Criminal Law Forum (2018) 29:1–24
https://doi.org/10.1007/s10609-017-9330-y

CEDRIC RYNGAERT*

ACCOUNTABILITY FOR CORPORATE HUMAN RIGHTS ABUSES: LESSONS FROM THE POSSIBLE EXERCISE OF DUTCH NATIONAL CRIMINAL JURISDICTION OVER MULTINATIONAL CORPORATIONS

ABSTRACT. In the implementation of the UN Guiding Principles on Business and Human Rights, little emphasis has been put on the criminal law as a mechanism to hold corporations to account. From a doctrinal perspective, the main stumbling block for a more intensive use of the criminal law appears to be how to establish jurisdiction and liability with regard to corporate involvement in human rights violations in transnational supply-chains. On closer inspection, however, domestic criminal law offers surprising, although largely untested opportunities in this respect. Criminal liability could notably be based on violations of a corporate duty of care violation, whereas jurisdiction could, relatively non-controversially, be grounded on the principles of territoriality, nationality, and universality. The Dutch criminal law system is used as a case-study in this article.

Since the adoption of the UN Guiding Principles (UNGPs) on Business and Human Rights in 2011,[1] states have taken a number of measures to hold multinational corporations to account for human rights abuses. They have adopted national action plans on business and human rights (BHR),[2] opened their courts for tort litigation in 'foreign direct liability' cases,[3] and imposed trade measures on the importation of 'human rights-

* Professor of Public International Law, Utrecht University, 3512HT Utrecht, The Netherlands. E-mail: C.M.J.Ryngaert@uu.nl.

[1] UN Office of the High Commissioner for Human Rights, UN Guiding Principles on Business and Human Rights (2011), HR/PUB/11/04, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited 13 June 2017).

[2] The UN Working Group on Business and Human Rights maintains a list of national action plans here: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (last visited 13 June 2017).

[3] E.g., Kesabo v African Barrick Gold Plc, Queen's Bench Division [2013] EWHC 3198 (QB) (23 October 2013); Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). See on foreign direct liability: L. Enneking, *Foreign Direct Liability and Beyond* (The Hague, Eleven, 2012).

unfriendly' goods.[4] However, so far, little emphasis has been put on the criminal law as an accountability mechanism. Hardly any criminal proceedings have been initiated against corporations in respect of human rights abuses committed abroad.[5] It does not help that some authoritative business and human rights instruments have failed to single out criminal prosecution as a priority in the implementation of the business and human rights agenda. The UNGPs themselves,[6] the UN Human Rights Council's 2016 resolution on 'business and human rights: improving accountability and access to remedy,'[7] nor the 2016 EU Council conclusions on business and human rights, which pertain to the implementation of the UNGPs, explicitly mention criminal liability. Nevertheless, other recent instruments do mention the criminal law, such as a 2016 resolution of the European Parliament on corporate liability for serious human rights abuses in third countries,[8] and a 2016 Recommendation of the Committee of Ministers of the Council of Europe on human rights and business.[9] These instruments call on member states to establish criminal (or equivalent) liability for the commission of of-

[4] *E.g.*, Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, O.J. L130/1 (2017). (requiring due diligence in respect of the importation of certain minerals from conflict-affected and high-risk areas); EU Commission Notice on Labels Israel Occupied Palestinian Territories (11 November 2015) (requiring the attachment of a label on products produced in Israeli settlements in OPT, settlement activity being in violation of international law).

[5] See for rare examples: *Argor Heraeus* (Switzerland), *Total* (Belgium), which were however discontinued.See for the discontinuation of the Swiss case http://www.stop-pillage.org/swiss-criminal-case/ (last visited 13 June 2017), and for the discontinuation of the Belgian case *Cour de Cassation* (Belgium), Judgment No P.07.0031.F/1, 28 March 2007.

[6] The Commentary to the UN Guiding Principles, however, refers nine times to the criminal law as a possible implementation mechanisms (Publication No HR/PUB/11/04, New York/Geneva: 2011).

[7] However, the Resolution contains a mysterious reference to improved international cooperation with respect to 'law enforcement.' This term is typically used in a criminal law context, but in all likelihood, the enforcement of civil rather than criminal judgments was meant, given the focus of the resolution on victims' access to a remedy. UN General Assembly Human Rights Council, Business and human rights: improving accountability and access to remedy, A/HRC/32/L.19. 29 June 2016.

[8] European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)) (2016).

[9] Recommendation of the Committee of Ministers of the Council of Europe on human rights and business, CM/Rec(2016)3, 2 March 2016.

fences constituting serious human rights abuses involving business enterprises, and to tackle legal, procedural and practical obstacles to successful prosecution.[10] Also, some National Action Plans on Business and Human Rights mention the potential of the criminal law,[11] and reports of non-governmental organizations, such as the International Corporate Accountability Roundtable (2016), have called on states to fight impunity for corporate crimes linked to human rights abuses by investigating and prosecuting offences.[12]

These recent pronouncements in favor of criminal prosecution for business and human rights (BHR) abuses invite us to reflect again on the added value of prosecution as a corporate accountability mechanism, its doctrinal underpinnings and challenges, and its practical constraints. In these pages, I will focus in particular on the doctrinal questions of state jurisdiction and liability in corporate parent-subsidiary relationships. Given the transnational character of complex corporate supply chains, these issues are of major importance: on what grounds can states establish domestic jurisdiction over a corporation linked to a human rights violation committed abroad, and on what grounds can such a violation be attributed to that corporation for criminal liability purposes?

[10] The Council of Europe recommendation also mentions corporate liability for participation in the commission of such crimes. It adds that *representatives* of business enterprises should be held responsible too. Furthermore, it provides that 'Member States have a duty to prosecute where warranted by the outcome of an investigation,' and that '[g]iven that victims are entitled to request an effective official investigation, any decision not to start an investigation, or to stay an investigation or prosecution, must be sufficiently reasoned.' The Recommendation also draws attention to the importance of judicial cooperation of member states in criminal investigations regarding business-related human rights abuses, and providing sufficient resources, guidance and training to judges and prosecutors. The EP resolution, apart from calling on member states to remove obstacles to prosecution (para. 35), also '[c]alls on the Council and the Commission to act in accordance with Article 83 of the TFEU, in order to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension pertaining to serious human right violations in third countries committed by corporations, given the nature and impact of such offences and the special need to combat them on a common basis' (para. 36).

