

I. Foreword

Ever since the establishment of the International Criminal Court (ICC) in 1998, the Netherlands is strongly committed to prosecuting alleged perpetrators of international crimes residing in our country. The thought that the Netherlands cannot be a ‘safe haven’ for war criminals is widely accepted. Admittedly, the practical implementation of this objective at first stayed behind, most likely because the Public Prosecution Service considered international crimes cases too complex, time-consuming, and politically sensitive.¹ Yet, following the introduction of the new International Crimes Act (ICA; *Wet Internationale Misdrijven*) in 2003, the prosecution of international crimes has received more attention. In its 2002 ‘Action Plan’, the Ministry of Justice stressed that the Netherlands should actively prosecute alleged perpetrators of international crimes and that investigating international crimes is a top-priority of the Dutch government.

Since the start of the new millennium, several high-profile international crimes cases have been prosecuted and adjudicated in the Netherlands. The majority of these cases concern (senior) political and military figures. Cases against businessmen are rarer and – when pursued – have yielded particular accountability problems. Indeed, as Huisman and Van Sliedregt observe ‘prosecuting corporations and/or individual businessman for complicity in international crimes is easier said than done’.² Nevertheless, some of the most notorious international crimes cases in the Netherlands concern complicity for business involvement.

In this report, we will discuss Dutch experience with prosecuting businessmen for international crimes and set out the possibilities and limitations for establishing individual criminal responsibility for corporate complicity. The report focuses on corporate complicity for ‘core’ international crimes, i.e. war crimes, crimes against humanity, genocide, and aggression. In addition, the report addresses criminal responsibility for torture, since this crime is also included in the ICA together with the core crimes. Moreover, both the core crimes and torture can be qualified as types of system criminality, i.e. crimes committed by groups of people acting in an organizational context, like a state or corporation.³ Since there is only little practice in this area, the report draws upon corporate complicity for other serious human rights violations – such as terrorism – where necessary. The case law in this broader area of human rights violations is used to assess to what extent corporate officials can be held responsible for international crimes and to anticipate the difficulties that may arise in this respect.

Following the structure of the questionnaire, we will set out the public debate and relevant case law on corporate complicity for international crimes (I.), the general framework of criminal responsibility under

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¹ Smeulers 2014.

² Huisman & Van Sliedregt 2010, p. 804.

³ Nollkaemper & Van der Wilt 2009, p. 15-24; Van Sliedregt 2013, p. 20-22.

Dutch law (II.), the *actus reus* and *mens rea* requirements for corporate complicity (III., IV., and V.), the regulation of inchoate offences (VI.), the ‘white collar crime doctrine’ (VII.), and defences (VIII.). Our findings are based on doctrinal research and case law analyses. Considering that the Dutch Penal Code (DPC; *Wetboek van Strafrecht*) only regulates perpetration and participation in general terms, special attention is paid to judgments of the Supreme Court in which the statutory regulations are explained in further detail. The research was completed on 5 January 2017.

1. Public debate

Relative to its geographical and demographical size, the Netherlands has a large economy. In 2016, the Dutch economy was the 17th largest in the world, while the Netherlands is only a small country with less than 17 million inhabitants. The Dutch economic success is largely based on international trade. Perhaps therefore, there is a strong public interest in and concern for the ‘crown jewels’ of the Dutch corporate world, such as Shell, Heineken, Ahold, and Unilever.⁴

Over the past years, leading Dutch politicians have repeatedly made the symbolical connection between the entrepreneurial mentality of the Dutch East Indies Trading Company (VOC) during the 17th century ‘Golden Age’ of Dutch economic global domination, and the successes of contemporary leading Dutch corporations. However, this reference has been met with criticism because of the atrocities committed by the VOC. While often presented as the first modern corporation in the world (private equity and tradeable shares), the VOC was responsible for acts that would nowadays qualify as international crimes. In 1621, the company annihilated the total population of the Banda Islands in modern day Indonesia, because they were unwilling to work on the company’s nutmeg plantations.⁵ Further, critics refer to the VOC’s involvement in the slave trade (another modern day international crime), even though it was in fact the company’s counterpart – the West Indies Trading Company (WIC) – that was responsible for the shipment of over half a million slaves from Africa to the Americas.

This dual position on Dutch economic history – praise and criticism – also typifies the public debate on the role of Dutch businesses during the Second World War. Right after the war, Dutch public and politics mainly regarded the nation as a victim of the German occupation. Studies by the National Institute for War Documentation supported the popular narrative of widespread resistance against the occupiers and their crimes.⁶ However, recently a steady flow of historical studies have unveiled that important sectors of civil society – such as the national railway company, banks, and legal professions – actively collaborated with the Nazi regime in the execution of the Holocaust.⁷

⁴ ‘A Dutch crown Jewel Tarnished’, *The Economist*, 28 February 2003, <http://www.economist.com/node/1605114>, last visited 5 January 2017.

