ACCESS TO JUSTICE FOR CORPORATE HUMAN RIGHTS HARMS

PRIVATE INTERNATIONAL LAW AND CRIMINAL LAW CONSIDERATIONS

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ABSTRACT: THIS ARTICLE EXAMINES THE ISSUE OF CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS AND ACCESS TO JUSTICE FOR THE VICTIMS THROUGH A DOUBLE LENS: THAT OF PRIVATE INTERNATIONAL LAW AND THAT OF INTERNATIONAL AND NATIONAL CRIMINAL LAW MECHANISMS. IN BOTH CASES, THE ANALYSIS FOCUSES ON THE RULES GOVERNING JURISDICTION AND APPLICABLE LAW. IN DOING SO, IT SHOWCASES THE EXISTING ACCOUNTABILITY GAPS, WHETHER RELATED TO THE UNWILLINGNESS OR INABILITY TO ADJUDICATE CASES OF CORPORATE HUMAN RIGHTS HARMS BEFORE NATIONAL CIVIL AND CRIMINAL COURTS, THE ABSENCE OF JURISDICTION AT INTERNATIONAL LEVEL (IN THE CASE OF THE INTERNATIONAL CRIMINAL COURT), DESIGN-RELATED WEAKNESSES OF THE APPLICABLE LAW OR THE LACK OF ENFORCEABILITY OF THE EXISTING RULES. AGAINST THAT BACKDROP, IT OFFERS SOME CONCLUSIONS ON THE NEXT STEPS TO BE TAKEN AT THE LEVEL OF REGULATION AND THE PRIORITIES TO BE SET WHEN COURTS ARE FACED WITH CASES OF CORPORATE LIABILITY ARISING OUT OF HUMAN RIGHTS ABUSES.

KEYWORDS: HUMAN RIGHTS HARMS; CORPORATIONS; CORPORATE LIABILITY; JURISDICTION; APPLICABLE LAW; PRIVATE INTERNATIONAL LAW; ALIEN TORT STATUTE; FORUM NON CONVENIENS; LEX LOCI DAMNI; (INTERNATIONAL) CRIMINAL LAW; INTERNATIONAL CRIMES; INTERNATIONAL CRIMINAL COURT; ROME STATUTE

RESUMO: ESTE ARTIGO EXAMINA A QUESTÃO DA RESPONSABILIDADE EMPRESARIAL POR VIOLAÇÕES DOS DIREITOS HUMANOS E DO ACESSO À JUSTIÇA PARA AS VÍTIMAS ATRAVÉS DE UMA LENTE DUPLA: A DO DIREITO INTERNACIONAL PRIVADO E A DOS MECANISMOS DE DIREITO PENAL INTERNACIONAL E NACIONAL. EM AMBOS OS CASOS, A ANÁLISE INCIDE SOBRE AS REGRAS QUE REGEM A JURISDIÇÃO E O DIREITO APLICÁVEL. AO FAZÊ-LO, MOSTRA AS LACUNAS EXISTENTES EM MATÉRIA DE RESPONSABILIZAÇÃO, QUER RELACIONADAS COM A FALTA DE VONTADE OU INCAPACIDADE DE JULGAR CASOS DE VIOLAÇÕES A DIREITOS HUMANOS DAS EMPRESAS PERANTE OS TRIBUNAIS CIVIS E PENAIS NACIONAIS, A AUSÊNCIA DE JURISDIÇÃO A NÍVEL INTERNACIONAL (NO CASO DO TRIBUNAL PENAL INTERNACIONAL), DEFICIÊNCIAS DA LEI APLICÁVEL RELACIONADAS COM A CONCEPÇÃO OU A FALTA DE APLICABILIDADE DAS REGRAS EXISTENTES. NESTE CONTEXTO, OFERECE ALGUMAS CONCLUSÕES SOBRE OS PRÓXIMOS PASSOS A SEREM DADOS A NÍVEL DA REGULAMENTAÇÃO E AS PRIORIDADES A SEREM ESTABELECIDAS QUANDO OS TRIBUNAIS FOREM CONFRONTADOS COM CASOS DE RESPONSABILIDADE DAS EMPRESAS DECORRENTES DE VIOLAÇÕES A DIREITOS HUMANOS.

PALAVRAS-CHAVE: VIOLAÇÕES DOS DIREITOS HUMANOS; EMPRESAS; RESPONSABILIDADE DAS EMPRESAS; JURISDIÇÃO; DIREITO APLICÁVEL; DIREITO INTERNACIONAL PRIVADO; *ALIEN TORT STATUTE*; *FORUM NON CONVENIENS*; *LEX LOCI DAMNI*; DIREITO PENAL (INTERNACIONAL); CRIMES INTERNACIONAIS; TRIBUNAL PENAL INTERNACIONAL; ESTATUTO DE ROMA

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I. INTRODUCTION

These last decades have seen an increase in the number of civil liability proceedings for alleged corporate human rights or environmental harms filed before the courts of EU Member States against EU-based companies [1]. However, claimants bringing legal claims for business-related human rights harms face many barriers when attempting to obtain redress [2]. Yet, the right to an effective remedy is universally recognized under international human rights law, and the notion of 'rights' is meaningless without a mechanism to ensure access to effective remedy when breaches have occurred [3].

In 2011, the UN Human Rights Council unanimously endorsed the Unites Nations Guiding Principles on Business and Human Rights, which operationalized the 2008 'Protect, Respect and Remedy' Framework resting on differentiated yet complementary duties and responsibilities for States and companies. The UN Guiding Principles on Business and Human Rights, which represents a 'globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises' to prevent and address business-related human rights impacts', [4] highlights that the duty to provide access to remedy is part of the State's duty to protect human

[1] LIESBETH ENNEKING, "Judicial remedies: The issue of applicable law", in Juan Jose Alvarez Rubio and Katerina Yiannibas, (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union, Routledge*, 2018, p. 38.

[2] Axel Marx, Claire Bright and Jan Wouters, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries", Study requested by the European Parliament, Sub-Committee on Human Rights, March 2019, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf (last access: 29 July 2021).

[3] MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance" (July 2020), p. 160, available at: https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf (last access: 29 July 2021).

[4] UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Corporate human rights due diligence — emerging practices, challenges and ways forward", A/73/163 (16 July 2018), para 1.

rights [5]. More specifically, States are required to ensure that when business-related human rights abuses 'occur within their territory and/or jurisdiction those affected have access to effective remedy' [6]. Guiding Principle 26 clarifies that:

'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'

The Commentary to Guiding Principle 26 gives examples of legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed which include both private international law and criminal law issues, such as 'the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability' as well as the situation 'where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim' [7]. In this respect, the 'host State' is the State *in which the alleged violations occurred*, whereas the 'home State' is the State *in which the corporation is based*. A 2019 study for the European Parliament looking at the outcome of relevant cases brought in EU Member States courts on the basis of alleged business-related human rights harms revealed that out of thirty--five cases, thirteen cases were dismissed, four were settled out-of--court, seventeen were still ongoing and only one led to a positive judicial outcome for the claimants [8]. This concerned a criminal law case filed against the head of a Dutch company, who was accused of complicity in war crimes by virtue of, amongst other things, supplying weapons to Charles Taylor's government in return for having been granted timber concessions in Liberia. On the 21st of April 2017, he was sentenced by the Den Bosch Court of Appeal *in absentia* to a

[5] UNITED NATIONS, (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31.

[6] Ibid, Guiding Principle 25.

[7] UN Guiding Principles on Business and Human Rights, *cit*., Commentary to Guiding Principle 26.

[8] A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies …", *cit*.

19-year jail sentence [9]. Since the study was published, there has now been the first positive judicial outcome for the claimants on the merits in a civil liability case against a corporation in the ruling against Shell which will be discussed below. However, the overall very low success rate of this type of cases highlights the difficulties faced by claimants in obtaining effective access to justice in this type of cases.

Against this backdrop, the purpose of this article is to explore the relevant mechanisms in private international law and criminal law which may hinder, or, on the other hand, facilitate access to justice and remedy for claimants in claims arising out of alleged human rights harms. It will proceed as follows: the first part will focus on private international law considerations and will address the issues of jurisdiction and applicable law and how they play out in concrete cases. The second part will focus on criminal law considerations and will address the twofold question of whether the international criminal law's accountability mechanism *can* facilitate the access to justice for corporate human rights harms, and whether (some) national jurisdictions *may* provide (more) suitable enforcement mechanisms, whether within or outside the realm of criminal law.

II. PRIVATE INTERNATIONAL LAW CONSIDERATIONS

Private international law rules have been identified as having the potential to either hinder or facilitate access to remedy for the claimants in concrete cases involving corporate human rights harms [10].

[9] Ibid, p. 28.

[10] Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, "The Third Pillar — Access to Judicial Remedies for Human Rights Violations by Transnational Business", December 2013 available at: https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf (last access: 29 July 2021); Amnesty International, "Injustice Incorporated: Corporate Abuse and the Human Right to Remedy", 7 March 2014, available at: https://www.amnesty.org/en/documents/POL30/001/2014/en/(last access: 29 July 2021); Jennifer Zerk, "Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies", Report prepared for the Office of the UN High Commissioner for Human Rights, 2014, available at: https://www.ohchr.org/documents/issues/business/domesticlawremedies/

Two types of rules are particularly relevant in this respect, the rules on jurisdiction and the rules on applicable law. They will be analysed in turn.

1. The issue of jurisdiction

In private international law, the concept of jurisdiction refers to adjudicate jurisdiction which concerns the authority of the courts of a State to entertain the disputes referred to them [(11)]. The allocation of jurisdiction in private international law constitutes 'an expression of the delimitation of jurisdiction in public international law that protects the state's sovereign authority over its territory and people therein against undue external interference by other states' [(12)].

In relation to the approach to adjudicative jurisdiction over corporate human rights abuses, the United States of America (hereinafter US) and the European Union (hereinafter EU) have evolved in opposite directions over the past few years. Whereas in the US, the possibility to bring claims against corporations on the basis of alleged human rights harms have been increasingly reduced, in the EU on the other hand, a number of courts have shown increased willingness to adjudicate this type of claims.

1.1. Jurisdiction in the US courts

Two key examples illustrate the approach of the US courts towards and increased delimitation of their jurisdiction to adjudicate civil claims

studydomesticelawremedies.pdf (last access: 29 July 2021), p. 100; VEERLE VAN DEN EECKHOUT, "The Private International Law Dimension of the Principles in Europe", in FRANCISCO JAVIER ZAMORA CABOT, LUKAS HECKENDORN URSCHELER. and STEPHANIE DE DYCKER (eds.), *Implementing the UN Guiding Principles on Business and Human Rights: Private International Law Perspectives*, Publications de l'Institut Suisse de Droit Comparé 81, 2017, p. 35.

(11) MARIA HELENA BRITO, *Direito do Comércio Internacional*, Coimbra, 2004.

(12) NICOLA JÄGERS and DANIEL AUGENSTEIN, "Judicial remedies: The issue of jurisdiction", in JUAN JOSÉ ÁLVAREZ RUBIO and KATERINA YIANNIBAS (eds.), *Human rights in Business: Removal of Barriers to Access to Justice in the European Union*, Routledge, p. 11.

arising out of alleged human rights violations: the recent case-law on the Alien Tort Statute and the use of the doctrine of *forum non conveniens*.

1.1.1. The Alien Tort Statute

Adopted as part of the Judiciary Act passed by the First Congress in 1789, the Alien Tort Statute (hereinafter ATS) [13] grants jurisdiction to US federal courts over civil claims filed by foreign claimants in reparation of 'violations of the law of nations or a treaty of the United States' [14]. During the XIXth century, this Act was applied to compensation claims against acts of piracy and infringement of the rights of foreign ambassadors, which were considered at the time to constitute violation of the *law of nations* [15]. After being largely dormant for almost two centuries, [16] the ATS was revived in the *Filártiga v. Pena Irala* [17] case in 1980 where the US Court of Appeals for the Second Circuit in New York asserted its jurisdiction on the basis of the ATS in a tort action brought by citizens of Paraguay against a former Paraguayan official, for wrongfully causing the death of a family member whom he had allegedly kidnapped and tortured to death in retaliation for his father's political activities and beliefs [18]. Later on, the case-law considered that private actors could also be

[13] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350.