[11] See notably the national action plans of Italy, Denmark, Sweden, available at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (last visited 13 June 2017).

[12] International Corporate Accountability Roundtable and Amnesty International, The Corporate Crimes Principles, report (October 2016) http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf (last visited 6 June 2017).

I will not engage in a reflection on the desirability of corporate criminal liability, as others have done so at length.[13] I assume that corporate criminal liability may be advisable in case a particular corporate culture has encouraged the commission of abuses, and individualized contributions are difficult to isolate. Holding corporations rather than (only) corporate officers liable also reflects the havoc that large, organized entities can wreak. I take it that corporate criminal liability expresses moral condemnation in ways that civil and administrative liability cannot, and that prosecuting corporations, with the attendant sanctions, including compulsory closure, may have deterrent effects. Corporate criminal liability can, and should nevertheless exist alongside other forms of corporate liability, and alongside the liability of responsible corporate officers.

The point of departure of the analysis is that, from a liability perspective, involvement of corporations in overseas human rights abuses often results from *negligent behaviour* rather than direct perpetration: the corporation failed to prevent human rights abuses committed by other – foreign-based – actors over whom it exercised a measure of control, such as subsidiaries, branches, offices, contractors, and suppliers. Thus, the first doctrinal challenge is to inquire how criminal law provisions concerning negligence, omissions, and duties of care lend themselves to application in a business and human rights context, and in particular how the scope of parent corporations' duties of care should precisely be determined. I do not deny that corporations can in principle also be held *directly* liable for abuses committed abroad (*e.g.*, the corporation hires paramilitaries to kill trade union activists), or may incur *accomplice* liability (*e.g.*, the corporation purchases mineral resources from an armed group suspected of committing war crimes), but in the ordinary course of events, these may be relatively rare occurrences. Regarding accomplice liability, for instance, it has to be established that the accomplice at least *knew* (was aware) that his assistance contributed to the violation, and in some systems even that the accomplice had the *intention*

[13] *E.g.*, JM Anderson and I Waggoner, *The Changing Role of Criminal Law in Controlling Corporate Behavior* (RAND, 2014); D Brodowski *et al*. (eds), *Regulating Corporate Criminal Liability* (Springer, 2014); Anthony S. Barkow and Rachel E. Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York, New York University Press, 2011).

to facilitate the crime.[14] This is a tall order indeed,[15] which has, for that matter, led to calls for a lowering of the complicity standard to negligence.[16] In the remainder of this article, I will only address the jurisdictional aspects of liability based on negligence and duty of care violations.

Apart from liability, the second doctrinal challenge, in fact a logically prior one, is to establish domestic (state) jurisdiction over corporations. As multinational corporations' supply-chains are distributed over multiple states, the question arises which state(s) have the jurisdiction to hold the corporations liable. More in particular: does a state have jurisdiction to address human rights abuses that are, at least at first sight, committed *outside its territory*? The answer to this question can in principle be found in the international law of jurisdiction: the state will have jurisdiction insofar as a (substantial) connection to the state can be found.[17] Jurisdiction could then be exercised on the basis of the principles of territoriality, nationality or – very exceptionally – universality. The application of these permissive principles of jurisdiction to transnational corporate misconduct may seem relatively straightforward,[18] but on closer inspection some jurisdictional challenges may well have to be confronted. Can the nationality principle be relied on in case of direct attribution of a foreign person's conduct to a domestic corporation? What is the required *quantum* of territorial connection for territorial jurisdiction to be exercised over foreign corporations? And when is a foreign cor-

[14] See at length: C. Ryngaert & H. Struyven, 'Threats Posed to Human Security by Non-State Corporate Actors - The Answer of International Criminal Law' in C. Ryngaert & M. Noortmann (Eds.), *Human Security and International Law - The Challenge of Non-State Actors* (pp. 101–134) (2014). Antwerp: Intersentia.

[15] Cf. W. Huisman & E. van Sliedregt, 'Rogue traders. Dutch businessmen, international crimes and corporate complicity', 8 *Journal of International Criminal Justice*, pp. 803–828, (2010), p. 804 ('prosecuting corporations and/or individual businessman for complicity in international crimes is easier said than done').

[16] J. Stewart, 'Complicity in Business and Human Rights', 109 *Proceedings of the ASIL Annual Meeting*, pp. 181–184 (2015).

[17] See C. Ryngaert, *Jurisdiction in International Law,* 2nd ed. (Oxford, Oxford University Press, 2015), pp. 38–39.

[18] The nationality principle normally grounds jurisdiction over domestically incorporated corporations, regardless of the place of misconduct, whereas the territoriality principle triggers jurisdiction over *any* corporation whose conduct can be linked to the forum's territory. The universality principle could trigger jurisdiction over *any* corporation, regardless of connection to the forum, but only in relation to a limited number of treaty-based offenses and core crimes against international law.

poration considered as 'present' for purposes of the exercise of presence-based universal jurisdiction?

The criminal law governing jurisdiction and liability pertaining to corporate human rights abuses is essentially of a domestic law nature. Accordingly, it may differ from state to state. In this article, only the jurisdictional and connected liability options offered by one legal system, that of the Netherlands, are examined. This choice is obviously informed by the fact that the author is based in the Netherlands and thus is familiar with the Dutch legal system. There is another reason, however: the Netherlands is establishing itself as an interesting laboratory for BHR litigation, which may provide guidance to other jurisdictions. Over the last few years, a number of relevant 'extraterritorial' Dutch cases have created legal precedents and invited international commentary. In the Dutch tort litigation against Shell regarding oil spills in Nigeria, the courts established civil jurisdiction over the Shell parent and its Nigerian subsidiary, and held the latter liable for duty of care violations committed in Nigeria.[19] Also, Dutch criminal courts convicted two individual Dutch businessmen for facilitating international crimes by exporting weapons and chemicals to Liberia and Iraq.[20] The next horizon for accountability for BHR violations under Dutch law is the exercise of criminal jurisdiction over corporate entities, *i.e.*, the subject of this contribution. At the time of writing, first steps in this respect had

[19] Akpan v. Royal Dutch Shell PLC, Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854). See for an unofficial translation: http://www.milieudefensie.nl/english/shell/oil-leaks/courtcase/ press/documents/documents-on-the-shell-legal-case. See for comments: N. Jägers *et al*., 'The Future of Corporate Liability for Extraterritorial Human Rights Abuses : The Dutch Case against Shell', *AJIL Unbound* e-36-e-41 (2014); C. Ryngaert, 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v. Shell Litigation in the Netherlands', 8 McGill International Journal of Sustainable Development Law and Policy, pp. 245–260 (2012).

