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CRIMINAL LIABILITY AND COMPULSORY IN INTERNATIONAL CRIMINAL JUSTICE: THE CASE OF CORPORATIONS

RESPONSABILIDAD PENAL Y OBLIGATORIA EN LA JUSTICIA PENAL INTERNACIONAL: EL CASO DE LAS EMPRESAS TRANSANCIONALES

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Abstract: The present study aims to explore the relationship of criminal liability and compulsory in international criminal justice according the founding of international individual criminal responsibility in relation on the Transnational Corporations. There are few cases in which an International Criminal Court has used previous international jurisprudence to establish a crime of conduct in international customary law, and in any case the importance of international judgments can not be underestimated as a general interpretative tool. The offer of incriminating solution that serves as an *extrema ratio* for the criminal penalties that are imputable to multinational companies and which completes the sanctioning apparatus of international law is one of the solution offered and the result of a reconstruction that started mainly from the examples of national laws, but it should not be overlooked, that the penal responsibility of the multinational companies was expressly foreseen and regulated in the draft of the Statute of the International Criminal Court.

Keywords: TNCs, international crimes, international criminal justice, international responsibility, criminal liability, IMN.

Resumen: El presente estudio tiene como objetivo explorar la relación de responsabilidad penal y obligatoria en la justicia penal internacional de acuerdo con la fundación de la responsabilidad penal individual internacional en relación con las empresas transnacionales. Hay pocos casos en los que una Corte Penal Internacional ha utilizado jurisprudencia internacional anterior para establecer un delito de conducta en el derecho internacional consuetudinario, y en cualquier caso, la importancia de las sentencias internacionales no puede ser subestimada como una herramienta interpretativa general. La oferta de solución incriminatoria que sirve como una proporción extrema para las sanciones penales que son imputables a las empresas multinacionales y que completa el aparato sancionador del derecho internacional es una de las soluciones ofrecidas y el resultado de una reconstrucción que comenzó principalmente a partir de ejemplos de leyes

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nacionales. Leyes, pero no debe pasarse por alto, que la responsabilidad penal de las empresas multinacionales fue expresamente prevista y regulada en el proyecto de Estatuto de la Corte Penal Internacional.

Palabras claves: TNCs, crímenes internacionales, justicia penal internacional, responsabilidad internacional, responsabilidad penal, IMN.

1 INTRODUCTION

The multinational companies are identified as actors in the current political and economic reality which also have significant benefits, such as the economic and technological growth of developing countries[2]. But it should not be forgotten that the work of multinational companies has sometimes conditioned the protection of fundamental rights, which, very often, are subject to strong restrictions. This would make it necessary to "moralize" multinational companies and regulate their activity in the current globalized market environment. This question brings with it a series of questions, just consider the examination of the most relevant cases that may arise; the identification of the current measures aimed at preventing and repressing the illicit conduct of the multinational companies and the effects of their imputed behaviors that derive to the detriment of the interests of individuals and collective interests. One can perhaps speak of a process of structural metamorphosis of international law. This is due, for two reasons, connected to each other. The first is to refer to the "subversive" or "revolutionary" nature of the theory of human rights with respect to the ratio that permeates the relations between States, since it is in contrast with the principle of sovereignty, which is the basic principle of traditional international law[3]. The reference runs to the so-called international law of coexistence, all set on an

[2] According to Higgins the Multinational societies: "(...) as participants with differing degrees of participation in the international law-making process is a very persuasive one in light of the fact that international law is no longer simply a body of rules for the regulation of interstate relations (...)". R. HIGGINS, Problems and process: International law and how we use it. In: J. ZERK, Multinationals and corporate social responsibility, Cambridge University Press, Cambridge, 2006, pag. 74. In the same opinion see. O.K. FAUCHALD, J. STIGEN, Corporate responsibility before International institutions, in George Washington International Law Review, 40, 2008, pp. 1025, 1029ss. M. NOORTMANN, A. REINISCH, C. RYNGAERT, *Non-State actors in international law*, Hart Publishing, Oxford & Portland, Oregon, 2015, pp. 154ss.

[3] T. MERON, *International law in the age of human rights*. General course on public international law, in Recueil des Cours, 301, 2004, pp. 12ss.

individualistic and "privatistic" conception of relations between States, on the principles of reciprocity and bilateralism in matters of responsibility among States, while surviving the so-called international law of cooperation, which has increasingly been open to the protection of collective interests. International law is no longer exclusively a right between States, but it is only "primarily" a right between States; or that its "main" aim is to regulate relations among States, but it can sometimes also regulate individual relations[4] arriving to the punishment of serious crimes that enter the global sphere of international criminal justice.

2 GAPS IN INTERNATIONAL SOURCES REGARDING THE RESPONSIBILITY OF MULTINATIONAL COMPANIES FOR INTERNATIONAL CRIMES

The greatest difficulty, which has always met with respect to multinational companies, is the absence of an organic regulatory framework. Difficulties were reduced through the intervention of international organizations, which developed international documents aimed at filling the regulatory gap[5].

The main regulatory sources[6], which could allow the interpreter to find the criminal responsibility of multinational companies[7], it is necessary to start from a certain datum dating back to the draft of the Statute of the International Criminal Court (St-ICC)[8]. In particular according to the

[4] R.Y. JENNINGS, International law, in *Encyclopedia of Public International Law*, 2, 1995, pp. 1159-1178.

[5] A. CLAPHAM, The question of jurisdiction over multinational corporations under international criminal law, in M. T. KAMMINGA, S. ZIA-ZARIFI, *Liability of multinational corporations under international law*, Kluwer Law International The Hague, 2000, pp. 145 ss. N. JÄGERS, *Corporate human rights obligations*: in search of accountability, ed. Intersentia, Anversa, Oxford, New York, 2002, pp. 230ss.

[6] International Military Tribunal, case No. 57, I.G. Farben Trial, 14 August 1947-29 July 1948, in *Law Reports of the Trials of War Criminals*, vol. X, pp. 1 ss.

[7] I. KYRIAKAKIS, Corporations before international criminal courts: Implications for the international justice project, in *Leiden Journal of International Law*, 30 (1), 2017, pp. 222ss.

[8] A. CLAPHAM, The question of jurisdiction over multinational vorporations under international criminal law, op. cit. N. JÄGERS, corporate human rights obligations: in search of accountability, op. cit..

International Criminal Court (ICC), company officials who are involved in committing crimes under international law are susceptible to the increased risks of being investigated, prosecuted, and punished in a wide range of jurisdictions, including to the articles of the StICC. This may not result in legal consequences to the corporation itself, the involvement of corporate leaders in human rights abuses cases can damage a company's reputation and cash flow?!. A genuine consideration of what it means to be complicit in human rights violations and a change in company policy to prevent criminal liability[9] can save corporations money, time, and the risk of negative publicity. There have been significant developments in clarifying the standards of liability for companies under criminal international law[10], there still remains some confusion in the courts as to the proper test for determining the mens rea element[11] needed to link a corporation to a human rights abuse[12]. In particular,

[9] As we can see in the case of German, which remains a "bastion" of the traditional principle societas delinquere non potest, with the result that under the German legal system a corporation as a legal person cannot be held criminally liable. Instead, the prosecutor must identify the individuals responsible and only prosecute those particular individuals, a task that can prove significantly difficult when dealing with the complex corporate structures of modern-day MNCs. In argument: B. SWART, International trends towards establishing some form of punishment for corporations, in *International Criminal Justice*, 6, 2008, pp. 947, 949ss. P. MUCHLINSKI, Limited liability and multinational enterprises: A case of reform, in *Cambridge Journal of Economics*, 34, 2010, pp. 920ss.

[10] The aggregation principle grounds the criminal liability of corporations on the combined acts or omissions of individual agents where each act or omission is in itself insufficient. Mental states and conduct on the part of different individuals are joined together and considered as a whole. The underlying rationale is that a combination of personal transgressions or minor failures might reveal a gross breach of duty on the part of the company, or collective awareness that warrants the entity's responsibility for a criminal consequence. Some jurisdictions have been hesitant to extend the application of aggregation to crimes requiring proof of intent as opposed to only knowledge. Other legal systems have recognised the utility of the principle with regard to situations entailing recklessness and even gross negligence. E. POSNER, A. PORAT, Aggregation and law, in J.M. *Olin Program in Law and Economics Working Paper No*. 587, 2012. M. FINDLAY, J. CHAH HUI YUNG, *Principled international criminal justice*: Lessons form tort law, ed. Routledge, London & New York, 2018. M. FINDLAY, R. HENHAM, *Exploring the boundaries of international criminal justice*, ed. Routledge, London & New York, 2016, pp. 83ss.

[11] The *mens rea* purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting-which appear in the legal instruments of the East Timor Panels of Judges and the IHT955Article 15(2)(c) of the IHT Statute. A similar purpose test is applied in a number of domestic jurisdictions: Canada's Section 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 and New Zealand's Section 66(1) Crimes Act 1961; the Model Penal Code of the American Law Institute; Section 14(3)(c) of Regulation 2000/15. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias

it is known that the criminal liability of legal persons is not an abstract data, but a concrete fact that found in the draft of the statute of the ICC (St-ICC) a full normative recognition.

against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia's withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor. Farrell's approach here seems to be in keeping with the brief observations made by the Pre-trial Chamber in The Prosecutor v. Callixte Mbarushimana, and also the manner in which the Panels of Judges attributed accomplice liability in East Timor. See, Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center American Law Institute, Model Penal Code: Official Draft and Explanatory Notes, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985); The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges) (ICC, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: "(...) the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)", and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15. G. PLOMP, Aiding and abetting. The responsibility of business leaders under the Rome statute of the International Criminal Court, in Utrecht Journal of International and European Law, 30, 2014, pp. 8ss.

[12] The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind proposes to impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing themeans for its commission". The ICTY deemed the ILC Draft Code an "authoritative international instrument" In the Einsatzgruppen case (Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 572 (William S. Hein & Co., Inc. 1997) (1949) quoted in Furundzija, case No. IT-95-17/1-T, par. 218), the American military court also used a knowledge test, in contrast to the aforementioned purpose test, to convict defendant Fendler; the court determined that the defendant knew that executions were taking place. The ICTY Trial Chamber in Furundzija adopted a knowledge test: "(...) the mens rea required is the knowledge that these acts assist in the commission of the offence (...)". The ILC code also adopted the knowledge test. Under the ILC code, a person can only be found guilty of aiding and abetting, or otherwise assisting if they know that their help will facilitate a crime. The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the ad hoc tribunals. The *mens rea* of aiding and abetting is knowledge that the acts performed by an individual assist the commission of the specific crime by the principal perpetrator. Under this code, the aider and abettor need not share the mens rea element of the principal; but instead, must be aware of the essential elements of the crime that was ultimately committed by the principal. In crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent. In particular in the case of genocide, the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or ethnic group.

The arguments, *rectius* the open questions according to our opinion regarding a more solid, concrete and effective regime regarding the responsibility of the multinationals are: To a corporation that can be held liable internationally?, If a corporation brought before an international court or tribunal is prosecuted for complicity of some sort, what are the feasible measures that can be taken against them and why?

According to our opinion multilateral corporations can become implicated in gross human rights abuses fall into four categories: a) businesses and their managers are accused of being the main perpetrators; b) businesses supply equipment or technology in the context of a commercial trading relationship that is then used abusively or repressively; c) businesses are accused of providing information, or logistical or financial assistance, to human rights abusers that has "caused" or "facilitated" or exacerbated the abuse; and d) businesses are accused of being "complicit" in human rights abuses by virtue of having made investments in projects, joint ventures, or regimes that have poor human rights records or connections to known abusers[13].

In the round-up of the mandate of Professor John Ruggie, the Special Representative of the United Nations (UN) Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), attention to the particular promise of this field of international law as a key means of addressing the worst manifestations of business-related human rights abuse[14].

[13] Opinion concluded partially from: D. OLSON, Corporate complicity in human rights violations under international criminal law, in International Human Rights Law Journal, 5 (1), 2015. J.P. BOCHOSLAVSKY, V. OPGENHAFFEN, The past and present of corporate complicity: financing the argentinean dictatorship, in Harvard Human Rights Journal, 23, 2010, pp. 160ss.

[14] See, The SRSG's original mandate is set out in Human Rights and Transnational Corporations and Other Business Enterprises, Commission on Human Rights (CHR), UN Doc. E/CN.4/RES/2005/69, 20 April 2005. The UN Human Rights Council (HRC) extended the SRSG's mandate for a further three years in 2008. HRC, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/8/7, 18 June 2008. HRC, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008, parr. 47-49. HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business

The desire to prosecute legal entities found recognition in the Nuremberg Tribunal precedents This proposal was to be included in Article 23 of the Statute, in paragraph 5, where it was specifically foreseen that: "without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if: a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in sub paragraphs (b) and (c); and b) The natural person charged was in opposition of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and d) The natural person has been convicted of the crime charged. For the purpose of this Statute, "juridical person" means a corporations whose concrete, real, or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organisation registered and acting under the national law of a State as a non-profit organisation (...)"[15].

Enterprises, John Ruggie, UN Doc. A/HRC/17/31, 21 March 2011, Principle 7, pp. 10-11. HRC, Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/32, 27 May 2011. According to Seck: "(...) the Guiding Principles refer only to the inability of the host state to protect human rights in conflict contexts due to a lack of effective control, international criminal law teaches us that another factor often at play is an unwillingness on the part of host states to protect against international crimes due to the state's own involvement in such crimes (...)". S.L. SECK, Collective responsibility and transnational corporate conduct, in T. ISAACS, R.VERNON, Accountability for collective wrongdoing, Cambridge University Press, Cambridge, 2011, pp. 142ss.

[15] In United States v. Goering, the Nuremberg Tribunal found that: "(...) those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it (...) he had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent (...) if they knew what they were doing (...)". UN Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2, del 3 July 1998.

Despite this, even today there is a current international orientation[16] according to which it is possible to recognize the criminal responsibility of multinational companies using the St-ICC rules. In particular, the art. 25, number 3, letter (d) should be read in conjunction with art. 21, number 1, letter (c)[17]. The two rules can also be applied to legal entities by implementing the so-called extensive interpretation.

Besides the draft of the St-ICC, there are other normative sources that allow to recognize *de relato* the criminal responsibility of multinational companies. That said, *in primis* it is held against the Alien Tort Statute (ATS, also known as the Alien Tort Claims Act or ATCA)[18]. The relevance of

[16] J.KYRIAKAKIS, International legal personality, collective entities and international crimes, in N. GAL-OR, C. RYNGAERT, M. NOORTMANN (eds.), Responsibilities of the non-State actor in armed conflict and the market place: Theoretical considerations and empirical findings, ed. Brill, The Hague, 2015, pp. 82ss. M. ENGELHART, Corporate criminal liability from a comparative perspective, in D. BRODOWSKI et al. (eds.), Regulating corporate criminal liability, ed. Springer, Berlin, 2014, pp. 54ss. J.G. STEWART, Atrocity, commerce and accountability: The international liability of corporate actors, in Journal of International Criminal Justice, 8, 2010, pp. 314ss.

[17] B. HOLÁ, A. SMEULERS, C. BIJLEVELD, International sentencing facts and figures: Sentencing practice at the ICTY and ICTR, in Journal of International Criminal Justice, 11, 2011, pp. 415ss. S. JOSEPH, M. CASTAN, The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary, Oxford University Press, Oxford, 2013. J. KELDER, B. HOLÁ, J. VAN WIJK, Rehabilitation and early release of perpetrators of international crimes: A case study of the ICTY and ICTR, in International Criminal Law Review, 14, 2014, pp. 1180ss. L.A. KHAN, B.L. DIXON, L. PULFORD, International criminal Courts, ed. Sweet & Maxwell, 2014. R. KOLB, La Cour internationale de justice, ed. Pedone, Paris, 2014. R. KOLB, Peremptory international law, Jus cogens. A general inventory, Hart Publishing, Oxford & Oregon, Portland, 2017. R. KOLB, D. SCALIA, Droit international pènal, Helbing & Lichtenhahn, Basel, 2012. R. KOLB, The International Court of Justice, Hart Publishing, Oxford & Oregon, Portland, 2013, pp. 1280ss.

[18] J.G. STEWART, The turn to corporate criminal liability for international crimes: Transcending the Alien Tort Statute, in New York University Journal of International law & Politics, 47 (1), 2014, pp. 122. C.A. WHYTOC, D. EARL III CHILDRESS, M.D. RAMSEY, After Kiobel-International human rights litigation in State Courts and under State law, in UC Irvine Law Review, 3 (1), 2013, pp. 5ss. A.L. PARRISH, State Court international human rights litigation: A concerning trend, in UC Irvine Law Review, 3, 2013, pp. 26ss. P.L. HOFFMAN, B. STEPHENS, International human rights cases under State law and is State Courts, in UC Irvine Law Review, 3, 2013, pp. 10ss. J. HASNAS, The centenary of a mistake: One hundred years of corporate criminal liability, in American Criminal Law Review, 46, 2009, pp. 1330ss. For a critique of all sides of this debate for failing to take into account the realities of corporate responsibility for international crimes, see J.G. STEWART, A pragmatic critique of corporate criminal theory, 16 in New Criminal Law Review, 16, 2013, pp. 262ss. M.J. KELLY, Grafting the command responsibility doctrine onto corporate criminal liability for atrocities, in Emory International Law Review, 24, 2010, pp. 672ss. J.G. STEWART, The end of "modes of liability" for international crimes, in Leiden Journal of International Law, 25,

corporate liability for international crimes[19] to contemporary transitional justice efforts is most prominently evinced in the spate of Alien Tort Statute ("ATS")[20] cases launched against transnational corporate defendants, which have wound their way into the U.S. court system.

The American legislative system adopted in 1789 the Alien Tort Act[21], as a law that allows foreign actors to bring cases of damages in the federal

2012, pp. 165-219. C.M. VAZQUEZ, Alien tort claims and the status of customary international law, in American Journal of International Law, 106, 2012, pp. 534ss. D. SCHEFFER, The impact of war crimes Tribunals on corporate liability for atrocity crimes under US Law, in C. WALKER-SAID, J.D. KELLY, Corporate social responsibility? Human rights in the new global economy, Chiago University Press, Chicago, 2015.

[19] M. SAIF-ALDEN WATTAD, Natural persons, legal entities and corporate criminal liability under the Rome statute, in UCLA Journal of International Foreign Affairs, 391, 2016, pp. 394ss.

[20] See from the Supreme Court of the U.S. the case: Jerner et al., v. Arab Bank, PLC n. 16-499 of 24 April 2018.

[21] The ATS declared that: "(...) U.S. district courts shall have 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 U.S.". See: H. WARD, Securing transnational corporate accountability through National Courts: Implications and policy options, in Hastings International and Comparative Law Review, 24, 2000-2001, pp. 451ss. M. I. MOULLIER, Observations sur l'Alien Tort Claims Act et ses implications internationales, in Annuaire Française de Droit International, 49, 2003, pp. 129ss. C.T. SALAZAR, Applying international human rights norms in the United States: Holding multinational corporations accountable in the United States for international human rights violations under the Alien Tort Claims Act, in St. John's Journal of Legal Commentary, 19, 2004-2005, pp. 111ss. J. KURLANTZICK, Taking multinational to Court: How the Alien Tort Act promotes human rights, in World Policy Journal, 21, 2004, pp. 62ss. A.J. BELLIA, B.R. CLARK, The Alien Tort statute and the law of Nations, in The University of Chicago Law Review, 70 (2), 2011, pp. 8ss. In 2004, the Supreme Court interpreted the ATS for the first time in Sosa v. Alvarez-Machain. The Court held that the ATS was solely a jurisdictional statute and did not create a federal cause of action. At the same time, the Court assumed that the statute permitted aliens to bring claims like those that the First Congress had in mind when it enacted the ATS. Although the opinion is not a model of clarity, the Court repeatedly emphasized the importance of historical context to a proper understanding of the ATS. See, E.A. YOUNG, Sosa and the retail incorporation of international law, in Harvard Law Review, 28, 2007 (observing that the Sosa opinion-has become something of a Rorschach blot‖). C.A. BRADLEY, The Alien Tort Statute and Article III, 42 Vanderbilt Journal of International Law, 42, 2002, pp. 587, 630-631 (describing how the ATS was-consistent with the law of international responsibility in the late 1700s‖). M.G. COLLINS, The diversity theory of the Alien Tort Statute, Vanderbilt Journal of Internaional Law, 42, 2002, pp. 649, 652 (describing sovereigns' obligation to remedy law of nations violations). D.H. MOORE MEDELLIN, The Alien Tort Statute and the domestic status of international law, Vanderbilt Journal of Internatonal Law, 50, 2010, pp. 485 (arguing that Medellin reinforces Sosa's separation of powers approach to reading the ATS). T.H. LEE, The safe-conduct theory of the Alien Tort Statute, in 106 Columbia Law Review, 106, 2006, pp. 830, 871.

district courts for violations of the rules established by international law[22] and by the treaties signed by the USA. Its application in fundamental rights cases began to be invoked by the 1980s, provoking mixed reactions[23]. The reasons for such interest in a civil proceeding law in the United States lie in the inability of international law to provide effective instruments of protection when the active subject of criminal conduct is a society. The difficulty lies in the fact that the aforementioned traditional orientation recognizes only states as subjects of international law[24].