[14] The Alien Tort Statute provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

[15] WILLIAM DODGE, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists", in *Hastling International and Comparative Law Review*, 19 (1996), p. 221.

[16] Kenneth Randall, "Federal Jurisdiction over International Tort Claims: Inquiries into the Alien Tort Statute", in *New York University Journal of International Law and Politics*, 18 (1985), p. 1.

[17] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[18] Jeffrey Blum and Ralph Steinhardt, "Federal Jurisdiction over International Human Rights Claims: the Alien Tort Claims After *Filártiga v. Peña-Irala"*, in *Harvard International Law Journal*, 22 (1981), p. 55; Richard Pierre Claude, "The Case of Joelito Filartiga and the Clinic of Hope", in *Human Rights Quarterly*, 5 (1983), p. 275

liable for violations of the law of nations under the ATS [19]. As a result, a number of cases were filed against multinational companies on the ground of the ATS which became considered as a powerful tool to redress serious corporate-related human rights violations committed in various parts of the world [20]. In most — if not all — of the case, the ATS provided a forum to foreign claimants who had generally been struggling to obtain justice elsewhere in relation to claims involving corporate human rights abuses regardless of where the alleged abuses had been committed, and against both US and foreign--based companies alike [21].

Nevertheless, such use of the ATS was short-lived. In the *Kiobel* case [22] in 2013 the US Supreme Court relied on the presumption against extraterritoriality — which entails that domestic legislation does not normally apply outside of the territory of the US — to decline to exercise jurisdiction over the case on the basis of the ATS [23]. This case had been filed by a group of Nigerian citizens — who had been granted political asylum in the US — against Anglo-Dutch company Royal Dutch Shell as well as its Nigerian subsidiary. They were claiming that the defendants aided and abetted human rights abuses committed by the Nigerian military against the "Movement for Survival of Ogoni People" — a group of Nigerian residents peacefully

[19] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[20] Jennifer Elsea, "The Alien Tort Statute: Legislative History and Executive Branch Views", in *CRS Report for Congress*, 2 October 2003; Maria Chiara Marullo, "Almost' Universal Jurisdiction", in *Yearbook of Private International Law* 21 (2019/2020), 549 (568).

[21] CLAIRE BRIGHT, "The Implications of the Kiobel v. Royal Dutch Petroleum Case for the Exercise of Extraterritorial Jurisdiction", in ADRIANA DI STEFANO, C. SALAMONE and ALESSANDO COCCI (eds.), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law*, Giappichelli, 2015, p. 165.

[22] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). MARIA CHIARA MARULLO and Francisco JAVIER Zamora Cabot, "Transnational Human Rights Litigations: Kiobel's Touch and Concern: A Test Under Construction", in *Papeles el tiempo de los Derechos,* 2016 available at: repositori.uji.es/xmlui/handle/10234/159819 (last access: 29 July 2021).

[23] WILLIAM DODGE, "Understanding the Presumption Against Extraterritoriality", in *Berkeley Journal of International Law,* 16 (1998) 85; Jason Jarvis, "A New Paradigm for the Alien Tort Statute under Extraterritoriality and the Universality Principle", in *Pepperdine Law Review,* 30 (2003), p. 671.

protesting against the harmful environmental effects of the activities of Shell in the region. In this case, the US Supreme Court restricted the possibility of using the ATS to cases which 'touch and concern' the territory of the US 'with sufficient force to displace the presumption against extraterritorial application' [24].

Subsequently in 2018 with the *Jesner* [25] case, the US Supreme Court further affirmed that foreign corporations may not be sued under the ATS. This restrictive approach to jurisdiction under the ATS was reaffirmed in a recent decision of the Supreme Court in relation to a lawsuit which had been filed by six Malian nationals against Cargill Inc and Nestle SA over claims that they were trafficked as child slaves to Ivory Coast and forced to work on cocoa farms. On the 17th of June 2021, [26] the US Supreme Court, reversing the decision of the Court of Appeals for the 9th Circuit which had allowed the claim to proceed, rejected the claim on the grounds that nearly all conduct had taken place outside of the US and that there was no basis for such extraterritorial application of the ATS.

This lack of willingness to adjudicate cross-border tort cases arising out of corporate human rights also transpires in the use of the *forum non conveniens* doctrine by US courts.

1.1.2. The doctrine of the *forum non conveniens*

The doctrine of *forum non conveniens* is an Anglo-Saxon doctrine according to which a court may decline to exercise jurisdiction when it considers that another forum is a more appropriate venue to hear the claim [27].

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[24] Anna GREAR and Burns WESTON, "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post — Kiobel Lawscape", in *Human Rights Law Review*, 15 (2015), p. 21; RALPH STEINHARDT, "Determining which Human Rights Claims 'Touch and Concern' the Unites States: Justice Kennedy's Filartiga", in *Notre Dame Law Review*, 89 (2014), p. 1695.

[25] *Jesner et. al. v. Arab Bank, PLC.*, No. 16-499, USSC, decided April 24, 2018.

[26] Supreme Court of the United States, *Nestlé USA, Inc. v. Doe et al.*, 17 June 2021, available at https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf (last access: 29 July 2021).

[27] J. Zerk, "Corporate liability for gross human rights abuses…", *cit.*, p. 65, https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomes-

Many courts have declined to exercise jurisdiction on this basis, including in relation to civil claims arising out of alleged corporate human rights abuses. One of the first and perhaps most well-known cases in this respect is the case of *Bhopal v Union Carbide Corporation* [28]. The tragic facts which gave rise to the legal proceedings are well known: in December 1984, a gas leak incident occurred at a pesticide plant owned and operated by an Indian company (Union Carbide India Limited (UCIL)) majority-owned by a US-based company (Union Carbide Corporation) and directly managed by a US-incorporated wholly owned subsidiary of the latter (Union Carbide Easter (UCE)) [29] which led to the death of thousands of people (Amnesty International estimates that between 7,000 and 10,000 people died within three days of the leak), [30] and over 570,000 were exposed to 'damaging levels of toxic gas, leading to a wide range of chronic and debilitating illnesses' [31]. In the aftermath of the tragedy, criminal proceedings were launched in India, whilst civil proceedings were filed both in India as well as in the US against the parent company, UCC. In the US, the Indian government — who had in the meantime passed the Bhopal Gas Leak Disaster (Processing of Claims) Act granting it an exclusive right to represent and act in place of the claimants — took over the civil action and all individual complaints were aggregated in a consolidated complaint involving over 200,000 claimants [32]. The Indian government contented, *inter alia*, that 'UCC owned, designed, constructed, operated and controlled the plant and therefore should be held liable for the resulting harm and damage' [33]. UCC sought to have the case stayed under the doctrine of *forum non conveniens*. The Indian government argued that the Indian judicial system was not equipped to handle a case of this magnitude and that litigation. In

ticelawremedies.pdf (last access: 29 July 2021).

[28] *Bhopal v. Union Carbide Corporation*, 809 F.2d 195 (2d Cir. 1987).

[29] Amnesty International, "Injustice Incorporated: Corporate Abuses and the Human Right to Remedy" (2014), p. 33, available at: www.amnesty.org/es/documents/POL30/001/2014/en/(last access: 29 July 2021).

[30] Ibid, p. 35.

[31] Idem.

[32] Ibid, p. 43.

[33] Ibid, p. 44.

support of its position, the Indian government submitted an affidavit from expert witness, Professor Galanter, who explained that the Indian system was 'characterized by massive backlogs of cases and enormous delays in the resolution of civil cases', [34] the effect of which is 'particularly devastating in tort cases where injured parties or their survivors must wait decades for compensation' [35]. He also affirmed that tort law was under-developed in India which inhibited innovative legal problem-solving, 'leaving courts and lawyers unequipped to meet the challenge of a massive and complex litigation of a type routinely handled in American courts, but unprecedented in the Indian system' [36]. Despite of these arguments, the US forum eventually declined to exercise its jurisdiction, largely on the grounds that the 'public interest' of India was greater than that of the US, as well as according to a number of 'private interest' factors [37]. The case was subsequently transferred to India where the parties entered a settlement [38]. However, it was widely criticized as having failed to provide effective remedies to those affected, and many were never compensated at all. Several decades after the tragedy and a comprehensive clean-up has still not been carried out [39].

Subsequently, the doctrine of *forum non conveniens* has been used in other cases, effectively allowing companies to escape the jurisdiction of the home State in situations where the damage occurred in another country [40]. An illustration can be found in the *Chevron*

[34] Affidavit of Marc Selig Galanter, 5 December 1985, in support of Union of India's Claim, reproduced in Updendra Baxi and Paul Thomas, *Mass Disasters and Multinational Liability: The Bhopal Case*, Indian Law Institute, 1986, p. 172.

[35] Ibid, p. 177.

[36] Ibid, p. 183.

[37] See Upendra Baxi, "Mass Torts, Multinational Enterprise Liability and Private International Law", in *Recueil des Cours de l'Academie de Droit International,* 286 (1999), p. 356.

[38] G. Skinner, R. McCorquodale, O. De Schutter, "The Third Pillar…", *cit*., p. 26.

[39] Ibid, at p. 26.

[40] Claire Bright, Maria Chiara Marullo and Francisco Javier Zamora Cabot, "Private international law issues in the Second Draft of the legally binding instrument on business and human rights", in *Nederlands International Privaatrecht* [Dutch Journal of Private International Law], 39/1 (2021), 35 (41).

case, [41] which concerned class actions filed in the US by Peruvian and Ecuadorian claimants seeking reparation for alleged contamination which arose out of the oil extraction activities of Texaco/Chevron in the region of Lago Agrio in Ecuador. The US courts dismissed the claims on *forum non conveniens* grounds. The case was subsequently refiled before the Ecuadorian courts which decided in favour of the claimants and ordered the company to pay over $18 billion — later reduced to $9.5 billion — to the claimants to remediate the environmental damage [42]. However, as the company had virtually no assets in Ecuador, it was impossible to enforce the ruling in that country. Chevron — which ironically had been the one arguing for the case to be dismissed in the US on *forum non conveniens* grounds on the basis that the Ecuadorian courts would be more appropriate forum — considered the judgment rendered by the Ecuadorian courts as illegitimate, arguing that it was 'a result of fraud and political pressure' and refused to pay [43]. Instead, the company filed an international arbitration claim before the Permanent Court of Arbitration in the Hague on the basis that the Government of Ecuador had violated a bilateral investment treaty between the US and Ecuador [44]. The arbitration tribunal rendered an award in favour of the company and also ordered Ecuador to annul the sentence of the Ecuadorian court, which it considered unlawful [45]. To date, the claimants have still not received any compensation and the requested clean-up of the site has never been carried out.

The dismissal of cases on *forum non conveniens* grounds normally rely on the expectation that the case will be filed in the host State.

[41] *Aguinda v. Texaco, Inc.,* 303 F.3d 470 (2d Cir. 2002).

[42] Business and Human Rights Resource Centre, "Chevron ordered to pay Ecuador $9,51bn on appeal", 13 November 2013, available at: https://www.business-humanrights.org/en/latest-news/chevron-ordered-to-pay-ecuador-951-bn-on-appeal/ (last access: 29 July 2021).

[43] G. Skinner, R. McCorquodale, O. De Schutter, "The Third Pillar…", *cit*., p. 27.

[44] Ibid, p. 27.

[45] Aldo Orellana López, "Chevron vs. Ecuador: international arbitration and corporate impunity", in *Open Democracy*, 27 March 2019, available at: https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/(last access: 29 July 2021)

However, data has shown that 99% of cases which are dismissed in the US on *forum non conveniens grounds* were never actually refiled [46]. This constatation raises some serious concerns in terms of effective access to justice for the victims, and its use was expressly excluded in the EU in the *Owusu* judgment of the Court of Justice of the EU [47].