[20] Court of Appeal 's-Hertogenbosch, *Kouwenhoven*, judgment of 21 April 2017, ECLI:NL:GHSHE:2017:1760; Court of Appeal 's-Gravenhage, judgment of 9 May 2007, ECLI:NL:GHSGR:2007:BA4676. See for comments: H.G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the Van Anraat Case, 4 *Journal of International Criminal Justice*, pp. 239–257 (2006); H.G. van der Wilt, 'Genocide v War Crimes in the Van Anraat Appeal', 6 *Journal of International Criminal Justice*, pp. 557–567 (2008); Huisman and van Sliedregt, above n 15; C. Ryngaert, 'Dutch Court of Appeal holds businessman liable for complicity in war crimes', 10 May 2017, available at http://blog.ucall.nl/index.php/2017/05/dutch-court-of-appeal-holds-businessman-liable-for-complicity-in-war-crimes/ (last visited 21 July 2017).

already been taken: in early 2017, a criminal complaint was filed against Rabobank accusing the Dutch bank of enabling crimes against humanity and torture committed by Mexican drug cartels (see further Section III).

Relevant Dutch criminal law is definitely not so idiosyncratic that it resists replication in other jurisdictions.[21] From a jurisdictional perspective, Dutch criminal law provides for the exercise of jurisdiction on the basis of the accepted permissive principles under public international law (territoriality, nationality/personality/universality)[22] – just like most other states. From a substantive law perspective, Dutch criminal law features a number of provisions creating liability for duty of care violations, money-laundering, and participation in a criminal organization, through which criminal accountability for BHR abuses could be channelled. From a comparative perspective, such provisions are hardly exceptional; they feature in the penal codes of most other states.[23] Also like many other jurisdictions, Dutch law provides for corporate criminal liability.[24] Pursuant to Dutch law, illegal conduct can be attributed to the

[21] The relevance of Dutch criminal law in the BHR context is discussed at length in C. Ryngaert & E. van Gelder, national report The Netherlands, for the Association Internationale de Droit Pénal, 'Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues', forthcoming in *International Review of Penal Law* (2018).

[22] Articles 2–8 of the Dutch Penal Code. For a discussion, in English, after the latest amendments in 2014: C. Ryngaert, 'Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction', 61 *Netherlands International Law Review,* pp. 243–248 (2014).

[23] Some provisions, or at least their application, is based on international standards that are applied in a large number of states. See for money-laundering notably the Financial Action Task Force (FATF), which counts 37 members and 'set[s] standards and promote[s] effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system' (http://www.fatf-gafi.org/about/) (last visited 21 July 2017). Other provisions are borrowed from other jurisdictions, *e.g.*, participation in criminal organization (Article 140 of the Dutch Penal Code, discussed in Section III) is modelled on the French 'association des malfaiteurs' (Article 450–1 of the French Penal Code).

[24] Article 51 Dutch Penal Code. See for a discussion in English: B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands', 14(3) *Electronic Journal of Comparative Law* (2010) available at http://www.ejcl.org/143/art143-9.pdf (last visited 21 July 2017).

corporation if it took place within the 'scope' of the corporation,[25] a standard of attribution which is largely similar to, albeit perhaps slightly more liberal than the standard used elsewhere.[26]

Accordingly, the insights gathered from the analysis of Dutch criminal law are relatively easily transposable to other jurisdictions. This holds even for jurisdictions such as Germany and Italy which only provide for (quasi-criminal) administrative liability of corporations: when pondering the initiation of proceedings, their authorities are likely to be confronted with similar jurisdictional and liability challenges. It will be pointed out that ultimately, the main obstacles to effective legal accountability for corporate BHR abuses are not of a legal doctrinal nature, but are due to practical and political constraints.

It bears emphasis that, despite the promises (Dutch) domestic criminal law holds for the prosecution of BHR violations, the analysis in this article is to a certain extent speculative. In the Netherlands, just like in most, if not all other countries, very few prosecutions have been recorded, and no BHR prosecutions against corporations have made it to the trial phase. It will fall to prosecutors and courts to test the interpretations espoused in this article.

In terms of structure, this article first explores how corporations could be held criminally liable for abuses of duty of care standards in a corporate social responsibility (human rights) context, especially in intra-corporate group relations (Section I). The article goes on to discuss the exercise of criminal jurisdiction, under Dutch law, over corporate misconduct on the basis of respectively the nationality principle (Section II), the territoriality principle (Section III), and the universality principle (Section IV). It is argued that there are sizable opportunities to exercise domestic criminal jurisdiction over corporations in respect of human rights abuses occurring abroad. Prosecutors in other jurisdictions may want to take notice.

I CORPORATE LIABILITY FOR EXTRATERRITORIAL HUMAN RIGHTS ABUSES: DUTIES OF CARE UNDER THE CRIMINAL LAW

When human rights abuses are committed abroad in complex, transnational industrial production and supply chains, it is rather

[25] Dutch Supreme Court, ECLI:NL:HR:2003:AF7938, 'Drijfmest', judgment (21 October 2003). This judgment is discussed in Section I of this contribution.

[26] See at length on various corporate criminal liability standards: Brodowski *et al.*, above n 13.

unlikely that parent corporations qualify as direct perpetrators. Rather, such abuses ordinarily result from corporate organizational failures to take precautionary measures in relation to the risk of abuse abroad, often at the hands of *other* persons, such as subsidiaries, branches, contractors, suppliers, or security personnel. In liability law, such failures can be addressed by the application of duty of care standards.