It is necessary to clarify that other subjects have entered the international scene[25]. The extension to other subjects can be found also taking into account the greater emphasis placed on the rights of the individual, who is the owner of the inalienable rights. As a result, it seems rather anomalous that states do not provide regulatory recognition for companies, especially for multinational corporations. For years, therefore, the United States has represented a unique opportunity for the repression of such crimes, offering, through the Alien Tort Act, a forum for claims for compensation. Indeed, many companies have a strong economic power that in some ways exceeds the one given to the States in which they invest, which, consequently, are not always able to ensure respect for the human rights of their citizens[26].

[22] M. NATARAJAN, International crime and justice, Cambridge University Press, Cambridge, 2010, pp. 52ss.

[23] D. SHAPIRO, Kiobel and corporate immunity under the Alien Tort Statute: The struggle for clarity post-sosa, in Harvard International Law Journal, 52, 2011. D.P. STEWART, I. WERTH, Kiobei v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute, in American Journal of International Law, 107 (3) 2013, pp. 602ss.

[24] E. BRANDABERE, Non-State actors and human rights corporate responsibility and the attemps to formalize the role of corporations as participants in the international legal system, in J. D'ASPREMONT (ed.), Participants in the international legal system multiple perspectives on non-State actors in international law, ed. Routledge, London & New York, 2011, pp. 270ss.

[25] P. MILLIET, Droits de l'homme et responsabilité des entreprises, in Covalence Intern Analyst Paper, 30.07.2009.

[26] See also: International Law Commission (ILC), "Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)" (ARSIWA), submitted to the UN General Assembly as part of the Report of the International Law Commission on the work of its 53rd session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, with commentaries on the articles. The General Assembly included the articles in Resolution 56/83, "Responsibility of States for internationally wrongful acts" (28 January 2002) UN Doc A/RES/56/83. The ultimate case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (30

Another important source in chronological order is found with the work of the United Nations since 1972[27]. The objective of the Organization was clarified by authoritative doctrine that supported "the conclusion of a general agreement on multinational corporations having the force of an international treaty and containing provisions for machinery and sanctions (...)"[28]. It should be noted that the Draft Code does not regulate the criminal liability of multinational companies, but its relevance in this area can not be denied since the Code of Conduct is an instrument of moral persuasion aimed at soliciting responsible and respectful conduct. of the values of the international community. As a result, the Commission on Transnational Corporations[29],

April 1990), XX UNRIAA 215 ("Rainbow Warrior"), par. 75. see, P.P. MIRETSKI, S.D. BACHMANN, The UN norms on the responsibility of transnational corporations and other business enterprises with regard to human rights: A requiem, in Deakin Law Review, 17 (1), 2012, pp. 12ss. KE. BOON, New directions in responsibility: Assessing the International Law Commission's Draft Articles on the responsibility of International Organizations, in Yale Journal of International Law, 37, 2011.

[27] See, ECOSOC, Official records-53rd session, 3-28 July 1972-Resolutions-Supplement No. 1 (E/5209). With this Resolution, adopted unanimously on July 2, 1972, ECOSOC asked the UN Secretary-General to set up a study group, composed of "eminent people"-selected in the public and private sector and representative of the different geographical areas-strictly informed about international economic, social and commercial issues and the consequent international relations, in order to study, in particular, the role of multinational corporations and their impact on development processes, especially in developing countries. In 1971, in fact, the World Economic Survey elaborated by the Department of Economic and Social Affairs of the UN Secretariat had affirmed, with reference to the multinational corporations, that: "(...) while these corporations are frequently effective agents for the transfer of technology as well as capital to developing countries, their role is sometimes viewed with awe since their size and power may surpass the host country's entire economy (...)". The international community was therefore (and for the first time) called to define a "positive policy" and to create an "effective machinery" to address the issues raised by the activity of the IMN. See: Department of Economic and Social Affairs, World Economic Survey, 1971-Current Economic Developments, United Nations - New York, 1972 (E/5144, ST/ECA/159), pp. 10.

[28] Department on Economic and Social Affairs (DESA), The Impact of Multinational Corporations on Development and on International Relations, 1974, ST/ESA/6 DESA, pp. 54ss.

[29] ECOSOC established this Commission as its advisory body with Res. ECOSOC n. 1913 (LVII) of 5 December 1974, The Impact of Transnational Corporations on the Development Process and on International Relations, in ECOSOC, Official records-Resumed 57th session, 14 and 18 October, 19, 26 and 19 November, 5, 10 and 16 December 1974-Resolutions-Supplement No. 1° (E / 5570/Add.1). In the same resolution the ECOSOC also established that the Information and Research Center on Transnational Corporations (CTC), established with the Expert Group, had suggested the development of a Code of Conduct, as a non-binding act, which was to operate as an instrument of "moral persuasion" Ris. ECOSOC n. 1908 (LVII) of 2 August 1974, The Impact of Transnational Corporations on the Development

starting in 1975, drafted a Code of Conduct on Transnational Corporations to be proposed to the Member States. In 1988 a first official version was drafted, but this tool has never received a unanimous consent. The debate continued until the 1990s when there was a further version of the draft code of conduct, which however was never approved by the General Assembly: the negotiations in this regard were therefore officially terminated in 1992 without a positive outcome.

The other regulatory source to refer to to build adequate regulatory coverage of the criminal liability of multinational companies is the Rules on the Responsibilities of Transnational Corporations and Other Businesses on Human Rights from 2003. Also for the 2003 Standards it is necessary to clarify that they do not regulate the criminal liability of multinational companies, but the relevance of the 2003 rules in this area can not be denied as they are considered as a tool that sets the rules for responsible and respectful conduct of the values of the international community. The 2003 rules recall, on the one hand, the principles and obligations deriving from the UN Charter (in particular its Preamble and articles 1, 2, 55 and 56) and, on the other hand, a series of international documents from which the general principles of the international community draw[30].

Process and on International Relations, in ECOSOC, Official records-57th session, 3 July-2 August 1974-Resolutions-Supplement No. 1 (E/5570), conducted its activities under the guidance of the Commission. Some have defined the creation of these two organs, "the most ambitious effort of the United Nations to influence the behaviour of transnational firms".

[30] Preamble and article 30 of the Universal Declaration of Human Rights, which clearly states that "every individual and every organ of society (...) shall strive (...) to promote respect for these rights and freedoms (...) to secure their universal and effective recognition and observance (...). The General Assembly has been affirming the TNC duty to respect human rights in recent resolutions concerning globalization and its impact on the full enjoyment of all human rights. Since the 65th session, resolutions in this series contain standard provisions: "Emphasizing that transnational corporations and other business enterprises have a responsibility to respect all human rights", and that: "(...) recognizes that (they) can contribute to the promotion, protection and fulfilment of all human rights and fundamental freedoms, in particular economic, social and cultural rights (...)". The resolutions were adopted by large majorities comprised chiefly of developing and the least developed countries. Although significant members in the minorities, including some countries in North America and Europe, opposed their adoption. Caution is then required from the interpreter assessing the effects of such resolutions G.A. Res. 65/216, supra note 48, was adopted by a 132-to-54 vote; G.A. Res. 66/161 (Mar. 22, 2012) (addressing globalization's impact on the full enjoyment of human rights) was adopted by a 137-to-54 vote (G.A. Dec. 66/161, annex, XI, U.N. Doc. A/11/1198 (Dec. 24, 2011)); and G.A. Res. 67/165 (Mar. 13, 2013) (also addressing globalization's impact on human rights) was adopted by a

margin of 133-to-54 with 2 abstentions (G.A. Dec., annex, VII, U.N. Doc A/11/331 (Dec. 20, 2012)). Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 16, 2011); Human Rights Council Res. 21/5, U.N. Doc. A/HRC/RES/21/5 (Oct. 16, 2012). Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003). See, C.F HILLEMANNS, UN norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, in German Law Journal, 4, 2003, pp. 1065, 1071ss. D. WEISSBRODT, M. KRUGER, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, in American Journal of International Law, 97, 2093, pp. 901, 902-915. L. CATÁ BACKER, Multinational corporations, transnational law: The United Nation's norms on the responsibilities of transnational corporations as harbinger of corporate responsibility in international law, in Columbia Human Rights Law Review, 37, 2006, pp. 287ss. D. KINLEY, R. CHAMBERS, The UN human rights norms for corporations: The private implications of public international law, in Human Rights Law Review, 6 (3), 2006, pp. 447ss. O. MARTIN-ORTEGA, Business and human rights in conflict, in Ethics & International Affairs, 22(3), 2008, pp. 273, 280ss. T. RULE, Using norms to change international law: UN human rights laws sneaking in through the back door, in Chicago Journal of International Law, 5, 2004, pp. 326ss. UN Draft Code of Conduct for Transnational Corporations (UNCTC, Transnational Corporations, Services and the Uruguay Round (United Nations, 1990) 231-243 (see particularly art 4)); the International Labour Organization in the Tripartite Declaration (International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)'(ILO, 1977); International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)-3rd Edition, ILO, 1 January 2006); International Labour Organisation, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)-4th Edition'(ILO, 1 January 2006); as well as in the OECD in its Guidelines for Multinational Enterprises (J. KARL, The OECD Guidelines for multinational enterprises, in M.K. ADDO (ed), Human rights standards and the responsibility of transnational corporations, Martinus Nijhoff Publishers, Leiden, 1999, pp. 98-106. OECD: The guidelines have since been reviewed five times, the latest in 2011. See The Organisation for Economic Co-operation and Development (OECD), "Declaration on International Investment and Multinational Enterprises" (adopted 21 June 1976, last reviewed 25 May 2011), Annex 1: "OECD Guidelines for Multinational Enterprises". Organization for Economic Co-Operation and Development, "OECD Guidelines for Multinational Enterprises" (Guidelines, OECD, 27 June 2000) Sub-Commission on the Promotion and Protection of Human Rights; Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Relationship between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations, 47th sess, Agenda Item 8, UN Doc E/CN.4/Sub.2/1995/11 (24 July 1995); Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter, 48th sess, Agenda Item 8, UN Doc E/CN.4/Sub.2/1996/12 (2 July 1996); Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Document on the Impact of the Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights, Prepared by Mr. El Hadji Guissé, Pursuant to Sub-

The 2003 rules assume that transnational companies and other commercial enterprises have a good capacity to support economic well-being and development. The capacity found is counterbalanced by the ability to produce a painful impact on human rights and the standard of living of individuals. As a result, the 2003 rules contribute to regulatory production and the development of international law regarding liability and related obligations, but they are not binding. With regard to obligations, the 2003 rules specify the behavior that States must take. In particular, States have the primary responsibility to promote, guarantee the implementation, respect, enforcement and protection of human rights recognized in international law and in national legislation. Furthermore, States must ensure that transnational corporations and other commercial enterprises respect human rights. The 2003 standards are guaranteed by a control and monitoring system. Transnational corporations and other commercial enterprises are subject to periodic verification by the UN and other international and national mechanisms. This control system is based on the reports that send the subjects involved in the entrepreneurial activity (stakeholders) (including non-governmental organizations). The source in its final part also provides remedial tools for people, institutions and the community that have been

Commission Resolution 1997/11, UN ESCOR 50th sess, UN Doc E/CN.4/Sub.2/1998/6 (10 June 1998). International Labour Organization Convention concerning Freedom of Association and Protection of the Right to Organize, July 4, 1950, ILO No. 87, 68 U.N.T.S. 17; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 18, 1951, ILO No. 98, 96 U.N.T.S. 257. International Labour Organization Convention concerning Forced or Compulsory Labour, May, 1, 1932, ILO No. 29, 39 U.N.T.S. 55; Convention concerning the Abolition of Forced Labour), January 17, 1959, ILO No. 105, 320 U.N.T.S. 291. International Labour Organization Convention concerning the Minimum Age for Admission to Employment, June 19, 1976, ILO No. 138, 1015 U.N.T.S. 297; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, November 19, 2000, ILO No. 182, 2133 U.N.T.S. 161. International Labour Organization Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, May, 23, 1953, ILO No. 100, 165 U.N.T.S. 303; Convention concerning Discrimination in Respect of Employment and Occupation, June 15, 1958, ILO No. 111, 362 U.N.T.S. 31. See: R. 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, pp. 210ss. J.N. DROBAK, The Alien Tort Statute from the perspective of Federal Court procedure, in Washington University Global Studies Law Review, 13, 2014, pp. 422ss. L. VAN DEN HERIK, J. LETNAR ČERNIČ, Regulating corporations under international law: From human rights to international criminal law and back again, 8 Journal of International Criminal Justice, 8, 2010, pp. 725-743.

victims of the offensive conduct of transnational companies and other commercial enterprises. The regulatory framework of the liability of multinational corporations for international crimes should be supplemented with the reports, which took place in 2007 and 2011, of the UN Special Representative, who are united by the same *ratio,* ie to charge multinational companies "(...) responsibility to respect human rights (...)"[31].

It is worth pointing out that relations do not regulate the criminal liability of multinational companies, but the relevance in this area can not be denied since there are instruments of moral persuasion aimed at encouraging responsible and respectful conduct of the values of the international community. The examination of the reports is limited, mainly, to the terminology used as it is found the use of the term "responsibility" and not the term "duty". With the term "responsibility" we do not want to refer to a "legal obligation" imposed by international law, but we prefer to recall a "standard of expected conduct", which is confirmed in the conventional instruments and in the so-called soft law on corporate social responsibility[32].

The responsibility of multinational companies implies for companies themselves the need to: a. avoid committing violations of human rights; b. consider the possible negative-current or potential-effects that its activities may determine or may contribute to[33]. It emerges in the various reports that the companies should incorporate the *modus operandi* that is given to them and that would allow them to behave according to the guidelines; in particular, it is urged to implement the so-called due diligence process[34], as "step a company must take to become aware of, prevent and address the human rights

[31] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights, 7 April 2008, A/HRC/8/5, par. 54.

[32] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework, 9 April 2010, A/HRC/14/27, par. 55.

[33] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights, 7 April 2008, A/HRC/8/5, par. 56.

[34] K.E. BOON, Are control tests fit for the future? The slippage problem in attribution doctrines, in Melbourne Journal of International Law, 15, 2014, pp. 6ss.

impacts (...)"[35]. Consequently, an enterprise should always take into account three factors: a. The specific context of the country in which it carries out its activities, in order to identify the particular problems that may arise in relation to human rights; b. the impact that their activities can have on these rights in that particular context; c. the possibility that the company itself may contribute to the violation of human rights through relations with other subjects connected to its activities.

Ultimately, if the multinational company conforms correctly and quickly to the indications provided in the due diligence process, the multinational company must adopt certain behaviors. In June 2014, the UN Human Rights Council adopted two human rights and business resolutions. One was advanced by the Core Group of states supportive of the Gps. The other, proposed by the group of States led by Ecuador and South Africa, "proposed the establishment of an intergovernmental working group with a mandate to elaborate an international legally binding instrument on human rights and transnational corporations as it is currently stands"[36]. Phase II of

[35] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, cit, par. 57.

[36] Vicarious-type corporate liability has been embraced in e.g. South Africa (Criminal Procedure Act, No. 51 of 1977, par. 332) and applied as a matter of common law by US federal courts (e.g. Western International Hotels Co. v. United States, 409 US 1125 (1973)). Variants of the identification principle have been espoused by legislators or courts in, inter alia, the UK (e.g. Tesco Supermarkets Ltd. v. Nattrass, AC 153 (1971); R. v. P&O European Ferries (Dover) Ltd., 93 Cr App R 72 (1990)), Canada (e.g. Canadian Dredge & Dock Co. v. R., 1 SCR 662 (1985)), Australia (Review of Commonwealth Criminal Law, Third Interim Report of Criminal Responsibility and Other Matters par. 4BA (3)(a) 1990; and subsequently Model Criminal Code par. 501.2 codified in the Criminal Code Act par. 12.3 (2)(a)-(b)), Israel (Penal Law 1977 as amended in 1994, par. 23 (a)(2) (3rd ed. 1999)), some US state courts (e.g. State v. Christy Pontiac-GMC Inc., 354 NW 2d 17, 19-20 (1984). And in the same spirit from the Extraordinary Chambers in the Courts for Cambodia (ECCC) see: Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016. The lack of legal framework among the majority of international Courts and Tribunals, corporate criminal liability is becoming more acceptable as a form of liability in international criminal law. Domestic law serves as legal basis for interpretation and application of criminal law when grave crimes have been commenced by corporate bodies and provide the courts with concise examples on how it is best applied in prace. Justice demands to hold legal entities liable for the commence of illicit acts regardless of the gravity of involvement; therefore, it is time for international criminal law to develop to the better. M.J. KELLY, The status of corporations in the travaux preparatoires of the Genocide convention: The search for personhood, in Case Western Reserve Journal of International Law, 43, 2010, pp. 483-490. I. EBERECHI, Rounding up the usual suspects: Exclusion, selectivity and impunity in

the UN Framework, with a focus on examples from the regions of Asia and Europe[37]. In particular we are talking about the following criteria of behavior: 1. the elaboration of a document that declares the policies adopted by the company in order to respect human rights (Human Rights Policy)[38]; 2. the periodic assessment of the impact, current or potential, that the activities of the company or its economic relations with other subjects may have on human rights (Impact Assessment); 3. the integration of these policies and assessments into the internal control and supervision mechanisms of the company (Integration); 4. the adoption of procedures aimed at monitoring and reporting on the developments achieved[39]. It is clear that respect for human rights and the consequent responsibility represent a *de facto* situation that unites all multinational companies, being able to refer to all human rights recognized by international law, "because companies can affect the entire spectrum of internationally recognized rights (...)"[40]. In fact, as observed by the RS, "the principles of these instruments are the foundational elements of the international human rights regime"[41]. It should also be noted that the due

the enforcement of international criminal justice and the African Union's emerging resistance, in African Journal of Legal Studies, 4, 2011, pp. 52ss. G. SIMPSON, Linear law: The history of international criminal law, in C. SCHWÖBEL (ed), Critical approaches to international criminal law: An introduction, ed. Routledge, London & New York, 2014, pp. 162ss. J. HERWIG, S. MAUS, A. MEYER ZU SCHWABEDISSEN, M. SCHULER, Global risks: Constructing world order through law, politics and economics, ed, Peter Lang, Frankfurt am Main, 2010, pp. 120ss.

37 See, UNHRC Res.26/...of 23 June 2014, Human rights and transnational corporations and other business enterprises, UN Doc.A/HRC/26/L.22/Rev.1. This resolution was supported by 22 countries. UNHRC Res. 26/...of 24 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/26/L.22/Rev.1. This resolution was supported by 20 countries.

38 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect and Remedy, op. cit., par. 57.

39 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy, op. cit., par. 83.

40 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy , cit., par. 59.

41 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy.

diligence process must be objectively connected to a precise parameter, ie the actual, direct or indirect, actual or potential impact that the activities of multinational companies can determine on recognized rights[42].

Finally, through the adoption of the due diligence criteria in their activities, companies can avoid being complicit in the abuses committed by other actors. The notion of "complicity/collusion" emerging in the 2008 report derives from international jurisprudence regarding individual responsibility and complicity for committing international crimes[43].

3 COLLUSION AND INTERNATIONAL CRIMINAL RESPONSIBILITY

The definition of "complicity" is, in fact, that defined in reference to the international crimes from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and perfected, with reference to the enterprises, from the recent practice of the United States courts following the petitions filed against some IMNs under the Alien Tort Claims Act (ATCA): "knowingly providing practical assistance or encouragement that has substantial effect on the commission of a crime (...)"[44]. The complicity of a company in the

[42] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy, op. cit., par. 72.

