognition of corporate legal personality at the international level in order to hold them criminally liable.

From this author's perspective, and for the purposes of this paper, corporations will be regarded as legal persons. However, they are possessing a limited form of international legal personality, as proposed by Clapham, acknowledging that while corporations may hold certain international rights and obligations, they do not constitute primary subjects of international law like states do due to their lack of rule-making power.⁹³

Customary law

Customary international law arises from consistent state practice accompanied by *opinio juris*, a belief that such practice is legally obligatory.⁹⁴ The Rome Statute is partially reflective of customary international law, particularly in its codification of the core international crimes. However, not all of its provisions are customary. The relation between the RS and customary law is expressed in Article 10 of the RS. The non-inclusion in the Statute does not mean that it cannot be customary beyond the ICC and vice versa. It ensures that the RS do not freeze customary international law.⁹⁵

Besides, although it is not customary yet, the RS could be amended to grant jurisdiction over corporations. The amendment could even lead to corporate criminal responsibility becoming customary as it would influence state's legislations and state practice.⁹⁶ This can be explained by the fact that, while State Parties are not legally required to harmonize their national laws with the ICC

⁹³ Clapham (n°37) 76-80.

⁹⁴ Andrew Clapham, "The Basis of Obligation in International Law," Oxford University Press eBooks (2012) <<https://doi.org/10.1093/law/9780199657933.003.0002>> 58.

⁹⁵ Larissa Van Den Herik, "The Decline of Customary International Law as a Source of International Criminal Law," Cambridge University Press eBooks (2016) <<https://doi.org/10.1017/cbo9781316014264.010>>.

⁹⁶ Kyriakis (n°79) 130

Statute, the preamble seems to indicate such a “duty” by “recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.⁹⁷

As explained, the debate is still ongoing over something as fundamental as the legal personality of corporations. Regarding corporate civil liability, in the U.S. Supreme Court opinion *Jesner v. Arab Bank*, the court did not recognize a clear norm of corporate liability under customary international law.⁹⁸

In conclusion it seems evident that the matter of civil liability and criminal liability, regarding corporations, is not yet customary.

General principles

The analysis will now shift to the general principles of law. Is corporate criminal responsibility a general principle?

First of all, Article 38 (1) (c) of the ICJ Statute stipulates that “the Court shall apply the general principles of law recognized by civilized nations”.⁹⁹

In addressing the role and formation of general principles in international law, the ILC, has recently work on the question and provided in May 2023 a “text of the draft conclusions provisionally adopted by the Drafting Committee on first reading”.¹⁰⁰ The draft conclusion 3 gives two types of general principles: those “that are derived from national legal systems” and those “that may be formed within the international legal system”.¹⁰¹

⁹⁷ RS (n°68) Preamble.

⁹⁸ *Jesner v Arab Bank*, PLC 584 US 1 (2018) <https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf>.

⁹⁹ Statute of the International Court of Justice, art 38(1)(c).

¹⁰⁰ International Law Commission, ‘Text of the Draft Conclusions on General Principles of Law Provisionally Adopted by the Drafting Committee on First Reading’ (2023) UN Doc A/CN.4/L.997.

¹⁰¹ Ibid Draft conclusion 3.

According to draft conclusion 4, in order to recognize general principles of law derived from national legal systems “the existence of a principle common to the various legal systems of the world and its transposition to the international legal system”¹⁰² is necessary. Draft conclusion 5 requires “the existence of a principle common to the various legal systems of the world and a comparative analysis of national legal systems” to determine a common principle to various legal systems.¹⁰³ Moreover, it is then important that the comparative analysis encompasses a wide range of legal traditions from various world regions. Regarding the term “transposition”, this means that the principle must also be recognized as applicable within the framework of international law.¹⁰⁴

Moving on to the second set of general principles, the ones formed within the international legal system, draft conclusion 7 states that it is essential to establish that the principle is recognized by the international community as inherent to the international legal system.¹⁰⁵ The general principles formed within the international legal system are more contested due to some troubles in separating clearly those principles from customary law.¹⁰⁶ This second category is still debated in the latest report of the ILC on the general principles which explains the wording “may be formed”.¹⁰⁷

Regarding the decision of courts and tribunals related to general principles, it is said that they constitute a subsidiary means of determining those principles.¹⁰⁸ Moreover, in determining a general principle, the writings of distinguished legal scholars may also be seen as a subsidiary mean of determination.

¹⁰² Ibid Draft conclusion 4.

¹⁰³ Ibid Draft conclusion 5.

¹⁰⁴ International Law Commission, Report on the Work of Its Seventy-Fourth Session (2023) UN Doc A/78/10, Chapter IV <<https://legal.un.org/ilc/reports/2023/english/chp4.pdf> 17>.

¹⁰⁵ Ibid Draft conclusion 7.

¹⁰⁶ International Law Commission, Report on the Work of Its Seventy-First Session (2019) UN Doc A/74/10, Chapter IX, <<https://legal.un.org/ilc/reports/2019/english/chp9.pdf>> para 245.

¹⁰⁷ ILC report (2023) (n°104)14-16.

¹⁰⁸ ILC (n°100) Draft conclusion 8.

Recently, the Special Tribunal for Lebanon (STL) decided that it has jurisdiction over corporations. In 2014, Judge David Baragwanath indicted two legal entities, New TV S.A.L. and Akhbar Beirut S.A.L.¹⁰⁹ The defence of New TV requested the dismissal of all charges, arguing that the Tribunal does not have jurisdiction as no legal foundation in the Tribunal's Statute, its Rules, or international criminal law in general can be found to initiate criminal proceedings against a legal entity.¹¹⁰ An initial judgment ruled in favour of the defence, but the matter went to appeal. The appeal overturned the decision and affirmed the Tribunal's jurisdiction over the corporation. It is stated in the appeal judgment that "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".¹¹¹ The Appeals Panel considers that, given all the developments outlined above, corporate liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law. This is a first and could indicate a growing trend toward holding corporations criminally liable. The same outcome occurred in the case of Akhbar Beirut. The scope of those decisions is rather narrow but has a great symbolic significance. It proves that corporate criminal responsibility can exist under international law.¹¹² Unfortunately, the News TV ruling does not have a major impact. The STL is an ad hoc tribunal, not like the ICC and has limited jurisdiction. Moreover, the decision only refers to contempt.¹¹³

However, coming back to the existence of general principles and more specifically the first type, in the view of this author, there are strong grounds to argue that corporate criminal responsibility has become a general principle of law. At the very least, it is undeniably advancing toward that status. However, in order for the ICC to prosecute corporations, an amendment is still necessary, even if

¹⁰⁹ Nadia 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" (2015) 13 *Journal of International Criminal Justice* 313 <<https://doi.org/10.1093/jicj/mqv014>> 314.