Corporate duties of care in respect of human rights abuses abroad are often associated with *tort litigation* in the first place, as a line of cases from *e.g.* England and the Netherlands, demonstrates. One should not overlook, however, that also some criminal law provisions penalize duty of care deficiencies or (culpable) gross negligence that could be relevant in a business and human rights context.[27] Examples of such criminal acts under Dutch law are wrongful death,[28] culpable arson or explosion,[29] culpable soil pollution,[30] or omission offences such as failing to assist a person in lethal danger,[31] or failing to tend to a person in need for whom one is responsible.[32] Thus, for instance, on the basis of the wrongful death provision, a Dutch corporation could possibly be held liable for failing to prevent conduct of its contractors, subsidiaries or even militia that led to the death of an employee. What is required for such liability is that it was *reasonably possible* for the Dutch corporation to take precautionary measures, in light of the information that was available to it, or that it could reasonably gather, and in light of the influence the corporation could reasonably exert on other actors. Application of this standard also means that, if the corporation acted diligently, it will escape liability.

The exact content and scope of the duty of care, for instance in relation to wrongful death, cannot be established in the abstract. It is always in need of an *in concreto* application in light of the specific circumstances of the case and the nature of the actor(s) involved. In giving shape to the duty of care in transnational business and human

[27] UCall, *Zorgplichten van Nederlandse ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (2015). The report, including an English summary, is available at: https://www.wodc.nl/onderzoeksdatabase/2531-maatschappelijk-verantwoord-ondernemen-in-het-buitenland.aspx, p. 143. (last visited 13 June 2017).

[28] *Dood door schuld* – Article 307 Dutch Penal Code (DPC).

[29] Article 158 DPC.

[30] Article 173b DPC.

[31] Article 450 DPC.

[32] Article 255 DPC.

rights cases, the judge can base his judgment on best practices developed with respect to socially responsible business practices,[33] notably those developed in the wake of the adoption of the UN Guiding Principles. What care a corporation should exactly take, or what 'due diligence' it should exercise in a business and human rights context, may vary depending on the industrial sector: what is expected in the extractive industry[34] may differ from what is expected in the garment and footwear sector.[35] The use of open-ended duty of care norms is in fact quite common in Dutch criminal law, as it offers a measure of flexibility to apply the criminal law to cases that were not originally foreseen by the legislature. These include cases concerning extraterritorial business and human rights abuses, in respect of which the content of the duty of care is still evolving for that matter, and new cases that have arisen as a result of technological developments.[36] To be true, open norms may appear to jeopardize legal certainty, as the norm addressee (the corporation in the case) may not know precisely what rules apply to his conduct. On the other hand, multinational corporations active in specific industrial sectors, given the panoply of due diligence initiatives, cannot reasonably claim that they are not aware of best business and human rights practices. Even if these initiatives are technically not binding – they are usually framed as 'guidelines' – they can still inform the contours of a corporation's duty of care under domestic criminal law (as well as tort law for that matter).

In case of duty of care abuses, the Dutch (parent) corporation is liable for *its own* failures. It is not as such liable for the wrongful conduct of the (foreign) actor which it failed to prevent, or put differently, such conduct is not directly attributed to the Dutch corporation. In some circumstances, however, such direct attribution is allowed under Dutch law. This makes it possible to hold, within one corporate group, a parent liable for the conduct of its subsidiary.

In the Netherlands, direct attribution has developed from the Dutch Supreme Court's *Drijfmest* judgment.[37] *Drijfmest* concerned

[33] UCall 2015, above n 27, p. 143.

[34] OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Third Edition, OECD Publishing, Paris, 2016).

[35] OECD, OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (OECD Publishing, Paris, 2017).

[36] UCall 2015, above n 27, p. 143.

[37] Dutch Supreme Court, ECLI:NL:HR:2003:AF7938, judgment (21 October 2003).

attribution of acts to corporations in general, with attribution of acts of *natural persons* to a corporation foremost in mind. However, the attribution criteria listed by the Supreme Court do not exclude their application in the relationship between a subsidiary and a parent, as they are neutral as to the exact quality of the actor. Still, as direct attribution of acts of a subsidiary to a parent *prima facie* negates their separate legal personalities under company law, it has been observed that such attribution should not be too readily accepted, and should in fact be limited to cases of abuse of legal personality: (only) where the parent sets up a subsidiary with a view to escaping accountability for wrongful acts, can the parent be identified with the subsidiary.[38] Alternatively, it is also possible that acts of *natural persons* operating at the level of the subsidiary could be directly attributed to the parent corporation, per the *Drijfmest* principles. This is, again, not self-evident, as an independent connection between the physical perpetrator and the parent corporation needs to be established, thereby bypassing the subsidiary. It has been noted in this respect that the entwining of parent and subsidiary as an economic unity, or the parent controlling the subsidiary, do not suffice for direct attribution as they negate the separate legal personality of the subsidiary.[39] In general, such attribution will be more likely in respect of smaller corporate groups, in which the parent can directly intervene in the operations of the subsidiary, and thus create a direct relation with persons working for the subsidiary. It is however not excluded in respect of larger corporate groups, provided that it can indeed be established that, at the level of the subsidiary, the physical person was seen to be running errands for the parent.[40]

It bears emphasis that, given the absence of geographical proximity between parent and subsidiary (*Drijfmest* was after all an intra-Netherlands case), it may be an uphill battle to establish direct attribution.[41] Indeed, as a rule, *foreign* subsidiaries will operate more autonomously from their parents than their domestic counterparts. It is also uncertain whether the aforementioned attribution framework under Dutch law is applicable in a transnational context. There may be good reasons to apply Dutch law in such a context – *e.g.*, criminal

[38] F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in A.J.A.J. Eijsbouts *et al.*, *Maatschappelijk verantwoord ondernemen*, 140 Handelingen Nederlandse Juristen-Vereniging, 2010-I, pp. 158–162 (2010).

[39] Kristen 2010, above n 38, pp. 166–169.

[40] UCall 2015, above n 27, p. 150.