[43] See the next cases: ICTY, Prosecutor v. Anto Furundija, n. IT-95-17/1-T, 10 December 1998 par. 235. ICTR, Prosecutor v. Jean-Paul Akayesu, n. ICTR-96-4-T, 10 december 1998, par. 545. See, ICTY, Prosecutor v. Jovica Stanišiæ and Franko Simatoviæ (Simatoviæ), the Appeals Chamber held that the Trial Chamber had erroneously applied a "specific direction" standard for aiding and abetting liability and remanded the case back to the Trial Chamber for retrial with explicit instructions to use the knowledge standard. This blunt instruction came as no surprise, because the ICTY Appeals Chamber had reaffirmed the knowledge standard and explicitly rejected the specific intent standard in its early 2015 ruling in Prosecutor v. Vujadin Popoviæ (Popoviæ).117Prosecutor v. Stanišiæ, Case No. IT-03-69-A, Judgment of 9 December 2015, parr. 43-50. See in argument: D. SCHEFFER, Reflections on contemporary responses to atrocity crimes, in Genocide studies International, 110, 2016, pp. 123ss.

[44] United States Court of Appeals, Ninth Circuit, Decision of 18 september 2002, case John Doe I et al. v. Unocal Co. et al., 395 F.3d 932, C.A.9 (Cal.) 2002, Section II. Analysis, par. 8. This decision applies to the behavior of Unocal the notion of complicity as formulated in particular by the ICTY in the case Prosecutor v. Anto Furundija (referred to in the previous note) without considering the reference to "moral support" in the present case (concerning a company and not an individual).

commission of a violation of human rights can not derive from the mere presence of this, or from its fulfillment of the tax burdens, in the country in which this violation is committed, or from the silence in relation to possible abuses the company is aware of it. The complicity could not be derived even from the simple fact that the company has derived an economic benefit indirectly from the misconduct of other subjects, even if-it has specified the RS-"benefiting from the public perception (...)[45].

When the complicity of the multinational company turns into a violation of human rights, it is not necessary for the company to be aware of or have called for the commission of a specific offense. It is sufficient, rather, that the factual circumstances show that the undertaking was aware-or should have been, as might reasonably have been claimed in the specific circumstances-of the fact that its actions or omissions contributed, in the present case, to the infringement of human rights. The fact, therefore, that a company is executing an order, fulfilling contractual obligations or even acting in accordance with specific national legislation, does not apply to the exclusion of punishment. The reports examined so far serve as a prerequisite for the 2011 intervention when the Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy Framework" were drafted, the draft of which was made public on November 22, 2010 at advisory purposes, with a view to the adoption by the Council of Human Rights at the end of June 2011.

In particular, the reports of the five-year period 2006-2010 and the recent Guiding Principles "sanction the definitive abandonment by the United Nations of the mandatory approach of the Norms (...) (and have decreed) the prevalence of the voluntary approach to social responsibility. even within the UN, disappointing the expectations of those-especially NGOs-hoped that the

It should be noted, however, that the recent ruling by the Second Circuit Court of Appeal concerning the Presbyterian Church of Sudan v. Talisman Energy, Inc, has rather affirmed the need for the applicants to demonstrate that a company has ""purposedly" (and not only "knowingly") aided and abetted" the commission of crime, why it can be considered complicit in a violation of human rights. See: United States Court of Appeals, Second Circuit, sentence of 2 October 2009, Presbyterian Church of Sudan v. Talisman Energy, Inc, 582 F.3d 244 (2nd Cir. 2009).

45 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, 9 February2007, A/HRC/4/35., par. 32.

Special Representative would encourage the process of transforming the Norms from a soft law source into a binding source.

In June 2011 the United Nations Human Rights Council (UN) unanimously adopted a document prepared by John G. Ruggie, then Special Representative of the UN Secretary General, entitled "Guiding Principles on Business and Human Rights" (Principles Guide)[46]. This document defines a set of rules of behavior in the field of human rights both for companies and for the States that have the task of controlling them, and responds to the need to fill the international regulatory gap regarding the potential negative impacts of the activity entrepreneurship on the protection of human rights. On the one hand, in fact, companies are not-at the current state of international law-recognized as subjects having full international legal personality. As a consequence, they are not direct recipients of international obligations to protect human rights. On the other hand, within the framework of the traditional vertical relationship between the individual and the international human rights regime, it is still difficult to determine for the States a clear obligation to prevent, punish and/or remedy any abuses perpetrated by companies in the context of the horizontal enterprise-individual relationship. The Guiding Principles have responded to this problem by establishing: 1. the duty of States (now consolidated in international law) to guarantee the protection of human rights from entrepreneurial activity, intervening through the adoption of appropriate policies, norms and judicial measures (State duty to protect-Pillar I); 2. the responsibility of companies (still not consolidated according to international law and, therefore, not comparable to the international obligations of States) to respect human rights and to act promptly in the event that their activity in some way jeopardizes their enjoyment (corporate responsibility to respect-Pillar II); 3. The need to provide victims of business abuse with access to effective remedies (right to effective remedy-Pillar III).

The Guiding Principles, despite their non-binding nature, soon became an important reference point at the international level. In May 2011, the Member States of the Organization for Economic Cooperation and

[46] Council of Human Rights: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework , A/HRC/17/31, 21 March 2011 and Council of Human Rights: Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, 7 April 2008.

Development (OECD), together with States that are not Members but adhere to the OECD Declaration on International Investment and Multinational Enterprises, have updated the "OECD Guidelines for Multinational Enterprises", introducing a new chapter on human rights (Chapter IV) with specific reference to the UN document. In October 2011, the European Commission then published the Communication "Renewed European Union Strategy for the period 2011-2014 on Corporate Social Responsibility" with which it formally invited all Member States to prepare a Plan of National Action to implement the Guiding Principles[47].

The so-called "Fundamental principles" of the report shows that States must protect against possible violations of human rights by third parties, including commercial enterprises within their territory and/or jurisdiction. From the beginning of the report it is clarified that there is a duty of the State to protect, which is qualifiable as a standard of behavior. In fact, states are held accountable only when they violate their international human rights legislative obligations or when they fail to take appropriate measures to prevent, investigate, punish and correct abuses of private actors. The obligation to protect should be read in conjunction with the obligation to take preventive measures and repressive measures to ensure the protection of human rights. Having clarified what is the prerequisite for the second part of the report, it is now possible to focus on the obligations imposed on multinational companies[48].

47 Communication from the European Commission, Renewed European Union Strategy for the period 2011-2014 on Corporate Social Responsibility, COM(2011) 681, 25 October 2011, par. 14. See also the Council Directive 14/95 2014 O.J. (L 330) 1 (regarding disclosure of nonfinancial and diversity information by certain large undertakings and groups). In argument: A. POITEVIN, Towards mandatory corporate human rights due diligence at the EU level?, in Institute of Human Rights & Business, 2015. S. DOUGLAS-SCOTT, M. HATZIS, Research handbook on European Union law and human rights, E. Elgar Publishing, London & New York, 2017.

48 In First National City Bank v. Banco Nacional de Cuba, a three-justice plurality accepted the so-called “Bernstein exception,” pursuant to which courts will not apply the act of state doctrine if the State Department says that they should not. First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764–70 (1972). Six justices explicitly rejected the exception, however. Id. at 772–73 (Douglas, J., concurring in result); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) (expressing skepticism about a Reverse-Bernstein exception); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 408 (rejectingan expansion of the act of state doctrine for cases that the State Department determines would embarrass foreign sovereigns). P. STRAUSS, “Deference” is too

The legal question makes it possible to identify, even if *de relato*, a normative suggestion, which recognizes the responsibility of multinational companies for international crimes. This means that companies must refrain from violating the human rights of third parties, being, *inter alia*, obliged to intervene on any negative effects on human rights to which they may have contributed. This responsibility goes beyond the mere compliance with the regulations of the national standards on the protection of human rights. Intervening on possible negative effects on human rights requires the adoption of appropriate measures for prevention and mitigation and, where necessary, interventions to remedy abuses committed. Businesses can make further commitments or initiate other activities to support and promote human rights, thus contributing to their dissemination; however this does not offset any failure to respect human rights in their respective activities. Corporate responsibility for respect for human rights requires that two necessary conditions exist. Businesses must: a) avoid causing adverse effects on human rights, or contribute to such effects through their respective activities, intervening to remedy them where they occur; b) work towards the objective of preventing or mitigating those negative effects on human rights that are directly related to their respective activities, products and services by reason of their business relationships, even if they have not contributed to such impacts. The obligation taken on by multinational companies inevitably passes through an *ad hoc* procedure, ie due diligence on human rights. The procedure must provide for the assessment of the actual and potential impact on human rights, the integration of conclusions and the adoption of the related measures, the verification of the results and the communication on the modalities with which the impact was recorded. It is necessary to intervene on this potential impact through prevention or mitigation, while the actual impact, ie the consequences that have already had practical effects, must be the subject of compensation interventions. Finally, after examining the system for monitoring the effectiveness of the measures adopted by the companies, the report also

confusing: Let's call them "Chevron space" and "Skidmore weight", in Columbia Law Review, 112, 2012, pp. 1144ss. D. JINKS, N.K. KATYAL, Disregarding foreign relations law, in Yale Law Journal, 116, 2007, pp. 1232ss. J. BELLINGER, Enforcing human rights in U.S. Courts and abroad: The Alien Tort Statute and beyond, 42 in Vanderbilt Journal of Transnational Law, 42, 2009, pp. 12ss (focusing specifically on the difficulties that case-by-case submissions create for the executive).

focuses on remedial measures, such as compensation for damages. If the companies find that they have been or have contributed to adverse effects, they must remedy or cooperate in order to achieve this end through legitimate processes. Ultimately, the 2011 report makes it possible to find some interesting insights that lead to a criminal liability of multinational companies when there is a violation of human rights.

The 2011 report repeatedly uses a terminology that reveals the identifying elements of the criminal liability, just consider the severity of the conduct, the offense to a good intended as relevant to the international community and, again, we can not even identify the link of material causality, where it is specified that companies are required to adopt the most appropriate measures to repair the damage inflicted on human rights. These elements, as indicated, which will be the subject of a specific treatment in the following paragraph, are added to the compensatory measure, which, generally, finds its place in the legal system following an illegal act. The International Convention on the Prohibition of the Crime of Apartheid is exemplary for the recognition of the criminal liability of multinational companies, where it is clearly stated that apartheid is an international crime and that juridical persons are held criminally liable in the same way as individuals[49]. In support of the criminal liability of legal persons, it should not be forgotten that the Convention has also provided for an *ad hoc* tribunal by means of an Additional Protocol for such a crime. Ultimately, from the examination of the international documents we can deduce the will of the

[49] Direct liability would arise where the parent company has itself engaged in wrongful or criminal conduct. Direct liability need not necessarily impute liability to any one of the parent corporation's subsidiaries though this is possible. Using in U.S. courts across different circuits have consistently pointed out the hybrid civil/criminal nature of liability questions under the ATS. See, e.g., Doe v. Unocal Corp., 395 F.3d 932, 949 (9th Cir. 2002); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 270, 310 n.5 (2d Cir. 2007) (Katzman, J., concurring). Judge Scheindlin illustrates this inherent tension when she notes in In re South African Apartheid Litigation that "(...) the (ATS) provides an alternative civil remedy for violations of customary international law that are traditionally addressed as crimes (...)" 617 F.2d 228, 257 n.144 (S.D.N.Y. 2009). A group of prominent international law scholars have discussed the normative implications of this blended criminal approach in the context of a (civil) tort statute in their Brief of Amici Curiae International Law Scholars in Support of Plaintiff-Appellees, Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2009) (No. 09-2778-CV), 2009 WL 7768619 at 9-10. in argument see: D. SCHEFER, C. KAEB, The five levels of CSR compliance: The resiliency of corporate liability under the Alien Tort Statute and the case for a counterattack strategy in compliance theory, in Berkeley Jounral of International Law, 29, 2011, pp. 335ss.

international bodies to prosecute also the conduct of the multinational companies confirming the choice contained at first in the StICC[50].

4 THE CONSTITUENT ELEMENTS OF THE CRIMINAL RESPONSIBILITY OF MULTINATIONAL COMPANIES FOR INTERNATIONAL CRIMES

The violation of an international (customary or conventional) obligation by a State through omissive or commissive behaviors determines the juridical consequence of the emergence of international responsibility from an unlawful act against it. The commission of an internationally wrongful act is therefore the presupposition of the international responsibility of the State[51]. State responsibility was based on some judgment agreed by international arbitration and practice. In practice, it established that the offending State was responsible internationally and had to provide for reparation, and that the injured State could react to the offense even with the use of armed force. In reality the cases in which it could be considered an illicit, or even what were the consequences linked to it, had never been determined.

As a rule, when a litigation took place the injured State could ask the counterparty for monetary compensation or the c.d. satisfaction (official presentation of excuses, etc.). In fact it was the most used mode. However, it was the whole state that had to pay the violation on an international level, even for acts committed by bodies or individuals belonging to it. In the *Tadić* from the ICTY case, the "global control criterion" was introduced[52]. The Chamber states in particular that the degree of control must vary according to the circumstances of the specific case and that for the purpose of allocating private behavior to the State, a general State control over the operation in which the abuses took place is sufficient.

According to our opinion, a regulatory reform on the international level would be the best and the only genuinely effective way to close the gaps in the

[50] A. CLAPHAM, The question of jurisdiction over multinational corporations under international criminal law, in M. T. KAMMINGA, S. ZIA-ZARIFI, Liability of multinational corporations under international law, op. cit. p.p. 145 ss. N. JÄGERS, Corporate human rights obligations: in search of accountability, op. cit., pp. 230ss.

[51] Art. 1 of the project of the articles: “Every internationally wrongful act of a State entails the international responsability of that State“.

[52] ICTY, Prosecutor v. Tadić, Case n. IT-94-1-T, 1999 I.L.M., vol. 38, p.1518.

current regulation. In practice, the reform would most likely mean the adoption of a new human rights treaty, in which the adhering states would acknowledge the direct responsibility of Transnational Corporations (TNCs)-and possibly some other non-State actors-for human rights violations under international law, along with the responsibility of the home states to regulate their corporate citizens and to protect individuals from abuses also outside their jurisdiction, as well as the remaining duty of the host state to provide protection. A the best alternative to close the regulatory loopholes would be the establishment of an international legal framework through a multilateral treaty. International cooperation is needed to effectively regulate international actors and their international operations. International regulation would help to ensure that TNCs cannot escape responsibility by simply moving their operations or headquarters to another state. Victims of human rights violations would benefit from a legal framework acknowledging corporate responsibility and establishing the obligation of the company's home state to provide access to remedies. Furthermore, a legal framework which would set down the legal obligations of companies would benefit the companies as well by clarifying their duties, by eliminating the "free-rider" effect, and by helping those companies willing to exceed their legal duties to truly show that commitment. Finally, while concerns can be expressed of the content and the effectiveness of the possible future treaty, a legally binding document would be important due to its moral significance. A binding treaty would show the commitment of states to effectively protect human rights against infringements by all actors, and it would confirm that violations of international law will be responded to, regardless of the identity of the perpetrator.

Only in some exceptional cases was the individual being sued internationally, such as for piracy and war crimes. In the current discipline we can distinguish two norms: the "Primary", ie the set of rules of international law that impose obligations of a substantive nature, and the "Secondary", a set of rules that establish: 1) the conditions for which it can be said that an offense occurred; 2) the legal consequences arising from that offense. Also the degree of responsibility can vary in "ordinary" responsibility, that is the one normally applicable in the relations between States following the commission of an offense, and the "aggravated" responsibility, which arises from violations of

fundamental norms of the community. Individual responsibility has also changed with respect to the traditional discipline[53]. In fact individuals can be responsible at international level for serious violations of international law, committed both in wartime and in peacetime. In the "ordinary" regime of liability, the international offense occurs with the existence of two factors, one of a "subjective" nature, according to which the offense committed by a subject is attributable to a state, and one of an "objective" nature ", according to which the offense occurs when the conduct: 1) is contrary to an international obligation; 2) causes a material or moral damage to another international subject.

Firstly, with regard to the objective element, namely the anti-juridical behavior, it may consist of an action (unlawful commission) or omission (unlawful act of omission), where it is expected that the conduct is unlawful when it contravenes customary international obligation or deriving from a treaty. If this action is committed prior to the issuing of the law, it does not involve illicit behavior. So, what matters is that the rule is in force for the state at the time the conduct was put in place, according to the *tempus regit actum* principle. For example, conduct contrary to a multilateral treaty will engage the international responsibility of the state, only from the moment the treaty is in force for the state in question. The offense can take place either for an action ("commission wrong") or for an omission ("omission") and can be

53 In particular see from the Special Court for Siera Leone the next cases: The Prosecutor v. Sam Bockarie (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Trial Judgement) (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Appeal Judgement) (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Trial Judgement) (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Appeal Judgement) (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008); The Prosecutor v. Johnny Paul Koroma (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003); The Prosecutor v. Fofana and Kondewa (CDF Case) (Trial Judgement) (Special Court-xxii-for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); The Prosecutor v. Fofana and Kondewa (CDF Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008); The Prosecutor v. Foday Saybana Sankoh (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003); The Prosecutor v. Charles Ghankay Taylor (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007).

instantaneous or continuous[54]. This norm is an expression of the general principle of "intertemporal law"[55], according to which a situation of fact must be assessed in the light of the international law in force at that precise moment. On the one hand, this represents a guarantee for States not to retroactively react to international law in matters of state responsibility, on the other it does not reduce liability if, as a result of the violation, the obligation lapses or international law molting.

With regard to the subjective element, it is necessary to ascertain whether a particular action or omission is imputable to the State. First of all, the conduct of one of its bodies is imputable to the State, as provided for in art. 4 of the Project, which may belong to the legislative, executive and judicial power[56]. The International Court of Justice (ICC) in the Genocide case has argued that, for the purposes of international accountability, it is possible to equate to public bodies even persons who do not have such qualification under national law, but it must be demonstrated that the State is responsible for exercised a full control over them[57]. As a rule, the conduct of individuals is not imputable to the State, subject to certain exceptions.

[54] International Court of Justice (ICJ), in its advisory opinion of 1999, on Immunity from the jurisdiction of a special rapporteur of the Commission on Human Rights, affirmed the customary nature of the art. 4 of the Project and the rule according to which the conduct of any body of the State itself is attributed to the State (ICJ, Reports,1999, 87-88, par. 62

[55] See the opinion of judge Max Huber in case Island of Palmas (1928, R.I.A.A., vol. II, p. 831, par. 845): "(...) a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled (...)".

[56] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, sentence of 26 February 2007. See also from the same Court: Reparations for Injuries suffered in the service of the United Nations (Advisory Opinion) (1949) ICJ Rep 174, p. 179 Reparations for Injuries, op. cit., at p. 179; Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (1996) ICJ Rep 66, para 25. These cases on the legal personality of non-state entities have concerned organizations created by States. See in argument: J. CRAWFORD, The system of international responsibility, in J. CRAWFORD, A. PELLET, S. OLLESON, (eds.), The law of international responsibility, in Oxford Commentaries on International Law, Oxford University Press, Oxford, 2010, pp. 18-19, where Crawford draws a distinction between international organizations and other non-state entities, noting that the existence of legal personality is less clear with respect to the latter.

[57] The International Court of Justice ("ICJ") expert legal panel described the actus reus element as satisfied if the company's conduct had "enabled," "exacerbated," or "facilitated" the abuses. "(...) if a company facilicated a gross human rights violation by enabling, exacerbating, or facilitating human rights abuses, the company or its officials would enter a zone in which they could be held criminally liable as an aider

In the exceptions according to opinion, the criterion of the instructions also enters; it is doubtless conceivable that these are supplied through a contract between the State and the multinational company, which makes it comparable to an "extended arm" of the State. The hypothesis of the direction or control by the State is that which, certainly more than the others, leaves room for uncertainty, especially considering the two different interpretative addresses elaborated respectively by the ICJ and from ICTY if we share the consolidated criterion of the effective against[58], the illicit conduct would not be attributable to the State in all cases in which it has not entrusted the exercise of public functions to a company and does not exert a stringent control on the private operator. If, on the other hand, the criterion elaborated by the ICTY acquires greater consensus at the international level, no doubt, there would be new openings regarding the possibility of affirming the responsibility of the host State on the basis of the attribution criterion under examination. The behaviors most likely related to this case are those of companies in public ownership, that is to say those joint-stock companies in which the State or other public bodies hold all or most of the shares or, in any case, a sufficient number to ensure, even in fact, the control of the company[59] (State-Owned Enterprises-SOE). Examining the practice, not only in terms of human rights but also international terrorism, would leave no doubt about the emergence of the concept of "continuous complicity" consisting of "military, financial, logistical and organizational support" that the State provides in a stable way to an organized group, which can be a multinational company, "for the

or abettor of a crime or as a participant in a common criminal plan, or under the law of civil remedies for intentionally or negligently causing harm to a victim (...). See, D. CASSEL, Corporate aiding and abetting of human rights violations: Confusion in the courts, in Northwestern Journal of International Human Rights, 6, 2008, pp. 305ss. The ICTY Trial Chamber in Furundzija adopted a knowledge test for aiding and abetting, the Rome Statute of the ICC adopted a purpose test. Article 25(3)(c) of the Rome Statute makes one who, "(...) for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission (...) criminally responsible (...)". This phrase introduced a mental element that went beyond the ordinary mens rea requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test.