¹¹⁰ *New TV S.A.L. and Khayat* (STL-14-05/PT/CJ), Defence Preliminary Motion challenging jurisdiction, Contempt Judge, 16 June 2014, para. 3.

¹¹¹ *New TV S.A.L. and Khayat* (STL-14-05/AJ) (Appeal Judgment, Appeals Panel) 8 March 2016, para 183, p 81.

¹¹² Bernaz (n°109) 315-321.

¹¹³ *Ibid* 329.

corporate criminal responsibility is recognized as a general principle. Indeed, general principles are only secondary sources¹¹⁴ and the RS is clear that the ICC only have jurisdiction over natural persons.

It is worth noting that an increasing number of states have now included in their national legislation corporate criminal responsibility as stated by the STL. Some treaties and states' legislations involving companies will be mentioned in an attempt to illustrate the growing practice of corporate criminal liability within the States Parties to the RS and the general principle "to be" especially if the Rome Statute is amended to include corporate criminal responsibility.

Other treaties

The Rome Statute does not hold corporations criminally liable before the ICC and the corporate criminal responsibility is not yet customary and its qualification as a general principle of law remains a subject of ongoing debate. However, in international law, it exists other treaties that render corporations criminally liable. Those treaties give a precedent in order to develop corporate criminal responsibility in ICL. Besides, these treaties are not the most recent and demonstrate a kind of longevity of the principle. Moreover, some treaties such as the Basel convention predate the Conference in Rome of 1998. The conception of corporate criminal responsibility was thus already known and some countries were already subject to some obligations in this regard. These conventions are enforced at national levels and require the parties to adopt appropriate legislations to hold corporations liable.

Basel Convention of 1989

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes was adopted in 1989 and entered into force in 1992. Article 4 provides a number of definitions, including

¹¹⁴ Rome Statute (n°68) article 21(1) (c).

that of “person” which “means any natural or legal person”.¹¹⁵ This Convention does not specifically mention the corporate criminal responsibility but under Article 4 (3) the “illegal traffic in hazardous wastes or other wastes is criminal”.¹¹⁶ The Parties to this Convention must adopt the necessary legal, administrative, and other actions in order to enforce and implement the Convention. By doing so, it encourages the Parties to adopt measures that may include holding corporations accountable for violations of the Convention's provisions under national law. In conclusion, this Convention creates an international crime and suggests that States have to criminalize the illegal traffic of hazardous wastes in their national legislation and natural and legal persons are subject to this jurisdiction.¹¹⁷

The Council of Europe Convention on the Protection of the Environment through Criminal Law of 1998

In the preamble it is stated that imposing criminal or administrative sanctions on legal persons can have an effective impact in preventing environmental violations and notes the increasing global momentum in this respect. Article 9, called corporate liability, provides for criminal liability for legal persons through national legislations of contracting states. The commission of the offence is made by the organ or a member or a representative of the legal person on its behalf. The proceedings against a natural person are not excluded by the corporate criminal liability. However, states can reserve the right not to apply it or that it is only applicable in the case of the commission of some specified offences.¹¹⁸

¹¹⁵ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) art 2.

¹¹⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) art 4.

¹¹⁷ Clapham (n°37) 174.

¹¹⁸ Council of Europe, Convention on the Protection of the Environment through Criminal Law (adopted 4 November 1998, not yet in force) ETS No 172.

The Council of Europe Criminal Law Convention on Corruption of 1999

This Convention aim at criminalizing corruption practices. This Convention is not only open to members of the Council of Europe, but also to other states. Article 1 defines the terms “legal person” as “any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations”.¹¹⁹ However, the interesting article here is Article 18 called “corporate liability”. This article requires the state to adopt a law to hold legal persons criminally liable for “the criminal offences of active bribery, trading in influence and money laundering”. The offence must be committed for the benefit of the legal person by a natural person who holds a position of power based on “a power of representation of the legal person or an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person”. The legal person should also be held responsible when the offence occurs because of a failure in supervision or control by individuals within the legal person’s structure. Moreover, the prosecution of a legal person, does not exclude the criminal responsibility of the individual.¹²⁰ The wording of this article and the conditions are rather similar to the French proposal. Indeed, both require that the crime is committed to the benefit of the legal person, through a natural person who holds a position of control. Furthermore, thanks to the definition given in Article 1 excluding states and other public bodies, one of the problems raised in Rome has been avoided.¹²¹

UN Convention against Transnational Organized Crime of 2000

Article 10 deals specifically with the liability of legal persons and stipulates that States Parties shall adopt measures to hold legal persons accountable for their participation in serious crimes involving an organized criminal group and for offences mentioned in the convention. Yet, the liability of legal persons under this convention does not need to be criminal. It depends on the legal principle of the

¹¹⁹ Council of Europe, Criminal Law Convention on Corruption (1999) ETS No 173, art 1.

¹²⁰ Ibid, art 18.

¹²¹ Clapham (n°37) 176.

state, it can be administrative, civil or criminal. This does not impact the criminal liability of the natural person.¹²²

Another UN Convention adopted in 2005, the Convention Against Corruption includes an article nearly identical to Article 10 and establishes the same liability regime for legal persons.¹²³

¹²² UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 10.

¹²³ UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, art 26.

National legislations

Introduction

This section will provide an overview of some national legislations that include or not corporate criminal responsibility. By doing so it demonstrates that the issue of complementarity, if it exists, raised in Rome does not prevent the amendment of Article 25 to grant jurisdiction to the ICC over corporations and that the principle is either already a general principle or becoming one. An analysis of these various laws also provides an idea of what has already been implemented and how they have been formulated.

At Rome, one issue raised was the one of complementarity. Indeed, many national legislations did not provide for corporate criminal responsibility. Today, the situation is quite different. Based on the research from Camille Cressent¹²⁴, the States Parties to the RS who have or have not implemented the corporate criminal responsibility in their national legislation can be observed (Annexe 1). Drawing on Cressent's study, the author of this paper observes that 63% of the States Parties to the Rome Statute have, in various forms, incorporated provisions on corporate criminal responsibility into their national legislation, while 27% have not. For the remaining 10%, relevant data was unavailable.

Moreover, if the Statute were to be amended, an offender could then be prosecuted by national jurisdictions or by the ICC. That is why experts refer to an “expanding web of liability for business entities implicated in international crimes” as liability for corporations could come from various

¹²⁴ Camille Cressent, “La Responsabilité Pénale Des Personnes Morales Pour Violations Graves Du Droit International” (PhD dissertation, L’université de Lille 2024) <<https://theses.hal.science/tel-04583001v1>>.

sources¹²⁵ and the risk of being prosecuted increases with the jurisdiction of national courts and the ICC.¹²⁶ This demonstrates once again the relevance of the national legislations on the subject.