1.2. Jurisdiction in EU Member States courts

In the EU, the jurisdictional rules applicable to trans-border civil claims are laid down by the Brussels I Recast Regulation [48]. The Brussels I Recast Regulation provides, as a general principle, the idea that individuals domiciled in a Member State should be sued in the country of their domicile [49].

The domicile of the defendant is a well-established jurisdictional criterion which is widely used in comparative law. It is seen as highly predictable and representative of a close connection between the dispute and the forum (i.e., the court seized) [50]. Accordingly, it avoids the risk of the defendant being sued in a court of a Member State which they could not reasonably have foreseen [51]. The domicile of a legal person is subject to an autonomous definition at Article 63 of the Regulation which provides that:

[46] G. Skinner, R. McCorquodale, O. De Schutter, "The Third Pillar...", *cit*., p. 24.

[47] CJEU 1 March 2005, Case C-281/02 [2005] ECR I-1445, NIPR 2005, 152 (Owusu).

[48] Council Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast"). MARIA HELENA BRITO, *Direito Internacional Privado sob influência do Direito Europeu*. Âncora Editora, 2017.

[49] Ibid, Article 4.1 which states in this respect that: "[...] persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

[50] Ibid, Recitals 15 and 16.

[51] Ibid, Recital 16.

'1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;
(b) central administration; or
(c) principal place of business'.

In the past few decades, this general rule of jurisdiction has been increasingly relied on by claimants bringing civil proceedings on the basis of business-related human rights or environmental harms before the courts of EU Member States, against EU companies which have their domicile in the EU territory. This development is linked to the fact that claimants often face difficulties in accessing justice in the host States of the corporations, which are often unwilling or unable to adequately regulate the activities of companies on their territory, and provide remedies in case of harms, for fear of discouraging foreign investors. Against this backdrop, claimants have sought to access home States' courts in an attempt to circumvent the hurdles faced in their own countries. In this respect, home States have an essential role to play in regulating corporate behaviour both within and outside its own territory so as to fulfil their general duty to protect against human rights abuse within their territory and jurisdiction, including by business enterprises, which arises under international law [52]. These cases have put in the spotlight the question of the legal responsibility of EU-based parent companies for the human rights or environmental harms arising out of the activities of their subsidiaries or business partners. Examples include the *KiK* case in Germany which concerns the tort action brought against German retailer KIK by the victims of a textile factory fire in Pakistan which supplied KIK; [53] the *Vedanta*

[52] The UN Guiding Principles on Business and Human Rights, *cit*., Guiding Principle 1.

[53] PHILIPP WESCHE and MIRIAM SAAGE-MAASS, "Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK", in *Human Rights Law Review* (2016), p. 307.

case, [54] which concerns the civil action filed in the UK against UK parent company Vedanta and its Zambian subsidiary on the basis of the alleged damage suffered by local communities in Zambia as a result of the release of toxic effluent arising out of the operations of the subsidiary in a copper mine operated by the latter; the cases brought against Shell in the UK and in the Netherlands in relation to the alleged environmental damage and resulting human rights harms arising out of oil spills linked to the operations of Shell's Nigerian subsidiary in the Niger Delta; [55] or the Boliden case concerning the civil proceedings brought in Sweden against Swedish company Boliden in relation to the harm allegedly suffered by Chilean communities as a result of the export and unprocessed disposal of industrial waste in Chile by a subcontractor of the company.[56]However, for many of these cases, issues of jurisdictions have been identified as potential hurdles to access to remedy.

Jurisdiction hurdles faced by claimants in concrete cases include the scope of the Brussels I Recast Regulation which is limited to EU-domiciled defendants, meaning that the jurisdictional rules set out in the Regulation do not apply vis-à-vis third country defendants, aside from some limited exceptions to ensure the protection of consumers and employees [57]. Accordingly, residual jurisdiction over third state defendants is to be determined pursuant to the rules on jurisdiction of the forum. In the case of civil claims for business-related human rights harms, questions concerning the jurisdiction of EU Member States courts vis-à-vis third country defendants such as the foreign subsidiaries or business partners of EU-domiciled companies are

[54] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

[55] CLAIRE BRIGHT, "The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands", in Angelica Bonfanti (ed.) *Business and Human Rights in Europe: International Law Challenges*, Routledge, 2018, p. 212.

[56] Rasmus Klocker Larsen, "Foreign direct liability claims in Sweden: Learning from 'Arica Victims KB v Boliden Mineral AB'?", in *Nordic Journal of International Law*, 4 (2014), p. 404.

[57] Council Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast"), Recital 14.

therefore governed by the domestic rules on jurisdiction of the forum [58]. Accordingly, the question of whether the foreign subsidiary or business partner of an EU-domiciled company may be joined in the legal proceedings against the parent company as a co-defendant is governed by the rules of jurisdiction of the forum, which vary depending on the Member State, giving rise to a great amount of legal uncertainty, but also creates unnecessary delays. For instance, in the above-mentioned Vedanta case, [59] even though the UK Supreme Court eventually allowed the case to proceed in English Courts against both the UK parent company and the Zambian subsidiary, it took four years just to reach a decision on the jurisdictional issues. In this respect, Lord Briggs warned against the dangers that an expensive and time-consuming hearing will be 'used by a richer party to wear down a poorer party' [60]. This is particularly relevant in relation to tort claims arising out of alleged human rights harms which are often characterised by significant imbalances of powers between the parties [61]. To overcome these difficulties, it has been suggested that the jurisdiction of Member States courts over this type of extraterritorial cases should be strengthened, [62] and that the Brussels I Recast Regulation be revised to include two new provisions.[63]The first provision would be extending the jurisdiction of the courts of the EU Member State where

[58] A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies …", *cit*., p. 110.

[59] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

[60] *Lungowe v Vedanta Resources plc* [2019] UKSC 20, Lord Briggs quoting Lord Neuberger of Abbotsbury in TB Capital plc v. Nutritek International Corp [2013] 2 AC 337.

[61] CLAIRE BRIGHT, "Corporate Due Diligence and Private International Law: Some Considerations from a Access to Remedy Perspective", Nova Centre on Business, Human Rights and the Environment Blog, 4 March 2021, available at: https://novabhre.novalaw.unl.pt/corporate-due-diligence-private-international-law-some-considerations-from-an-acess-to-remedy-perspective/(last access: 29 July 2021).

[62] A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies …", *cit*., p. 110.

[63] Daniel Augenstein, "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union", in *Report of a study prepared for the European Commission by the University of Edinburgh*, available at: https://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf (last access: 29 July 2021).

the EU parent company is domiciled to the claims over its foreign subsidiary or business partners when the claims are so closely connected that it is expedient to hear and determine them together [64]. The second provision would be establishing a *forum necessitatis* on the basis of which a court of an EU Member State may, on an exceptional basis, hear a case brought before it when the right to a fair trial or access to justice so requires, and the dispute has sufficient connection with the EU Member State of the court seized [65].

However, in order to achieve substantive access to justice, these reforms would need to be complemented by reforms in relation to the conflict of law rules to determine the applicable law to the dispute.

2. Applicable law

The issue of the applicable to a dispute is extremely relevant from an access to substantive justice perspective as it will be according to that law that the forum will determine, *inter alia*, the basis and extent of liability, the issues of immunity, the existence and nature of the damage, the level of damages, as well as time limitations [66]. In this respect, many legal systems have opted for the law of the place where the damage occurred as the applicable law, although mechanisms of exceptions such as the overriding mandatory provisions or the public policy exception can sometimes be used.

2.1. The *lex loci damni* and its limitations

In comparative law, the law of the place where the damage occurred (*lex loci damni)* is often used as the conflict of law criterion for

[64] A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies …", *cit*., p. 112.

[65] Idem. See also Daniel Augenstein, "Study of the Legal Framework…", *cit*. p. 16.

[66] C. Bright, M. C. Marullo and F. J. Zamora Cabot, "Private international law issues …", *cit*. p. 45.

transnational tort cases as it is generally considered to be the law of the country which has the most territorial proximity with the tort. (67)

An illustration can be found in European Private International Law with the Regulation 864/2007 (Rome II) (68) — which governs the issue of applicable law in the EU — and lays down a general rule in its Art. 4 according to which the applicable law for torts is the 'law of the country in which the damage occurs' (69).

One the one hand, the *lex loci damni* is often considered to be a law that is predictable, easy to locate and in line with the approach to civil liability in many tort systems for which liability is not always conditioned on a fault on the part of the tortfeasor but might simply arise because of the damage which has been suffered (70). For this reason, the drafters of Rome II had stated that it 'strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability' (71).

(67) VEERLE VAN DEN EECKHOUT, "The instrumentalisation of private international law; quo vadis? Rethinking the neutrality of private international law in an era of globalisation and Europeanisation of private international law", in JEAN--SYLVESTRE BERGE, STEPHANIE FRANCQ, and MIGUEL GARDENES SANTIAGO, M. (eds.), *Boundaries of European private international law/Les frontières de droit international privé européen/Las fronteras del derecho internacional privado europeo*, Bruylant, 2015, p. 387.

(68) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").

(69) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 4 which provides that "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

(70) Symeon Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity", in *American Journal of Comparative Law*, 56 (2008), p. 173.; Veerle Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law — The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor", in (2011) *Working Paper Series* (July 26, 2011), available at: http://ssrn.com/abstract=1895690 (last access: 29 July 2021), p 12.

(71) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome

However, one of the main difficulties of the *lex loci damni* is that, by making the law of the host State the applicable law, it can create a barrier for the victims to access substantive justice and contribute to increasing the inequality between the parties even further [72]. This is linked to the fact that, in many cases, host States tend to have lower standards — which is often one of the reasons for which they are selected as destination of foreign direct investment since that entails lower costs for the companies — or weaker enforcement of legal standards [73].

As a result, the *lex loci damni* often deprives claimants of access to substantive remedy in practice [74]. This, in turn, prevents tort law of performing the traditional function attributed to it of corrective or distributive justice, or to play a deterring role [75]. For instance, in the case against Shell filed in the Netherlands, at first instance the District Court of the Hague had dismissed the claims against the parent company on the grounds that the applicable law, that is, Nigerian law, did not provide for a general duty of care for parent companies to prevent their subsidiaries from inflicting damage on others through their business operations [76]. On appeal, the Court of Appeal of the Hague eluded this difficulty by finding that Nigerian law as a *common law* system, is based on English law and that common law and in particular the English case-law — which has recognized that parent companies may, in certain circumstances, incur a duty of care in relation

II"), Recital 16.

[72] VEERLE VAN DEN EECKHOUT, "Corporate Human Rights Violations and Private International Law ..." *cit.*

[73] MICHAEL ANDERSON, "Transnational Corporations and Environnemental Damage: Is Tort Law the Answer", in Washburn Law Journal 41 (2002), 400 (418); L. ENNEKING, "Judicial remedies: The issue of applicable law", *cit.*, p. 48.

[74] C. Bright, M. C. Marullo and F. J. Zamora Cabot, "Private international law issues...", *cit.* p. 68.

[75] Claire Bright and Benedict Wray, "Corporations and Social Environmental Justice: the Role of Private International Law", in A. DUVAL and M.-A. MOREAU (eds.). *Towards Social Environmental Justice?*. Cadmus, *EUI Working Papers* (2012), p. 75.

[76] District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050/HA ZA 09-1580, January 30, 2013, para. 4.26.

to the harmful activities of their subsidiaries — are relevant sources of Nigerian law.

In addition, both the *KIK* case [77] and the *Boliden* [78] case mentioned above were eventually rejected on the basis that the claims were time-barred under the applicable law (i.e., the law of the host State), which would not necessarily have been the case had the home State law been applicable [79].