[58] Y. BEIGBEDER, International criminal tribunals: Justice and politics, ed. Palgrave Macmillan, London, 2011, pp. 63ss. M. ENGELHART, Corporate criminal liability from a comparative perspective, in D. BRODOWSKI, Regulating corporate criminal liability, ed. Springer, Berlin, 2014, pp. 54ss.

[59] See the case: Leo Hertzberg et al. v. Finland,Leo Hertzberg et al. v. Finland, Communication n. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985)

achievement of internationally illegal objectives, on which both the will of the State and the will of the group converge". Here emerges a connection between the theory of state responsibility and the so-called *Drittwirkung* concept, that is to say the horizontal effectiveness of international human rights norms, particularly those of a contractual origin, in inter-private relations and not only in those between State and individual.

Suffice it to consider with regard to the exceptional hypotheses, the case in which the State adopts the behavior of individuals, as happened for the hostages in Tehran[60], where the behavior held by Islamic students at one point has been endorsed by the State[61]. Finally, the case in which the State can be held responsible when it exercises control over the individual acts committed by individuals by excluding the so-called global control. The acts put in place are subject to control or to the management of the State and therefore the injurious event is immediately imputable to it[62]. Finally, we examine the damage can be material or moral.

The first consists in an economic and patrimonial prejudice to the interests of a State; the second is the prejudice caused to the dignity and honor of a state. According to the ICJ, however, the damage is not considered in the illicit, since it is constituted only by the injury of a subjective right. Thus the case of an offense can also occur without material or moral damage. Furthermore, guilt is not a constitutive element of the unlawful act, including both the fraud and the fault[63]. The subjective element can be operative only

60 And precedent the case: Phosphates in Morocco, Preliminary Objections, 1936, PCIJ, Series A/B, n. 74, p. 28.

61 ICJ, Diplonatic and Consular staff in Teheran (United States v. Iran) sentence of 24 May 1980.

62 ICJ, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States), sentence of 27 June 1986.

63 Zschernig v. Miller, 389 U.S. 429, but the immunity example suggests that they are not as damaging over the long-term as State Department decisions made on a case-by-case basis. Indeed, in Zschernig, the U.S. government disagreed with the Court: it did not believe that the state court statute and the court decisions applying it harmed U.S. foreign relations. K.M. STACK, The President's statutory power to administer the law, in Columbia Law Review, 106, 2006, pp. 264ss. I.B. WUERTH, The Alien Tort Statute and federal common law: A new approach, 85 in Notre Dame Law Review, 85, 2010, pp. 1932. C. VÁZQUEZ, Alien Tort Claims and the status of customary international law, in American Journal of International Law, 106, 2012, pp. 531, 642-543. M. LANGER, The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes, in American Journal of International Law, 105, 2011, pp. 1, 42ss. M.D. RAMSEY,

when there is an explicit recognition of the norm and, obviously, it will never be imputable to the State, as an abstract entity, but only to the individual-organ. In the case of hostages in Tehran, the ICJ charged Iran with the commission of the offense for failing to activate the prevention measures necessary for the protection of American diplomats[64]. In fact, the liability regime normally applicable in the relationship between states as a result of offenses requires the existence of material or moral damage as a necessary objective requirement. Having identified the essential elements of liability for illicit fact, the question that arises in practice is: when the illicit conduct of a Multinational Enterprise (IMN), therefore of a subject "other" than the State, involves international responsibility of the latter? Given the above illustration on state human rights obligations, the circumstances that can determine such liability according to our opinion are: 1.the case where an IMN takes a behavior contrary to international human rights law and this behavior it is attributable to the State, determining the international responsibility of the latter for the violation of the obligation to respect human rights; 2.If an IMN adopts a behavior contrary to international human rights law which is not in itself attributable to the State but in respect of which the State has not taken appropriate measures of prevention and sanction, determining the international responsibility of this last for the violation of the obligation to protect human rights. In general, in order for a state behavior to be qualified as "internationally illegal", giving rise to the responsibility of the State, there must be two elements: a. The attribution of the behavior, active or omissive to the State; b. the contrariness of the behavior, active or omissive, to an international obligation, of any kind. First of all, it should be noted that the need to ascertain the attribution of the behavior to the State also exists in the case of MN owned or controlled by the State: in fact, since these are generally companies in which the State is a single shareholder or majority shareholder State controls through intermediary holdings of public ownership that owns the shares, such IMN are entities endowed with distinct legal personality and, therefore, not automatically assimilable to the State. In principle, the conduct of an IMN (like that of any other "private" actor) can be attributed to a State if

International law limits on investor liability in human rights litigation, in Harvard International Law Journal, 50, 2009, pp. 280ss.

64 ICJ, Diplonatic and Consular staff in Teheran (United States v. Iran) op. cit.

the conditions codified in the draft article on the responsibility of States for internationally unlawful acts are satisfied (2001)[65]. The problem that remains to be faced is that according to which the multinational company can be held criminally liable for the violation of human rights. It is possible to compose an adequate normative substratum, starting from the draft of the St-ICC[66].

The problem concerning the regulatory coverage is soon solved, but what is causing difficulties are the identification of the elements constituting the criminal responsibility of the multinational companies and the direct imputation of the violation of human rights. The responsibility of multinational companies for international crimes, at present, can be solved in two ways: a) not to intervene with the sanctions, but this would mean leaving the conduct of multinational companies unpunished; and b) report the conduct of multinational companies to the host State[67].

The consequences that derive from this are well known, considering that the international offense which is materially prejudicial to the rights of individuals is subject to the jurisdiction of the State that is the author. On the other hand, as regards the first profile, there is the risk of making unpunished the conduct of multinational companies violating indirectly the principle of legality and directly the principles underlying the international community. In other words, if the system of international law does not operate the instruments envisaged by the legislation examined above for the protection of

65 OHCHR, State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties, Report No. 3, Individual Report on the International Covenant on Civil and Political Rights, June 2007. Report No. 3 (ICCPR), parr. 128 and 148. V. NERLICH, Core crimes and transnational business corporations, in Journal of International Criminal Justice, 8, 2010, pp. 898ss.

66 A. CLAPHAM, The question of jurisdiction over multinational corporations under international criminal law, in M. T. KAMMINGA, S. ZIA-ZARIFI, Liability of multinational corporations under international law, op. cit. pp. 145ss. N. JÄGERS, Corporate human rights obligations: in Search of accountability, op. cit., pp. 230ss.

67 L.VAN DEN HERIK, Corporations as future subjects of the International Criminal Court: An exploration of the counter arguments and consequences, in C. STAHN, L. VAN DEN HERIK, Future perspectives on international criminal justice, T.M.C. Asser Press, The Hague, 2010, pp. 352ss. J. SUNDELL, Ill-Gotten gains: The case for international corporate criminal liability, in Minnesota Journal of International Law, 20, 2011, pp. 648, 675-678. J. STEWART, A pragmatic critique of corporate criminal theory: Lessons from the extremity, in New Criminal Law Review, 16 (2), 2013, pp. 262ss. L. VAN DEN HERIK, D.D. DAM JONG, Revitalizing the antique war crime of pillage: The potential and pitfalls of using international criminal law to address illegal resource exploitation during armed conflict, in Criminal Law Forum, 15, 2011, pp. 238ss.

human rights, a double violation of the latter can be determined. Consequently, the need to activate suitable instruments provided for by the international legal system makes it possible to use an instrument suitable for finding the direct imputability of multinational companies, ie the extensive interpretation[68].

It is known that the penal system repudiates the analogy, but at the same time allows extensive interpretation. Consequently, even for the multinational companies it will be possible to find, as a result of the extensive interpretation, the existence of the constituent elements of the unlawful act[69]. Both elements (subjective and objective) are directly attributable to the conduct of multinational companies, which can be understood as an active conduct or an omissive conduct. In other words, the conduct may be active when the companies directly violate the provisions of the law protecting human rights for their own profit, causing incident effects on individuals, which are permanently located in the area where multinational companies operate; instead, the conduct is omitted, when the multinational companies fail to adopt the prevention measures (which could correspond to the c.d.

[68] A. CLAPHAM, The question of jurisdiction over multinational corporations under international criminal law, in M. T. KAMMINGA, S. ZIA-ZARIFI, Liability of multinational corporations under international law, op. cit. pp. 145ss. N. JÄGERS, Corporate human rights obligations: in Search of accountability, op. cit., pp. 237ss.

[69] As we can notice from the domestic courts: Australia: Commonwealth v. Beneficial Finance Co, 275 NE 2d 33 (1971) Hamilton v. Whitehead (1988) 161 CLR 121; Canada: R v. Hibbert, 1995 CanLII 110 (S.C.C.); New Zealand: R v. Samuels (1985) 1 NZLR 350 (CA); United Kingdom: Anon (1701) 12 Mod 88 ER 1518 Director of Public Prosecutions v. Kent & Sussex Contractors Ltd (1944) KB 146 Lennard"s Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915) AC 705 Meridian Global Funds Management Asia Ltd v. Securities Commission [1995] AC 500 Moore v. I Bresler Ltd (1944) 2 All ER 515; R v. ICR Haulage Ltd (1944) KB 551; P & O European Ferries (Dover) Ltd (1991) 93 Cr App R 72 Salomon v. Salomon & Co Ltd (1897) AC 22 Spiliada Maritime Corp. v. Cansulex Ltd (1987) AC 460 Tesco Supermarkets Ltd v. Nattrass (1972) AC 153, HL; United States: Adra v. Clift, 195 F Supp 857 (D Md 1961); Boimah Flomo, et al v. Firestone Natural Rubber Co, No. 10-3675 (11 July 2011) Boim v. Holy Land Foundation, 549 F 3d 685 (3 December 2008); Bolchos v. Darrel, 1 Bee 74, 3 F Cas 810 (DSC 1795); Filártiga v. Peña-Irala, 630 F 2d 876 (2nd Circuit, 1980); Inland Freight Lines v. United States, 191 F 2d 313 (10th Circuit, 1951) In Re South African Apartheid Litigation (relates to the matters of Lungisile Ntsebeza, et al v Daimler AG, et al and Khulumani, et al v. Barclays National Bank Ltd, et al) 02 MDL 1499 (SAS) (8 April 2009); John Doe VIII v Exxon Mobil Corporation, No. 09-7125 (8 July 2011); New York Central & Hudson River Railroad Co. v. United States, 212 U S 481(1909); Standard Oil Co. of Texas v. United States, 307 F 2d 120 (5th Circuit, 1962); Steere Tank Lines v. United States, 330 F 2d 719 (5th Circuit, 1964); United States v. Hilton Hotels Corp., 467 F 2d 1000 (9th Circuit, 1972); United States v. Bank of New England, 821 F 2d 844 (1st Circuit, 1987); United States v. Peoni (1938) 100 F 2d 401; Wiwa v. Royal Dutch Petroleum Co, et al, 96 Civ 8386 (KMW) (HBP) (April 23, 2009).

compliance programs)[70] aimed at reducing or eliminating the offensive consequences deriving from their conduct to the detriment of human rights. Ultimately, having ascertained that the activity of multinational companies is covered by the norms of international organizations and that the extensive interpretation of the essential elements constituting the illicit fact of the State is admissible, multinational companies can be responsible for international crimes[71] "(...)governmental regulation still remains the most significant level of regulation. Emergent regional and multilateral regulatory orders remain insufficiently developed to replace the nation State as the principal focus for the regulation of MNEs, while informal and regulation by non-state actors is likely to be selective and probably self-serving"[72].

5 LEADING CASES OF INTERNATIONAL RESPONSIBILITY OF MULTINATIONAL COMPANIES

The jurisprudence confirmed the existence of the direct responsibility of the multinational companies following the violations of human rights. American jurisprudence establishes the conditions for inciting an appeal under the Alien Tort Act. Reference is made to the decision of the Second Circuit

[70] V. NERLICH, Core crimes and transnational business corporations, in Journal of International Criminal Justice, 8, 2010, pp. 896ss. D. LUBAN, After the honeymoon: Reflections on the current state of international criminal justice, in Journal of International Criminal Justice, 11, 2013, pp. 506ss. J. MBOKANI, La cour pénale internationale: Une cour contre les africains ou une cour attentive À la souffrance des victimes Africaines?, in Quebec Journal of International Law, 26 (2), 2013, pp. 48ss. A.G. KIYANI, Third world approaches to international criminal law, in American Journal of Inyernational Law, 109, 2016, pp. 256ss. S. KENDALL, Commodifying global justice: Economies of accountability at the International Criminal Court, (2015) 13 in Journal of International Criminal Justice, 13, 2015, pp. 114ss. P. MUCHLINSKI, The changing face of transnational business governance: Private corporate law liability and accountability of transnational groups in a post financial crisis world, in Indiana Journal of Global Legal Studies, 18 (2), 2011, pp. 667, 685-690. U. KOHL, Corporate human rights accountability: The objections of western governments to the Alien Tort Statute, in International and Comparative Law Quarterly, 63, 2013, pp. 668ss.

[71] A. CLAPHAM, The question of jurisdiction over multinational corporations under international criminal law, in M. T. KAMMINGA, S. ZIA-ZARIFI, Liability of multinational corporations under international law, op. cit. pp. 145ss. N. JÄGERS, Corporate human rights obligations: in Search of accountability, op. cit., pp. 228ss.

[72] P.T. MUCHLINSKI, Multinational enterprises and the law, Oxford University Press, Oxford, 2007, pp. 114ss.

Court of Appeals in the *Filártiga case v. Peña-Irala*[73] and the subsequent decision of the same Court in the *Kadic case v. Karadi*[74]. Regarding the first decision, the Federal Court extended the application of the Alien Tort Act to violations of international human rights law committed by an individual. On the other hand, the second case allows the Court to add that private conduct can, in the case of genocide and war crimes, integrate a breach of international law that can be compensated in accordance with the applicable legal provisions on the matter. It should be noted that, generally, violations of human rights presuppose State action, as emerges in acts of torture. In such cases, the personal responsibility of a private individual could arise only if the private individual acted at the same time as the action of the State involved. Ultimately, the decision in this case appears to be particular in that it allows an appeal to be raised under existing legislation against a private person for the direct violation by the latter of international human rights law, if such violation excludes the intervention of a state. On the other hand, in the case of offenses that presuppose the intervention of the State, the private entity can be considered complicit and concurrent with the State as we have noted in the case *Doe v. Unocal*[75].

The Court of Appeals of the Ninth Circuit has, for the first time, applied such clarifications of the Alien Tort Act to a multinational company. The Court

73 See: United States Court of Appeals, Second Circuit, sentence of 30 June 1980: case Dolly M. E. Filártiga and Joel Filártiga v. Americo Norberto Peña-Irala, in 19 International Legal Material, 966, 1980. D. LIAKOPOULOS, Multilatateral corporations and international criminal responsibility. The case of United States, in International and European Union Legal Matters, working paper series, 2018.

74 United States Court of Appeals, Second Circuit, sentence of 13 October 1995: case S. Kadic v. Radovan Karadi, in 34 Internatonal Legal Material, 1595, 1995. Banco Nacional de Cuba v. Sabbatino 376 US 398 (SCt 1964) 428; Kadic v. Karadzic 70 F 3d 232 (2d Cir 1995). D. DEYA, Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes, in OpenSpace on International Criminal Justice, 2012, pp. 224ss. M. PIETH, R. IVORY, Emergence and convergence: Corporate criminal liability principles in overview, in M. PIETH, R. IVORY (eds), Corporate criminal liability: Emergence, convergence and risk, ed. Springer, Berlin, 2011, pp. 12ss. J. STEWART, A pragmatic critique of corporate criminal theory: Lessons from the extremity, in New Criminal Law Review, 6 (2), 2012, pp. 261-299. J. SUNDELL, Ill-Gotten gains: The case for international corporate criminal liability, in Minnesota Journal of International Law, 20, 2011, pp. 650ss.

75 United States Court of Appeals, Ninth Circuit, sentence of 18 September 2002, case John Doe I et al. v. Unocal Corporation, in 41 International Laegal Material, 1367, 2002, "(...) generally deemed a milestone with respect to suing companies, including foreign ones, under ATCA for alleged complicity with host State's violation of international human rights (...)".

took a position with respect to the US multinational company, which was held responsible for complicity with the host state (Myanmar) for seriously offending the human rights of Burmese citizens through despicable actions (in particular summary executions, sexual violence and work forced). From this it emerges that a civil liability of multinational companies can derive from the Alien Tort Act when serious actions are carried out such as to integrate the "*jus cogens* violations" (for example, torture, slavery, forced labor and summary executions).

The New York District Court also ruled on this point in the Presbyterian Church of Sudan v. Talisman Energy Inc.[76], stating that, in the presence of serious violations of human rights, the criminal liability of multinational companies would be the general rule, never the exception2[77].

[76] United States District Court, Southern District of New York, Decision of 19 March 2003: caso Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F.Supp.2d 289 (S.D.N.Y.2003), parr. 308-313. Brief for the United States as Amicus Curiae at 2-3, Khulumani v. Barclay Nat'l Bank Ltd. (Nos. 05-2141, 05-2326), supra note 15; Brief for the United States as Amicus Curiae at 4, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); see generally Stephens, Beth, Judicial Deference and the Unreasonable Views of the Bush Administration, 33 Brook. J. Int'l L. 773 (2008). See also: Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (alleging that human rights abuses took place in Abu Ghraib prison, Iraq, when it was under the complete control of the United States). W.F. BAXTER, Separation of powers, prosecutorial discretion, and the "common law" nature of antitrust law, in Texas Law Review, 60, 1982, pp. 661, 663. M.H. LEMOS, The other delegate: Judicially administered statutes and the non delegation doctrine, in South California Law Review, 81, 2008, pp. 405, 429-430. J. KNOX, A presumption against extrajurisdictionality, in American Journal of International Law, 104, 2010, pp. 35, 379-388. W.S. DODGE, Understanding the presumption against extraterritoriality, 16 in Berkeley Journal of International Law, 16, 1998, pp. 85, 99ss.

[77] Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2nd Cir. 2009) (finding that purposes and not knowledge is required for aiding and abetting with the ATS context, and interpreting purpose as going to the consummated offence). For cases applying a "knowledge" standard, see In Re South African Apartheid Litigation 617 F. Supp. 2d 288 (2009); Romero v. Drummond Co., 552 F3d 1303 (11th Cir. 2008); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009). Khulumani v. Barclay National Bank Ltd, 504 F.3d 254 (2d Cir. 2007); Ntsebeza v. Daimler Chrysler Corp, 504 F.3d 254 (2d Cir 2007), n.15. In expressing apprehension about the curious idea of "specific direction" as a form of actus reus, one appellate judge in the Khulumani litigation pointed out that: "(...) a possible tension in the tribunals' definition aiding and abetting under which the necessary mens rea is knowing assistance (...) yet requires that the act of assistance be specifically directed to assist the perpetration of a specific crime (...) this possible tension might be resolved. In the same spirit (...)". The ICTY overturned its own previous caselaw that had upheld the "specific direction" standard. See Prosecutor v. Šainović et al, case No. IT-05-87-A, Judgment, 2014: "(...) view "specific direction" as a contradiction when treated as part of the actus reus, I have pointed to the need to consider these types of considerations as justifications in

Regarding the Alien Tort Act, the case of Royal Dutch Shell (RDS) operating with the publicly owned NNPC company[78]. The RDS, a multinational company, has been settled before the US courts twice and, precisely, in the case *Wiwa et al. v. Shell*[79] and in case *Kiobel et al. v. Shell*[80]. The cases

international criminal law (...). See also the ICTY Trial Chamber in Furundzija adopted a knowledge test for aiding and abetting, the Rome Statute of the ICC adopted a purpose test. Article 25(3)(c) of the Rome Statute makes one who, "(...) for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission (...) criminally responsible (...)". This phrase introduced a mental element that went beyond the ordinary mens rea requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test. S. DROUBI, Transnational corporations and international human rights law, in Notre Dame Journal of International & Comparative Law, 6 (1), 2016.

78 S. DROUBI, transantional corporations and international humna rights law, in Notre Dame journal of International & Comparagive Law, 6 (1), 2016, pp. 2ss. W. KALECK, M. SAAGE-MAAB, Corporate accountability for human rights violations amounting to international crimes-The status quo and its challenges, in Journal of International Criminal Justice, 8, 2010. M. KREMNITZER, A possible case for imposing criminal liability on corporations in international criminal law, in Journal of International Criminal Justice, 8 (3), 2010. P. MUCHLINSKI, Limited liability and multinational enterprises: A case for reform, in Cambridge Journal of Economics, 34, 2010.