Attention is now directed to the different legal systems. Firstly, historically, there has been a clear distinction in approaches to corporate criminal responsibility based on the legal tradition whether a system follows civil law or common law.¹²⁷ As a product of international negotiation, the Rome Statute embodies a convergence of common and civil law approaches.¹²⁸

In the common law system, the concept of corporate liability has been established for quite some time. In the US for example, it exists since 1909.¹²⁹ In the civil law system, the principle “*societas delinquere non potest*”¹³⁰ was held strongly for a long time. In Europe, most of the civil law system now include criminal responsibility with first the Netherlands¹³¹ and a first wider attempt in 1988 when the Council of Europe made several recommendations to its member states in order to render corporations liable when committing offences “in the exercise of their activities, beyond existing regimes of civil liability of enterprises to which these recommendations do not apply”.¹³² Since then, more and more civil law countries adapted their legislations. The trend holding corporations

¹²⁵ Robert C Thompson, Anita Ramasastry and Mark B Taylor, “Translating UNOCAL : The Expanding Web of Liability for Business Entities Implicated in International Crimes” [2009] SSRN Electronic Journal <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2279584_code1688652.pdf?abstractid=2279584&mirid=1>.

¹²⁶ International Commission of jurists, “Corporate Complicity and Legal Accountability” (2009) volume II <<https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol2-publication-2009-eng.pdf>> 55.

¹²⁷ Caroline Kaeb, “The Shifting Sand of Corporate Liability under International Criminal Law” (2017) 49 The George Washington International Law Review <<https://www.proquest.com/docview/1900042667?pq-origsite=gscholar&fromopenview=true&sourcetype=Scholarly%20Journals>> 380.

¹²⁸ David J Scheffer and Ashley Cox, “The Constitutionality of the Rome Statute of the International Criminal Court” (2008) 98 The Journal of Criminal Law and Criminology (1973-) 983 <<https://dialnet.unirioja.es/servlet/articulo?codigo=2753265>> 992.

¹²⁹ New York Central & Hudson River Railroad Co v United States, 212 US 481 (1909).

¹³⁰ A legal entity cannot be blameworthy.

¹³¹ Stephens (n°7) 64.

¹³² Council of Europe, Recommendation No R (88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality (adopted 20 October 1988).

criminally responsible is growing internationally.¹³³ This could serve as some sort of evidence supporting the usefulness of corporate criminal responsibility.¹³⁴

The legislations of France, the United Kingdom, Germany, Japan, South Africa, Argentina, Australia and Canada will now be discussed. The ICL Draft conclusion 5 refers to a comparative analysis of national legal systems and that this analysis must be wide and representative. However, this does not mean that each state should be analysed.¹³⁵ Due to the constraint of this work some states have been chosen in order to represent different legal families, and different world regions.

France

France, a European civil law country, was among the primary advocates for the inclusion of corporate criminal responsibility during the Rome Conference, so it is unsurprising that this principle is reflected in its Penal Code. Under French law, a corporation is a “*personne morale*” and is criminally liable. It incorporated the principle of corporate criminal responsibility as early as 1994 through Article 121-2 of its Penal Code.¹³⁶ This provision has undergone two amendments, but has stayed quite similar, the most recent of which was introduced by the 2004 law.¹³⁷ This article now stipulates that:

“Legal persons, with the exception of the State, are criminally liable, in accordance with the distinctions set out in articles 121-4 to 121-7, for offences committed on their behalf by their bodies or representatives.”

¹³³ Theodor Meron, “Is International Law Moving towards Criminalization?” (1998) 9 European Journal of International Law 18 <<https://doi.org/10.1093/ejil/9.1.18>> 19.

¹³⁴ Mordechai Kremnitzer, “A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law” (2010) 8 Journal of International Criminal Justice 909 <<https://doi.org/10.1093/jicj/mqq036>> 914.

¹³⁵ Report ICL (2023) (n°100) 18.

¹³⁶ Code pénal (France), art 121-2 (1994)

¹³⁷ Loi n°2004-204 du 9 mars 2004, art 54 (JORF, 10 March 2004, in force 31 December 2005).

However, local authorities and their groupings are only criminally liable for offences committed in the exercise of activities that may be the subject of public service delegation agreements.

*The criminal liability of legal entities does not exclude that of natural persons who are perpetrators or accomplices in the same acts, subject to the provisions of the fourth paragraph of article 121-3”.*¹³⁸

This article allows for the prosecution of corporations for crimes committed on their behalf by a natural person. Notably, the concept of “control” found in the proposal is absent here. Furthermore, the natural person is not exempt from liability and cannot use the corporate structure as a shield from prosecution.

Regarding international crimes provided by the ICC Statute, the law of 9 August 2010¹³⁹ adapting criminal law to the institution of the International Criminal Court, modified the Penal Code to include war crimes and offences. In 462-5 it recognized the possibility for corporations to commit war crimes and offences committed during an armed conflict as this article set out the penalties applicable to legal entities for committing these acts.¹⁴⁰

The ongoing¹⁴¹ case against Lafarge is currently before French tribunals. Lafarge is a multinational created under French Law in 1833 and specializing in cement and the construction sector.¹⁴² Since 2010, Lafarge has operated in Syria a cement plant in Jalabiya through a subsidiary. The company maintained its operations in the region throughout the conflict that took place there between 2012 and

¹³⁸ Code Pénal (France) art 121-2 (2005) translated by the author.

¹³⁹ Loi n° 2010-930 du 9 août 2010 adaptant le droit pénal à l'institution de la Cour pénale internationale (France).

¹⁴⁰ Code pénal (France, art 462-5).

¹⁴¹ The official documents except the “Bulletins Des Arrêts Chambres Criminelles” from 2021 are not available to the public.

¹⁴² “Notre histoire” (Lafarge France : Ciment, Bétons, Granulats, Solutions Et Produits, March 6, 2025) <<https://www.lafarge.fr/notre-histoire>>.

2015.¹⁴³ In 2016, 2 NGOs and 11 employees filed a complaint against Lafarge before French courts.¹⁴⁴ They accuse Lafarge of financing terrorism, war crimes, crimes against humanity, abusive exploitation of labour and endangering lives.¹⁴⁵ This is based on the activities of Lafarge between 2011 and 2014 in Jalabia. During this period, Lafarge allegedly made payments to armed groups, including terrorist organizations such as ISIS¹⁴⁶, to maintain its operations.¹⁴⁷ In June 2018, the company was indicted.¹⁴⁸ This indictment is possible thanks to Article 121-2 of the Penal Code. Moreover, the French Penal Code contains provisions criminalizing crimes against humanity.¹⁴⁹ In 2021, the Court of Cassation recognized that the payments and knowledge of the actions of the groups who benefited from this money implies complicity on the part of the company.¹⁵⁰ In 2024, the competence of the French courts to prosecute Lafarge for crimes against humanity in this case was recognized by the Court of Cassation.¹⁵¹ This case is unprecedented in the realm of corporate criminal prosecution, especially if Lafarge ends up being convicted, as no company has ever been convicted of crimes against humanity before.¹⁵²

¹⁴³ Cour de Cassation, “Bulletins Des Arrêts Chambres Criminelles” (2021) <https://www.courdecassation.fr/system/files/pdf_bulletins/validation_CCAS_BULL~2021-09_CRIM_1645546755.pdf> 9.