[41] UCall 2015, above n 27, p. 150.

courts do not normally apply foreign criminal law[42]– but this has not been conclusively settled.[43]

II CRIMINAL LIABILITY UNDER THE NATIONALITY PRINCIPLE

Duty of care abuses committed by Dutch corporations in relation to overseas activities do not in principle raise difficult jurisdictional issues. Even if the actual death, arson, or pollution occurred outside the Netherlands, the Netherlands has jurisdiction on the ground that a Dutch corporation failed to comply with its duty of care, *i.e.*, nationality-based jurisdiction. This is, provided that the act is also punishable under local law.[44] The dual criminality requirement does not apply to a number of offenses, however.[45] Moreover, it appears that the requirement of dual criminality has little relevance where the Dutch corporation's negligent behaviour of that corporation could be located *on Dutch territory* (even if the physical violation occurred abroad). In such a situation, application of the (unconditional) territoriality principle will be triggered. As a Dutch corporation's oversight and decision-making organs are likely to be based in, or operate from the Netherlands, a territorial nexus with the Netherlands may often be found. Territorial jurisdiction in respect of corporate duty of care abuses is addressed in Section III.

While the exercise of nationality-based jurisdiction over Dutch corporations is relatively self-evident, it is, however, not entirely certain whether Dutch courts will be willing to establish such jurisdiction in cases of direct attribution, *i.e.*, the alternative scenario sketched in Section I. Sure enough, under the nationality principle, Dutch courts have jurisdiction over Dutch parent corporations, even absent any territorial conduct or omission on their part. However, if a Dutch corporation is hauled before a Dutch court on the basis of direct attribution, the *foreign* acts of a *foreign*-incorporated legal person rather than the (original) acts of the Dutch parent are at issue. It is not clear whether this transnational attribution affects the

[42] Compare Kristen 2010, above n 38, pp. 170–171 (submitting that one should avoid that Dutch courts have to examine foreign law, as well as that foreign acts cannot be attributed to the Dutch parent or foreign subsidiary under foreign law).

[43] UCall 2015, above n 27, p. 151.

[44] Article 7(1) DPA.

[45] Article 7(2) DPA.

availability of nationality-based jurisdiction. Arguably, it does not, as the preliminary question of jurisdiction is to be separated from the subsequent liability analysis. Moreover, jurisdiction could be based on the territoriality principle, as the involvement of the Dutch corporation could be located in the Netherlands, even if the actual violation was abroad. Kristen has added that the infringement of the host state's sovereignty would in any event be limited as abuses of corporate social responsibility norms are of an international nature, although at the same time he suggests using the dual criminality requirement to prevent international strife.[46]

III CRIMINAL LIABILITY UNDER THE TERRITORIAL PRINCIPLE

The territoriality principle may acquire particular relevance for the exercise of Dutch jurisdiction over duty of care abuses committed by a foreign corporation, and to a lesser extent such abuses committed by Dutch corporations insofar as the dual criminality requirement has not been met. Territorial jurisdiction will be obtained as soon as the corporation can be considered as negligent *in the Netherlands*. Thus, a foreign corporation's criminal liability could be engaged in case a corporate representative based in the Netherlands (whose acts are then attributed to the corporation) failed to take adequate action after being informed of a dangerous (extraterritorial) state of affairs, where the taking of such action was reasonably within his powers.

Imagine that a Swiss corporation organizes a management meeting in the Netherlands in relation to the activities of its subsidiary or contractor in a high-risk country, *e.g.*, the supervision of overseas production processes, or engagement with security forces. Imagine that, at that moment and location, the corporation fails to take precautionary measures to prevent abuses from happening, even if it disposes of sufficient information and has sufficient control to intervene. At least technically speaking, such a corporation may be amenable to Dutch jurisdiction as its organizational planning has a sufficiently strong link to the Netherlands.

It is not fully clear whether the Netherlands has jurisdiction in case the violation of the duty of care is not just limited to the Netherlands. This scenario may be the rule rather than the exception, as decision-making within multinational corporations – with the potential attendant involving negligent conduct and omissions giving rise to

[46] Kristen 2010, above n 38, p. 172.

rights abuses – is not bound to just one state, but may be connected to a number of states and involve multiple persons. Possibly, territorial jurisdiction only obtains in case of major involvement of Dutch-based decision-makers, and not in case Dutch-based actors only contributed tangentially to abuses of a corporate duty of care.[47] In the literature, it has even been submitted that the (only) territorial place of action of the corporation is the place where its centre of main interest lies, at least under a holistic, organizational failure-based model of corporate criminal liability.[48] In any event, in light of scarce prosecutorial resources, it is unlikely that prosecution of incidental duty of care abuses on Dutch soil by foreign corporations will feature high on the priorities list of Dutch prosecutors. Only when a foreign corporation has its centre of main interest in the Netherlands may prosecution be legitimately expected. In this case, one obviously sails close to the nationality principle.

While it is relatively unlikely that territoriality will on its own (*i.e.*, without being combined with nationality) sustain jurisdiction in respect of foreign human rights abuses, there are however two criminal law provisions that lend themselves relatively well to the exercise of territorial jurisdiction in respect to corporate involvement in abuses abroad: money-laundering and participation in an international criminal organization. When corporations launder (in the Netherlands) money generated by criminal activity abroad, or where they participate from the Netherlands in foreign schemes involving criminal law abuses, by a foreign subsidiary or supplier, territoriality applies because of the territorial connection of the offender and the offense with the Netherlands. It is of no moment that the actual abuses have occurred abroad. Liability pursuant to these provisions may be based on duty of care standards, but, where the original abuses occurred far down the supply chain, it will not be obvious to connect the activity and mental state of the Dutch-based presumed offender to the actual abuses that occurred on the other side of the world.

As far as the charge of money-laundering is concerned, any person who launders money in the Netherlands, *i.e.*, directly or indirectly

[47] Compare A. Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction' in D. Brodowski *et al.* (eds.), *Regulating Corporate Criminal Liability* (Springer 2014), p. 256 ('it would need to be considered whether any act of any person involved in the failure could trigger jurisdiction according to this principle, or whether only a major involvement would have this consequence').