79 Compare Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103-06 (2d Cir. 2000) (forum non conveniens disfavored in ATS cases),with Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum (No. 10-1491) at 25 n.13 (explicitly disagreeing with the Second Circuit's analysis in Wiwa). EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). Compare Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 284-292 (2d Cir. 2007) (Hall, J.), aff 'd sub nom due to lack of a quorum, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (mens rea for aiding and abetting supplied by federal common law), with Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (mens rea supplied by customary International law). See also I.K. CHIMËNE, Conceptualizing complicity in Alien Tort Cases, in Hastings Law Journal 60, 2008, pp. 62ss. H. THOMAS, The safe-conduct theory of the Alien Tort Statute, in Columbia Law Review, 106, 2006, pp. 832ss.

80 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010). Kiobel v. Royal Dutch Petroleum Co, 133 S. Ct. 1659, 1665 (2013). Kiobel, 621 F.3d at 152 (Leval, J., concurring in part and dissenting in part). Judge Leval states that: "(...) the fact that international tribunals do not impose criminal punishment on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can incur no civil compensatory liability to victims when they engage in conduct prohibited by the norms of international law (...). In the same case: Justice Carbanes held that since corporations cannot be liable for international crimes under international law, they could not be held accountable under the ATS cause of action. In a separate opinion, the third judge, Justice Leval, attacked the judicial logic of the majority decision. He suggested that the majority's argument was "illogical, misguided, and based on misunderstandings of precedent (...)". See the Ninth Circuit, through Doe I v. Nestle USA, 766 F.3d 1013 (9th Cir. 2014), all endorse corporate liability under the ATS. The Second Circuit has followed its earlier ruling in Kiobel v. Royal Dutch Petroleum Co. against corporate liability, arguing that "the Supreme Court in Kiobel II (has not) overturned (the

indicated refer to the alleged complicity of the RDS, through the subsidiary Shell-Nigeria, in the serious violations of human rights carried out by the Nigerian military junta against the Ogoni people. The residents of the area, object of the RDS's activity, began to protest against the oil company because it had polluted and destroyed the local ecosystem. Furthermore, in the case

Second Circuit's) holding in Kiobel I because the Supreme Court failed to address the specific question of whether corporations are liable for violations of international laws under the ATS." Balintulo, 796 F.3d at 166 n.28 (reasoning that: "(...) there is no authority for the proposition that when the Supreme Court affirms a judgment on a different ground than an appellate court it thereby overturns the holding that the Supreme Court has chosen not to address (...) hold otherwise would undermine basic principles of stare decisis and institutional regularity (...)". According to our opinion, both judicial opinions based their reasoning on interpretations of Nuremberg-era jurisprudence. See in argument also: C. KAEB, D. SCHEFFER, The paradox of Kiobel in Europe, American Journal of International Law, 107, 2013, pp. 852, 854-855. C.M. VÁZQUEZ, Customary international law as U.S. law: A critique of the revisionist and intermediate positions and a defense of the modern position, in Notre Dame Law Review, 86, 2011, pp. 1495, 1515-1516, 1538-1554. D. LUSTIG, Three paradigms of corporate responsibility in international law: The Kiobel moment, in Journal of International Criminal Justice, 12 (3), 2014, pp. 596ss. E. KONTOROVICH, Kiobel surprise: Unexpected by scholars but consistent with international trends, in Notre Dame Law Review, 89, 2014, pp. 21ss. (stating that the only treatment of the question of extraterritoriality came in 2003, within a student note, and the issue was not raised by scholars or anyone else; There were, however, early calls for jurisdictional limitations on the scope of the ATS). A.L. PARRISCH, Kiobel, unilateralism, and the retreat from extraterritoriality, in Maryland Journal of International Law, 28, 2013, pp. 208, 213ss. ("(...) extraterritorial jurisdiction has innocuous forms, for example, jurisdiction over one's own nationals or jurisdiction to punish offenses directed at state security, it becomes contentious when one state purports to tell foreigners what they can or cannot do on foreign soil (...)"). See also, M. KUNZ, Conceptualizing transnational corporate groups for international criminal law, ed. Nomos, Baden Baden, 2017, pp. 27ss. A.L. PARRISH, Domestic responses to transnational crime: The limits of national law, in Criminal Law Forum, 23, 2012, pp. 275-293 (arguing that extraterritorial exercises of criminal law are highly problematic in practice, and should not undermine multilateral attempts at regulating global criminal offending). L. VAN DEN HERIK, J. LETNAR ČERNIČ, Regulating corporations under international law: From human rights to international criminal law and back again, Journal of International Criminal Justice, 8, 2010, pp. 725-743. ("(...) in situations where a multinational corporation outweighs a developing host state in terms of economic power, that state may not be inclined toregulate a corporation too stringently. The investment and economic activity coming from the multinational may be more appealing to the developing state than the need to protect its citizens from violations committed by the multinational (...)"). J. VON ERNSTORFF, M. JACOB, J.D. STONE, The Alien Tort Statute before the US Supreme Court in the Kiobel case: Does international law prohibit US courts to exercise extraterritorial civil jurisdiction over human rights abuses committed outside of the US?, in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 72, 2012, pp. 580ss.

Kiobel et al. v. Shell[81], the applicants claimed that Shell-Nigeria paid the members of the Nigerian army[82]. Regarding the case *Wiwa et al. v. Shell* the

[81] In the same spirit see also the enxt case: Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011). The court concluded that: "(...) deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties (...) if the alleged torturer is found and served with process by an alien in the United States, then the ATS provides federal jurisdiction because the alien is suing for a tort in violation of the law of nations (...) its exercise of jurisdiction was consistent with the limits of Article III because the case arose under the law of nations, which has always been part of the federal common law (...)". See also: Hiloa v. Estate of Marcos, 25 F3d 1467 (9th Cir 1994) (aligning its reasoning with that of the Second Circuit-in concluding that the Alien Tort Act, 28 USC par. 1350, creates a cause of action for violations of specific, universal, and obligatory international human rights standards). Alvarez-Machain v. United States, 331 F3d 604, 641 (9th Cir 2003). R. GOODMAN, D.P. JINKS, Filartiga's firm footing: International human rights and federal common law, in Fordham Law Review, 66, 1997, pp. 463ss. M.D. RAMSEY, International law limits on investor liability in human rights litigation, in Harvard International Law Journal, 50, 2009, pp. 284-292 (discussing the limits of prescriptive jurisdiction under customary international law). S. JAY, The status of the law of Nations in early american law, in Vanderbilt Law Review, 42, 1989, pp. 42ss. Given America's status as a global superpower, modern Congresses may be less concerned with how other nations will react to a decision to grant aliens a federal cause of action against other aliens in exceptional circumstances. See also: Torture Victims Protection Act of 1991 (TVPA), Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC par. 1350 (establishing a civil right of action against individuals who torture or subject individuals to extrajudicial killing). Unlike ATS claims, suits under the TVPA do not depend on diversity jurisdiction because they arise under a federal statute and thus satisfy both Article III and 28 USC par. 1331. Murray v Schooner Charming Betsy, 6 US (2 Cranch) 64 (1804); Bellia & Clark. Sarei v. Rio Tinto PLC, 650 F Supp 2d 1004, 1020-1026 (CD Cal 2009) (concluding that torture, genocide and war crimes-but not environmental torts-are of universal concern). Sinaltrainal v. Coca-Cola Co, 578 F3d 1252, 1265 (11th Cir 2009) (stating that-ATS claims generally require allegations of state action because the law of nations are the rules of conduct that govern the affairs of a nation, acting in its national capacity). Jones v. Saudi Arabia [2006] UKHL 26, (13)-(14) (appeal taken from Eng.). D.F. DONOVAN, A. ROBERTS, The emerging recognition of universal civil jurisdiction, 100 in American Journal of International Law, 100, 2006, pp. 142, 146-149, 153-154. J.J. PAUST, Human rights responsibilities of private corporations, in Vanderbilt Journal of Transnational Law, 35, 2002, pp. 801, 802-809. J. WRIGHT, Retribution but no recompense: A critique of the torturer's immunity from civil suit, in Oxford Journal of Legal Studies, 30, 2010, pp. 143, 160-162. See also the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, para. 30, UN Doc. A/HRC/4/35 (Feb. 19, 2007). H.H. KOH, Is international law really State law?, in Harvard Law Review, 111, 1998, pp. 1825ss. D.J. BEDERMAN, International law advocacy and its discontents, 2 in Chicago Journal of International Law, 2, 2001, pp. 476ss.

[82] G.L. SKINNER, Beyond Kiobel: Providing access to judicial remedies for violations of international human rights norms by transnational business in a new (Post-Kiobel) World, 46 in Columbia Human Rights Law Review, 46, 2014, pp. 158, 168ss. D. DE FELICE, Challenges and opportunities in the production of business

applicants accused the Anglo-Dutch multinational company of having "directed, ordered, confirmed, ratified, and/or conspired with the military regime"[83] in the commission, of summary executions of the group "Ogoni 9", of crimes against 'humanity, torture and other cruel, inhuman or degrading treatment, arbitrary arrests and detentions, violations of the right to life, liberty, personal security, as well as the right of association and peaceful assembly, illegal killing, aggression and mistreatment[84].

In addition, they also blamed Shell, more generally, for negligence and for violating the US Racketeer Influenced and Corrupt Organizations (RICO) Act[85]. The other case law to refer to is the case *Kiobel et al. c. Shell*, where the

and human rights indicators to measure the corporate responsibility to respect, in Human Rights Quarterly, 37, 2015.

83 Case Wiwa at al. v. Shell , Fifth Amended Complaint (2009), cit., par. 121-193.

84 According to article 9 (1) of the London Charter, Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 280, art. 9(1),which states: "(...) at the trial of any individual member of any group or organization, the Tribunal may declare (in connection with any act of which the individual may be convicted that the group or organization of which the individual was a member was a criminal organization (...)".

85 See also: In Hartford Fire Ins. Co. v. California, Justice Souter noted the American Banana cases but then said without explanation that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 795–96 (1993); see also id. at 814 (Scalia, J., dissenting) (stating that the presumption has been "overcome" in Sherman Act litigation and citing earlier decisions of the Court and the Second Circuit). Even when the Court declines to apply the Sherman Act to conduct abroad, it does not do so based on the presumption. see F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004). Today, amendments to the Sherman Act may make its extraterritorial application clear, but the Court had already ruled that the statute applied extraterritorially in Hartford Fire Ins. Co. See, W.N. ESKRIDGE, E.L. BAER, The continuum of deference: Supreme Court treatment of agency statutory interpretations from Chevron to Hamdan, 96 Georgetown Law Journl, 96, 2008, pp. 1083, 1111-1115. E.A. POSNER, C.R. SUNSTEIN, Chevronizing foreign relations law, 116 in Yale Law Journal, 2007, pp. 1170, 1198 (noting that: "(...) the Law has-peculiarly-not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications (...)").The decision to impose a compliance monitor depends on the specific facts of the case. According to the Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA) by the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC), the following factors: "(...) determine whether a monitor is appropriate, namely: "seriousness of the offense; duration of the misconduct; pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; nature and size of the company; quality of the company's compliance program at the time of the misconduct; subsequent remediation efforts (...)". Department of Justice, Criminal Divise and seccurity, Enf't Divise, A Resource guide to the U.S. Foreign corrupt practices Act, at 71 (2012). J. JORDAN, Recent developments in the foreign corrupt

charges were the same as in the *Wiwa* case, in addition to the additional charges of forced exile and destruction of property. The three appeals relating to the *Wiwa case v. Shell* settled on June 8, 2009 out of court with an agreement between the parties, which ordered compensation of $ 15.5 million to the applicants, of whom 4.5 million for the creation of a trust fund, "The Kiisi Trust" "helping defendants portray the settlement as a humanitarian gesture" rather than an implicit acknowledgment of fault (...)"[86]. The case *Kiobel et al. v. Shell,* on the other hand, ended (unfavorably for the applicants) on 17 September 2010 with a ruling by the Court of Appeal. The ruling is relevant because the jurisdictional conditions are established to resort directly to the multinational corporations carrying out international crimes. In the *Kiobel* case, the judicial requirements for the application of the Alien Tort Act start, which are identified as follows: 1) the applicant's foreign nationality; 2) the commission of a civil offense by the defendant; 3) the violation of a customary norm of international law or of a treaty ratified by the United States. According to the Court, if the defendant is a legal person, it must be ascertained in what terms the violation of a customary norm of international law or of a treaty ratified by the United States may exist. In particular (ie, the third requirement mentioned above): "(...) we must ask whether a plaintiff bringing an ATS suit against a corporation has alleged a violation of customary international law (...)"[87]. The Court has therefore held that it should be international law and not the US "municipal law" to define the applicability of the Alien Tort Act with regard to companies, as suggested by the Supreme Court itself in the Sosa case: "a related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual"[88]. This is known as the "Holmes test" because it finds its

practices act and the new UK Bribery Act: A global trend towards greater accountability in the prevention of foreign bribery, in New York Journal of Law & Business, 2011, pp. 853ss.

86 I. WUERTH, Case Wiwa v. Shell: The $15.5 Million Settlement, in ASIL Insights (American Society of International Law), 9 September 2009, pp. 2ss.

87 United States Court of Appeals, Second Circuit, Sentence of 17 September 2010: case Kiobel et al. v. Royal Dutch Petroleum Co. et al., Co. 569, U.S. 108 (2013), pp. 6.

88 For a rejection of the idea that indirect perpetration through an organisation can be derived from the language of Article 25(3)(a), see ICC, Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgement Pursuant to Article 74 of

clearest expression in Justice Holmes's opinion (*American Well Works Co. v. Layne & Bowler Co.34*). Since the general federal question statute is narrower in scope than the "arising under" clause of Article III, 35 any suit that satisfies the Holmes test necessarily falls within the scope of Article III. It is also clear that a suit that arises under federal common law arises under the "laws of the United States" within the meaning of section 133 and hence also within the meaning of Article III. The section 1350 easily satisfies Article III insofar as it grants the federal courts jurisdiction over the federal common law[89] cause of action recognized in *Sosa*[90]. The Court of Appeal therefore wondered whether,

the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Trial Chamber II), 18 December 2012. In argument: G.P. CALLESS, Introduction: Transnational corporations revisited, in Indiana Journal of Global Legal Studies, 18 (2), 2011, pp. 604-605. See, W.S. DODGE, Alien Tort litigation and the prescriptive jurisdiction fallacy, in Harvard International Law Journal, 51, 2010, pp. 35ss. C.A. BRADLEY, J.L. GOLDSMITH, D.H. MOORE, Sosa, customary international law, and the continuing relevance of erie, in Harvard Law Review, 120, 2007, pp. 870ss. B. STEPHENS, Comment, Sosa v. Alvarez-Machain: The door is still ajar for human rights litigation in U.S. Courts, in Brooklyn Law Review, 70, 2005, pp. 534ss. E. KONTOROVICH, Implementing Sosa v. Alvarez-Machain: What piracy reveals about the limits of the Alien Tort Statute, in 80 Notre Dame Law Review, 80, 2004, pp. 112ss. B. STEPHENS, The curious history of the alien tort statute, in Notre Dame Law Review, 89 (4) 2014, pp. 147ss.

89 In fact, as early as 1701, Sir John Holt C.J., in obiter dictum, reflected upon the existing common law position when he said that: "(...) corporations were incapable of committing criminal offences. According to Holt C.J., only particular members of the corporation could be indicted for criminal offences, but not the corporate entity itself (...) changed at the turn of the century. Anon (1701) 12 Mod 560, 88 ER 1518 (...)". Positions discussed in A. PINTO, M. EVANS, Corporate criminal liability, ed. Sweet & Maxwell, London, 2008, pp. 6ss. D. STOITCHKOVA, Towards corporate liability in international cirminal law, ed. Intersentia, Antwerp, Oxford, 2010. C. WELLS, Corporate criminal liability: Exploring some models in United Kingdom, the Law Commission, criminal liability in regulatory contexts, Consultation Paper N. 195, 2010, pp. 198ss. J. CLOUGH, Bridging the theoretical gap: The search for a realist model of corporate criminal liability, in Criminal Law Forum, 18, 2007, pp. 268ss.

90 In the same spirit see also. Mohamed v. Jeppesan Dataplan, Inc.579 F.3rd 943 (9th Cir. 2009), "(...) the five plaintiffs had been suspected of terrorism, thus subject to rendition to countries such as Egypt in which security personnel subjected them to torture and long periods of confinement, bereft of any judicial proceedings or intervention. Defendant Jeppesan had provided fueling and flight guidance to the aircraft and crews which had transported the plaintiffs (...)". In the same spirit: United States v. Krauch (the I.G. Farben Case) United States v. Krauch (The I.G. Farben Case), Trials of War Criminals Before the Nuremberg Military Tribunals 1117 (1952), offers a reverse conclusion: "(...) pharmaceutical corporate executives were actually acquitted because the prosecution could not show that defendants knowingly participated in the planning, preparation or initiation of an aggressive war (...) is an important aspect of knowledge and, perhaps, a required component. In the I.G. Farben Case, the executives believed the gas they manufactured was put

under customary international law, a multinational company could be held responsible for international crimes:"(...) together, those authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm, it is not a rule of customary international law that we may apply under the ATS (...)"[91].

The Court also referred to the statement by the Nuremberg Military Criminal Court that "crimes against international law is committed by men, not by abstract entities"[92]. Ultimately, only individuals can be accountable under international law for international crimes, thus excluding juridical persons. Therefore, the defendants in the Kiobel case were companies and the Court decided to dismiss the appeal, for lack of jurisdiction *ratione materiae*. Furthermore, on 4 February 2011, the Court refused to re-examine the case requested by the applicants in October 2010. The only possibility for victims could be to bring an appeal against individuals who have operated "on behalf of corporations". Ultimately, the case studies examined confirm the absence of direct responsibility of multinational companies[93]. In June 2005, an appeal against Shell-Nigeria by the Nigerian citizen, who acted as a representative of the *Iowakan* community of the Niger Delta State, was incriminated before the Nigerian Federal Court of Benin City[94]. The applicants accused the company of having violated: a) articles 33 (1) and 34 (1) of the Nigerian Constitution of

to the purpose of delousing prisoners. They were, in fact, unaware of the criminal purposes for which it was being used (...)".

91 United States Court of Appeals, Second Circuit, Sentence of 17 September 2010: case Kiobel et al. v. Royal Dutch Petroleum Co. et al., cit ., pp. 43.

92 United States Court of Appeals, Second Circuit, Sentence of 17 September 2010: case Kiobel et al. V Royal Dutch Petroleum Co. et al., cit ., pp. 7.

93 See: Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 47, UN Doc. A/56/10 (2001) ("(...) the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (...)").

94 The Corporate Responsibility (CORE) Coalition, The Reality of Rights: Barriers to Accessing Remedies When Business Operates Beyond Borders, May 2009, pp. 51ss.

1999[95], which enshrine, respectively, the right to life and the right to the dignity of the human person; b) articles 4, 16 and 24 of the African Charter of Human and Peoples' Rights (ACHPR), concerning the right to life and the integrity of the human person, physical and mental health and a satisfactory environment; -art. 2 (2) of the Nigerian Environmental Impact Assessment Act, which requires companies to carry out an environmental impact assessment in case of highly polluting practices. The present case concerned, in fact, the practice of the so-called gas flaring[96], which consists of the open-air combustion of gases associated with oil during extraction phases and which is banned in industrialized countries because of its harmful effects on the environment. Also in Nigeria the gas flaring process was restricted by the law in 1984; but, in any case, it is foreseen that companies can, in special cases, obtain a ministerial certificate that authorizes them. The applicants complained that Shell-Nigeria and its related companies had caused considerable environmental pollution as they had not bothered to carry out an environmental impact assessment (as required by the Nigerian law)"massive, relentless and continuous gas flaring in their community"[97].

The gas flaring practices implemented "in open and uncontrolled manner"[98] by the two companies involved, compromised the health of local inhabitants, causing them serious respiratory illnesses, when not even death. In November 2005, the Nigerian Federal Court recognized the violation by Shell-Nigeria of the claim to the life and human dignity of the applicants claiming that these rights "inevitably include the right to clean poison-free, pollution-free and healthy environment"[99]. Furthermore, art. 3 (2) (a) and (b) of the Associated Gas Re-Injection Act (which derogates from the general

95 African Charter on Human and Peoples Procedure Rules (Ratification and Enforcement) Act , in Laws of the Federation of Nigeria, 2004, Vol. I, Cap. A9

96 A. SINDEN, An emerging human right to security from climate change: The case against gas flaring in Nigeria, in W. BURNS, O.H. SOFSKY (a cura di), Adjudicating climate change: Sub-national, national, and supra-national approaches, Temple University Legal Studies Research Paper No. 2008-77, 2008, pp. 5ss.