¹⁴⁴ Ibid 41.

¹⁴⁵ Ibid.

¹⁴⁶ Nathalie Belhoste and Bastien Nivet, “The Organization of Short-Sightedness: The Implications of Remaining in Conflict Zones. The Case of Lafarge during Syria’s Civil War” (2020) 60 *Business & Society* 1573 <<https://doi.org/10.1177/0007650320934389>>1573.

¹⁴⁷ Bulletins Des Arrêts Chambres Criminelles 47.

¹⁴⁸ Ibid 42.

¹⁴⁹ Code pénal (France), art 212-1 to 212-3

¹⁵⁰ Bulletins Des Arrêts Chambres Criminelles 57.

¹⁵¹ Catherine Maia, “Lafarge, « Complice de Crimes Contre l’humanité » En Syrie ? Vers Un Procès sans Précédent Pour Une Multinationale” (The Conversation) <<https://theconversation.com/lafarge-complice-de-crimes-contre-lhumanite-en-syrie-vers-un-proces-sans-precedent-pour-une-multinationale-223499>>.

¹⁵² Samanth Subramanian, “The Cement Company That Paid Millions to Isis: Was Lafarge Complicit in Crimes against Humanity?” *The Guardian* (April 2, 2025) <<https://www.theguardian.com/world/2024/sep/17/french-cement-company-lafarge-paid-millions-to-islamic-state-syria#:~:text=Lafarge%20pleaded%20guilty%20to%20conspiring,as%20a%20%E2%80%9Cstaggering%20crime%E2%80%9D.>>.

United Kingdom

The common law tradition originated in the United Kingdom during the Middle Ages.¹⁵³ As common law is typically not codified in a comprehensive legal code the source for corporate criminal responsibility is not found in a Penal Code like in France.

Corporations can be held criminally liable through various mechanisms. According to a 2022 research paper by Ali Shalchi, there are three distinct ways in England and Wales to hold a corporation criminally liable for acts committed by individuals acting on its behalf. Either a specific criminal offence for corporations has been created or through vicarious liability or through the identification doctrine.¹⁵⁴ The identification doctrine restricts corporate liability to acts and knowledge of senior managers or directors, which can make it difficult to prosecute large corporations where decision-making is decentralized.¹⁵⁵ Furthermore, ongoing reform discussions are taking place, and the paper from 2022 contributes to that process. Several acts concerning corporate criminal responsibility will now be examined.

First of all, the Interpretation Act from 1978, in Schedule 1, provides definitions for key terms, including “person,” which is defined to include a “body of persons corporate or unincorporated”.¹⁵⁶ This definition, originating from 1889, allows courts to infer that if an act criminalizes certain conduct without specifying whether it applies to corporations, they may rely on the Interpretation Act to argue that it does.

Another example is The Corporate Manslaughter and Corporate Homicide Act from 2007, under which corporations can be prosecuted if its activities “causes a person's death, and amounts to a gross

¹⁵³ “THE COMMON LAW AND CIVIL LAW TRADITIONS” <<https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf>>1.

¹⁵⁴ Ali Shalchi, “Corporate Criminal Liability in England and Wales” (2022) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9027/>>4.

¹⁵⁵ Ibid 8.

¹⁵⁶ Interpretation Act 1978 (UK) sch 1.

breach of a relevant duty of care owed by the organisation to the deceased”.¹⁵⁷ It is then stated clearly that this disposition applies to corporations. The wording corporation is interpreted in this act as “corporation does not include a corporation sole but includes any body corporate wherever incorporated”.¹⁵⁸

Regarding international crimes and the Rome Statute, the International Criminal Court Act 2001 incorporates the Statute into UK domestic law. However, it seems like this does not extend to corporations as in the explanatory notes it is said that: “This section is intended to incorporate the offences of genocide, crimes against humanity and war crimes as defined in the Statute into the law of England and Wales. Courts will have jurisdiction over these offences when committed in England and Wales, or when committed overseas by UK nationals, UK residents or persons subject to UK Service jurisdiction”.¹⁵⁹ According to this author, it can be inferred from the wording of the Act and its alignment with the ICC framework that corporations have been excluded from its scope.

South Africa

Firstly, South Africa has a mixed legal system combining civilian Roman-Dutch law and English common law.¹⁶⁰ Moreover, it is still part to the Rome Statute even though in 2017 it attempted to withdraw from the Statute.¹⁶¹ South Africa also implements in its national law provisions on corporate criminal responsibility. Section 332 of Chapter 33 of the Criminal Procedure Act 51 of 1997 is entitled: “Prosecution of corporations and members of associations”.¹⁶² Section 332 (1) states that:

¹⁵⁷ Corporate Manslaughter and Corporate Homicide Act 2007 (UK) s 1.

¹⁵⁸ Ibid s 25.

¹⁵⁹ Explanatory Notes to the International Criminal Court Act 2001 (UK) s 51.

¹⁶⁰ Salona Lutchman, “Researching South African Law” (GlobalLex | Foreign and International Law Research, 2018) <https://www.nyulawglobal.org/globalex/south_africa1.html#thelegalsystem>.

¹⁶¹ “Presidency on Participation of South Africa in International Criminal Court | South African Government” (April 26, 2023) <<https://www.gov.za/news/media-statements/presidency-participation-south-africa-international-criminal-court-26-apr>>.

¹⁶² Criminal Procedure Act 51 of 1977, s 332, ch 33.

“For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body”.

Moreover, 332 (5) stipulates that corporate criminal responsibility does not exclude the responsibility of “a director or servant of the corporate body”.¹⁶³

Furthermore with the aim of having a comprehensive overview of the notion of corporate responsibility, it is important to mention some African mechanisms: The Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights from 1998¹⁶⁴; the Protocol of the Court of Justice of the African Union from 2003¹⁶⁵; the Protocol on the Statute of the African Court of Justice And Human Rights from 2008¹⁶⁶ and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights from 2014 (Malabo Protocol).¹⁶⁷

¹⁶³ Ibid s 332 (5).

¹⁶⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

¹⁶⁵ Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 26 May 2009).