Against this backdrop, it is argued that the Rome II Regulation should be revised to include in particular a choice-of law provision specific to business-related human rights claims against EU companies that would allow the claimants to choose, *inter alia*, the law of the place where the defendant company is domiciled (i.e., the home State law), as the applicable law [80]. It is submitted that this would ensure a more effective access to effective justice and redress the balance of power between the parties to civil claims for business-related human rights harms. In this respect, scholars have noted that the possibility for claimants in this type of cases to have their claim litigated before the courts of the EU Members States 'on the basis of home country tort law is of fundamental importance' [81]. In particular, they noted that 'it determines whether EU Member States can deploy their national systems of tort law as a much needed regulatory instrument' in order to promote high standards in terms of corporate respect for human rights in relation to the operations of their companies both within and outside of their territory [82].

The proposal to offer a choice of law for claimants in the context of civil claims arising out of human rights violations was included in a report of the Committee on Legal Affairs of the European

[77] P. WESCHE and M. SAAGE-MAASS, "Holding Companies Liable...", *cit.* p. 307.

[78] R. Klocker Larsen, "Foreign direct liability claims in Sweden', *cit.*, p. 404

[79] C. Bright, M. C. Marullo and f. J. Zamora Cabot, "Private international law issues...", cit, p. 48.

[80] A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies ...", *cit.*, p. 110.

[81] L. ENNEKING, "Judicial remedies: The issue of applicable law", *cit.*, p. 62.

[82] Idem.

Parliament of the 11 February 2021, [83] which recommended to revise the Rome II Regulation in order to add an Article 6a entitled 'Business--related human rights claims' according to which:

'In the context of business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a Member State of the Union or operating in the Union […], the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4 (1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates'.

Regrettably the proposal did not feature in the report which was eventually adopted in the resolution of the European Parliament with recommendations to the European Commission on corporate due diligence and corporate accountability [84]. As things stand, the possibility for the law of the home State to be applicable remains circumscribed to two mechanisms of exceptions which are the overriding mandatory provisions and the public policy exception.

2.2. The overriding mandatory provisions and the public policy exception

In many jurisdictions, the possibility for the home State law to be applicable in business-related human rights abuses is confined to two mechanisms of exceptions. The first one concerns the overriding mandatory provisions of the forum which have been defined as 'national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the

[83] European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 11 February 2021, available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf (last access: 29 July 2021).

[84] European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State' [85]. An illustration of this can be found in the Article 16 of the Rome II Regulation which provides that:

'Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.'

As clarified in Article 16, overriding mandatory provisions are applicable irrespective of the content of the applicable law. However, in the context of civil claims arising out of business-related human rights harms, the overriding mandatory provisions could be used to ensure a sufficient level of protection of human rights, including health and safety and labour standards, for the victims [86]. In addition, the overriding mandatory provisions mechanism may be particularly relevant in relation to domestic laws which impose duties on companies [87] to exercise human rights due diligence, such as the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Act or the German Supply Chain Due Diligence, [88] could — and should in order to ensure their efficacy extraterritorially — be considered as overriding mandatory rules.[89]This was recognised by the European Parliament in its

[85] ECJ Cases C-369/96 and C-376/96, 23 November 1999, [1999] ECR I-8453 (Arblade), building on the definition from Phocion Francescakis, Travaux du comité français de droit international privé, 1966-1969, p. 165.

[86] G. Skinner, R. McCorquodale, O. De Schutter, "The Third Pillar", *cit*., p. 61.

[87] AUKJE VAN HOEK, "Transnational Corporate Social Responsibility: Some issues with regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers", in Frans Pennings, Yvonne Konijn and Albertine Veldman (eds.), *Social responsibility in labour relations: European and comparative perspectives*, Kluwer Law International, (2008) p. 147.

[88] CLAIRE BRIGHT, "Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains", in Guillaume Delautre, Elizabeth Echeverría Manrique and Collin Fenwick, *Decent work in globalised economy: Lessons from public and private initiatives*, ILO 2021, 75-108

[89] L. ENNEKING, "Judicial remedies: The issue of applicable law", *cit*., p. 57.

recently adopted resolution on corporate accountability, which affirms in its Recital 29 that:

victims of business-related adverse impacts are often not sufficiently protected by the law of the country where the harm has been caused […]in this regard, that relevant provisions of the future directive should be considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

The second relevant exception is the public policy exception under which the forum can preclude the application of a foreign law that would be manifestly inconsistent with its public policy. An illustration of this can be found in Article 26 of the Rome II Regulation which provides that:

'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (order public) of the forum.'

Scholars have argued that this exception could 'provide an important minimum guarantee (or 'emergency brake') in foreign direct liability cases that are brought before EU Member State courts but governed by host country law, especially since fundamental human rights principles, whether ensuing from international or domestic law, are considered to be part of the public policy of the forum' [(90)]. Interestingly, the public policy exception was recently used by the UK Court of Appeal refused to disapply the one-year time limited imposed by the applicable law — Bangladeshi law — to a dispute on the basis that it was contrary to public policy [(91)]. The case had been filed in the UK against UK shipping company, Maran, who had acted as an agent to sell a defunct vessel to a 'demolition buyer' who, in turn, had conveyed it to a ship breaking yard in Bangladesh to perform the demolition of the vessel in spite of the international concern regarding the dangerous working practices in the Bangladesh shipbreaking yards which have been raised over the past few years. In the process of the

[(90)] Ibid., p. 60.

[(91)] Court of Appeal of England and Wales, *Begum v Maran* (UK) Ltd [2021] EWCA Civ 326 (10 March 2021).

demolition of the vessel, the worker fell to his death and his widow brought proceedings against Maran in the English courts in negligence and unjust enrichment for damages. On the 10th of March 2021, the Court of Appeal for England and Wales found that the claim could proceed to trial. However, the court rejected the argument of the claimant who had sustained that the one-year limitation period was incompatible with public policy. The court highlighted in this respect that public policy 'should be invoked for the purposes of disapplying a foreign limitation period only in exceptional circumstances' where the foreign limitation period was 'manifestly incompatible' with public policy, as a result of which the bar was set very high [92]. The court added that the fact that the Bangladeshi limitation period was 'manifestly less generous' than the English limitation period did not imply, in itself, that it was contrary to English public policy. However, the court did consider that it was arguable that the one-year limitation period caused 'undue hardship' to the claimant, and allowed the case to proceed on that basis [93]. This case illustrates the courts reluctance to make use of the public policy exception in relation to prescription periods under the normally applicable law which, as described earlier, often constitute an insurmountable obstacle to access to justice in concrete cases such as the *Boliden* or the *KIK* case. In this respect, the EU Fundamental Rights Agency (FRA) has called upon 'the EU to provide guidance on when and how to make full use of the flexibility available under the ordre public-clause of the Rome regime, in particular in extraterritorial settings. This should be done to ensure that, when damage levels in 'host' countries are too low, an EU-wide level of damage, high enough to deter business from further abuse, could be applied'. [94] Similarly, in is 2016 Recommendation on human rights and business, the Committee of Ministers of the Council of Europe had encouraged Member States to make use of these exceptions by

[92] Ibid, para. 113.

[93] Ibid, para. 11

[94] FRA Opinion, "Improving Access to Remedy in the Area of Business and Human Rights at the EU Level", Fra Opinion 1/2017 [B&HR], 10 April 2017, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017--business-human-rights_en.pdf (last access: 29 July 2021).

stating that: 'Member States should apply such legislative or other appropriate measures as may be necessary to ensure that their domestic courts refrain from applying a law that is incompatible with their international obligations, in particular those stemming from the applicable international human rights standards' [95].

These exceptions provide, theoretically at least, the possibility for the forum State to apply its own law when the law of the host state is not protective enough of the human rights of the victims. However, their use is limited to 'exceptional circumstances', as affirmed by Recital 32 of the Rome II Regulation.

Alongside the private international law considerations outlined above and in the previous sections, the landscape of corporate accountability for human rights harms is also shaped by criminal law considerations. As will be shown, Private International Law and International Criminal Law are significantly different as regards their historical background, scope, design and prospect of evolution, while the function of national criminal law mechanisms is not free of enforcement constraints when it comes to addressing *corporate* wrongdoing.

III. CRIMINAL LAW CONSIDERATIONS

The involvement of corporations in human rights violations amounting to international crimes has attracted the public attention since the International Military Tribunal (hereinafter IMT) at Nuremberg. The spectrum of dubious corporate activities in conflict affected countries ranges from the direct violation of International Humanitarian Laws' (hereinafter IHL) mandates on the part of companies being present on the battleground, such as the so-called Private Military Security Companies (hereinafter PMSCs) [96], and facilitation of such abuses

[95] COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights an business, n.º 40.

[96] MARCO SASSÒLI, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare,* Chatenham, Edward Elgar Publishing Limited, 2019, pp. 542-553.

committed by others (for instance, equipping a non-State armed group with arms or inciting people to violence through radio or television programmes) to operating in counties where such violations occur (for instance, providing funds to governments or militia that may be used for criminal purposes) [97]. Decoding the issue of corporate accountability in that context is part of the considerably 'broader challenge of maintaining the effectiveness of the international legal order' both in general and regarding the 'protection of human rights in an increasingly globalized world' in particular [98]. This requires, first, acknowledging the shift in power from State to non-State actors, such as the corporate ones, and, second, assessing that shift at legislative level by providing adequate accountability mechanisms [99]. When seeking to overcome the theoretical obstacles associated with the evaluation of that paradigm shift at international level, International Criminal Law (hereinafter ICL) appears to be — at least at first sight — a promising area of regulation considering its specificities: The focus lies on the individual, namely a non-State actor, as the bearer of the duty to comply with IHL and human rights rules and extraterritorial jurisdiction is more accepted and possibly exercised compared to, for instance, human rights law [100]. However, this does not negate the fact that the shift from individuals to corporations is still pending before both the International Criminal Court and several national criminal courts.

Against this backdrop, the following analysis examines the means provided by international and national criminal law to address the

[97] NORMAN FARRELL, "Attributing Criminal Liability to Corporate Actors. Some Lessons from the International Tribunals", in *Journal of International Criminal Justice*, 8 (2010), 873 (874). See WOLFGANG KALECK and MIRIAM SAAGE-MAASS, "Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges", in *Journal of International Criminal Justice*, 8 (2010), 699 (700-709).

[98] JONATHAN KOLIEB, "Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability under International Law", in *American University International Law Review*, 32 (2017), 569 (573).

[99] J. KOLIEB, "Through the Looking-Glass..." *cit*., p. 573; LARISSA VAN DEN HERIK and JERNEJ LETNAR ČERNIČ, "Regulating Corporations under International Law. From Human Rights to International Criminal Law and Back Again", in *Journal of International Criminal Justice*, 8 (2010), 725 (726).

[100] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit*., p. 740.

commission of international crimes by corporate actors *as legal entities*. That said, individual liability related questions fall outside of its scope. Besides this, it will not delve into the long-standing (if not eternal) doctrinal dilemma of holding corporations accountable by means of criminal law *stricto sensu*, as the doctrine has already dealt with it to a great extent [101].

1. The issue of jurisdiction

1.1. A brief historical introduction: from the International Military Tribunal at Nuremberg to the *ad hoc* International Criminal Tribunals

The prosecution of German industrialists alongside military and political leaders was on the agenda of the Allied Powers at the end of the Second World War [102] — seeking to address their direct involvement in war atrocities or the support they granted to State actors in violations of international law. In the IMT at Nuremberg, the defendants list originally included *Gustav Krupp*, the businessman behind a heavy industry conglomerate of companies (Krupp AG) deemed of key importance for the acquisition of new military equipment in Germany during the inter-war years and the creation of the Nazi war-machine [103]. Being the only industrialist in the aforementioned list, *Krupp* (or anybody else at his place) did not actually stand trial for health-related reasons, as it was believed that he was mentally and physically unable to defend himself before the court [104].

As the IMT ended without prosecuting any representative of the German industry and the plans for a 'Second Nuremberg' for industrialists failed after the outbreak of the Cold War [105], it is not

[101] See the author's personal opinion on the matter: ATHINA SACHOULIDOU, *Unternehmensverantwortlichkeit und- sanktionierung. Ein strafrechtlicher und interdisziplinärer Diskurs*, Baden-Baden, Mohr Siebeck, 2019.