⁵ Huisman, Van Baar & Gorsira 2015. The then company director Jan Pieterszoon Coen has for centuries been portrayed as a hero of Dutch national history. However, when his statue in his former home town Hoorn was accidentally knocked down in 2011, local protesters pleaded for not returning the statue to its base. The local history museum organized an exhibition in the form of a ‘criminal trial’ against Coen. In a survey among the visitors of the museum, 63% voted for placing back the statue on the condition that the accompanying placard would mention the crimes for which Coen was responsible. The city administration followed up on this advice.

⁶ De Jong 1969-1991.

⁷ Meihuizen 2006; Tielhof 2003; Schultz 2016.

Dutch public interest for corporate involvement in human rights abuses skyrocketed in the 1980s with public outrage about the role of Dutch companies in South-Africa during the Apartheid regime. Public scrutiny focused on Shell, which continued to deliver crude oil to South-Africa and also operated a refinery in the country. In 1980, two Dutch anti-apartheid groups founded the Research Shipping Bureau (SRB) to monitor compliance with proclaimed oil-embargoes. Between January 1979 and December 1993, the SRB identified 865 oil deliveries by large vessels (+50.000 ton), which they estimated to be 81% of South Africa's crude oil import needs over those years.⁸ In the mid-1980s, public pressure in the form of boycotts, protests, institutional divestment and other types of private condemnation of apartheid reached an unprecedented intensity. From 1987-1989, the action group RaRa (revolutionary Anti-Racist Action Group) even conducted several attacks against Shell fueling stations and other company assets in the Netherlands.

Today, the Dutch public continues to hold the integrity of Dutch businesses (and public administration) in high esteem. The perceived level of corruption is among the lowest in the world.⁹ The combination of a strong economy and a (perceived) high level of integrity has the effect that Dutch officials take the moral high ground in international debates on businesses and human rights. Whilst on foreign trade missions, Dutch politicians feel pressure of the Parliament and media to critically address human rights issues in countries with less than perfect human rights records. A dilemma that is known in Dutch public discourse as balancing between the role of 'merchant' and 'reverend', again referring to the colonial past of economic exploitation and evangelization.

Following the report by the Special Rapporteur on Business and Human Rights for the United Nations and the publication of the United Nations' Guiding Principles on Business and Human Rights, the Minister of Foreign Affairs launched a 'National Action Plan for Business and Human Rights' in 2014, which introduced a list of actions to be taken by the Dutch Government. Whilst the initiative was positively received by civil society actors, the Netherlands Institute for Human Rights¹⁰ and the Platform for Socially Responsible Business raised critical questions about the implementation of these actions.¹¹ In January 2016, the Netherlands Institute for Human Rights sent a letter to the Minister of Foreign Affairs calling for an overview and update on the progress of the activities in the Action Plan.¹²

In the public debate, corporate human rights abuses are traditionally attributed to corporations as such. It is considered that certain types of corporate misconduct are embedded in organizational culture, independent of the persons holding executive positions. Following this view, corporate criminal liability was introduced in the DPC in 1976. However, due to unethical behavior in the financial sector that led to the global financial crisis of 2007 and due to recent major cases of fraud in the upper echelons of the Dutch business community, the public debate recently started to focus more on the responsibility of individual executives and managers for the wrongdoings of corporations. This has raised interest in how existing tools can be used to hold individual managers liable under civil law.¹³ Furthermore, in administrative law, sanctions aimed at individual executives have been introduced, and in criminal law,

⁸ Hengeveld & Rodenburg 1995, p.89.

⁹ Transparency International 2016.

¹⁰ Netherlands Institute for Human Rights, Response to the National Action Plan on Business and Human Rights "Knowing and Showing", February 2014.

¹¹ <http://mvopatform.nl/news-en/dutch-national-action-plan-on-business-and-human-rights>, last visited 5 January 2017.

¹² Netherlands Institute for Human Rights, Letter to the Ministry of Foreign Affairs, 27 January 2016.

¹³ Eshuis et al. 2012.

the maximum penalties for several business-related crimes have been raised.¹⁴ Also, regulatory agencies have developed tools to assess the personal integrity of CEO's of corporations in the financial industry. This shift towards individual responsibility of corporate executives has not yet been transposed to corporate involvement in human rights abuses.