¹⁶⁶ Protocol on the Statute of the African Court of Justice And Human Rights (adopted 1 July 2008, not yet in force).

¹⁶⁷ 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) (Malabo Protocol).

The Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights establishes The African Court on Human and Peoples' Rights (ACHPR) while the Protocol of the Court of Justice of the African Union establishes the Court of Justice of the African Union (CJAU). The Protocol on the Statute of the African Court of Justice Human Rights has as its objective to combine the ACHPR and the CJAU in one unified Court.¹⁶⁸

Regarding corporate criminal responsibility, the interesting instrument is the Malabo Protocol as Article 46C stipulates that “the Court¹⁶⁹ shall have jurisdiction over legal persons, with the exception of States”.¹⁷⁰ Moreover, corporate criminal responsibility does not absolve individuals of liability. The Malabo Protocol contains 14 different crimes including 4 core international crimes such as war crimes, genocide or crimes against humanity. In order to enter into force, 15-member States must deposit their instrument of ratification.¹⁷¹ This has not been done yet.

Focusing on South Africa, it has ratified the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights¹⁷² and the Protocol of the Court of Justice of the African Union.¹⁷³ However, it has not ratified the Protocol on the Statute of the African Court of Justice Human Rights¹⁷⁴ nor the Malabo Protocol.¹⁷⁵

¹⁶⁸ Protocol on the Statute of the African Court of Justice And Human Rights, art 2.

¹⁶⁹ The unified Court provided by The Protocol on the Statute of the African Court of Justice Human Rights

¹⁷⁰ Malabo Protocol, art 46C.

¹⁷¹ Malabo Protocol, art 11.

¹⁷² African Union, List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (updated August 2024).

¹⁷³ African Union, List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union.

¹⁷⁴ African Union, List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁷⁵ African Union, List of Countries which have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

Germany

Germany is rooted in the civil law tradition and is a state party to the RS. It is one of the last European countries to defend the position “*societas delinquere non potest*”.¹⁷⁶ Under German Law, corporations do not face direct criminal prosecution. However, they can still face administrative penalties under the Act on Regulatory Offences¹⁷⁷. Section 30 of this act deals with “Regulatory Fine Imposed on Legal Persons and on Associations of Persons”.¹⁷⁸ According to this, the criminal or regulatory offence should be committed by a person with a managerial position and when the corporation’s duty has been violated or when it resulted in the enrichment of the person or the corporation.¹⁷⁹

Japan

Japan has a codified legal system inspired by the German model with some influence from the United States.¹⁸⁰ Japan joined the RS in 2007.¹⁸¹ Under Japanese law, corporations cannot be subject to criminal prosecution in the traditional sense. However, they may still be held liable where a dual punishment provision, known as *ryōbatsu-kitei*, applies. This clause must be explicitly included. This legal mechanism allows both the individual offender and the corporation to be punished simultaneously for certain offences.¹⁸² An example where such a clause is provided is in the Unfair Competition Prevention Act, under Article 22.¹⁸³

¹⁷⁶ Thomas Weigend, “Societas Delinquere Non Potest?: A German Perspective” (2008) 6 *Journal of International Criminal Justice* 927 <<https://doi.org/10.1093/jicj/mqn069>> 930.

¹⁷⁷ Sijad Allahverdiyev and Marvin Othman, “‘Verbandssanktionengesetz’ — Corporate Liability for Germany?” (2022) 23 *German Law Journal* 637 <<https://doi.org/10.1017/glj.2022.37>> 638.

¹⁷⁸ § 30 Gesetz über Ordnungswidrigkeiten (OWiG) [Act on Regulatory Offenses], BGBl I 1968, 481.

¹⁷⁹ *Ibid.*

¹⁸⁰ Elliott J Hahn, “An Overview of the Japanese Legal System” (1983) 5 *Northwestern Journal of International Law & Business* 517 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1151&context=njilb>> 521.

¹⁸¹ ICC, “Accession of Japan to the Rome Statute” (2007) <[https://www.icc-cpi.int/news/icc-accession-japan-rome-statute#:~:text=On%2017%20July%2C%202007%2C%20Japan,International%20Criminal%20Court%20\(ICC\)>](https://www.icc-cpi.int/news/icc-accession-japan-rome-statute#:~:text=On%2017%20July%2C%202007%2C%20Japan,International%20Criminal%20Court%20(ICC)>).

¹⁸² Yoshinori Ono and Norimitsu Yamamoto, “Chapter 19 Japan” [2018] ICLG <<https://www.nishimura.com/sites/default/files/images/48478.pdf>> .

¹⁸³ Unfair Competition Prevention Act (Act No. 47 of 1993), art 22.

Argentina

Argentina has a civil law system¹⁸⁴ and ratified the RS in 2001.¹⁸⁵ In 2017, Argentina adopted Law 27401 on Criminal Liability of Legal Persons.¹⁸⁶ Article 2 outlines the conditions under which a legal person may be held liable. These conditions closely mirror those proposed in the French proposal. Liability arises when the act is committed by an individual acting on behalf of or in the name of the legal entity, by someone with authority to represent it or when the legal entity has ratified the act, even implicitly.¹⁸⁷ However, this law does not extend to international crimes.

Australia

Australia follows a common law legal system¹⁸⁸ and has ratified the RS in 2002.¹⁸⁹ Moreover, the international crimes of the RS have been incorporated in Australia's national legislation by the International Criminal Court Act in 2002.¹⁹⁰ The legal framework regarding corporate criminal responsibility is found in the Criminal Court Act of 1995.¹⁹¹ Part 2.5 of this act is called "Corporate criminal responsibility". Section 12.1 states that "A body corporate may be found guilty of any offence, including one punishable by imprisonment".¹⁹²

¹⁸⁴ Juan-Andrés Fuentes, "Research Guides: Argentinian Legal Research: Basic Legal Structure" (Harvard Law School Library, 2025)

<[¹⁸⁵ "Argentina | International Criminal Court" \(March 11, 2003\) <\[>\]\(https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/argentina\)](https://guides.library.harvard.edu/law/argentina#:~:text=Argentina%20is%20part%20of%20the,one%20(1)%20autonomous%20city.></p></div><div data-bbox=)

¹⁸⁶ República Argentina, 'Ley 27.401: Responsabilidad Penal de las Personas Jurídicas' [2017] Boletín Oficial de la República Argentina, 1 December 2017,

¹⁸⁷ Ibid, art 2.

¹⁸⁸ "Infosheet 23 - Basic Legal Expressions" (Parliament of Australia, August 17, 2018)

<[¹⁸⁹ "Australia | International Criminal Court" \(ICC, March 11, 2003\) <\[>\]\(https://asp.icc-cpi.int/states-parties/western-european-and-other-states/australia\)](https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_23_-_Basic_legal_expressions#:~:text=The%20common%20law%20system%20is,interpretation%20of%20earlier%20court%20decisions.></p></div><div data-bbox=)

¹⁹⁰ International Criminal Court Act 2002 (Australia, Cth) <[>](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1607)

¹⁹¹ Criminal Code Act 1995 (Cth, Australia).