[102] J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 580.

[103] Idem.

[104] Ibid, pp. 580-581.

[105] JONATHAN BUSH, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", in *Columbia Law*

surprising that scholars shift the focus on the so-called Subsequent Nuremberg Trials, held by each of the Allies in their respective zones of occupied Germany [106], and the known as 'Industrialists (or industrial) Trials' when exploring corporate criminal liability through a historical lens [107]. In three out of the twelve Subsequent Trials, the defendants were employees and/or executives of the Flick Concern (including coal mines and steel plants) [108], the Krupp Group (including steel and armament factories) [109] and the I.G. Farben (chemical company) [110] — each of them believed to have played an important role for the progressive development of the Nazi arms and the execution of their war plans [111]. For instance, the Farben trust developed the synthetic nitrate (allowing the German military forces to get supplied within the national borders), invented and manufactured the poison gas (Zyklon *B)* used in the Nazi concentration camps and served itself as a concentration and extermination camp, where inmates were forced to work and even became subjects of inhumane medical and chemical experiments [112]. Out of the forty-two defendants in those cases, twenty-seven were found guilty of different international

Review, 109 (2009), pp. 1094-1262.

[106] See ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON and ELISABETH WILMSHURST, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge, Cambridge University Press, 2010, pp. 119-120.

[107] For instance, J. KOLIEB, "Through the Looking-Glass…", *cit*., pp. 582-584; W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., pp. 701-702; OLE KRISTIAN FAUCHALD and JO STIGEN, "Corporate Responsibility Before International Institutions", in *The George Washington International Law Review*, 40 (2009), 1025 (1035-1036); REGIS BISMUTH, "Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders", in *Denver Journal of International Law & Policy*, 38 (2010), 203 (223).

[108] The Flick Case (1948), reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals*, Volume VI, Washington, United States Government Printing Office, 1952.

[109] The Krupp Case (1948), reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals*, Volume IX, Washington, United States Government Printing Office, 1950.

[110] The I.G. Farben case (1948), reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals*, Volume VII and VIII, Washington, United States Government Printing Office, 1952-1953.

[111] J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 583.

[112] Idem.

crimes, ranging from slave labour to torture and mass murder [113], and sentenced to imprisonment, ranging from one-and-a-half to twelve years, coupled in case of *Alfred Krupp* with forfeiture of his real and personal property [114]. Similarly, in the case of Tesch & Stabenow [115], a company supplying camps with Zyklon B, its owner (*Bruno Tesch*) and its manager (*Karl Weinbacher*) were convicted in 1946 for aiding and abetting murder by a British Military Tribunal, despite not being physically present at the concentration camps, when the intimates were murdered with the help of that gas [116].

Following the precedent set by the Subsequent Nuremberg Trials, the International Criminal Tribunal for Rwanda (hereinafter ICTR) also turned the spotlight to corporate leaders. *Ferdinand Nahimana* (one of the founders of a *comité d' initiative* to set up the *Radio Télévision Libre des Mille Collines, S.A.* and member of the party known as *Mouvement Révolutionnaire National pour le Développement*), *Jean-Bosco Barayagwiza* (lawyer and founding member of the *Coalition pour la Défense de la République* party as well as member of the *comité d' initiative*) and *Hassan Ngeze* (founder of the newspaper *Kangura* and holding the post of the Editor-in-Chief) were finally convicted by the ICTR Appeals Chamber on 28 November 2007 for conspiring to commit genocide, committing genocide, direct and public incitement to commit genocide, persecution and extermination [117]. Before that, the guilt of *Alfred Musema*, the director of the Gisovu Tea Factory in Kibuye Prefecture during the 1944 genocide in Rwanda (accused for, *inter alia*, having transported armed traffickers, including employees of the factory, to different locations and ordering them to attack Tutsis), was affirmed regarding the crime of genocide and

[113] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., p. 701.

[114] J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 584.

[115] The Zyklon B case (1946), reprinted in THE UNITED NATIONS WAR CRIMES COMMISSION, *Law Reports of Trials of War Criminals*, Volume I, London, His Majesty Stationery Office, 1947, pp. 93-103.

[116] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…" *cit*., p. 701-702.

[117] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A (28 November 2007).

extermination as a crime against humanity before the ICTR Appeals Chamber on 16 November 2001 [118].

That brief overview of the Nuremberg and post-Nuremberg jurisprudence already indicates that there was no prosecution against a corporation as a legal entity. According to its Statute (known as the London Charter), the Nuremberg IMT was established 'for the trial and punishment of the major war criminals of the European Axis countries [...] whether as individuals or as members of organisations' (Art. 6). Those organisations, whether corporate or not, fell outside of the subjective scope of the Trial from the very beginning, despite the Tribunal's possibility to declare those as criminal (Art. 9) [119]. It is argued that that possibility (materialised in the case of the Leadership Corps of the Nazi Party, Gestapo, SD, SS) does not amount to an (even implicit) recognition of the criminal responsibility of legal persons [120]. On the contrary, the lack of it is affirmed by the maybe most frequently quoted passage of the Nuremberg judgment: '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' [121]. That view was also supported by the fact that the recognition of the criminal liability of legal persons at domestic level was a rare exception in the Nuremberg era [122].

While the shift of focus from 'abstract entities' to 'men' is believed to have served as an explicit rejection of the defendants' argument that international law shall only be concerned with State actions and individuals shall not be punished before an international criminal

[118] Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A (16 November 2001).

[119] "Draft Code of Offences Against the Peace and Security of Mankind — Report by JEAN SPYROPOULOS, Special Rapporteur", in *Yearbook of the International Law Commission*, 2 (1953), U.N. Doc. A/CN.4/25/1950, p. 260 (cited by J. KOLIEB, "Through the Looking-Glass..." *cit*., p. 586); R. BISMUTH "Mapping a Responsibility of Corporations..." *cit*., p. 208.

[120] R. BISMUTH "Mapping a Responsibility of Corporations..." *cit*., p. 208.

[121] Nürnberg Trial, 6 F.R.D. 69, 110 (IMT 1946).

[122] J. SPYROPOULOS Report, *cit*., p. 161 (cited by J. KOLIEB, "Through the Looking-Glass..." *cit*., p. 586).

tribunal, and as such it does not exclude corporate criminal liability [123], the negative approach outlined above was reaffirmed by the following developments in the field of ICL. Art. 6 of the Statute of the International Tribunal for the Former Yugoslavia (hereinafter ICTY) and Art. 5 of the ICTR Statute expressly state that those tribunals may only exercise jurisdiction over natural persons. Nevertheless, there are scholars adopting a broader legal lens, when examining the Nuremberg jurisprudence and the 'Industrialist trials' in particular, and claiming that those individual corporate actors were convicted for international crimes 'due to their participation in the criminal conduct of corporations' [124]. Or, despite that the Nuremberg IMT had no jurisdiction over legal persons, those decisions focus on the corporation's nature and its role in committing international crimes [125]. Similarly, when discussing the outcome of the same trials in the context of the *Kiobel* Alien Tort Claims Act case, Justice Leval stated: '[…] tribunals found that corporations violated the law of nations and imposed judgment on individual criminal defendants based on their complicity in the corporations' violations' [126].

Before revisiting that dispute on the recognition of corporate criminal liability at international level in the light of the ICC Statute (known as the 'Rome Statute') in the following subsection, it is worthy to briefly examine how Flick, Krupp, and Farben actually 'experienced' the condemnation they received by the Allied Powers. The three of them as well as other German corporate giants were the subjects of seizure and reparation orders [127]. The I.G. Farben in particular received the corporate 'capital punishment', when the Allied Control Council issued the Allied Control Council Law No. 9 of 30

[123] Brief for Kiobel-Navi Pillay as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), p. 19-20; J. KOLIEB, "Through the Looking-Glass…" *cit*., p. 590-592.

[124] J. KOLIEB, "Through the Looking-Glass…" *cit*., p. 588.

[125] ANITA RAMASASTRY, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", in *Berkley Journal of International Law*, 91 (2002), 91 (106).

[126] Kiobel, 621 F.3d, p. 180 (cited by J. KOLIEB, "Through the Looking--Glass…" *cit*., p. 588).

[127] J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 594.

November 1945 that seized not only its assets, but also dissolved it to make sure that 'Germany will never again threaten her neighbors or the peace of the world' [128]. However, the dissolution has never occurred, as the Allies could not afford a weakened German economy in the light of the nascent Cold War. I.G. Farben was instead divided into Bayer, BASF and Hoechst, which were quickly found among the largest multi-national corporations [129].

Even the convicted natural persons escaped the consequences of their actions relatively quickly with *Alfred Krupp* resuming control of his firm in 1953 and *Fritz Ter Meer*, who played a key role in Farben's slave labour factories in Auschwitz, becoming the chairman of Bayer's board in 1956 [130]. That said, in the Nuremberg era (and beyond), the accountability gap was certainly not limited to corporations as legal entities.

1.2. Before the International Criminal Court

Corporate involvement in human rights harms occurring on the battleground or in conflict affected areas in general does not solely belong to the Nuremberg era. According to the categorisation provided by *Kaleck* and *Saage-Maaß*, recent cases encompass two typical scenarios: 1) the cooperation of corporations with military regimes and dictatorships, ranging from collaborating with a regime's abusive police or security forces to secure profits and supplying the regime with the necessary means to facilitate human rights abuses to directly supporting repression in kind of, for instance, persecution of political dissidents without direct financial profits; and 2) the involvement of corporations in conflict zones, ranging from sustaining the conflict by providing goods or illicitly funding it to being contracted by governments to fulfil a variety of tasks, such as logistics, security, training

[128] Law No. 9: Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof (1945), reprinted in *Property Control: Annex XVIII* 87 (1949) (cited by J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 593).

[129] J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 597.

[130] Ibid, p. 598.

and intelligence gathering or protection of persons, goods and transports [131].

While there is an ongoing debate as to whether corporations as non-State actors and particularly the PMSCs can be considered as addressees of treaty and customary IHL [132] or whether the only way to delimit such activities is through soft law instruments, such as the Montreux Document [133], or by means of self-regulation, such as the International Code of Conduct for Private Security Providers [134], the *ratione personae* jurisdiction of the ICC is shaped in a rather clear way. According to Art. 25 (1) Rome Statute, '[t]he Court shall have jurisdiction over *natural persons*' (emphasis added), that is, the ICC may not exercise jurisdiction over legal persons, including corporations.

However, when the Rome Statute was drafted, there was a proposal, stemming from the French Delegation, according to which '[t]he Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives' [135] and that liability 'shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes' [136]. That proposal was not adopted in the final text for various reasons [137], which can be divided into three categories: 1) practical difficulties (for example, evidentiary problems the ICC would encounter if it had to

[131] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., pp. 703-709.

[132] M. SASSÒLI, *International Humanitarian Law…*, *cit*., pp. 542-553.

[133] INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, Geneva, 2009.

[134] SCHWEIZERISCHE EIDGENOSSENSCHAFT, *International Code of Conduct for Private Security Service Providers*, 9 November 2010.

[135] UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/2/Add/1, Rome, 1998, Art. 23 (5).

[136] Ibid, Art. 23 (6).

[137] See J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 599-600; fn. 174.

prosecute legal persons); 2) normative-political issues, particularly related with the fact that, back at that time, corporate criminal liability (as opposed to civil tort liability) was largely rejected at domestic level and a disparity at international level would not comply with the nature of the ICC as a last resort court (principle of complementarity enshrined in Art. 17 Rome Statute); and 3) moral reasons, as the States were called to regulate the liability of all other entities than themselves [138]. The final decision against introducing corporate criminal liability was rather the outcome of time pressure and diplomatic expediency, considering that even defining the term 'international crime' was anything else but barrier-free [139]. In other words, that proposal was rejected as it could have jeopardised the Rome Statute's ratification by several States, particularly 'given the novelty of corporate exposure to criminal liability before the ICC' [140].