97 Federal High Court of Nigeria (Benin Judicial Division), Sentence of 14 November 2005: case Gbemre v. Shell Petroleum Development Company of Nigeria and Nigerian National Petroleum Corporation, Case n. FHC/B/CS/53/05, p. 4.

98 Federal High Court of Nigeria (Benin Judicial Division), Sentence of 14 November 2005: case Gbemre v. Shell Petroleum, op. cit., pp. 5.

99 Federal High Court of Nigeria (Benin Judicial Division), Sentence of 14 November 2005: case Gbemre v. Shell Petroleum, op. cit., pp. 30.

prohibition of gas flaring) has declared unconstitutional, null and void, ordering Shell-Nigeria and the NNPC to suspend this practice and to take immediate measures in order to permanently interrupt it in the territory of the *Iwherekan* community[100]. The jurisprudential case, differently from the previous one, makes it possible to support the existence of the responsibility of multinational companies for the violation of human rights, but as it emerged, there are strong limits to enforce the sentence. From this impossibility emerges the need for the international system to implement the instruments that are present in the legal system. In fact, the victims could have resorted to civil courts for compensation for damages suffered or in administrative cases for the revocation of the authorization to continue in the practices of gas flaring, granted to the two companies involved. However, the civil proceeding would have led to the difficulty of proving a causal connection between the polluting practice and the environmental and physical damage suffered by the applicants (and a greater need for technical expertise) and could not in any case order the interruption of the flaring gas. The administrative appeal, in addition to confirming this last limit, presented further procedural problems related to the lack of transparency of the authorization management mechanisms. Finally, the ascertainment of the criminal responsibility for international crimes could be subject to the same obstacles, but it should not be overlooked that the interpreter should impute criminal action by sticking to the objective element and the subjective element. In particular, the regulatory coverage and the presence of the constituent elements of the illicit fact that can be extended to multinational companies, would allow to criminalize the violation of human rights and, presumably, to achieve an immediate result by bypassing the restrictions of the connection establishment causal place for the protection of multinational companies.

Equally important, the case of the diamonds in blood is the most current issue and serves as a test bed for the direct and even criminal responsibility of the multinational companies for the violation of human rights. The case of the bloodstained diamonds takes its origin in the mid-nineteenth century when the first diamond was discovered in South Africa and the Kimberley deposits were also opened. The diamond mining sees the

[100] Federal High Court of Nigeria (Benin Judicial Division), Sentence of 14 November 2005: case Gbemre v. Shell Petroleum, op. cit., pp. 31ss.

African countries in the foreground, in fact half of the diamonds extracted comes from central and southern Africa[101]; Democratic Republic of Congo,

[101] See also from the Special Ttribunal for Lebanon (STL) the next cases: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber Judgement, 15 July 2016 (Akhbar, Trial Chamber Judgement) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law (...) held that the mens rea can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and wilfully in order to show culpability (...) the Amicus had to prove that the accused "(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various circumstances (...) if only wilful blindness is established, that alone suffices knowledge whichgives reason to impute criminal liability (...). Dee also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing Judgement, 5 September 2016, para. 2. (Akhbar, Sentencing Judgement) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)". New TV S.A.L, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Case No STL-14-05/PT/AP/AR126.1, 2 October 2014; Akhbar Beirut S.A.L., Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Case No STL-14-06/PT/AP/AR126.1, 23 January 2015. For a summary of the cases see N. BERNAZ, Corporate criminal liability under international law: The New TV S.A.L and Akhbar Beirut S.A.L. Cases at the STL, in Journal of International Criminal Justice, 13, 2015, pp. 314ss. See also: Prosecutor v. Ayyash et al., STL-11-01, Public Redacted Version of Judgment on Appeal, par. 2 (STL, Mar. 8, 2016). Contempt charges are based on Rule 60 bis. See STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1 (Apr. 3, 2014). In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, par. 74 (STL, Oct. 2, 2014): The case illustrates how heavily debated is the issue of corporate liability before the international tribunals and under international law. Contempt Judge took: "(...) the traditional view by finding the respective corporate manager criminally liable, but not the corporate entity itself (...) several problems with the premise that the prosecution of responsible, natural persons within the corporation would be sufficient to render effective the contempt authority of the STL (...) the approach to impose criminal liability solely on the responsible individual within the corporation runs the risk of producing significant accountability gaps and would "potentially lead to unacceptable impunity," as the STL Appeals Panel concluded (...)". C. KAEB, The shifting sand of corporate liability under international criminal law, in The Georgetown Washington

Angola, Botswana, South Africa, Zimbabwe and Central African Republic are the main producing countries. A peculiarity of the Central African state compared to other producing countries is the absence of large mining companies. In fact, the reality confirms that to derive greater profits from the sale of diamonds it is not the State itself, but unscrupulous mediators, guerrillas and law enforcement agencies who smuggle them and sell them for sums derisory to the big multinationals. The problem of illegal diamond trade is not new, especially in Africa[102]. The diamond trade has affected Sierra

International Law Review, 49, 2016, pp. 354ss. N. BERNAN, Corporte criminal liability under international law: The new TV S.A.L. Anmd Akhbar Beirut S.A.L. cases at the Special Tribunal for Lebanon, in Journal of International Criminal Justice, 13, 2015, pp. 314ss.

[102] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) (adopted 27 June 2014). These include and are not limited to: Botswana (Section 24 of the Penal Code 1964); Ethiopia (Article 34 of the Criminal Code 2004); Ghana (Section 192 of the Criminal Procedure Code 1960); Kenya (Section 23 of the Penal Code 1930); Malawi (Nyasaland Transport Company Limited v R 1961-63 ALR Mal 328 and Section 24 of the Penal Code); Nigeria (Sections 65-66 of the Companies and Allied Matters Act 1990); South Africa (Section 332 of the Criminal Procedure Act 1977); Zambia (Section 26(3) of the Penal Code Act 1950); Zimbabwe (Section 277 of the Criminal Law (Codification and Reform) Act 2004). (Some of these provisions do not establish corporate criminal responsibility but are premised upon its existence pursuant to other statutory or common law sources). precluding mens rea offences or limiting liability to crimes "typically associated with the economic, environmental, or social impact of the modern (multinational) corporation". Having said this, the Court (Prosecutors, Judges) may identify certain ACC crimes that cannot be committed by corporations and in particular the leadership clause of the crime of aggression may render corporate prosecutions incongruous (Art 28M). Art 46C states that the: "(...) Court shall have jurisdiction over legal persons, with the exception of States and Art 1 states that that the term "person" as it appears in the Statute "means a natural or legal person" (...) the title of Art 46C and repeated use of derivations of "corporate" within Art 46 strongly suggest that the Statute is directed to a limited range of legal persons: entities incorporated under domestic laws (...)". See also in that spirit the "Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo" (16 October 2002) UN Doc S/2002/1146; "Final Report of the Monitoring Mechanism on Angola Sanctions" (21 December 200) UN Doc S/2000/1225; "Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone" (20 December 2000) UN Doc S/2000/1195. The "Declaration of the African Coalition for Corporate Accountability (ACCA)" (November 2013), According to Article 31(1) of the Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 17 January 1980) 1155 UNTS 331: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. There is also the principle of interpreting criminal statutes, that in cases of ambiguity the matter should be resolved in favour of the defendant. See also: I. EBERECHI, Rounding up the usual suspects: Exclusions, selectivity and impunity in the enforcement of international criminal justice and the African Union's justice and emerging resistance, in African Journal of Legal Studies, 4, 2011, pp. 52ss.

Leone, where the rebel group Revolutionary United Front (RUF) controlled diamond areas to sell diamonds to multinational companies and obtain money for the purchase of weapons and war material. The RUF was held responsible for war crimes and against humanity. In 1997 the Security Council banned the sale of oil to Sierra Leone, but nothing said about the diamonds[103].

Only in 2000 did the Security Council intervene and banned the Member States from buying diamonds from Sierra Leone, which, for its part, had to certify diamonds, so to speak, legal and distinguish them from the bloody ones coming from the exploitation of individuals.

In the same years the Council established a group of experts who had to monitor the traffic of diamonds and had to verify the connection between the diamonds sold to multinational companies and the purchase of war material. In this context, the problematic concerning the multinational companies arises, which, for years, have purchased diamonds in blood that have been damaged[104]. As mentioned earlier, this represents the test bed of the criminal liability of multinational companies, as the jurisprudence is still not pronounced in this regard. Regarding their conduct, it is claimed that it is the result of the violation of human rights and this would be sufficient to integrate criminal responsibility. But, faced with a necessary assessment of the specific case, it can be argued that the conduct of the multinational companies is suitable to integrate the anti-juridical conduct and the related imputability. In this way, the position supported so far is maintained, which allows to find the penal responsibility in relation to the so-called extensive interpretation. Returning to the intervention of the Group of Experts, following the investigation, it emerged that the Liberian Government was also involved and supported the work of the RUF.

As is known from here the trial was derived from President C. Taylor[105], who became responsible for acts of terrorism, murder, rape, kidnapping and

[103] Security Council, Resolution n. 1156 (1998) of 16 March 1998 and Resolution n. 1151 (1998) of 5 June 1998.

[104] SCSL, Prosecutor v Sessay, Kallon and Gbao, SCSL-04-15-T, sentence of 8 April 2009, e SCSL-04-15-A, sentence of Appeals Chamber of 26 October 2009.

[105] SCSL, Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-PT, 29 May 2007. This process has received particular attention from the media, due to the testimony given to the Court by the model Naomi Campbell, regarding a diamond that she received as a gift-presumably from the former dictator-during a party at home. Nelson Mandela in 1997, both of whom were guests. Naomi Campbell claims she

exploitation of child soldiers. In exchange for the material and tactical support given to rebel groups, he obtained diamonds extracted from enslaved workers. C. Taylor was convicted by the Special Court of Sierra Leone (SCSL) and also by the SCSL for behaviors that have harmed the victims and for threatening the international stability and security of West Africa[106]. The Security Council also adopted penalties for the trade in rough diamonds against Angola as the trade in precious stones fueled civil wars[107]. Despite the intervention of the Security Council, the traffic of bloodied diamonds resisted. In light of this, the United Nations General Assembly adopted new instruments and defined the conflict diamonds: "rough diamonds which are used by rebel movements to finance their military activities", including attempts to undermine or overthrow legitimate Governments"[108]. Furthermore, the Assembly invited all the countries of the United Nations to adhere to the "Kimberley Protocol" based on consultations of the various heads of government that determined the establishment of the Kimberley Process Certification Scheme (KPCS), a certification agreement signed by several Countries with the aim of ensuring that the profits obtained through the sale of diamonds do not serve to finance civil wars or other phenomena of violence. The real novelty consists in the fact that it consists of the international certification system, suitable for tracing the entire path of diamonds, from extraction to cutting. The participation of the European Union in the Kimberley process also contributes significantly to the success of the latter, since in Europe there are mineral processing centers, such as Antwerp and London, which in the past have attracted large quantities of "bloody" diamonds. In implementation of the Protocol, the Council of the

was woken up the night after the party by two men, who would have given her a huge diamond, but did not tell her who the gift was. On the contrary, according to the testimony given to the court by the actress Mia Farrow-also a guest of the party-for breakfast, the model, in reporting to the actress the gift received during the night, would have clearly stated that the diamond was given to her from Charles Taylor.

[106] African Charter on Human and Peoples' Rights (ACHPR), "The Banjul Charter" (adopted 28 June 1981, entry into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 1520 UNTS 217. For an overview of the African Commission's jurisprudence with respect to the rights provided under the African Charter, see for instance O. AMAO, Civil and Political Rights in the African Charter, and M. SSENYONJO, Economic, Social and Cultural Rights in the African Charter, in M. SSENYONJO (ed.), The African Regional Human Rights System: 30 years after the African Charter on Human and Peoples' Rights, Martinus Nijhoff Publishers, Leiden, Boston, 2012.

[107] UN, Conflict diamonds: sanctions and war, comunication paper of 21 March 2001.

[108] General Assembly, UN Doc. A/RES/55/56 of 29 January 2001.

European Union adopted Regulation n. 2368/2002 of 20 December 2002[109], which requires the Member States to establish an internal Community authority to monitor the imports and exports of diamonds affecting the Union.

In conclusion, the examination of case law allows to find the absence of a univocal orientation, but, for sure, the cases examined did not absolutely rule out the existence of the criminal liability of multinational companies, but rather was recognized and linked to a concrete assessment of the factual situation in order to verify in what terms the violation of human rights is carried out[110].

6 ASPECTS OF COMMAND RESPONSIBILITY UNDER THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL JUSTICE

The position of guarantee, in particular of control, of the superiors, asserted itself as a consequence of the decentralization of the armed forces, which made it possible to identify the privileged observers of the subordinates precisely in the commanders of the peripheral units. The legal nature of this responsibility, whose value is emphasized with respect to that of subordinates, is still oscillating: from responsibility for the subordinate, to responsibility *sui generis*[111] for non-fulfillment of the duty to control the work of subordinates, to responsibility for complicity, in the form of moral or material competition.

On the defining side, various options have alternated: responsibility for a fact committed by others[112], which is reflected in a normative transposition in the statutes of the *ad hoc* Tribunals; type of individual criminal responsibility for the illegal acts of subordinates; type of imputed responsibility or indirect

[109] Regulation (EC) n. 2638/2002 of the Council of 20 December 2002 on the implementation of the Kimberley Process certification system for the international trade in rough diamonds, in GU L 358/28 of 31 December 2002, art. 2.

[110] C. STAHN, Liberals vs Romantics: Challenges of an emerging corporate international criminal law, in Case Western Reserve Journal of International Law, 50, 2018, pp. 94ss.

[111] ICTY, Prosecutor v. Halilović, Trial Chamber I, op. cit., par. 78: "(...) a debate has recently been taking place at the crimes of subordinates or is a sui generis responsibility for dereliction of duty (...)". S. DARCY, The doctrine of superior responsibility, in A.A.V.V., Rethinking international criminal law-The substantive part, Europa Law Publishing, Groningen, 2007, pp. 131ss.

[112] ICTY, Prosecutor v. Halilović, Trial Chamber I, op. cit., par. 54. ICTY, Prosecutor v. Enver Hadžihasanovic and Amir Kubura, Case n. IT-01-47-T, Trial Chamber, 15 March 2006, parr. 69-75.

responsibility[113], and finally dereliction of duty, in the presence of a reprehensible failure to perform an act required by international law[114]. The alternation of these definitions did not produce purely terminological effects. In fact, the construction of the case focused on the dereliction of duty has the merit of reporting the institution of responsibility by command in the course of responsibility for culpable fact, but has the demerit of not dissolving the Gordian knot of the link between the guilty omission of the superior and the crime committed by subordinates[115].

What is certain is that, when the responsibility as a hierarchical superior lives with a responsibility deriving from a direct participation in the crime, it is the latter to establish the imputation, while the command responsibility is degraded to aggravating[116]. It is common for the command responsibility to be marginalized, favoring the institutions of the People's Competition or the Joint Criminal Enterprise (JCE)[117], despite presenting not a few friction points with the principles of criminal responsibility. Arguably, there is even the accumulation of responsibilities, configuring, at the head of the hierarchy, contextually direct responsibility and responsibility by command. It is also the amplitude of the notion of complicity that makes the boundaries between responsibility for competition and responsibility to be

[113] ICTY, Prosecutor v. Zejnil Delalić, Zdravko Mucić (alias "Pavo"), Hazim Delic and Esad Landžo (alias "Zenga") (Čelebici case), n. IT-96-21-A, Appeals Chamber, judgment, 20 February 2001, par. 225.

[114] ICTY, Prosecutor v. Naser Orić, n. IT-03-68-A, Appeals Chamber, judgment, 3 July 2008, par. 293.

[115] C. GOSNELL, Damned if you don't liability for omissions in international criminal law, Ashgate Publishing, Farnham, 2013.

[116] ICTY, Prosecutor v. Blaškic, Case n IT-95-14-PT, Pre-Trial Chamber, 4 April 1997, par. 91. ICTR, Prosecutor v. Juvénal Kajelijeli, Case n° ICTR-98-44A-A, Appeals Chamber, judgment, 23 May 2005, par. 85.

[117] Prosecutor v. Krstić, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, parr. 266-269; Prosecutor v. Kvoćka et al., Judgment, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, parr. 79-91. H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, T.M.C. Asser Press, The Hague, 2010, pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, in Journal of International Criminal Justice, 2011, pp. 165ss. A. CASSESE, The nexus requirement for war crimes, in Journal of International Criminal Justice, 10, 2012. B. DON TAYLOR III, Crimes against humanity in the Former Yugoslavia, in R. BELLELLI (a cura di), International criminal justice. Law and practice from the Rome Statute to its review, Ashgate Publishing, Farnham, 2010, pp. 285-294.

fluid and to determine double imputations, sometimes stigmatized by jurisprudence[118].

This is demonstrated by the difference between the solutions offered by the ad hoc Tribunals and those from the ICC, as well as the ambiguity of the latter. The reason is to be found in the massive nature of international crimes[119], and in the difficulties inherent in the control to be operated in

[118] ICTY, Prosecutor v. Brđanin, Trial Chamber II, Case n. IT-99-36-T, Trial Chamber II, 1 September 2004, parr. 284-285. ICTY, Prosecutor v. Krnojelac, Trial Chamber II, judgment, n. IT-97-25-A, Appeals Chamber, judgment, 17 September 2003, par. 173. Unlike the Krstić and Vasiljević judgments, in the Krnojelac case the judges did not motivate the choice in favor of appearance. A dissenting opinion was expressed by Judge Shahabuddeen in the Krstić case, in which the latter declared to comply with the conclusion reached by the majority of the Chamber of Appeal only because of the existence of two precedents (the aforementioned cases Vasiljević and Krnojelac) which affirmed the appearance of the competition. It is interesting to report a significant passage of the partially dissenting opinion in which, after having said that the two cases present distinct elements, the judge affirmed that: "(...) were it otherwise, the legal elements of the crime of persecution would vary according to the legal elements of the particular crime on which the persecution is based. The legal elements of the crime of persecution would include the legal elements of the crime of enslavement if enslavement were alleged to be the basis of the persecution charged. Similarly with respect to deportation, imprisonment, torture and rape. The legal elements of a charge for persecution would thus vary from case to case; in the present case, they would include the legal elements of all the crimes on which the persecution is alleged to have been based. That variability is not reconcilable with the stability, definitiveness and certainty with which the legal elements of a crime should be known. Those elements must not depend on accidents of prosecution; they must clearly appear once and for all from a reading of the provision defining the crime (...)": ICTY, Prosecutor v. Radislav Krstić, Partial Dissenting Opinion of Judge Shahabuddeen, AC, IT-98-33-A, 19 April 2004, par. 91. In our opinion, the suggestion proposed by Judge Shahabuddeen does not take due account of the peculiar normative construction of the persecution. As mentioned above, persecution presents itself as a complex crime in which alongside some typical elements of its own-the discriminatory intent and the victim group-can be added to the objective and subjective elements of other cases already codified within of the Statute. Consequently, the configuration of the persecution necessarily depends on the modality of the conduct with which it is carried out and imputed to the author. R. ESTUPIÑAN SILVA, Principios que rigen la responsabilidad internacional penal por crìmenes internacionales, in Anuario Mexicano de Derecho Internacional, 2012, pp. 136ss.

[119] From the inter-American Court see the next cases in relation on crimes against humanity: Almonacid Arellano v. Chile, excepciones preliminares, fondo, reparaciones y costas, 26.09.2006; Bámaca Velásquez v. Guatemala, fondo, 25.11.2000 Barrios Altos v. Perú, fondo, 14.03.2001; Bueno Alves v. Argentina, fondo, reparaciones y costas, 11.05.2007; Bulacio v. Argentina, sentencia de fondo, reparaciones y costas, 18.09.2003; Castillo Páez v. Perù, fondo, 03.11.1997; Comunidad Moiwana v. Surinam, excepciones preliminares, fondo, reparaciones y costas, 15.06.2005; García Asto y Ramírez Rojas v. Perù, excepciones preliminares, fondo, reparaciones y costas, 25.11.2005; Gelman v. Uruguay, fondo y reparaciones, 24.02.2011; Godínez Cruz v. Honduras, fondo, 20.01.1989; Goiburú y otros v. Paraguay, fondo, reparaciones y costas, 22.09.2006; Gomes Lund y otros v. Brasil

macro-levels. Just think of the case *Yamashita,* declared responsible by the Supreme Court of the United States for allowing his men to commit atrocities[120]. In his dissenting opinion Judge Murphy based his dissent on the verdict, based on the absence of knowledge in which the defendant was involved, as well as the lack of direct links with the atrocities committed.