¹⁹² Ibid Division 12.

The physical element can be attributed to the corporation if the act is committed by an employee, agent, or officer of a corporation while acting within the scope of their actual or apparent authority or employment. Moreover, the corporation must have “expressly, tacitly or impliedly authorized or permitted the commission of the offence”. It is interesting to note that under this legislation, the culture of the corporation can be sufficient to establish a permission or authorization to commit such an act.¹⁹³

Canada

Canada's legal system combines both common law and civil law, with Quebec being the sole province with a civil code.¹⁹⁴ However, the Criminal code is recognized as a code and applies uniformly across Canada.¹⁹⁵ Corporations are subject to the Criminal Code as some definitions in section II already include them.¹⁹⁶ In 2004, the Bill C-45 amended the Criminal Code to modify the criminal liability of organizations.¹⁹⁷ Under this bill, organizations are defined as:

- “(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons”¹⁹⁸.

¹⁹³ Ibid.

¹⁹⁴ Department of Justice Canada, “CANADA’S SYSTEM of JUSTICE” (2015) <<https://www.justice.gc.ca/eng/csjsjc/just/img/courten.pdf>> 4.

¹⁹⁵ Ibid.

¹⁹⁶ Department of Justice Canada, “Criminal Liability of Organizations: A Plain Language Guide to Bill C-45” <<https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/>>.

¹⁹⁷ Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, 2nd Sess, 37th Parl, (2003) <<https://www.parl.ca/DocumentViewer/en/37-2/bill/C-45/royal-assent>>.

¹⁹⁸ Ibid.

Two types of crimes can be committed by an organization: crimes requiring negligence¹⁹⁹ and those requiring intent or knowledge.²⁰⁰ In cases of negligence, the offence must be carried out by one or more of the organization's representatives, and at least one senior officer must have failed to exercise the reasonable care required to prevent it. For non-negligent offences, liability arises when a senior officer either commits the offence directly or instructs others to do so with the intent of benefiting the organization. An organization may also be held liable if a senior officer is aware that an offence is about to be committed by an employee and chooses not to intervene because it would serve the organization's interests.²⁰¹

¹⁹⁹ Criminal Code, RSC 1985, c C-46 s 22.1.

²⁰⁰ Ibid s 22.2.

²⁰¹ Ibid.

Article 25 including corporate criminal responsibility

As currently formulated, Article 25 provides for the prosecution of natural persons only. The new formulation would add a fifth paragraph to the article to include jurisdiction over corporations. Two possibilities are being explored in the literature. The provision could implement criminal responsibility for corporations or a middle ground could be found with an “exception-based approach”.²⁰²

First, the criminalization approach would result in an article similar to the one proposed by the French delegation at the Rome conference. Several elements seem to be common to many treaties and national legislation and should be incorporated in the new Article 25 such as the requirement that the natural person is acting on behalf of the corporation, a position of control and that the act is beneficial to the corporation. Moreover, national legislations also ensure that the natural person’s responsibility is not excluded. However, it is of this author’s opinion that including the requirement of explicit consent is not necessary as the consent could be implicit like mentioned in several national legislations. Moreover, it seems like the requirement that “the natural person has been convicted” is not fundamental and that proceedings against the natural person could be simultaneous with those against the corporation. However, both must be prosecuted to prevent one from being used as a scapegoat for the other. Furthermore, the definition of a juridical person has been slightly modified to fit the definition given in this paper. As stated by Van der Wilt, the French proposal can be treated as a framework that can be adapted to find a more convincing formulation of Article 25.²⁰³

The amendment proposed by this paper is then very similar to the one proposed at Rome with few changes:

²⁰² Katheryn Haigh, “Extending the International Criminal Court’s Jurisdiction to Corporations: Overcoming Complementarity Concerns.” (2008) 14 Australian Journal of Human Rights <https://www.researchgate.net/publication/320929255_Extending_the_International_Criminal_Court's_jurisdiction_to_corporations_overcoming_complementarity_concerns> 211-214.

²⁰³ Van der Wilt (n°36) 72.

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

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

- (a) The **charges filed by the Prosecutor against the natural person** and the juridical person allege the matters referred to in subparagraphs (b) and (c); and*
- (b) The natural person charged **was in a position of control** within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and*
- (c) The crime was committed by the natural person **acting on behalf** of the juridical person and with the explicit or implicit **consent** and **in the course of its activities***

For the purpose of this Statute, “juridical person” means a corporation whose a legal person one of whose objectives is the pursuit of economic gain, and is neither a State or other public body in the exercise of State authority, a public international body or an organisation registered, and acting under the nation- al law of a State as a non-profit organization”.

Another possibility is to introduce an exemption for corporations from states that do not include corporate criminal responsibility in their national legislation. Moreover, in this idea, articles 17 and 19 should also be amended.²⁰⁴ However, this author rejects this solution, as it would create safe havens where corporations could evade prosecution and would undermine the potential progressive influence such an inclusion could have on national legal systems.

²⁰⁴ Haigh (n°197).

Amendment procedure of the Rome Statute

Article 121 of the RS governs the process of amending the Statute. No amendments were permitted during the first seven years following the entry into force of the Statute. After this period, any States Parties may propose amendments by submitting them to the UN Secretary-General, who must distribute them to all States Parties.²⁰⁵ After a period of three months after the notification to the States Parties, the Assembly of States Parties, at the upcoming meeting should vote by a majority of the states in attendance and decide whether or not to consider the proposal. Alternatively, the Assembly may decide to convene a Review Conference instead of addressing the matter directly.²⁰⁶ If at a Review Conference or at the Assembly of States Parties a consensus is not reached, the amendment requires a two-thirds majority vote of the States Parties to be adopted.²⁰⁷ Once adopted, the amendment enters into force for all States Parties one year after 78 States have deposited instruments of ratification or acceptance.²⁰⁸ It can also enter into force in some States if less than 78 states deposited those instruments. For each individual state, the amendment enters into force one year after the deposition of their own ratification instrument. Paragraph 5 of Article 121 of the RS applies specifically to amendments concerning Articles 5, 6, 7, and 8. If an amendment seeks to extend the Court's jurisdiction to corporations, Article 25 must be amended. So, paragraph 5 is not relevant in the case at hand. Additionally, if an amendment is accepted by 78 States as per paragraph 4 of Article 121, any state that refuses the amendment may withdraw from the Statute by providing notice within one year of the amendment's entry into force.²⁰⁹ This paragraph opens a dangerous door that will be discussed.