Today, though, the great majority of national jurisdictions hold corporations accountable for wrongful conduct under their criminal laws (despite shaping that liability's prerequisites differently) [141]. That said, one could reasonably wonder whether the ICC's jurisdiction can be extended to encompass legal persons, since domestic law serves as a proof that (at least) the (normative) obstacles can be removed — as argued in 2008 by the International Commission of Jurists

[138] ALBIN ESER, "Individual Criminal Responsibility. Mental Elements — Mistake of Fact and Mistake of Law", in ANTONIO CASSESE, PAOLA GAETA and JOHN R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, Oxford University Press, 2002, p. 779; MORDECHAI KREMNITZER, "A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law", in *Journal of International Criminal Justice*, 8 (2010), 909 (917); DAVID SCHEFFER, "Corporate Liability under the Rome Statute", in *Harvard International Law Journal*, 57 (2016), 35 (38).

[139] ROBERT CRYER, "The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth'", in *Journal of Conflict & Security Law*, 6 (2001), 3 (9-10).

[140] DAVID SCHEFFER, "Corporate Liability under the Rome Statute", in *Harvard International Law Journal*, 57 (2016), p. 38.

[141] For an overview see GERD EIDAM, in id (ed.), *Unternehmen und Strafe. Vorsorge — und Krisenmanagement*, 5th edn, Köln, Carl Heymanns Verlag, 2018, Chapter 6, para. 48 et seq.

(hereinafter ICJ) [142]. That opinion is also supported by scholars, who shift the focus onto the collective nature of international crimes and call for the recognition of corporate liability for human rights harms to safeguard ICL's integrity [143]. For instance, while presenting *Hannah Arendt*'s interpretation of Nuremberg trials' outcome, *Koskenniemi* points out that 'sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it' [144].

Besides the specificities of human rights abuses amounting to international crimes, one may also advocate the extension of ICC's jurisdiction by highlighting the special traits of criminal law as accountability forum compared to administrative sanctions and civil liability. Those encompass a well-equipped mechanism for investigation and evidence collection, an accessible prosecutor to victims, who are often helpless and unable to litigate, increased publicity, strong educational messages, a high level of due process and, thus, increased protection of the rights of suspected and accused persons [145]. To what extent the need for enhanced procedural safeguards and communicative power of the accountability mechanism may circumvent the persisting doctrinal burdens, particularly arising from the human-centred principle of guilt, is, as will be shown below, a matter of legal tradition.

In the case of the ICC, the extension of its personal jurisdiction on the basis of the aforementioned arguments would require *complex amendments*. Those amendments would entail not only the explicit reference to legal persons in Art. 25 (1) Rome Statute and the clarification that the term 'persons' used in Art. 1 Rome Statute shall mean both natural and legal persons, but also a delicate distinction between those two for a variety of purposes: evidence production; the exercise of due process

[142] INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, *Corporate Complicity & Legal Accountability, Volume 2: Criminal Law and International Crimes*, Geneva, 2008, pp. 57-59.

[143] For an overview see J. KOLIEB, "Through the Looking-Glass…" *cit*., p. 575.

[144] MARTTI KOSKENNIEMI, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 6 (2002), 1 (2).

[145] M. KREMNITZER, "A Possible Case for Imposing Criminal Liability…", *cit*., p. 916.

rights; defendant's physical presence and/or representation before court; State cooperation requirements; and penalties [146]. Such amendments would require approval by two-thirds of the State Parties (Art. 121 [3] Rome Statute). Subsequently, to enter into force for all State Parties, they shall also be ratified or accepted by seven-eighths of the State Parties in accordance with Article 121 (4) Rome Statute [147]. This is already a great diplomatic challenge, taking into account that States, the economies of which may be fueled by multinational corporations (and even dwarfed by those corporations' annual turnover), would most likely react rather hesitantly or even oppose those efforts given the potential financial costs associated with the ICC's interference with corporate activities [148].

Should those obstacles be overcome, the next question that arises is that of whether the ICL is indeed a better forum to address corporate human rights harms therein. While human rights law encompasses a great array of rights, including but not limited to civil, political, economic and cultural rights, the subject matter of ICL is considerably narrower by expressly focusing on genocide, crimes against humanity, war crimes and the crime of aggression (Art. 5 Rome Statute) [149]. Additionally, as already mentioned above, the ICC is a court of last resort. Its function is based on the principle of complementarity mandating that a case will be inadmissible and the ICC will not be able to exercise its jurisdiction, if a State, which has jurisdiction over it, is investigating or prosecuting it or has already done so or decided not to do so, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution or the decision reached has resulted from that unwillingness or inability (Art. 17 Rome Statute). This kind of prioritisation of national jurisdiction is not only a sign of

[146] D. SCHEFFER, "Corporate Liability ...", *cit*., p. 39.

[147] Scheffer argues that a maybe less stringent alternative would be to negotiate 'a protocol to the Rome Statute that would permit States Parties that ratify or accept it to "opt in" to coverage of juridical persons' (idem). Even in that case, he correctly underlines that this solution would still require the Rome Statute's radical transformation to accommodate corporate criminal liability requirements for those State Parties, which would choose to ratify or accept that protocol.

[148] D. SCHEFFER, "Corporate Liability ...", *cit*., p. 38.

[149] L.VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit*., p. 741.

respect for State sovereignty, but also the outcome of 'practical considerations of efficiency and effectiveness' inasmuch as States have better access to evidence and witnesses as well as better resources at their disposal to carry out proceedings [150].

Finally, should the personal jurisdiction of the ICC be actually extended, this would not automatically lead to a radical shift of focus from natural persons to corporations in terms of case selection and investigation [151] — considering *inter alia* the almost 20-year attachment of ICC's function to individual criminal liability and how the latter has shaped its (maybe not extensive) jurisprudence. Besides that, further restrictions already arise from increasing workload and resource limitations, in the light of which the ICC Prosecutor's Office plans to further prioritise amongst investigations and prosecutions [152].

The lack of jurisdiction over legal persons and the great challenges associated with its future establishment do not undermine the fact that the ICC continues constituting a rather unique venue to adjudicate cases against individual corporate officers — provided their actions or omissions can be subsumed under the crimes typified in the Rome Statute [153]. In that sense, corporate crime is on the ICC's agenda [154]. The adjudication of the respective cases remains, though, *inter alia*, a matter of prosecutorial strategy in the absence of a State or UN Security Council referral [155].

1.3. Before national courts

The extension of the ICC's personal jurisdiction to include legal persons was, *inter alia*, inspired by the *enforcement gap* at national

[150] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 153.

[151] L.VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law…", *cit*., pp. 741-742.

[152] INTERNATIONAL CRIMINAL COURT THE OFFICE OF THE PROSECUTOR, *Strategic Plan 2019-2021*, 2019, p. 18.

[153] Cf. D. SCHEFFER, "Corporate Liability…", *cit*., p. 36.

[154] Cf. J. KOLIEB, "Through the Looking-Glass…", *cit*., p. 601.

[155] Cf. W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., p. 710.

level, given that, back then, very few States held corporations accountable by means of criminal law [156]. In that sense, the inclusion of corporations as subjects of the ICC was associated with the hope to fill that gap. Those expectations were already too high, when they were first formulated, given the considerably limited subject-matter scope of the Rome Statute. Today, the *status quo* is rather different, as a considerable amount of national jurisdictions have endorsed corporate criminal liability.

Starting with the *common law jurisdictions*, corporate criminal liability has encompassed intentional wrongdoing in the US since the US Supreme Court issued a decision on the *New York Central & Hudson River Rail Co. v. US* [157] case. Corporate criminal liability has been derived since then from the *respondeat superior* doctrine, according to which the criminal acts of a corporate officer (independently of his/her hierarchical position) can be attributed to the corporation itself, when that act takes place within the scope of the corporation's authority with an intent to benefit the latter. Similarly, corporate criminal liability is a long-standing accountability mechanism in the UK. In 1915, Justice Haldane argued that '[a corporation's] active and directing will must [...] be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation' [158]. Nowadays, corporate criminal liability is provided for, *inter alia*, in the UK Corporate Manslaughter and Corporate Homicide Act (26 July 2007) and the UK Bribery Act (8 April 2010). Canada and New Zeeland have also adopted the *alter ego* doctrine, while Australia completed the accountability model with further elements such as that of corporate culture (Criminal Code Act [Australia] 1995) [159].

[156] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit.*, p. 741.

[157] New York Central & Hudson River Rail Co. v. US (1909), 481 (492 *et seq*).

[158] Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd. (1915) A.C. 705.

[159] For this overview see A. SACHOULIDOU, *Unternehmensverantwortlichkeit und — sanktionierung...*, *cit.*, pp. 301-302.

In the case of *civil law jurisdictions* and the Western European ones in particular, the economic post-war developments and their impact on modern industrial world triggered the adoption of corporate criminal liability laws [160]. Today, the following States provide for corporate criminal liability *stricto sensu*: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Island, Latvia, Lithuania, Malta, the Netherlands, Northern Macedonia, Norway, Poland, Portugal, Rumania, Slovenia, Spain, Sweden and Switzerland. Germany and Italy and — outside of Europe — Brazil, Chile and Russia have adopted quasi-criminal (also known as administrative-criminal) solutions for holding corporations accountable for wrongdoing. On the contrary, Bulgaria, Greece and Slovakia are the only States rejecting the idea of corporate criminal liability on doctrinal grounds and impose, instead, administrative sanctions against legal persons [161]. Among those States, the doctrinal debate has been considerably strong in Germany [162] and Greece [163]; in the case of Germany, that debate has been revived particularly since November 2013 and once again in June 2020, when draft legislation on

[160] MARK PIETH and RADHA IVORY, in MARK PIETH and RADHA IVORY (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk*, Dordrecht, Springer, 2011, 3 (9 *et seq*).

[161] For this overview see A. SACHOULIDOU, *Unternehmensverantwortlichkeit und — sanktionierung...*, *cit.*, pp. 302-303. See also JAMES GOBERT and ANNA-MARIA PASCAL (eds.), *European Developments in Corporate Criminal Liability*, London, Routledge, 2011; ANTONIO FIORELLA (ed.), *Corporate Criminal Liability and Compliance Programs. First Colloquium, Sapienza University of Rome 12-14 May 2011*, Napoli, Jovene, 2012; DOMINIK BRODOWSKI, MANUEL ESPINOZA DE LOS MONTEROS DE LA PARRA, KLAUS TIEDEMANN and JOACHIM VOGEL (eds.), *Regulating Corporate Criminal Liability*, Cham; Heidelberg, Springer, 2014.

[162] For an overview see, for instance, THOMAS WEIGEND, "Societas delinquere non potest? A German Perspective", in *Journal of International Criminal Justice*, 6 (2008), 927-945; GÜNTHER KLAUS, "Nulla poena sine culpa and corporate personhood", in *Kritische Vierteiljahresschrift für Gesetzgebung und Rechtswissenschaft*, 98 (2015), 360-376.

[163] For an overview see, for instance, MARIA PAPAIOANNOU, *Το πρόβλημα της ποινικής ευθύνης των νομικών προσώπων — επιχειρήσεων. Δογματική ανάλυση και αναζήτηση ενός εναλλακτικού μοντέλου ευθύνης* (*The problem of corporate criminal liability: A doctrinal analysis in search of an alternative model of liability*), 2011, available at: https://www.didaktorika.gr/eadd/handle/10442/28140 (last access: 29 July 2021).

corporate liability *ex crimine* was proposed (even if none of those draft laws has been adopted yet) (164).