Not too much has changed from the case law to the *Đordevic* case[121], which has declined the factors that govern the existence of effective control: power *de jure,* precise knowledge of events, role-pivotal in the coordination of operations, presence in the territory, active role in operations and information received simultaneously with the facts constituting international crimes. As mentioned, on the regulatory level, the responsibility of the superior can be traced back to two different paradigms: that of direct responsibility, consequent to a personal contribution, material or moral, governed respectively by art. 25 par. c) and b)[122], and the responsibility of command, governed by art. 28 of the StICC. The latter provides for the "indirect" responsibility of superiors for crimes committed by subordinates, structured in a subsidiary form compared to the "direct" one corresponding to the issue of orders (article 25 subparagraph 3, letter b) or participation in criminal organizations (article 25 subparagraph 3, letter d)[123]. From a formal point of view, the disposition is divided into two parts, corresponding to two different disciplines: the first concerning the relations of military subordination; the second, accessory, concerning all non-military superiors (paramilitaries, heads of irregular militias, armed bands, civilians and politicians).

Article 28 of the StICC contemplates a specific form of responsibility of the hierarchical superior for the crimes committed by his subordinates,

(Guerrilha do Araguaia), excepciones preliminares, fondo, reparaciones y costas, 24.11.2010; Heliodoro Portugal v. Panamá, excepciones preliminares, fondo, rearaciones y costas, 12.08.2008; Ticona Estrada y otros v. Bolivia, fondo, reparaciones y costas, 12.08.2008; Trujillo Oroza v. Bolivia, reparaciones y costas, 27.02.2002; Velásquez Rodríguez v. Honduras, fondo, 29.07.1988.

120 Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 8 October-7 December 1945, Case n. 21, IV Law Reports of Trials of War Criminals 1, par. 13.

121 ICTY, Prosecutor v. Đordevic, Case n. IT-05-87/1, Trial Chamber, 23 February 2011, Summary of judgment.

122 H. OLASOLO, Artigo 25 (1)-(3) (a): Responsabilidade individual e autoria, ed. Belo Horizonte, Konrad Adenauer Stiftung, Brazil, 2016, pp. 448ss.

123 ICTY, Prosecutor v. Delalić and others (Celebici case), Appeals Chamber, judgment, op. cit.

interpreted by the doctrine, on the basis of the structure of the case, as a form of negligent omission of the superior in the offenses of subordinates or as form of autonomous responsibility for culpable facilitation of an intentional crime. On the basis of this rule, it is basically aimed at criminalizing the inertia of the commanders and superiors of the hierarchy, thus affirming the superior's responsibility for making the commission of crimes committed by the negligence or superficiality possible or easier for the subordinates prevent or for not having proceeded to their punishment. Faced with the often omission of the responsibility of the superior, underlined by the jurisprudence of *ad hoc* Tribunals[124],one can not help but remember another dissenting opinion, which moves on the same guaranteeing logic as the previous one: that of Judge Shahabuddeen in the *Hadžihasanović* case[125], which emphasizes that the hierarchical superior should not be held responsible for the crimes committed by subordinates in the absence of subjective element and any type of participation in the realization of the typical fact, unless, in fact, did not know or had a way to know.

With this in mind, it has been clarified that superiors can not be held responsible for crimes committed before being invested with power and being able to effectively exercise it[126]. Tuttavia, non mancano orientamenti più restrittivi e probabilmente più funzionali ad esigenze repressive. The *Hadžihasanović* ruling is just one of the three important rulings that the

[124] ICTY, Prosecutor v. Aleksovski, Trial Chamber, judgment, op. cit., par. 67: "(...) la théorie de la responsabilité du supérieur hiérarchique fait peser la responsabilité pénale sur un supérieur non en raison de ses actes, sanctionnés sur la base de l'article 7 1) du Statut, mais en raison deses abstentions: un supérieur hiérarchique est tenu responsable des actes de ses subordonnés s'il n'a pas, soit empêché les violations criminelles commises par ses subordonnés, soit puni les auteurs de ces violations (...)". See also: ICTY, Delalić and others (Celebici case), Trial Chamber, judgment, op. cit., par. 346. ICTY, Prosecutor v. Blaškić, Trial Chamber I, judgment, op. cit., par. 484. ICTY, Prosecutor v. Aleksovski, Appeals Chamber, judgment, op. cit., par. 72. ICTY, Kordić and Čerkez, Appeals Chamber, judgment, op. cit., par. 827. ICTY, Prosecutor v. Kvoćka, Kos, Radic, Žigić and Prcać ("Omarska and Keratem Camps"), Trial Chamber I, op. cit., par. 401.

[125] ICTY, Prosecutor v. Hadžihasanović and Kubura, Case n. IT-01-47-T, Trial Chamber, Decision on the Defence Motion on Jurisdiction (in seguito ICTY, Decision Hadžihasanović on the Defence Motion on Jurisdiction), par. 32.

[126] ICTY, Prosecutor v. Hadžihasanović and Kubura, Case n. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, par. 51. J.A. WILLIAMSON, Some consideration on command responsibility and criminal liability, in International Review of the Red Cross, 90, 2008, pp. 306ss.

Appeals Chamber of the ICTY has recently issued regarding the command responsibility, in addition to the rulings *Orić* and *Strugar*[127].

Also from the reading of the Statutes of the International Criminal Tribunals, as well as from the jurisprudence, it is given to extrapolate the assumptions of the responsibility of the superior: the bond of subordination; the subjective element constituted by the actual knowledge ("knew") or potential ("had reason to know")[128] and the failure of the obligation to prevent or punish subordinates[129].

The bond of subordination, even if temporary[130], indirect or mediated[131], is the source of the guarantee position, therefore of the legal obligation to prevent the event, because it is in this bond that the superior's power to control the subordinates rests. The subordinate superior bond is directly linked to the problem of identifying subordinates[132]. To the bond of

[127] ICTY, Prosecutor v. Orić, Appeals Chamber, judgment e ICTY, Prosecutor v. Strugar, Case n. IT-01-47-A, Appeal judgment, 17 July 2008, parr. 34, 55, 60. D. LIAKOPOULOS, La sentenza "Pavle Strugar" per i danni alla città di Dubrovnik del Tribunale penale internazionale per la ex Jugoslavia, in Rivista Gazzetta Ambiente, 3, 2005, pp. 154-167. T. SQUATRITO, O.R. YOUNG, A. FOLLESDAL, G. ULSTEIN, The performance of international Courts and Tribunals, Cambridge University Press, Cambridge, 2018.

[128] S. DARCY, The doctrine of superior responsibility, op. cit., pag. 131 ss.: "(...) in the case of the Statutes of the ad hoc Tribunals the standard is that an accused "knew or had reason to know" that crimes had been or were about to be committed. Around the time of the adoption of the ICTY Statute, the Commission of Experts felt that was needed on the part of a superior is: a) actual knowledge b) such serious personal dereliction or the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein (...)", (Final Report of the Commission of Government Experts, U.N. Doc. S/1994/674, 27 May 1994, par. 56, reprinted in M. CHERIF BASSIOUNI (ed.), International Criminal Law-Vol. III: Enforcement, 2 nd Edition, Transnational Publishers, Ardsley, New York, 1999, pp. 443ss.

[129] ICTY, Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 346. in the same sense: ICTY, Prosecutor v. Halilović, Trial Chamber I, op. cit., par. 56 in which the three elements of the command responsibility doctrine have been extrapolated: a) the existence of a superior-subordinate relationship; b) that the superior knew or had reason to know that subordinates had or were about to commit criminal acts, and c) the superior did not take the necessary and reasonable measures to prevent those crimes or to punish the perpetrators.

[130] ICTY, Prosecutor v. Kunarac, Kovać and Vuković ("Foca" Case), Trial Chamber II, judgment, n. IT-96-23-T & IT-96- 23/1-T, Trial Chamber I I, Decision on Motion for Acquittal , 3 July 2000, par. 399

[131] ICTY, Prosecutor v. Strugar, Case n. IT-01-42-T, Trial Chamber II, judgment, 31 January 2005.

[132] "(...) the first element of superior responsibility, the superior-subordinate relationship, must involve the superior having the power to control or influence the

subordination is added[133], for civil or political superiors, "the inherence" of the crimes committed by the subordinate to his own service activity, which however risks introducing an unequal treatment with respect to the other hypotheses. It is not said that a guarantee position must be present, because in many cases the jurisprudence of the ad hoc Tribunals disregards it, recognizing a facilitating character also to the omissive conduct of those who were not obliged to prevent crimes, in the absence of the superior-subordinate relationship or other source of the obligation to act[134].

In this way, an exemption is introduced to the fundamental assumptions of the omissive responsibility and a questionable extension of the details of the insolvency liability[135]. It would seem to be required, to configure

acts of subordinates (...)": ICTR, Prosecutor v. Bagilishema, Trial Chamber I, judgment, op. cit., par. 37.

133 The Appeals Chamber in the Orić case held that, while it is not necessary to identify the subordinates in person, at least "their existence" must be established before superior responsibility ca arise (ICTY, Prosecutor v. Orić, Appeals Chamber, judgment, op. cit., par. 35). The Appeals Chamber reversed the conviction of Oric for crimes committed by the Military Police because the Trial Chamber did not mention the potentially culpable members of the Military Police but only established the existence of the Military Police as an entity (ICTY, Prosecutor v. Orić, Appeals Chamber, judgment, op. cit., par. 35. The identification of the subordinates and finding of their criminal responsibility is particularly important in cases where subordinates of the accused are alleged to be criminally responsible for the crimes of direct perpetrators who are not subordinates of the accused (ICTY, Prosecutor v. Blagojević and Jokić, Case n. IT-02-60-A, Appeals judgment, 9 May 2007, parr. 280, 281). Per questa ricognizione giurisprudenziale si rinvia, più diffusamente, a M. ELEWA BADAR, N. KARSTEN, Current developments at the International Criminal Tribunals, in Internatuonal Criminal Law Review, 8, 2008, par. 238.

134 ICTR, Prosecutor v. Kayshema and Ruzindana, Trial Chamber II, judgment, op. cit., par. 200. ICTY, Prosecutor v. Boškoski and Tarculovski, Trial Chamber II, Case n. IT-04-82-PT, Pre-Trial Chamber, Decision on Assigned Pro Bono Councel Motion Challenging Jurisdiction, 8 September 2006, par. 402.

135 The Prosecutor v. Sam Bockarie (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Trial judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Appeal judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Trial judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Appeal judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008); The Prosecutor v. Johnny Paul Koroma (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003); The Prosecutor v. Fofana and Kondewa (CDF Case) (Trial judgment) (Special Court- xxii-for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); The Prosecutor v. Fofana and Kondewa (CDF Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008); The Prosecutor v. Foday Saybana Sankoh (Withdrawal of

the omissive responsibility, a duty to act to be found beyond the criminal law *stricto sensu* intented[136], therefore a position of guarantee, whose source is variously identified: by the laws and customs of war for the Appeals Chamber of the *Mrkšić* case[137], to international humanitarian law, to positions of authority or to the situation of danger previously caused for the Trial Chamber in the *Orić* case[138]. Until the *Šljivancanin* case, in which the right of armed conflicts was invoked[139]. The lowest common denominator of this jurisprudence is precisely to be directed towards finding a source of the obligation to act, even found in national rights, instead identifying in the laws and customs of war an alternative source[140]. The same casuistry on the configuration of the duty to act is rather rich but above all the duty to act incardinated on the responsibility of position stands out: think of the case *Mucić*[141] and the case of *Bala, Musliu, Murtezi*[142]. If, on the side of the individual criminal responsibility[143], first stop on the physical and personal

Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003); The Prosecutor v. Charles Ghankay Taylor (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007).

136 "(...) common ground would seem to be that criminal responsibility for omission requires a duty to act (...) quite a few national legal system use legal duties from beyond the criminal law as a constituent element to establish criminal liability for omission (...)": as noticed from. L.C.BERSTER, "Duty to act" and "commission by omission", in Internatonal Criminal Law Review, 10, 2010, pp. 619, 621-625.

137 ICTY, Prosecutor v. Mrkšic-Šljivancanin, Case n. IT-95-13/1-A, Appeals Chamber, judgment, 5 May 2009, par. 151.

138 ICTY, Prosecutor v. Orić, Case n. IT-03-68-T, Trial Chamber II, judgment, 30 June 2006, par. 304.

139 M.G. KOHEN, La promotion de la justice des droits de l'homme et du règlement des conflits par le droit international. Liber amicorum Lucius Caflisch, Martinus Nijoff Publishers, The Hague, 2007. J. WEEKS, Strongmen and straw men: Authoritarian regimes and the initiation of international conflict, in American Political Science Review, 106 (2), 2012, pp. 329ss.

140 K. AMBOS, Treatise on international criminal law. Volume I: Foundations and general part, Oxford University Press, Oxford, 2013, pp. 97ss.

141 In Čelebici case the Trial Chamber held that the defendant Mucic had been in a position of de facto superior authority over the Celebici-prison camp and, by virtue of his position, was primarily responsible for the detainees' living-conditions. By withholding adequate food, water, health care and sanitary facilities from those under his control, Mucic was found to have participated in maintaining the inhumane conditions that prevailed at the prison-camp: ICTY, Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 1123.

142 "(...) in Limaj et al., defendant Bala was found guilty for having participated in cruel treatment by omission in that he failed to satisfy the basic needs of detainees under his control (...)": ICTY, Prosecutor v. Limaj, Bala and Musliu, Trial Chamber II, Case n. IT-03-66-T, Trial Chamber II, 30 November 2005, par. 652.

143 P.J. STEPHENS, Collective criminality and individual responsibility: The constraints of interpetation, in Fordham International Law Journal, 2014, pp.

perpetration of the crime, it is noted that the concept of "commission" has been expanded[144],conflicting tendencies are found in the case law on the commission by omission. But the same jurisprudence tries to contain such tendencies by requiring that the commission by omission presupposes an obligation to act[145]. The doctrine, however, believes that the question of the position of guarantee is marginal if we consider that art. 28 of the StICC does not establish a general clause of extension of the punishment through the asserted equivalence between the act and the omitting, but proceeds to the typing, even if incomplete, of the omissive case, through the identification of the obliged subject, the description of the proper conduct and the indication of the specific subjective element.

Control must be effective, and must result in the material possibility of preventing or punishing criminal behavior[146]. This capacity can find its

508ss. V. VIJ, Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišć cases, in Die Friedens-Warte, 2013, pp. 160ss. C. WAUGH, Charles Taylor and Liberia: Ambition and atrocity in Africa's lone star State, ed. Zed Books, New York, 2011. J. CCOURTNEY, C. KAOUTZANIS, Proactive gatekeepers: The jurisprudence of the ICC's pre-trial Chambers, in Chicago Journal of International Law, 16, 2015, pp. 525ss. B. GOY, Individual criminal responsibility before the International Criminal Court: A Comparison with the ad hoc Tribunals, in International Criminal Law Review, 2012, pp. 34ss. P. GRECIANO, Justice pènale internationale, ed. Mare & Martin, Paris, 2016. L. GROVER, Interpreting crimes in the Rome statute of the International Criminal Court, Oxford University Press, Oxford, 2016. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, in Russian Law Journal, 3, 2015, pp. 144ss.

144 ICTR, Prosecutor v. Gacumbitsi, ICTR-2001-64-A, Appeals Chamber, judgment, 7 July 2006, par. 206.

145 ICTY, Prosecutor v. Galić, Appeals Chamber, IT-98-29-A, Appeals Chamber, 30 November 2006, par. 175. ICTY, Prosecutor v. Blaškic, Appeals Chamber, judgment, op. cit., par. 663. ICTR, Prosecutor v. Ntagerura and others, Case n. ICTR-99-46-A, Appeals Chamber, 7 July 2006, par. 659. ICTY, Prosecutor v. Mrkšic-Šljivancanin, Appeals Chamber, judgment, op. cit., par. 134-146-147. ICTY, Prosecutor v. Popovic and others, n. IT-05-88-T, Trial Chamber II, 10 June 2010, par. 1019.

146 ICTY, Prosecutor v. Delalić and others (Celebici case), Trial Chamber, judgment, op. cit., par. 378. ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, op. cit., par. 491. ICTR, Prosecutor v. Kayshema e Ruzindana, Trial Chamber II, judgment, n. ICTR-95-1-A, Appeals Chamber, 1 June 2001, par. 222. The term of: "effective control" was defined as: "(...) the material ability to prevent and punish criminal conduct". ICTY, Prosecutor v. Delalić & Others (Zejnil Delalic, Zdravko Mucic alias "Pavo", Hazim Delic and Esad Landžo alias "Zenga"-Čelebici case), Case n. IT-96-21-T, Trial Chamber, judgment, 16 November 1998, par. 198 and 256. And in the same spirit: SCSL, Prosecutor v. Brima, Kamara and Kanu, Appeals Chamber, judgment, SCSL-04-16-T, Trial judgment, 20 June 2007, par. 257.

foundation in official functions, in *de jure or de facto*[147], and in the place occupied within the military or political hierarchy. Not even an appreciable influence can be compared to an effective control, drawn from specific indices[148]. The fact that there is a *de jure* power does not imply, at least until proven otherwise, the effectiveness of control[149]. The Appeals Chamber in the *Hadžihasanović* and *Kubura* case confirmed the *Čelebici* orientation, and also ruled out legal presumptions and reversals of the burden of proof in this regard[150]. Also in the *Orić* case it has been confirmed that *de jure* power is not synonymous with effective control, it is only one of the factors from which to infer the existence of the effectiveness of control[151].

147 ICTY, Prosecutor v. Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 378. ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, op. cit., par. 491. ICTR, Prosecutor v. Kayshema e Ruzindana, Trial Chamber II, judgment, op. cit., par. 216 and 222. ICTR, Prosecutor v. Musema, Trial Chamber I, judgment and Sentence, ICTR-96-13-T, Trial Chamber I, judgment and Sentence, 27 January 2000, par. 148. ICTY, Prosecutorr v. Krnojelac, Trial Chamber II, judgment, op. cit., par. 93. ECCC, Prosecutor v. Eav alias Duch, n. 001/18-07-2007/ECCC/TC, Trial Chamber, judgment, 26 July 2010, par. 540, citated the jurisprudence form the case: ICTY, Prosecutor v. Delalić & Others (Čelebici case), Appeals Chamber, judgment, op. cit., par. 191-192. ICTR, Prosecutor v. Kajelijeli, Appeals Chamber, judgment, ICTR-98-44-T, Trial Chamber II, 1 December 2003, par. 85.

148 ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 541. ICTY, Prosecutor v. Delalić and others (Čelebici case), Trial Chamber, judgment, op cit., par. 364-378. ICTR, Prosecutor v. Bagilishema, n. ICTR-95-1A-A, Appeals Chamber, judgment, 3 July 2002, par. 61:

149 ICTY, Prosecutor v. Delalić and others (Čelebici case)Appeals Chamber, judgment, op. cit., par. 197.

150 ICTY, Prosecutor v. Hadžihasanovic and Kubura, Case n. IT-01-47-A, Appeals Chamber, judgment, 22 April 2008, par. 21.

151 According to our opinion in the Hadžihasanovic and Kubura case and in the Delić case, it was in dispute whether the accused exercised effective control over Mujahedin detachment, which fought alongside with the units of the accused, and whether the accused were responsible for crimes committed by these detachments. The issue was whether the accused bear responsibility since they benefited militarily from the cooperation with those units. The Appeals Chamber clarified that the alleged benefit from the cooperation with other units is not a relevant factor when assessing whether the superior had effective control (ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, judgment, op. cit., par. 189). It added that it may entail some form of responsibility if the particulars of such responsibility are adequately pleaded in an indictment. However, ultimately the superior responsibility is only triggered upon a showing of effective control (ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, judgment, op. cit., par. 213). In the Hadžihasanovic and Kubura case, the Appeals Chamber found that the relationship between the accused and the Mujahedin detachment was one of cooperation and did not evolve into a superior- subordinate-relationship (ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, n. IT-01-47-A, 22 April 2008, par. 21, parr. 200, 210, 214, 217, 221). In the Delic case, the majority found that the Mujahedin detachment was not an independent unit merely cooperating with the army of Bosnia and Herzegovina, although it enjoyed a certain

With regard to the subjective element, the required standard fluctuates from fraud[152], with further complications for cases that require a specific

degree of autonomy (ICTY, Prosecutor v. Rasim Delić, Case n. IT-04-83-T, Trial Chamber I, judgment, 15 September 2008, par. 466). The majority found that Delic exercised effective control over the Mujahedin and was, therefore, criminally responsible for a number of crimes committed by the Mujahedin. In his dissenting opinion; Judge Moloto considered that the relationship between the Mujahedin detachment and the Army of Bosnia was throughout one of cooperation rather than one effective control. A. GRESCHKOW, Feindbilder der Nachkriegsgeneration in Bosnien und Herzegowina: Bosniens Jugend zwischen Hoftung und den Schatten der Vergangenheit, Diplomica Verlag GmbH, Hamburg, 2014.