An amendment to the Statute is not inconceivable as the RS has been amended in the past. The first amendment happened in Kampala, Uganda, the States Parties met in 2010 for the first Review

²⁰⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 121, (1).

²⁰⁶ Ibid art 121 (2).

²⁰⁷ Ibid art 121 (3).

²⁰⁸ Ibid art 121 (4).

²⁰⁹ Ibid art 121 (6).

Conference. During this Conference, 2 resolutions were adopted by consensus. Article 8 and the crime of aggression were amended.²¹⁰ Both were ratified by 47 States Parties.²¹¹ The latest amendment to the Statute concerned once again Article 8 and occurred in 2019 at the Hague. Currently, 19 States have ratified this amendment regarding the starvation of civilians.²¹² Those previous amendments demonstrate that, with political will, international criminal law and the RS can evolve to reflect societal changes and needs.²¹³

²¹⁰ “Amendments to the Rome Statute - Campaign for the Universality and Effectiveness of the System of the Rome Statute of the International Criminal Court (ICC)” <<https://www.pgaction.org/ilhr/rome-statute/amendments.html>>.

²¹¹ “Rome Statute and Other Agreements | International Criminal Court” (January 1, 2025) <<https://asp.icc-cpi.int/RomeStatute>>.

²¹² *Ibid.*

²¹³ Fien Schreurs, “Revisiting the Possibility of Corporate Criminal Responsibility in International Criminal Law: Amending Article 25 of the Rome Statute to Include Legal Entities within the Jurisdiction of the ICC.” [2020] SSRN Electronic Journal <<https://doi.org/10.2139/ssrn.3700432>>.

Discussion

According to this author, from a conceptual perspective, the Rome Statute should be amended to grant the ICC jurisdiction over companies, despite certain drawbacks. However, from a practical point of view, it may prove difficult to obtain the required two-thirds majority of States Parties, even though more and more national legal systems are adopting the principle of corporate criminal responsibility. Furthermore, the legitimacy of the ICC is currently the subject of criticism.

First of all, corporations are the basis of business life and some of them have a powerful influence. Sometimes they can even be more influential than certain states.²¹⁴ It is therefore important to regulate their behaviour. The corporation itself needs to be held accountable as the natural person within it and its organs are acting on its behalf and with the aim of benefiting the corporation itself.²¹⁵ Moreover, the corporation is more powerful and is therefore more capable of committing international crimes than the individual alone.²¹⁶ In addition, it has already been mentioned in the introduction that a company forms a distinct legal entity which exists independently and has rights and responsibilities which go beyond those of the individuals who form it. Another reason to establish corporate responsibility is that the structure of certain corporations can make it challenging to identify a specific natural person responsible for the wrongdoing.²¹⁷

If corporations are subject to criminal liability, it may influence their internal governance and business practices, encouraging shareholders to be more careful in the decision-making process.²¹⁸

²¹⁴ Kremnitzer (n°134) 909.

²¹⁵ Ibid 912.

²¹⁶ Van der Wilt (n°36) 72-77.

²¹⁷ Caspar Plomp, "Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court" (2014) 30 *Utrecht Journal of International and European Law* 4 <<https://doi.org/10.5334/ujiel.cl>> 22.

²¹⁸ Kremnitzer (n°134) 914.

The liability of corporations should be criminal and not be limited to civil cases. Kremnitzer notes some reasons why criminal liability should be preferred to civil and administrative sanctions. First, criminal proceedings carry significant reputational consequences for corporations, and since reputation is vital in the business world, this could enhance the deterrent effect. Moreover, such proceedings address conduct of considerable seriousness, failing to impose criminal liability on corporations for these acts could undermine the perceived gravity of core international crimes.²¹⁹

The ICC should be granted jurisdiction in addition to the national courts that already provide for it, since states may be reluctant to prosecute corporations due to competing interests, such as economic considerations.²²⁰ In addition, the international structure of some corporations can make it difficult to prosecute on a national basis, the ICC is then better equipped.

Furthermore, allowing the ICC to prosecute corporations would help clarify the applicability of international legal norms to corporations and promote greater legal certainty and predictability.²²¹ Moreover, the problem of complementarity was mentioned. However, regardless of the position adopted, it seems that this problem is no longer so significant as national law has evolved.²²² Adopting corporate criminal responsibility within the Rome Statute could even drive legislative harmonization among States Parties and is maybe the main impact of such an amendment.²²³

Concerning the feasibility of amending the RS, a consensus or a two-thirds majority is required. This could be politically challenging to reach.²²⁴ This would require an enormous amount of negotiation

²¹⁹ Ibid 915-916.

²²⁰ ICJ Corporate Complicity and Legal Accountability (n°126) 58.

²²¹ Joanna Kyriakakis, "Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law," Cambridge University Press eBooks (2009) <<https://doi.org/10.1017/cbo9780511642265.007>> 136-137.

²²² Scheffer (n°80) 38.

²²³ Marie Davoise, "All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute" (Opinio Juris, 2019) <<http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/>>.

²²⁴ Lambridis (n°88) 149 - 151.

and could potentially become quite costly. Moreover, some States Parties may be hesitant to extend jurisdiction to the ICC, as multinational corporations and businesses more broadly are key drivers of their economies.²²⁵ The threat of an ICC investigation or a finding of corporate criminal responsibility may deter investment and disrupt economic activity, with potentially severe repercussions for national economies.²²⁶

Another potential limitation arises from the ICC's policy of focusing on the most serious international crimes and those most responsible for them.²²⁷ The Office of the Prosecutor may determine that prosecuting corporations is not a priority, particularly since they are often viewed as playing a more "supporting" role in such crimes.²²⁸ The ICC's resources are limited and prosecuting corporations has also an impact on the organization of the Court. For example, a new division of the Office of the Prosecutor would need to be created.²²⁹ Issues such as evidence production, corporate representation as a defendant, and the determination of penalties should also be considered, however, they fall outside of the scope of this paper.

As an alternative to amending the Rome Statute, which may prove too complex or politically unfeasible, Scheffer proposed in 2016 the negotiation of an additional protocol that States Parties could choose to ratify.²³⁰ However, this author argues that such a protocol would not offer an effective solution, given the Rome Statute's nature as a "complete deal," and because it could once again result in safe havens where corporations evade prosecution.

²²⁵ Ibid.

²²⁶ Scheffer (n°80) 38-39.

²²⁷ Understanding the International Criminal Court (n°69) 32.

²²⁸ Lambridis (n°88) 150.

²²⁹ David Scheffer, "Keynote Address: Is the Presumption of Corporate Impunity Dead?" (2018) 50 Case Western Reserve Journal of International Law 213
<<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2527&context=jil>> 222.