[48] Schneider 2014, above n 47, pp. 257–259.

benefits from illegal activity, is punishable there,[49] irrespective of the place where that illegal activity originally unfolded. This allows for the exercise of Dutch jurisdiction over corporations which receive and invest funds, or import products that have been generated or produced by means of the perpetration of criminal offenses abroad, *e.g.*, Dutch parent corporations which import goods from a foreign subsidiary or supplier which produced them in substandard, criminal conditions. This applies even if the Netherlands does not have jurisdiction over these extraterritorial abuses. It suffices that the original violation also qualifies as a criminal law violation in the foreign state, and that the Dutch parent could have reasonably presumed that the relevant goods originated from the perpetration of criminal offenses.[50] This standard of reasonableness may point to a duty of care or 'should-have-known standard' in that it requires that the parent corporation actively inquire whether the products and funds from which it benefits have not been generated by means of rights abuses abroad. Whether or not the corporations acted with care is, as indicated above, a function of expectations within particular sectors, on which international guidelines may shed a light.[51] There is no requirement that the parent corporation *intended* such abuses to be committed.

Dutch parent corporations could also incur criminal liability under a Dutch provision that criminalizes participation in a criminal organization.[52] At first sight, such a provision does not easily lend itself to application to corporate human rights abuses in a transnational parent-subsidiary or -supplier context, as multinational corporations are not normally criminal organizations. Still, it has been argued that, as the provision only requires a continuous and structured cooperative relationship and the immediate goal of committing crimes, Dutch parent corporations could well be held responsible for participation in criminal offenses committed abroad by their foreign subsidiaries or suppliers, provided that the foreign acts are also punishable under local law (dual criminality).[53] Jurisdiction is not an issue, as the act of participation takes place in the Netherlands. Thus,

[49] Articles 420*bis-quater* DPC.

[50] Kristen 2010, above n 38, pp. 149–150.

[51] Notably the OECD has been particularly active in the field of anti-corruption. See for an overview of relevant documents: http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm (last visited 13 June 2017).

[52] Article 140 DPC.

[53] Kristen 2010, above n 38, p. 153.

it has been suggested that Dutch jurisdiction could obtain over a Dutch parent who instructs foreign subsidiaries or third parties to dismantle polluted objects, in the process of which environmental crimes and labor conditions-related crimes are committed abroad.[54] Participation in a criminal organization ordinarily requires the taking of some active steps by the parent (giving orders, exercising influence, facilitating). However, it has been submitted that also omissions or duty of care abuses could give rise to criminal liability, namely where the parent consciously failed to ensure compliance with local legal obligations, and thus contributed to the realization of the organization's goal.[55]

At the time of writing, a – first – criminal case was pending against a Dutch corporation being charged with money-laundering and participation in a criminal organization involved in foreign human rights abuses. In February 2017, the human rights group SMX Collective filed a criminal complaint with the Dutch public prosecutor's office against the Dutch bank Rabobank.[56] SMX Collective alleged that Rabobank Netherlands, via a US subsidiary, laundered the criminal profits of Mexican drug cartels and enabled the murder and torture of Mexican civilians at the hands of these cartels. The Netherlands has territorial (as well as personal) jurisdiction over the Rabobank parent corporation, but the remoteness of the parent's involvement will make it difficult to establish liability. Indeed, to prove participation in a criminal organization, it needs to be established that the parent had positive knowledge of the criminal goals of the cartels, and contributed to (facilitated) these goals through its activity. To prove money-laundering, it needs to be established that the parent was aware of the criminal origins of the funds. This may perhaps be feasible regarding the US-based Rabobank subsidiary – over which the Netherlands does not have jurisdiction – but it is hardly certain that knowledge and contribution on the part of the Dutch parent can be established.

Whether the lower standard of *dolus eventualis* – pursuant to which an accused is culpable where he foresees, or should have foreseen the possibility of an unlawful circumstance or consequence occurring, and nonetheless proceeds with his conduct – would apply

[54] Kristen 2010, above n 38, p. 153. *Ibid.*

[55] Kristen 2010, above n 38, p. 155. *Ibid.*

[56] See Prakken d'Oliveira, 'Aangifte tegen Rabobank Groep vanwege witwassen van winsten van Mexicaanse drugskartels' (2017), http://www.prakkendoliveira.nl/nl/nieuws/aangifte-tegen-rabobank-groep-vanwege-witwassen-van-winsten-van-mexicaanse-drugskartels/ (last visited 6 June 2017).

to participation in a criminal organization, remains to be seen. Admittedly, this recklessness-based *mens rea* standard is routinely applied to complicity cases,[57] and has sustained the convictions of the aforementioned Dutch businessmen for facilitating the commission of international crimes abroad.[58] So far, however, Dutch courts have not been willing to apply this lower liability standard with respect to participation in a criminal organization. While they do not require knowledge of specific illegal acts, they do require that the suspect actually know, albeit in general, that the organization has as its aim the commission of crimes.[59]

IV CRIMINAL LIABILITY UNDER THE UNIVERSALITY PRINCIPLE

In case the foreign corporation has no territorial link with the Netherlands, criminal jurisdiction over duty of care abuses can only be established under the universality principle, but only in relation to a limited number of core crimes under international law: war crimes, genocide, crimes against humanity, and torture (International Crimes Act, ICA 2003). The ICA does not distinguish between natural and legal persons, so that corporations in principle fall within the Act's remit. One may perhaps observe that legal persons cannot commit international crimes in the first place, as the international criminal tribunals have only been given jurisdiction over natural persons.[60] However, the unavailability of an international tribunal, *i.e.*, a procedural issue, cannot be cited as evidence of the absence of liability, *i.e.*, a substantive issue. As Andrew Clapham has pointed out, non-state actors, such as corporations, do have substantive obligations under international criminal law since they have the capacity to commit wrongs.[61] It could even be argued that it is immaterial whether corporations are subjects of international criminal law as questions of criminal liability arising before domestic courts are

[57] Complicity as a mode of liability is governed by Article 48 DPA.

[58] See the *Van Anraat* and *Kouwenhoven* cases mentioned above n 20.

[59] Dutch Supreme Court, judgment of 5 September 2006, LJN AV4122; LJN AV4144.

[60] *E.g.*, Article 25 of the Statute of the International Criminal Court.