The differences among the corporate criminal liability models adopted in the States mentioned above are significant (165) — given the close connection between criminal law and national legal and doctrinal traditions. One of those differences refers to the range of corporate criminal accountability as reflected in the distinction between the all--crime and the list-based approach (166). In the first case, a legal person may be held accountable for all crimes a natural person may be liable, namely for all possible criminal offences codified in a certain jurisdiction. In the case of the list-based approach (adopted by Czech Republic, Italy, Poland, Portugal and Spain), corporate criminal liability is limited to specific criminal offences, the choice of which reflects common corporate risks and regional or international obligations (see Section III.2.2.1). The Swiss legislator combines those two models providing for different liability requirements in each case (so-called 'dual approach') (167). That said, in States adopting a list-based-approach, should human rights abuses and international crimes in particular be left outside of that list, the national courts will have no jurisdiction over the corporations involved in such wrongful activities. If that kind of corporate 'behaviour' is part of the list or a State follows, instead, an all-crime-approach, the ground, upon which national jurisdiction may be exercised, needs to be clarified:

Looking at the traditional heads of jurisdiction, the *territoriality principle*, under which States are entitled to exercise jurisdiction over all events occurring on their territory (including ships and aeroplanes

(164) A. SACHOULIDOU, *Unternehmensverantwortlichkeit und — sanktionierung...*, *cit.*, pp. 278-284; id., "Entwurf eines Verbandssanktionengesetzes — Eine kritische Auseinandersetzung mit den materiell-rechtlichen Kernvorschriften", in *Neue Juristische Online Zeitschrift*, 2021, 353-360.

(165) See, for instance, CHRISTINA DE MAGLIE, "Models of Corporate Criminal Liability in Comparative Law", in *Washington University Global Studies Law Review*, 4 (2005), 547-566.

(166) M. PIETH and R. IVORY, *Corporate Criminal Liability...*, *cit.*, p. 20.

(167) For this overview see A. SACHOULIDOU, *Unternehmensverantwortlichkeit und — sanktionierung...*, *cit.*, pp. 625-626.

registered in them), is the least controversial ground of jurisdiction [168]. The same principle *lato sensu* applies, when a crime originates or is completed abroad as long as one of its elements occurs on the State's territory (objective and subjective territoriality respectively) [169]. The validity of the territoriality principle is not doubted at international level. Nevertheless, States often appear to be reluctant when it comes to prosecuting international crimes occurring on their territory, or when they actually take the initiative to prosecute those crimes, fair trial guarantees might be compromised [170].

Equally well-established is the *nationality principle*. In the case of active nationality, States have the right to exercise jurisdiction over the crimes committed by their nationals (in the case of legal persons: those registered in that specific State) and permanent residents (in some cases) abroad [171]. Concerning international crimes, active nationality serves as a ground to establish national jurisdiction not only in the case of members of armed forces, but also extends to civilians [172]. Of key importance is the 'link between a national and the State to which he or she owes allegiance' [173]. According to the test for nationality developed in the *Nottebohm* case (originally referring to the exercise of diplomatic protection and not to a jurisdictional matter), 'the person with the purported nationality must have a "genuine connection" with the State he or she is an alleged national' [174].

In the case of passive personality, the focus lies instead on the offences committed against the nationals of a State abroad [175]. The applicability of that principle (often deployed by the US with regard to terrorist offences) remains disputable at international level. In the *Lotus*

[168] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 46.
[169] Idem.
[170] Ibid, p. 47.
[171] Ibid, pp. 47-49.
[172] Ibid, p. 47.
[173] Idem.
[174] Lichtenstein v. Guatemala (1995) ICJ Reports 4 (cited by R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 48).
[175] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 49.

case [176], for instance, all the judges supported the opinion that customary international law does not accept passive personality, even if the judgment itself did not contain such a ruling [177]. Nevertheless, the exercise of national jurisdiction on the grounds of passive personality is traditionally accepted in the case of war crimes [178].

Additionally, a State has the right to exercise jurisdiction over extraterritorial activities to protect its own interests. That is the case with activities threating a State's own security, such as the crime of spying. The protective principle is rarely applied in ICL cases, as it usually overlaps with territoriality, active or passive personality principles [179].

Finally, national jurisdiction may be exercised on the basis of the *universality principle* that — in opposition to the territoriality principle — constitutes the most controversial principle of jurisdiction in general and in ICL in particular. According to that principle, States are entitled to exercise jurisdiction over specific crimes irrespective of whether those take place on their territory, without reference to the nationality of the offender or the victim and without requiring a substantial link between the crime and the prosecuting State [180]. Among those crimes that are deemed to concern the international legal order as a whole, one may find war crimes, crimes against humanity, genocide and torture [181]. Controversial remain though the conditions, under which a State may assert jurisdiction on that ground, as well as whether a State may do so and ought to do so [182]. This is why, despite its origins going back to (at least) the 1949 Geneva Conventions (hereinafter GC) (Art. 49 GC I [183]), which are ratified by every

[176] SS Lotus (France v. Turkey) (1927) PCIJ Rep., Ser. A, No. 10.

[177] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 49.

[178] Idem.

[179] Ibid, p. 50.

[180] Ibid, pp. 50-51.

[181] Ibid, p. 51.

[182] Ibid, pp. 51-62.

[183] '[…] Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. […]'

State in the world, universal jurisdiction has been exercised in just a few cases as far as the subject matter of ICL is concerned (for instance, *Adolf Eichmann* and *John Demjanjuk* cases; UK's War Crimes Act 1991; Australia's War Crimes Amendment Act 1988; *Pinochet* case) [184]. While Belgium has activated several times its 1993 legislation on grave breaches, in widely reported cases, such as that of *Yaser Arafat* and *Fidel Castro*, those proceedings have never been completed (cf. the *Yerodia* case too, which was ultimately brought before the ICC) — a development serving as an indication of universal jurisdiction's decline and leading Belgium to amend its universal jurisdiction laws [185].

Today, Germany, which like other countries has incorporated international crimes into its domestic law and adopted universal jurisdiction over them [186], has asserted jurisdiction on the grounds of universality in several cases. Those include, for instance, the genocide of Yazidis [187], cases of Syrian State-sponsored torture [188] and the killing of a Saudi journalist (Jamal Khashoggi) in Istanbul [189].

Nevertheless, passing national laws on universal jurisdiction over international crimes (and in general) does not guarantee a successful prosecution, as this neither generates an obligation to collaborate for the territorial or nationality State nor overcomes issues of inter-cultural understanding [190]. Moreover, 'forum shopping' cannot be excluded

[184] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., pp. 53-55.

[185] Ibid, pp. 55-57.

[186] Ibid, p. 58.

[187] ALEXANDRA LILY KATHER and ALEXANDER SCHWARZ, "First Yasidi Genocide Trial Commences in Germany", in *Just Security*, 23 April 2020, available at: https://www.justsecurity.org/69833/first-yazidi-genocide-trial--commences-in-germany/(last access: 29 July 2021).

[188] EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, First criminal trial worldwide on torture in Syria before a German court, available at: https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria--before-a-german-court/(last access: 29 July 2021).

[189] DEUTSCHE WELLE, RSF files criminal complaint against Saudi crown prince in Germany, available at: https://www.dw.com/en/rsf-files-criminal-complaint--against-saudi-crown-prince-in-germany/a-56744342 (last access: 29 July 2021).

[190] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 60.

giving rise to violations of the rights of defendants and the *ne bis in idem* principle [191].

In the case of corporate human rights harms, the identification of the appropriate forum for criminal proceedings generally remains a challenge. The host State or the home State usually appear to be the first choice [192]. That choice, though, is not free of concerns. As implied above, the host State usually has better access to evidence and witness testimonies in particular and the exercise of jurisdiction on its behalf may also lead to a social and political debate on how to deal with human rights abuses at domestic level. Nevertheless, cases of corruption obstructing the administration of justice, direct political interventions, inadequacies of law or lack of law enforcement cannot be excluded [193]. Besides territoriality and active personality principles, the exercise of jurisdiction upon the grounds of universality is still possible as explained above — particularly, in States, like the Netherlands, which created special units to facilitate the prosecution of international crimes on the basis of universality (and active personality) [194]. The same States could even be the future protagonists of the extension of the ICC personal jurisdiction, in order to enable the adjudication of criminal complaints against corporations [195].

In practice, however, those States only hesitantly assert jurisdiction over offences committed by corporations based on their territory for extraterritorial wrongful activities [196]. In that sense, the *LaFargeHolcim* case — with the group Lafarge itself facing complaints for complicity in war crimes and crimes against humanity, financing a terrorist enterprise, deliberately endangering people, exploitative labour work, undignified working conditions and forced labour before the French courts because of the events occurred in its subsidiary in Syria

[191] Idem.

[192] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations...", *cit.*, p. 714.

[193] Ibid, p. 715.

[194] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit.*, p. 740.

[195] D. SCHEFFER, "Corporate Liability...", *cit.*, p. 39.

[196] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit.*, p. 740.

in 2013-14 [197] — remains rather unique. Even if the charges of complicity in crimes against humanity were rejected by the French court adjudicating the case in November 2019 (with the Paris Appeal Court maintaining at the moment the other charges), this is still the very first case, in which France initiated a prosecution against a corporation for wrongful activities taking place abroad and amounting to the commission of international crimes.

2. Applicable law and enforcement difficulties

2.1. Domestic criminal law and international obligations

Given that the ICC has no jurisdiction over crimes committed by legal persons, their prosecution at national level constitutes the only available solution, should they be involved in wrongful activities amounting to an international crime. That solution requires — besides criminal jurisdiction (see Section III.1.1.3.) — applicable national criminal laws. There are international conventions, such as the Genocide Convention (Art. *V)* and the 1949 Geneva Conventions (Art. 49 GC I; 50 GC II; 129 GC III; and 146 GC IV) expressly requiring States Parties to adopt the necessary rules at domestic level. Depending on the choices reached at constitutional level, some States transpose those international obligations into domestic law by adopting implementing legislation, while in some others international law of that kind becomes directly applicable [198].

The special legislation that may be introduced is not necessarily satisfactory, as — even when the definitions correspond to those adopted in international law — the modes of liability shaped by the latter might be 'overlooked or inadequately addressed by the application of ordinary domestic criminal law principles' [199]. Besides that, the

[197] EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, *Case Report Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity*, available at: https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf (last access: 29 July 2021).

[198] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 73.

[199] Ibid, p. 74.

possibility of designing or interpreting national law in a way that facilitates its selective application cannot be excluded [200]. And even when domestic criminal law offences, which are more familiar to national judges compared to international law itself, are interpreted in good faith, the standards finally imposed might be considerably narrower compared to those set by the respective international law [201].

In that context, the Rome Statute has served as a 'catalyst for domestic legislation' — a conclusion primarily based on the principle of complementarity allowing the ICC to intervene, when the State having jurisdiction is, *inter alia*, either unwilling or unable to exercise it [202]. Given the strong national character of criminal law and criminal justice, States will want to pass the complementarity test, which requires, among other things, enacting appropriate laws at domestic level [203]. In that way, States are also given a chance to prove in practice their willingness to combat impunity and to address atrocities no matter how powerful the offender might be.

That task presupposes delicate political and legal considerations [204]. That burden is relatively high in the case of natural persons, but non-existent, as explained above, in the case of legal persons, over which the ICC has no jurisdiction. Irrespective of that, the approaches adopted by States with that regard may be classified as follows: 1) ensuring that the channels of criminalisation available at domestic level match that of the ICC, so that the latter will not have to intervene and the State will not have to bear the political cost of such an intervention; 2) transforming the Rome Statute's offences into the usual legal terminology of the national legislation; or 3) making sure that the offences codified in the Rome Statute fall into the scope of the 'ordinary' domestic offences [205].

[200] Idem.

[201] Ibid, p. 75; cf. W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations...", *cit*., p. 715.

[202] R. CRYER *et al*, *An Introduction to International Criminal Law and Procedure*, *cit*., p. 75.

[203] Idem.

[204] Idem.

[205] Ibid, pp. 75-76.