The public debate on business and human rights is fueled by the work of several NGO's, both Dutch subsidiaries of international organizations (e.g. Amnesty International, Human Rights Watch, Transparency International), as well as local human rights groups. Particularly active in the field of business and human rights is the Centre for Research on Multinational Corporations (SOMO). Founded in 1973, SOMO investigates multinational corporations and the impact of their activities on humans and the environment. For instance, in 2016, SOMO published a report which concluded that multinational companies operating in conflict-affected areas often lack proper policies on how to deal with conflict situations, thereby running the risk of contributing to human rights violations and sparking renewed conflict.¹⁵ Besides research, SOMO provides consultancy and training to non-profit organizations and the public sector.

In addition, investigative journalists have played an active role in discovering cases of involvement of Dutch companies and businessmen in international crimes and in informing the public about these cases. Especially Arnold Karskens has published extensively on the criminal trials against the Dutch businessmen Kouwenhoven and Van Anraat, for their alleged complicity in war crimes committed in Sierra Leone and Iraq (see section 2 below).¹⁶ In 2015, Van Beemen published a book on the operations of the Dutch beer brewing company Heineken in Africa¹⁷ in which he argues that the crucial involvement of the (local subsidiaries) of the company in Rwanda, Burundi, and DRC could qualify as complicity in international crimes. While Heineken largely remained silent about Van Beemen's finding, the book received extensive media coverage and led to questions by Dutch parliamentarians to the Minister of Economic Affairs.¹⁸

In 2006, a television documentary by 'Netwerk' showed how cranes of the Dutch company RIWAL operated at a construction site of the dividing wall between Israel and the Occupied Palestinian Territories. In response to this documentary, a member of Parliament asked questions to the Minister of Foreign Affairs, who replied that the cooperation of any Dutch firm to the construction of the wall is 'unwanted'.¹⁹ As will be elaborated in section 2, in 2010 a criminal investigation against RIWAL for alleged complicity to war crimes was opened by the Dutch Public Prosecution Service. Similarly, the criminal investigation against the Dutch businessman Guus Kouwenhoven was opened after a Dutch television documentary based on a report by the NGO Global Witness about Kouwenhoven's alleged involvement in the crimes committed by the former Liberian president, Charles Taylor.²⁰ These examples illustrate the interaction between human rights organizations, the media, Dutch politics, and in some instances also the Public Prosecution Service in cases of alleged business involvement in international crimes.

¹⁴ *Kamerstukken II*, 2012/13, 33 685, 1-3.

¹⁵ SOMO 2016.

¹⁶ Karskens 2006.

¹⁷ Van Beemen 2015.

¹⁸ *Kamerstukken II*, 2015/16, 34300, 17.

¹⁹ *Kamerstukken II*, 2005/06, 23432, nr. 2068. See also, *Kamerstukken II*, 2005/06, 23432, nr. 209.

²⁰ Personal communication of the head of the criminal investigation unit of the Dutch police unit for international crimes.

The Dutch cases against businessmen have raised the attention of criminologists. Dutch criminologists have taken the initiative to develop a typology of criminal involvement in international crimes.²¹ Particularly in relation to the topic of this report, Dutch criminologists have been applauded for studying corporate involvement in international crimes.²² Their research has produced an inventory of over 80 cases in which corporations have been accused of involvement in international crimes and has resulted in a criminological framework to analyze such cases.²³

2. Cases before criminal courts

2.1. *Frans van Anraat*

In 2007, Frans van Anraat was prosecuted for complicity in genocide and war crimes. Van Anraat is a Dutch businessman, who traded in chemicals as an intermediary. Whilst officially representing a company, Van Anraat in fact acted autonomously and did not have any employees. He was the sole supplier of the chemical gas thiodiglycol (TDG) to the regime of Saddam Hussein. TDG was used by Hussein for the production of chemical weapons that were later deployed during the war between Iraq and Iran in 1988, most notably in the city of Halabja.

The District Court of The Hague – though acknowledging that genocide was committed – dismissed the charge of complicity to genocide against Van Anraat. According to the Court, there was insufficient evidence to establish that Van Anraat himself had acted with genocidal intent, or with ‘positive knowledge’ of the main perpetrators’ genocidal intent.²⁴ The Court did convict Van Anraat for complicity in war crimes on the basis of Article 8 War Crimes Act (*Wet Oorlogsstrafrecht*) and Article 48 DPC. Basically, the Court held that ‘Van Anraat must have been aware of the considerable chance that his merchandise would be used to produce chemical weapons that would subsequently be deployed against Iraqi’s perceived enemies, and that he must have accepted that chance’.²⁵

On appeal, the Court of Appeal upheld Van Anraat’s conviction, though based on different reasoning. The Court of Appeal applied a stricter *mens rea* standard of ‘positive knowledge’ finding that ‘the defendant was very aware of the fact that – “in the ordinary [course] of events” – the gas was going to be used’. The Court of Appeal convicted Van Anraat to 17 years’ imprisonment.²⁶ In 2009, the Supreme Court upheld the ruling by the Court of Appeal, but reduced the sentenced by 6 months, because of a violation of the right to a trial within reasonable time, as stipulated in Article 6 European Convention of Human Rights (ECHR).²⁷ Van Anraat’s appeal to the European Court of Human Rights (ECtHR) was declared inadmissible.²⁸

²¹ Smeulers & Haveman 2007.