[152] See, judgment, Kunarać (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Gacumbitsi (ICTR-2001-64-T, Trial Judgment, 17 June 2004, par. 285 ("committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); judgment, Kayishema (ICTR-95-1-A), Appeals Chamber, 1 June 2001, par. 187; judgment, Vasiljević (IT-98-32-T), Trial Chamber, 29 Nov. 2002, par. 62 ("The accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law (...)"); judgment, Kamuhanda (ICTR-99-54A-T), Trial Chamber, par. 595 ("(...) to commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law (...)"); judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, par. 188; judgment, Kunarac (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Krstić (IT-98-33-T), Trial Chamber, 2 August 2001, par. 601; judgment, Krnojelac (IT-97-25-T), Trial Chamber, 15 March 2002, par. 73. judgment, Blagoje Simić (IT-95-9-T) Trial Chamber, 17 October 2003, par. 137 ("(...) any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge (...)". M.W. BADAR, The concept of Mens rea in international criminal law. The case for a unified approach, Hart Publishing, Oxford & Oregon, Portland, 2013. J. PEAY, Mental incapacity and criminal liability: redrawing the fault lines?, in International Journal of Law and Psychiatry, 2015, pp. 4ss. M.E. BADAR, The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective, in Criminal Law Forum, 19 (4), 2008, pp. 477ss. According to the above author: "(...) a number of theories havve emerged in criminal law to istinguish between dolus eventualis and advertent negligence, among others, consent or approval theory (*die Billigungs-oder Einwilligungtheorie*), indifference theory (*die Gleichgültigkeitstheorie*), possibility theory (*die Vorstellungs-oder Möglichkeitstheorie*), probability theory *(die Wahrscheinlichkeitstheorie*), combination theory (*Kombinationstheorien*) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)". R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, in Criminal Law Forum, 5, 2001, pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, Cambridge University Press, Cambridge, 2010. A. ESER, Mental elements-Mistake of fact and mistake of law, in A. CASSESE, P. GAETA, G.R.W.D JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, Oxford, 2002, pp. 890ss. A. GIl GIL, Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments

intent, to negligence so serious as to be assimilated to acquiescence, to pure and simple negligence[153]. To the variety found on the subjective side is added, however, a multiplicity of situations compatible with the omissive responsibility of the superior: from the omission combined with the choice to be present (approving spectator) that proves to be instigating[154], to the similar presence nearby, until absentee facilitator.

The offense that contemplates the responsibility of command is sustained by subjective attitudes, in derogation from the general subjective parameter of the intent and knowledge of art. 30 of the StICC, but both in the case of fraudulent and negligent liability, there is evidence of evidential simplifications. However, in the case of *Brđjanin,* jurisprudence denounced the tendency to impute such a form of responsibility for competition in the crime based on the passive presence at the scene of the crime, through a series of presumptions and presumptive deductions. An essential role assumes the available information.

We need an effective knowledge[155] that the subordinates had committed or were committing a crime[156], or potential, deriving from the

against punishment for excesses committed by the agent or the co-perpetrator, in International Criminal Law Review, 14, 2014, pp. 87ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBBER (eds.), The handbook of comparative criminal law, Stanford Law Books, Stanford, 2011, pp. 597ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, ed. Nomos, Baden-Baden, 2014. K.M.F. KEITH, The mens rea of superior responsibility as developed by ICTY Jurisprudence, in Leiden Journal of International Law, 14, 2001, pp. 618ss. P.H. ROBINSON, J.A. GRALL, Element analysis in defining criminal liability: The model penal code and beyond, in Stanford Law Review, 35, 1983, pp. 685ss. D. FLECK, The law of non-international armed conflict, in D. FLECK (a cura di), The Handbook of International humanitarian law, Oxford University Press, Oxford, 2013, pp. 581-610. E. WILMSHURTS (a cura di), International law and the classification of conflicts, Oxford University Press, Oxford, 2012.

153 ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, op. cit., par. 489, which is noticed that: "(...) negligence so serious as to be tantamount to acquiescence or even malicious (...)", as we can see from the case: ICTY, Prosecutor v. Blaškic, Trial Chamber I, judgment, op. cit., par. 314,

154 ICTR, Prosecutor v. Mpambara, case n. ICTR-01-65-T, Trial Chamber, 11 September 2006, par. 22; ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, n. ICTR-96-4-A, Appeals Chamber, 1 June 2001, par. 605, parr. 704-705.

155 ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 523, whihc is repeated the jurisprudence of the case: ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, judgment, op. cit., par. 30 ("(...) la Chambre d'Appel souligne que lorsqu'un supérieur ne punit pas un crime dont il a effectivement connaissance, ses subordonnés sont portés à croire qu'il cautionne, voire qu'il encourage de tels agissements et qu'ils sont alors plus enclins à commettre d'autres crimes (...)"). In the same spirit see also: SCSL, Prosecutor v.

possession of exhaustive information[157] or that are in any case such as to lead to investigations. No intrinsic limitation of the relevant information is established, either in terms of the form, oral or written, or the official character of the same. It is possible to draw the effectiveness of the knowledge from circumstantial elements[158]: the number, the type and the extent of the illegal acts imputed to the subordinates; the era of facts, the weapons used; the logistical means put in place; the places where the crime was consummated, their breadth; the times of evolution of the operations; the methods for carrying out illegal acts; the officers and the people employed; the place where the superior was at the time of the events. By way of example, it will be difficult to prove an effective knowledge in the face of a great physical distance between the place where the superior was located and the one in which the crime was consumed, on the contrary, instead, in the face of proximity and reiteration[159].

Sesay, Kallon and Gbao, Trial judgment, Sesay, Kallon & Gbao (RUF Case) (Trial judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009, par. 311.

156 ICTY, Prosecutor v. Furundžija, Trial Chamber, judgment and Sentence, Appeals Judgment, TC, IT-95-17/1-T, 10 December 1998, par. 240-243, (according to the spirit of casw: Soering v. United Kingdom of 7 July 1989 from European Court of Human Rights, par. 90).

157 S. DARCY, The doctrine of superior responsibility, op. cit., pag. 131 ss.: "(...) it is clear that a more exacting standard is required of civilian superiors, while military commanders may be liable for subordinate crime on the basis of their own recklessness or possibly negligence. The latter are said to beunder a “more active duty” to keep themselves informed “of their subordinates” conduct (...)", ICTR, Prosecutor v. Kayshema e Ruzindana, Trial Chamber II, judgment, op. cit., par. 227. The cumulative definition of recklessness in the Model Penal Code is formulated in the following fashion: A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

158 ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 543, citated the jurisprudence of: ICTY, Prosecutor v. Kordić and Čerkez, Trial Chamber, judgment, op. cit., par. 427 and SCSL, Prosecutor v. Sesay, Kallon and Gbao, Trial judgment, SCSL-04-15-A, Appeal judgment, 26 October 2009, par. 309.

159 ICTY, Prosecutor v. Aleksovski, Appeals Chamber, judgment, IT-95-14/1-A, 24 March 2000, The Appeals Chamber has established that to ensure a reasonable predictability of judgments it is necessary to follow previous decisions, but has foreseen the possibility of departing from them if imperative reasons seem to impose it in the interests of justice. This decision was confirmed in the Semanza judgment of May 31, 2000 of the ICTR, and finds a normative basis also in the art. 21 paragraph 2 of the StICC.

Effective knowledge is even more easily demonstrated if the superior is part of a structured organization that has information and surveillance systems[160]. The superior has the right to know when he has information that will allow him to know about the crime or anyway information that is so alarming that it leads to inquiries for obtaining feedback[161]. No detailed information is necessary, but it is sufficient that they are general[162], being sufficient also the violent or unstable character traits of certain soldiers or their criminal reputation, provided they are subordinates[163]. No constant control is necessary, but only in relation to certain revealing indices[164]. In fact, the by-laws adopted the so-called theory of alarm signals, through which he wanted to limit the duty of inquire of superiors: in the presence of certain information, from which he could clearly deduce the commission of offenses by the subordinates, the superior can not neglect to evaluate them for the purposes of his due determinations. It is clear that the information must present a margin of evaluation, otherwise it would fall under the hypothesis of full knowledge, with consequent change of the subjective title of responsibility. Among other things, also regarding information, there is a linguistic problem that lurks in the discrepancy between the English version (information which clearly indicated, that the subordinates were committing or about to commit such crimes) and the French one (*informations leur* allow conclusion)[165] of the

[160] ICTY, Prosecutor v. Naletilić, alias Tuta, and Martinović, alias Štela, Trial Chamber, judgment, IT-98-34-T, Trial Chamber, judgment, 31 March 2003, par. 73. See also in the same spirit the case: ICTY, Prosecutor v. Kordić and Čerkez, Trial Chamber, judgment, op. cit., par. 428.

[161] ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 544, citated the jurisprudence of the case: ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, judgment, op. cit., par. 28.

[162] ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 544, citated the juripsurdence of case: ICTY, Prosecutor v. Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 393 and the case from: SCSL, Prosecutor v. Sesay, Kallon and Gbao, Trial judgment, op. cit., par. 310.

[163] ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op cit., par. 43, citated the jurisprudence of case: ICTY, Prosecutor v. Orić, Trial Chamber II, judgment, op. cit., par. 57 A 59.

[164] ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 544, citated the jurisprudence of the next cases: ICTY, Prosecutor v. Delalić & Others (Čelebici case), Appeals Chamber, judgment, op. cit., par. 226. ICTY, Prosecutor v. Blaškic, Appeals Chamber, judgment, op. cit., parr. 62, 64 and 406. SCSL, Prosecutor v. Sesay, Kallon and Gbao, Trial judgment, op. cit., par. 312

[165] J. PUSCHKE, Grund und Grenzen des Gefährdungsstrafrechts am beispiel der Vorbereitungsdelikte, in R. HEFENDEHL, Grenzenlose Vorverlagerung des Strafrechts?, BWV Berliner Wissenschafts-Verlag, Berlin, 2010, pp. 10ss.

standard, a difference that also affects the subjective element, because only the French version emphasizes the mere objective fact of the availability of information, regardless of their suitability to be symptomatic of crimes[166], given the circumstances[167], to prevent crime or punish the perpetrators. The effectiveness and reasonableness of the measures must be proven case by case[168] on the basis of further indices: the orders given, the measures taken to make them executive, the measures aimed at ending illegal acts, the initiation of adequate investigations to bring out the crime or to bring the guilty to justice. Given the need to contextualize the adequacy of the measures so that the superior can avoid the omissive responsibility, it is as if, from the general obligation, one could derive a particular. The obligation to prevent is separate from that of punishing. Concerning the obligation to punish, the Appeals Chamber in the *Krnojelac* case[169] considered that leaving the crimes of subordinates unpunished can not be considered proof of the superior's knowledge of the future commission of crimes, and therefore does not reach the threshold of had reason to know. Evaluation must always be a case[170]. However, in the most recent case *Gotovina*[171], it was emphasized that creating a climate of impunity among subordinates produces an encouraging effect in the commission of crimes.

The pronunciation *Boškoski* and *Tarćulovski*[172], was no less incisive, in which the hierarchical superior was deemed to be exempted from the obligation to punish by notifying the competent authorities and soliciting the

166 ICTY, Prosecutor v. Delalić & Others (Čelebici case), Appeals Chamber, judgment, op. cit., par. 256).

167 ICTR, Prosecutor v. Krnojelac, Trial Chamber II, judgment, op. cit., par. 95. Regarding the relevance of de facto power, in the Celebici case, the Trial Chamber concluded that "a superior can be held criminally responsible even if he has not officially and juridically the power to take the necessary measures to prevent the crime committed by subordinates". See also: ICTY, Prosecutor v. Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 395.

168 ECCC, Prosecutor v. Eav alias Duch, Trial Chamber, judgment, op. cit., par. 545, citated the case: ICTY, Prosecutor v. Halilović, n. IT-01-48-A, Appeals Chamber, judgment, 16 October 2007, par. 63.

169 ICTY, Prosecutor v. Krnojelac, Appeals Chamber, judgment, n. IT-97-25-A, Appeals Chamber, judgment, 17 September 2003, par. 169.

170 ICTY, Prosecutor v. Hadžihasanovic and Kubura, Appeals Chamber, judgment, op. cit., par. 30-31.

171 ICTY, Prosecutor v. Gotovina and others, Trial Chamber, Summary of judgment.

172 ICTY, Prosecutor v. Boškoski and Tarćulovski, Appeals Chamber, op. cit.

opening of inquiries, thus fully fulfilling the duty of inquire. It is not necessary that there is a causal link between the action or the omission of the superior and the perpetration of crimes[173], and the discrepancies found in the same jurisprudence because, if such a link is required, it would mean demanding a necessary involvement of a material nature or psychic, thus distorting the responsibility of the superior[174].

In general, the international legislator in the discipline of the competition of people does not contemplate the causal contribution to the consummation of the crime. This inevitably leads to the marginalization of the relevance of the contribution, which must not necessarily have an etiological efficacy, as long as it is in some way directed to favor the plan or the purpose[175]. Some conclusive observations on the structure of art. 28 of the StICC as the norm in several cases, whose omissive conduct is alternatively related to the prevention of crimes, punishment of the perpetrators or, in a totally innovative way, to the collaboration of the superior for justice purposes: a conduct previous or subsequent to the crime, whose roster realizes an indictment in the sense of "progressive-dependent"[176], depending on the crime

[173] ICTY, Prosecutor v. Halilović, Trial Chamber I, par. 78, "(...) dans l'affaire Čelebici (ICTY, Prosecutor v. Delalić and others-Čelebici case, Trial Chamber, judgment, op. cit., par. 398), la Défense n'a pris comme référence que l'ouvrage (...)", according to opinion of de M. CHERIF BASSIOUNI, The law of the International Criminal Tribunal for the Former Yugoslavia, ed. Transnational Publisher, ardsley, New York, 1996, pp. 350-351: "(...) qui parle de l'existence d'un lien de causalité comme d'un élément essentiel de la théorie de la responsabilité du supérieur hiérarchique (...)".

[174] ICTY, Prosecutor v. Delalić and others (Čelebici case), Trial Chamber, judgment, op. cit., par. 396-400. On the possibility of establishing the responsibility of the superior, see: ICTY, Prosecutor v. Halilović, n. IT-01-48-A, Appeals Chamber, judgment, 16 October 2007, par. 78.

[175] ICTY, Prosecutor v. Kvoćka, Kos, Radic, Žigic and Prcać ("Omarska and Keratem Camps"), Trial Chamber I, Trial Chamber I, n. IT-98-30/1, Trial Chamber I, 2 November 2001, par. 289.

[176] D. LIAKOPOULOS, Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechun, in International and European Union legal Matters, 2012. G. TURAN, Responsibility to prosecute in an age of global governamentality: The International Criminal Court, in Cooperation and Conflict, 50, 2015. M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, in Revista Electrònica de Ciencia Penal y Criminologia, 17, 2015, pp. 7ss.N. JAIN, Perpetrators and accessories in internatonal criminal law. Individual modes of responsibility for collective crimes, Hart Publishing, Oxford and Portland, Oregon, 2014.B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, in International Criminal Law Review, 12, 2012, pp. 5ss. A. AZZOLINI BIANCAZ, La

committed, the position of the superior and the degree of collectability of the dutiful conduct assessed case by case. What has been outlined above is, essentially, the responsibility of superiors for complicity in an omissive form. More complex is the "mapping" of the dogmatic transpositions offered to the various commissions, and can be understood only by retracing the jurisprudence on the subject, from that of the ad hoc Tribunals, to that of the ICC. In the jurisprudence of the *ad hoc* Tribunals, to impute crimes to the leaders, we use the institute of the competition[177], declined through planning, instigation and direct order. For the planning activity, on which the jurisprudence has focused a lot[178], the importance of consumption is considered controversial, considered necessary by the majority jurisprudence[179], except for isolated rulings[180].

Behind the conduct of ordering, part of the jurisprudence hides a form not of complicity but of self-mediated with consequent attribution of primary responsibility to the hierarchical superior[181]. A concept of author and coauthor of a teleological and non-formal character is applied, which makes it possible to equate the conduct of the hierarchical superior who imparts the criminal order to that of the author, by virtue of his lordship over the fact. In particular, a teleologically oriented conception of auteur is accepted, based on the criterion of the domain of conduct. In practice, international jurisprudence, in particular that of the ICTY, on the basis of this teleological notion, which is very different from the formal one, succeeds in making the co-author notion

construcciòn de la responsabilidad construcciòn de la responsabilidad penal individual en el àmbito internacional, in Alegatos Revista, 20, 2018.

177 ICTY, Prosecutor v. Kordić and Čerkez, Trial Chamber, judgment, op. cit., par. 373. ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, opò cit., par. 473. ICTR, Prosecutor v. Muvunyi, n. ICTR-00-55-T, Trial Chamber II, 12 September 2006, par. 460. ICTR, Prosecutor v. Kajelijeli, Trial Chamber II, op. cit., par. 757. ICTR, Prosecutor v. Bisengimana, n. ICTR-00-60-T, Trial Chamber II, 13 April 2006, par. 31. ICTR, Prosecutor v. Nzabirinda, Case n. ICTR-2001-77-T, Trial Chamber II, 23 February 2007, par. 15.

178 In this sense see: ICTR, Prosecutor v. Akayesu, Trial Chamber, judgment, op. cit., par. 40. ICTY, Prosecutor v. Blaškic, Trial Chamber I, judgment, op. cit., par. 279. ICTY, Prosecutor v. Limaj, Bala and Musliu, Trial Chamber II, op. cit., par. 513.

179 ICTR, Prosecutor v. Jean de Dieu Kamuhanda, n. ICTR-95-54A-T, Trial Chamber II, 22 January 2004, par. 592. ICTY, Prosecutor v. Mrkšic-Radic-Šljivancanin, n. IT-95-13/1-T, Trial Chamber II, 27 September 2007, par. 548. ICTR, Prosecutor v. Seromba, n. ICTR-2001-66-1, Trial Chamber, 13 December 2006, par. 303.

180 ICTY, Prosecutor v. Kordić and Čerkez, Trial Chamber, judgment, par. 386.

181 ICTY, Prosecutor v. Kordić and Čerkez, Trial Chamber, judgment, op. cit., par. 367.

anybody contributing to the JCE, and the *Tadić* case it's an example. It is just one of many examples of how we can expand the mesh of the responsibility of hierarchical superiors, probably because the narrow confines of command responsibility are not suited to repressive needs.

7 CONCLUDING REMARKS

In particular, we can say that the positive solution proposed in relation to the criminal liability of multinational companies for international crimes is certainly not an exhaustive solution since there is still no unanimous opinion on the matter. The decision to address the issue from a different perspective angle moves from the desire to use existing tools and interpret the current legislation to guarantee the values of the international community. In other words, it was decided to offer an incriminating solution that serves as an *extrema ratio* for the criminal penalties that are imputable to multinational companies and which completes the sanctioning apparatus of international law. The solution offered was the result of a reconstruction that started mainly from the examples of national laws, but it should not be overlooked, even in the general conclusions, that the penal responsibility of the multinational companies was expressly foreseen and regulated in the draft of the St-ICC. As a consequence, the presence of such authoritative regulatory source was read in conjunction with the current legislation and with the jurisprudential contribution. Specifically, after examining national and international legislation and case law, it was possible to find that the elements constituting the illicit act can be the subject of extensive interpretation. Consequently, making use of the extensive interpretation would result in the indictment of the illicit conduct without derogating from the principle of legality and its application corollaries. Moreover, through the extensive interpretation it would be possible to dispose of the means present in the international order, guaranteeing the widest protection to the values of the international community. Ultimately, it is reiterated that the solution proposed in this regard does not want to be exhaustive of an issue that has a considerable operating scope and that has proved to be connected with various factors (economic, political and social) not always easy to understand.

I will conclude with the words of the International Military Tribunal, which famously noted that "crimes 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(...)"[182]. The same idea on the need to effectively protect human rights in the light of new challenges is echoed in the discussion of the responsibility of transnational corporations. What has changed is the legal subject whose responsibility is in question; what remains is the need for the international legal order to face the reality of today.

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