When it comes particularly to legal persons, soft-law instruments establish standards (even if non-binding) for shaping domestic law. For instance, Art. 7 of the Revised Draft of the Proposed Business and Human Rights Treaty provides that 'State Parties shall ensure that their domestic legislation provides for *criminal*, *civil or administrative* liability of legal persons' (emphasis added) for a list of crimes that includes war crimes, crimes against humanity and genocide (namely three out of the four basic categories of international crimes), torture, cruel, inhuman or degrading treatment, enforced disappearance, extrajudicial execution, forced labour, the use of child soldiers, forced eviction, slavery and slavery-like offences, forced displacement of people, human trafficking, including sexual exploitation, sexual and gender-based violence (with the majority of those crimes being codified as distinct genocidal acts, war crimes or crimes against humanity in the Rome Statute). In that context, the legislator is granted the same flexibility (s)he enjoys at EU level; that is, when imposing sanctions against legal persons, (s)he is only obliged to punish them by providing for *effective, proportionate and dissuasive sanctions or measures*. In other words, the national legislator has discretion as to the choice between criminal, administrative or civil sanctions. That approach to corporate liability *ex crimine* is almost identically adopted in various EU legal instruments [(206)]. That is a way to

[(206)] For instance, Art. 5-6 Framework Decision 2003/568/JHA of the Council of 22 July 2003 on combating corruption in the private sector; Art. 5-6 Framework Decision 2008/841/JHA of the Council of 24 October 2008 on the fight against organized crime; Art. 8-9 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse; Art. 6-7 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA; Art. 17-18 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; Art. 6-9 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law; Art. 10-11 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA. See MARC ENGELHART, "Unternehmensstrafbarkeit im europäischen und internationalen Recht", in *eucrim*, 3 (2012),

acknowledge not only that the criminal sanctions are the 'harshest weapons in the arsenal of a [S]tate when reacting to misconduct', but also the close link between them and the national cultural, social and historical roots of a certain jurisdiction [207]. The latter has blocked, as shown above, the recognition of corporate *criminal* liability in several national jurisdictions.

2.2. Enforcement restraints

In theory, the legal basis for holding corporations involved in the commission of international crimes accountable exists, as a great number of States, and particularly the EU Member States, have adopted schemes of corporate criminal liability and incorporated international criminal law provisions and the Rome Statute in particular into their domestic law [208]. As explained above, this might not be the case in those States that, following a list-based approach to corporate criminal liability (or corporate liability *ex crimine* as regards the States that have adopted non-criminal-law solutions), chose to exclude international crimes from the subject-matter scope of the respective laws. That kind of obstacle is, though, of marginal importance (in quantitative terms), as most of the EU Member States have opted in favour of the all-crime approach — with the judiciary taking on the difficult task of interpretation, namely deciding whether as specific crime can be committed by a non-human actor or not. In that sense, the lack of rules as a problem concerns a small number of countries. Nevertheless, this does not automatically mean that national law enforcement and criminal justice authorities are willing or able to apply the existing rules, particularly in extraterritorial cases [209].

110-123; NICOLA SEVAGGI, "Ex Crimine Liability of Legal Persons in EU Legislation. An Overview of Substantive Criminal Law", in *European Criminal Law Review*, 4 (2014), 46-58; ANDREAS RANSIEK, "Criminal Sanctions against Corporations?", in *European Criminal Law Review*, 5 (2015), 337-346

[207] HELMUT SATZGER, "The Harmonisation of Criminal Sanctions in the European Union — A New Approach", in *eucrim*, 2019, 115 (119).

[208] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations...", *cit.*, p. 715.

[209] Ibid, p. 716.

When seeking to investigate corporate criminality in general, the authorities usually encounter *complex organisational structures* that do not allow (or at least adversely impact on) the identification of the individuals acting on behalf of and for the benefit of the corporation. Or the corporate activity might be so divided (for instance, due to complicated delegation-of-tasks and decision-making schemes) that it becomes considerably difficult, if not impossible, to identify single wrongful acts/omissions that amount to a criminal offence for which the corporation can be blamed [(210)]. This poses a significant obstacle to the successful investigation and prosecution of corporate crime — almost irrespective of the corporate criminal liability system chosen by the national legislator — inasmuch as even in the cases, where the emphasis is put on the so-called corporate elements (for example, corporate structure, organisation or culture), the latter shall be materialized in *concrete* acts or omissions that fulfil the individual criminal liability requirements, and particularly that of guilt. The absence of such an act/omission or the inability to identify it inevitably impacts on the individual liability of corporate officers too [(211)]. The attribution of liability becomes more complicated in the case of corporate human rights harms that takes place in conflict affected areas as the actual corporate decision-makers may be located at a great distance from the place where the harm occurs. And that 'distance' increases when the corporation does not even use its own staff, but suppliers when involved in the commission of an international crime [(212)]. In that context, proving the mental elements of criminal liability, such as the element of knowledge, becomes an even greater challenge, considering, *inter alia*, the unpredictability associated with business activities in distant countries and in insecure political situations as well as the difficulties associated with the distinction between

[(210)] A. SACHOULIDOU, *Unternehmensverantwortlichkeit und — sanktionierung...*, *cit*., pp. 60-65.

[(211)] Cf. ibid, pp. 216-219.

[(212)] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations...", *cit*., p. 716.

legitimate business risks and decisions deliberately putting human lives at risk [213].

Additionally, one shall also consider the (often) political background of international crimes as such and their investigation. *Kaleck* and *Saage-Maaß* underline the role of economic elites in that regard by explaining how those might escape prosecution and punishment even when the legitimate power is re-established; that is, there is an increased interest to 'keep certain company structures in [the] countries [having suffered, for instance, a severe national armed conflict or experienced a repressive regime] *regardless of allegations of human rights*' (emphasis added) [214]. In other words, business continuity is prioritized on the basis of strong power relations, while the access to justice, whether criminal or civil, for the victims is obstructed.

Should the political will for investigating, prosecuting and punishing wrongful corporate activity exist, the next challenge is to identify not only the criminally relevant behaviours as shown above, but also to determine when neutral business activities, such as the provision of goods or financial resources, may be classified as such or — in other words — to distinguish between illegality and immorality [215]. That presupposes a further distinction regarding the goods supplied by the corporation at hand, namely a distinction between goods being dangerous *per se* (with weapons being the most representative example) and dual-sue ones (for instance, a computer programme) that also impacts on the *mens rea* requirements [216]. To determine when a corporation crosses the threshold, beyond which its activities cannot be considered as neutral business, the ICJ provides for criteria upon which a certain conduct shall be avoided. That is a conduct enabling specific abuses to occur or exacerbating them in terms of worsening the situation at hand ('including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency') or facilitates them (including where the corporation 'changes the way the abuses are carried out, including the

[213] Cf. idem.
[214] Ibid, p. 718.
[215] Ibid, pp. 720-721.
[216] Ibid, p. 721.

methods used, the timing or their efficiency') [217]. As far as the *mens rea* elements are concerned, the ICJ report requires that the corporation or its employees 'actively wish to enable, exacerbate or facilitate the abuses' amounting to international crimes or, if this is not the case, they 'know or should know from all the circumstances, of the risk that their conduct will contribute to [those] abuses, or are wilfully blind to that risk' [218]. Considering the evidentiary difficulties mentioned above, the same report finally requires the corporation's or its employees' proximity to the principal perpetrator of the offences at hand or the victim. That proximity might arise from the 'geographic closeness or [from] the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned' [219]. To identify links of that kind, considerable resources are required at law enforcement level as well as willingness to go beyond the direct perpetrators, namely those acting on the ground, and the 'main' atrocities to identify corporate actions taking place in the background [220]. This presupposes not only shifting the focus onto corporate actors, but also safeguarding access to often confidential information, in order to gather the evidence required for a criminal prosecution.

IV. CONCLUSION: EXISTING WEAKNESSES AND WAYS TO MOVE FORWARD

The potential for companies to support national economies by 'stimulat[ing] economic growth, development and employment' can positively impact — at least in theory — on the improvement of human rights situation in the countries where they choose to place their

[217] INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, *Corporate Complicity & Legal Accountability, Volume 1: Facing the Facts and Charting the Legal Path*, Geneva, 2008, p. 9 (also cited by W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., p. 721).

[218] Idem.

[219] Idem.

[220] W. KALECK and M. SAAGE-MAASS, "Corporate Accountability for Human Rights Violations…", *cit*., p. 722.

investments by transferring, *inter alia*, part of their business [221]. In practice, however, there have been numerous cases in which the presence of corporations in developing and often conflict affected areas has had an adverse impact on human rights *status quo* as it has caused or contributed to grave human rights abuses and environmental harm. Against this backdrop, affected individuals and communities have turned to various accountability mechanisms in the realm of both private international law and criminal law in an attempt — not always successful — to obtain access to remedy.

Tort law has been a traditional forum for claimants to bring their legal claims for corporate human rights harms. Given the cross-border nature of these actions, the private international law mechanisms have been deployed to determine notably the jurisdiction and applicable law. Today, however, the trends observed before national courts are rather controversial: The dynamic of the ATS that served as a ground for those claims before US courts has progressively been reduced in the context of civil claims arising out of human rights violations, whilst defendant companies have benefited from US courts' reliance on the *forum non conveniens* doctrine. The EU seems to offer a friendlier environment, at least for claims that are filed against EU-based companies, thanks to the Brussels I Recast Regulation. The latter, though, is anything else but free from limitations as — most importantly — its personal scope captures principally EU-domiciled defendants — which means that the jurisdiction of EU Member States' courts over third country defendants depends on the content of domestic rules on jurisdiction of the forum, which creates legal uncertainty and gives rise to delays. As regards the applicable law, considerable limitations arise from the *lex loci damni* rule that the Rome II Regulation provides for as the conflict of law rules applicable to transborder tort claims, considering that the choice of the host State on the part of companies is often (if not always) driven by the "flexible" regulatory standards or their weak enforcement in certain States. Against this background, regulatory reform is urgently needed to strengthen the jurisdiction of

[221] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law...", *cit.*, p. 726.

EU Member States Courts over both EU-based companies and their foreign subsidiaries and business partners, and to establish a *forum necessitatis* in cases where the claimants cannot obtain adequate access to justice elsewhere. In addition, it is necessary to access to Member State laws as applicable law through the provision of the choice of law for claimants in this type of cases in order to redress the imbalances of powers between the parties and to address the limitations of the host State law as the applicable law.

Turning the spotlight to international criminal law as a set of non-State-oriented rules of ascribing liability for international crimes, the main challenge that arises as to holding corporations accountable under this field of law is related to its criminal law-counterpart [222]. The lack of recognition of corporate criminal liability at domestic level blocked the inclusion of legal persons in the ICC jurisdiction when the Rome Statute was drafted — fact that has not been overturned yet. Despite that, today, the majority of national jurisdictions provide for corporate liability *ex crimine* either in the realm of criminal law or by adopting hybrid solutions or imposing administrative sanctions. Considering the persisting lack of ICC jurisdiction on corporate human rights harms and the normative and political difficulties associated with attempts to overturn this *status quo* as well as the enforcement restraints arising at national level, which are mostly of practical or political nature, alternative priorities need to be set to enable access to justice for victims.

The focus shall lie on holding individual corporate officers accountable before the ICC for the crimes falling into its jurisdiction (making use, for instance, of the mechanism of superior responsibility scheme as enshrined in Art. 28 [b] Rome Statute) *and* furthering national corporate criminal liability schemes to ensure, *inter alia*, that international crimes fall into their scope (when this is not already the case) [223]. Measures of that kind follow a more pragmatical approach to corporate liability that is better adjusted to the specificities of the legal reality at international and national level. The real exposure of

[222] L. VAN DEN HERIK and J. LETNAR ČERNIČ, "Regulating Corporations under International Law…", *cit.*, p. 742.

[223] D. SCHEFFER, "Corporate Liability…", *cit.*, p. 39.

corporate officers before the ICC in particular could also be perceived as 'a risk in corporate circles' and, as such, impact on corporate conduct in conflict affected areas, especially if that 'risk' becomes clear in the context of educational and training activities [224]. That shall also increase the general preventive function of such measures.

[224] Ibid., p. 37.