[61] A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' 6 *Journal of International Criminal Justice*, pp. 899–926 (2009).

typically governed by national rather than international criminal law.[62] Arguably, Dutch courts can exercise their (universal) criminal jurisdiction over corporations because Dutch criminal law provides for general corporate criminal liability in the Dutch Penal Code.[63]

It is unlikely that the corporation will itself commit core crimes, but it may happen that it *facilitates* such crimes. It can do so by aiding and abetting international crimes (complicity),[64] but also by failing to take precautionary measures, or, put differently, by failing to comply with duty of care obligations. Thus, Article 9(2) ICA makes a punishable offence for a person to fail to take the necessary measures – to the extent they could be reasonably required from him – in relation to the commission of core crimes by his subordinates. This provision was obviously meant to apply in the first place to military, and to a lesser extent civilian, relations in a hierarchical, governmental structure. However, on a broad reading of the term 'subordinate,' any person over whom the corporation can exercise command and control may possibly qualify. Michael Kelly has, in any event, previously argued that the jump from the military context to the corporate context, while not being completely analogous, holds some promise.[65]

---

[62] Compare J.G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', 47 *New York University Journal of International Law and Politics*, pp. 121–206 (2014–2015) (arguing that corporate accomplice liability is based on domestic criminal law, perhaps complemented but not contradicted by international criminal law).

[63] In the United States, the question of whether corporate liability exists under the Alien Tort Statute, 28 U.S.C. § 1350, pursuant to which a large number of tort cases have been brought before US federal courts relating to violations of international criminal law, has not yet been settled. A case regarding this question, *Jesner v Arab Bank*, was pending before the US Supreme Court at the time of writing. See for a restrictive approach: J. Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking', 51 *Virginia Journal of International Law*, pp. 353–395 (2010).

[64] Cf. Court of Appeal The Hague, *van Anraat*, above n 20, para. 18. There is no precedent of a *corporation* incurring complicity-based criminal liability. Note that, under general Dutch criminal law, it is not required that the conduct of the principal is criminal or punishable in the Netherlands [H.D. Wolswijk, *Locus delicti en rechtsmacht* (Deventer, Gouda Quint, 1998), pp. 227–230]. This principle obviously has little relevance for international crimes which are supposedly illegal anywhere in the world.

[65] M.J. Kelly, 'Grafting the Command Responsibility Doctrine Onto Corporate Criminal Liability for Atrocities' 24(2) *Emory International Law Review*, 671 (2010).

The main jurisdictional problem regarding the establishment of corporate liability under the universality principle appears to be the *presence requirement* pursuant to Article 2(1)(a) ICA – a requirement which features in a large number of universal jurisdiction statutes.[66] Under this provision, universal jurisdiction only applies in case the suspect is *found in the Netherlands* ('zich in Nederland bevindt').[67] While such presence is relatively easy to picture in the case of natural persons, application of the presence requirement seems to be far less straightforward in the case of corporations: when is a corporation exactly 'present' in the Netherlands? Bearing in mind that voluntary, transitory presence after the act normally suffices to trigger jurisdiction, it is arguable that the presence of the natural person whose conduct engaged the liability of the corporation under an imputative attribution model, or the presence of a senior decision-maker under a more holistic organizational failure corporate liability model, may suffice to trigger Dutch jurisdiction.

However, corporate 'presence' need not necessarily derive from the territorial presence of employees or agents of the corporation. It could also be based on the territorial presence of a subsidiary, branch, office, or production facility. It is of note that these interpretations are entirely conjectural, as no Dutch court has ruled on this question nor do the *travaux préparatoires* of the ICA offer any clarification. It is well possible that Dutch courts give a restrictive interpretation to 'corporate presence.' In this respect, they may draw an analogy to the interpretation currently given by US courts to the doctrine of personal jurisdiction in civil matters. In a recent case involving allegations of core crimes committed abroad by a foreign corporation – in the case the alleged involvement of the German corporation Daimler in Argentina's 1976–1983 ''Dirty War'' – the US Supreme Court decided that 'only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction,' namely only in the following 'exceptional' circumstances: (1) the forum that has specific jurisdiction because the lawsuit stems from the defendant's contacts with that forum; (2) the defendant's place of

[66] See on the scope of universal criminal jurisdiction, including the presence requirement: K. Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press 2016, pp. 224–229.

[67] See generally J. Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies', A report prepared for the Office of the UN High Commissioner for Human Rights, 2015, para. 2.1.5.

incorporation; and (3) the defendant's principal place of business.[68] As the first circumstance is not relevant to core crimes committed abroad, personal jurisdiction regarding core crimes may only be established over corporations that are incorporated in the forum or have their principal place of business in the forum. Transposition of this case-law to a universal criminal jurisdiction context means that corporate presence is essentially limited to incorporation and principal place of business. As incorporation is already captured by the active personality principle, only principal place of business remains as a separate jurisdictional requirement. Clearly, equating 'presence' with 'principal place of business' sets the bar high, as it excludes the mere presence of subsidiaries, branches, offices, and some facilities. Still, even this narrow reading of 'presence' would cast the jurisdictional net somewhat wider. It allows for the exercise of 'universal' jurisdiction over foreign corporations with their principal place of business in the Netherlands, even if that business did not facilitate the wrongful act whatsoever, and thus cannot be captured by the territoriality principle: it simply suffices that there *is* a principal place of business on Dutch soil.

V CONCLUDING OBSERVATIONS

The above overview demonstrates that there are considerable doctrinal options to exercise jurisdiction over corporations, and hold them liable, in respect of extraterritorial human rights abuses. Utilizing these options will require prosecutorial inventiveness, courage, and a (political) willingness to commit resources. Obstacles remain, however. Foreign states – where crucial evidence may be located – might not be willing to cooperate for political reasons,[69] because they lack capacity, or because they do not know the concept of corporate criminal liability. Proof may then be insufficiently

[68] *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 (2014), further developing the 'essentially at home' test espoused in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011).

