

# TABLE OF CONTENTS

List of abbreviations	xi
<b>1 INTRODUCTION</b>	<b>1</b>
I Corporations, conflicts and human rights	1
II The rise of corporate social responsibility	5
III Regulation at the domestic level	7
III.1 Criminal liability	7
III.2 Liability through civil courts	9
III.3 Non-mandatory mechanisms	11
IV International regulation	12
IV.1 ‘Soft-law’ initiatives	12
IV.2 The International Criminal Court	13
IV.3 Some post-Rome developments	17
V Central question	18
VI Method and structure	20
<b>2 CRIMINAL RESPONSIBILITY AND THE CORPORATE ENTITY</b>	<b>23</b>
I Introduction	23
II The criminology of international corporate crime	24
II.1 Conceptualising corporate crime	24
II.2 Corporate crime in international context	27
III The morality paradigm and corporate liability	28
III.1 Can corporations be regarded as persons?	29
III.2 Moral agency and moral responsibility	30
III.3 Legal personhood and moral responsibility	32
IV Guilt and punishment of collectives	33
IV.1 The moral guilt contention	35
IV.2 Collective legal guilt and the position of the individual	36
IV.3 Accountability, culpability and due process	38
V Conclusion	41

<b>3 CORPORATE ACCOUNTABILITY À LA NUREMBERG</b>	<b>43</b>
I Introduction	43
II The Nuremberg ‘collective criminality’ model	44
II.1 The doctrine of conspiracy	44
II.2 The concept of criminal organisations	46
II.3 A missed opportunity <i>vis-à-vis</i> corporate accountability?	50
III The Nuremberg prosecution of industrialists	53
III.1 An overview of domestic military trials	53
III.2 Synthesising the Nuremberg principles of individual criminal responsibility in relation to corporate officials	56
III.3 The implicit denunciation of corporations as accessories to Nazi crimes	58
IV The legacy of Nuremberg	61
V Conclusion	63
<b>4 COLLECTIVE CRIMINALITY AND THE ROME STATUTE</b>	<b>65</b>
I Introduction	65
II The ‘common purpose’ doctrine	67
II.1 Joint criminal enterprise: doctrinal overview	67
II.1.1 The elements of joint criminal enterprise as a mode of liability	68
II.1.2 Jurisprudential attempts at counteracting the drawbacks of the JCE doctrine	70
II.1.2a The customary law origins of JCE	70
II.1.2b The inherent complexities of extended JCE	72
II.1.2c Critical appraisal of the <i>ad hoc</i> tribunals’ approach to JCE	74
II.2 The ‘common purpose’ concept in the Rome Statute	76
II.2.1 The divergent nature of Article 25(3)(d) RS	78
II.2.2 A redundant provision?	79
III The concept of superior responsibility	82
III.1 Brief historical survey of the development of the doctrine	82
III.2 Superior responsibility under the Rome Statute	83
III.2.1 The components of superior responsibility as a mode of liability	84
III.2.1a The existence of a superior – subordinate relationship	85
III.2.1b The cognitive requirement for superior responsibility	87
III.2.1c Activities within the effective responsibility and control of superiors	89
III.2.1d The duty of superiors to act	91
IV Conclusion	93

<b>5</b>	<b>THE CRIMINAL LIABILITY OF CORPORATIONS WITHIN THE ROME STATUTE FRAMEWORK</b>	<b>95</b>
I	Introduction	95
II	The ambit of <i>actus reus</i> and <i>mens rea</i> in the Rome Statute	96
II.1	Acts and omissions	96
II.2	The <i>dolus directus</i> facet of Article 30 RS	97
II.3	<i>Dolus eventualis</i> as a form of volition?	98
II.4	<i>Culpa</i> -type liability under the Rome Statute	101
III	Utilising the current Rome Statute provisions	102
III.1	Indirectly implicating MNCs on the basis of individual convictions	102
III.2	The notion of complicity as an avenue for corporate liability	103
IV	Direct corporate criminal liability <i>sui generis</i>	108
IV.1	The criminal responsibility of corporations ‘in the draft’	108
IV.1.1	Declarations of criminality	109
IV.1.2	Liability along vicarious lines	110
IV.2	Domestic approaches to corporate criminal liability	113
IV.2.1	The principle of aggregation	113
IV.2.2	Proactive and reactive fault	115
IV.2.3	The corporate ethos approach	117
IV.2.4	Constructive corporate fault	118
IV.3	The constructive method and international crimes	121
IV.3.1	Setting the subjective threshold of corporate liability	121
IV.3.1a	The <i>dolus eventualis</i> standard of corporate misconduct	122
IV.3.1b	<i>Culpa</i> as a benchmark for corporate criminal responsibility	125
IV.3.1c	A word on <i>dolus specialis</i>	133
IV.3.2	The scope of the objective element	134
V	Conclusion	137
<b>6</b>	<b>CULPABILITY BEYOND THE CONFINES OF THE CORPORATE FORM</b>	<b>139</b>
I	Introduction	139
II	Direct parent liability	140
II.1	The intrinsic protections of the corporate form	140
II.2	Justifying the attribution of criminal responsibility to parent companies	142
II.3	The criteria for ascribing direct liability to parent corporations	143
II.3.1	The duty to intervene	146
II.3.1a	Authority	147
II.3.1b	Awareness	148
II.3.2	The power to intervene	149
II.3.2a	Control	150
II.3.2b	Causality	155

III	Direct criminal responsibility and supply chain dynamics	156
IV	The superior responsibility of corporate officials	159
IV.1	Superior – subordinate relationships and the ‘effective responsibility and control’ test	161
IV.2	The cognitive requirement and the corresponding failure to act	163
V	Conclusion	165
<b>7</b>	<b>CONCLUSION</b>	<b>167</b>
I	Overview	167
II	Prospects along the regulatory continuum	169
II.1	The complementarity contention pertaining to ‘inaction’ and ‘inability’	170
II.2	Alternatives to corporate criminal liability and the implications for the principle of complementarity	171
II.3	Non-criminal regulation – a viable option for the ICC?	173
III	The pitfalls of collective criminality	174
III.1	The imperative of aligning accountability with due process	176
III.2	Collective punishment: effects on the ‘innocent’ bystander?	179
IV	Liability of MNCs in international criminal law: from aspiration to reality	182
V	Corporate accountability and the goals of international criminal justice	184
V.1	The ‘problem’ of plea bargaining	186
V.2	Deterrence, retribution and the expressive function of (international) criminal law	187
	Summary	191
	Samenvatting	197
	Selected legal provisions	205
	Bibliography	211
	Table of cases	223
	Table of UN and other documents	229
	Index	231
	Curriculum vitae	235