²³⁰ Scheffer (n°80) 38-39.

Finally, there is a risk that if an amendment to the Rome Statute is adopted by the necessary majority and more than 78 states have deposited instruments of ratification, states opposed to it may choose to withdraw. The ICC's current situation is already facing growing political pressure and legitimacy challenges.²³¹ For example, recently, Hungary has announced its withdrawal from the Rome Statute.²³² In addition, several countries have refused to cooperate with the ICC in the execution of the arrest warrant against Netanyahu.²³³ One wonders whether such an amendment if even viable, would open the door to further withdrawals.

²³¹ Tim Lister, "Netanyahu Arrest Warrant Tests Western Commitment to International Law" (CNN, 2024) <<https://edition.cnn.com/2024/12/04/middleeast/icc-arrest-warrants-putin-netanyahu-analysis-intl>>.

²³² ICC, "Presidency of the Assembly of States Parties Responds to Announcement of Withdrawal from the Rome Statute by Hungary" (2025) <<https://www.icc-cpi.int/news/presidency-assembly-states-parties-responds-announcement-withdrawal-rome-statute-hungary>>.

²³³ Rebecca Ingber, "Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant" (Just Security, April 29, 2025) <<https://www.justsecurity.org/105064/arrest-warrants-state-reactions-icc/>>.

Conclusion

This paper aimed to address the following research question: “*Should Article 25 of the Rome Statute be amended to grant jurisdiction to the Court over private corporations?*”. The answer has to be somewhat nuanced. As stated in the discussion, the author supports the view that it should be amended as such a development is desirable in order to fill the current accountability gap, but still acknowledges a number of challenges. In order, to reach this conclusion, a number of aspects were discussed.

First of all, even though the IMT Charter and the subsequent NMTs did not establish corporate criminal responsibility, several business leaders were prosecuted at the NMTs which in itself is already a novelty and a big step towards criminal responsibility for corporations. Moreover, during those proceedings, the corporations also play an important role and were being referred to as “instruments”. Later, in 1998, the French proposal made at the Rome Conference to include jurisdiction over juridical persons was not rejected because of fundamental opposition on the part of the states, but rather because of a time constraint that made it impossible to reach an agreement in such a short period of time.

Then, it has been explained by a study of customary law and general principles that corporate criminal responsibility is not yet a settled norm. However, the study of some treaties and national legislations demonstrates a growing international trend in holding corporations responsible. According to this author, it could even be argued that corporate criminal responsibility may have evolved into a general principle of law.²³⁴ Although the author of this work does not believe that the complementarity argument is valid, since a lack of legislation is not equivalent to a total or substantial collapse or

²³⁴ However, further study of the different legal systems is needed to support this theory. As this work is limited, it merely demonstrates a trend.

unavailability of the national system, the study of national legislations was also intended to counter this argument as national legislations have evolved since Rome.

In order to fully answer the research, question the amendment procedure and a proposal was made. Indeed, this paper suggests amending Article 25 so that a fifth paragraph is added.

Nevertheless, some practical and political challenges exist. Some of which are for example: achieving a consensus among State Parties or a two-thirds majority; potential economic consequences; and the ICC's resource limitations. Nevertheless, these should not outweigh the legal and moral imperative of ending the impunity gap for corporations implicated in core international crimes. The symbolic and the deterrence value of criminal prosecution, the clarifying effect on legal norms, and the harmonization it could trigger at the national level argue in favour of the reform.

Finally, this thesis contends that Article 25 of the Rome Statute should be amended to explicitly include corporate criminal responsibility. While the road to such reform may be long and politically difficult, it is a necessary step to ensure that international criminal law reflects the reality of the corporate world and holds all actors accountable.

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Annex²³⁵

Annex 1: Table of States Parties who include or not corporate criminal responsibility in their national legislation

STATES	Criminal corporate responsibility
Afghanistan	YES
Albania	YES
Andorra	NO
Antigua and Barbuda	NO
Argentina	NO
Armenia	NO
Australia	YES
Austria	YES
Bangladesh	YES
Barbados	X
Belgium	YES
Belize	YES
Benin	NO
Bolivia	NO
Bosnia and Herzegovina	YES
Botswana	YES
Brazil	YES
Bulgaria	NO

²³⁵ Made by the author with the help of Camille Cressent's work.

Burkina Faso	YES
Cabo Verde	X
Cambodia	YES
Canada	YES
Central African Republic	YES
Chad	YES
Chile	NO
Colombia	NO
Comoros	X
Congo	X
Cook Islands	YES
Costa Rica	NO
Côte d'Ivoire	YES
Croatia	YES
Cyprus	YES
Czech Republic	YES
Democratic republic of Congo	NO
Denmark	YES
Djibouti	YES
Dominica	X
Dominican Republic	NO
Ecuador	YES
El Salvador	NO
Estonia	YES

Fiji	YES
Finland	YES
France	YES
Gabon	YES
Gambia	NO
Georgia	NO
Germany	NO
Ghana	YES
Greece	NO
Grenada	YES
Guatemala	YES
Guinea	YES
Guyana	X
Honduras	YES
Hungary	YES
Iceland	YES
Ireland	YES
Italy	NO
Japan	NO
Jordan	YES
Kenya	YES
Kiribati	YES
Latvia	YES
Lesotho	YES

Liberia	YES
Liechtenstein	YES
Lithuania	YES
Luxembourg	YES
Madagascar	NO
Malawi	NO
Maldives	YES
Mali	NO
Malta	NO
Marshall Islands	YES
Mauritius	YES
Mexico	NO
Mongolia	YES
Montenegro	YES
Namibia	YES
Nauru	YES
Netherlands	YES
New Zealand	YES
Niger	YES
Nigeria	YES
North Macedonia	YES
Norway	YES
Panama	YES
Paraguay	NO

Peru	YES
Poland	NO
Portugal	YES
Republic of Korea	NO
Republic of Moldova	YES
Romania	YES
Saint Kitts and Nevis	X
Saint Lucia	X
Saint Vincent and the Grenadines	X
Samoa	X
San Marino	YES
Senegal	NO
Serbia	YES
Seychelles	X
Sierra Leone	YES
Slovakia	YES
Slovenia	YES
South Africa	YES
Spain	YES
State of Palestine	YES
Suriname	X
Sweden	YES
Switzerland	YES
Tajikistan	NO

Timor-Leste	YES
Trinidad and Tobago	YES
Tunisia	NO
Uganda	X
Ukraine	NO
United Kingdom	YES
United Republic of Tanzania	YES
Uruguay	NO
Vanuatu	YES
Venezuela	NO
Zambia	YES

Annex 2: Graph of States Parties who include or not corporate criminal responsibility in their national legislation

States including corporate criminal responsibility in their national laws