[69] *E.g.*, the Dutch case of *Riwal* (Lima/Israel), Al-Haq – report of war crimes and crimes against humanity by Riwal, *Böhler Advocaten*, retrieved from: http://www.alhaq.org/images/stories/PDF/accoutability-files/Complaint%20-%20English.pdf (last visited 13 June 2017) (public prosecutor citing probable lack of cooperation of Israel as a ground to dismiss NGO complaints against Dutch companies alleging complicity in war crimes linked to the construction of a wall and of Israeli settlements in the Occupied Palestinian Territories).

available to sustain a conviction. Also, where business and politics are closely entwined, prosecutors may take action at their own peril, and, exercising their discretion, prefer not to initiate proceedings.[70] Such non-action may furthermore be informed by the view that the criminal law is too blunt a mechanism to hold corporations to account for CSR abuses, as 'innocent' stakeholders may be affected by penalties imposed on the corporation. Such stakeholders include shareholders, workers, and even consumers (to which the corporation may pass on the cost of penalties). In this respect, it remains to be seen whether organizational compliance programmes in combination with deferred prosecution, or even settlements, may be appropriate substitutes in cases of serious corporate human rights abuses. Prosecutors may also refrain from prosecuting corporations, even if they are convinced of their guilt, reasoning that a money judgment (penalty) may only have symbolic value if the corporation has only few assets within the jurisdiction to satisfy the judgment, bearing in mind that criminal judgments are not normally enforced abroad.[71] Moreover, prosecutors espousing a narrow interpretation of the *lex certa* principle may recoil at the thought of sanctioning corporations on the basis of vaguely defined human rights due diligence obligations when implementing duty of care standards. Or they may be of the view that the retributivist goal of criminal law may be ill-suited to repair the damage done to victims. In some systems, courts may admittedly order compensation in criminal proceedings.[72] However, the courts may refuse to exercise this competence if such would be too complicated,[73] a category into which BHR liability cases may well fall

[70] ICAR and AI report 2016, above n 12, p. 1. In some states, victims can challenge before a court a prosecutor's decision not to prosecute. In the Netherlands this is possible pursuant to Article 12 Sv.

[71] It is to be borne in mind that foreign enforcement of criminal judgments is hardly self-evident. While there are international or regional agreements on the enforcement of civil judgments (*e.g.*, EU Regulation No 1215/2012, OJ L 351 (20 December 2012), pp. 1–32), no such agreements exist for criminal judgments. That being said, enforcement of criminal judgments has distinct advantages for victims, as, unlike in civil proceedings, the *state* enforces the judgment, thus relieving the execution burden for the victims.

[72] *E.g.*, in the Netherlands (*vordering benadeelde partij*; Article 51f(1) Sv).

[73] The Dutch criminal judge is not required to grant compensation if addressing the civil action creates a disproportionate burden for the criminal proceedings (Article 361 Sv). In the case of *van Anraat*, for instance, in which the court convicted a Dutch businessman for complicity in war crimes committed in Iraq, the court de-

given that duty of care standards used in tort law may differ from those used in criminal law.[74]

Possibly, within Europe, the EU can remove some of these obstacles by establishing minimum rules concerning the definition of criminal offenses and sanctions under Article 83 Treaty on the Functioning of the EU (TFEU).[75] It remains, nevertheless, that the EU cannot compel prosecutors to prioritize corporate human rights violations. Only states can do so. In light of recent calls of the European Parliament, the Council of Europe, and the International Corporate Accountability Roundtable to utilize the criminal law arsenal to address such violations, states can no longer abdicate their responsibilities in this respect. In fact, under international human rights law, there may be a *state duty* to prosecute the presumed offenders of criminally punishable violations of human rights,[76]

Footnote 73 continued
clared the civil actions filed by the victims inadmissible [Dutch Supreme Court, NJ 2009/481, judgment (30 June 2009), para. 13].

[74] In such a situation, victims could obviously initiate proceedings before a civil court.

[75] Article 83 TFEU provides: 'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.' Article 83 TFEU goes on to give an overview of the crimes that qualify for such action, and gross abuses of human rights in general are not mentioned, although related abuses such as trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, and corruption are mentioned. That gross human rights abuses are not mentioned does not preclude EU action, however, as Article 83 TFEU also provides that '[o]n the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.' It is arguable that gross corporate human rights abuses do meet the threshold of 'particularly serious crimes with a cross-border dimension,' even if the cross-border dimension originally envisaged was probably an intra-European one. It is of note, however, that the procedure to take an EU decision regarding a crime not enumerated in Article 83 TFEU is much more burdensome than the procedure to take a similar decision regarding an enumerated crime: whereas for the latter category, a qualified majority in the Council suffices, for the former the unanimity requirement (28 Member States in favor) applies.

[76] ICAR and AI report, above n 12, p. iii.

regardless of the nature of the offender. Such a duty to prosecute is not territorially restricted. Indeed, the jurisdictional clauses of the International Covenant on Civil and Political Rights and the European Convention on Human Rights provide that State Parties shall respect, ensure, or secure to everyone *within their jurisdiction* the rights recognized by those conventions.[77] It is arguable that victims of foreign corporate abuses fall within a state's jurisdiction when the responsible corporation is incorporated in that state, or, short of incorporation, when it has a strong link with that state.[78] Accordingly, states may have positive obligations to prevent and punish 'extraterritorial' BHR abuses involving 'their' corporations. States may thus want to put in place arrangements that (a) allow their law-enforcement authorities to be properly informed of foreign corporate supply-chain violations involving corporations over which they have jurisdiction,[79] and that (b) equip these authorities in such a way that they have the time and resources to investigate credible allegations of abuse and involvement, and can initiate a prosecution in case of convincing evidence.

[77] Article 2(1) ICCPR; Article 1 ECHR. See on the duty to prosecute, *e.g.*, Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8, 15, 18; ECtHR, *Aksoy v. Turkey*, 100/1995/606/694, Judgment of 18 December 1996, para. 98.

[78] See at length C. Ryngaert, 'Jurisdiction: Towards a Reasonable Test', in M. Langford *et al.* (Eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law,* Cambridge University Press 192–211 (2013).

[79] Given the geographical remoteness between the actual violation somewhere down the supply chain and (the duty of care violation of) the parent corporation, there is a likely informational deficit, in the sense not only that the parent may not be fully aware of the actual violations, but also that the law-enforcement agencies of the parent's home state may never be informed of violations that have taken place. There may be a role here for non-governmental organizations (NGOs) with local branches that could bring corporate abuses to the attention of prosecutors in various states connected to the abuse. So far, most extraterritorial human rights cases, including corporate abuses, have in any event been 'brought' by NGOs, via formal or informal complaints mechanisms. States could possibly improve cooperation with NGOs, *e.g.*, in terms of the evidence needed for the prosecutor to start an investigation.

ACKNOWLEDGMENTS

The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230 – UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No. 016.135.322).