²² Bantekas 2015, p 37.

²³ Huisman 2010; Van Baar & Huisman 2013.

²⁴ District Court The Hague, 23 December 2005, ECLI:NL:RBSGR:2005:AX6406.

²⁵ Huisman & Van Sliedregt 2010, 807-808.

²⁶ Court of Appeal The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676 (official Dutch verdict) and ECLI:NL:GHSGR:2007:BA6734 (English translation).

²⁷ Supreme Court, 30 June 2009, ECLI:NL:HR: 2009:BG4822, NJ 2009, 481.

²⁸ ECtHR, *Van Anraat v. the Netherlands*, 6 July 2010, appl. no. 65389/09.

The judicial findings in this case have been instrumental for the development of criminal responsibility for international crimes in the Netherlands, in particular insofar as it concerns the applicable *mens rea* standards (see section IV.).

2.2. *Guus Kouwenhoven*

Guus Kouwenhoven – also known as ‘Mr. Gus’ – was a Dutch businessman who was the shareholder and director of several companies in Liberia, amongst which the Royal Timber Company (RTC) and the Oriental Timber Company (OTC). In 2003, the NGO Global Witness reported that Kouwenhoven was an important business partner of Charles Taylor – the former President of Liberia – and had financed the civil war in Liberia and Sierra Leone between 1999 and 2003. Moreover, it was reported that Kouwenhoven’s security personnel – many of whom were also former militia members – had committed violence against the civilian population and that Kouwenhoven had smuggled weapons for Taylor’s army. Based on these reported facts, Kouwenhoven was charged with (co-)perpetrating/ aiding and abetting/ superior responsibility for war crimes by Taylor’s troops. In addition, Kouwenhoven was accused of violating the Dutch Sanctions Act (*Sanctiewet*), which implemented the UN and EU regulations that prohibited the supply of weapons to Liberia.

In first instance, the District Court of The Hague in 2006 convicted Kouwenhoven for breaching the Dutch Sanctions Act and for acting in violation of the UN sanctions against Taylor.²⁹ However, the District Court held that it could not be established that Kouwenhoven had also facilitated the commission of war crimes. According to the District Court, there was insufficient evidence to establish that Kouwenhoven was involved in, or had knowledge of, the crimes committed by the Taylor’s army. In particular, the Court considered that the mere fact that Kouwenhoven’s security personnel had committed war crimes, does not automatically entail that Kouwenhoven consented with or had knowledge of these crime. Similarly, the mere delivery of weapons to Taylor did not suffice to hold Kouwenhoven responsible as an accomplice.

In 2008, the Court of Appeal in The Hague overturned Kouwenhoven’s conviction and acquitted him of all charges for lack of evidence. The Court considered that ‘[i]n the case file there is no objective and solid evidence whatsoever, found in documents such as cargo manifests, finance documents, customs reports etcetera, that arms were carried to Liberia on board the Arctic Mariner’.³⁰ In April 2010, the Dutch Supreme Court quashed the judgment of the Court of Appeal. According to the Supreme Court, the prosecution had not been given sufficient opportunities to interview two anonymous witnesses, who could supposedly give incriminating evidence about Kouwenhoven’s knowledge that his arms were being used in the conflict in Liberia and Sierra Leone. The Supreme Court referred the case to another appellate court for re-examination,³¹ where it is currently still pending. The first days of preliminary hearings have already made clear that it is difficult to trace and interview the relevant witnesses, partly because the Ebola epidemic has hampered travelling to Liberia.

²⁹ District Court The Hague, 7 June 2006, ECLI:NL:RBSGR:2006:AX7098.

³⁰ Court of Appeal The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068 (official Dutch verdict) and ECLI:NL:GHSGR:2008:BC7373 (English translation).

³¹ Supreme Court, 20 April 2010, ECLI:NL:HR: 2010:BK8132, NJ 2011, 576.

2.3. *Riwal*

Whilst the cases against Van Anraat and Kouwenhoven focused on prosecuting individual *businessmen* for their (alleged) complicity in international crimes, Dutch law also allows for establishing criminal responsibility of *corporations* for (contributing to) international crimes. The most prominent case in which questions concerning corporate responsibility for international crimes were addressed, is the *Riwal* case. This case concerned the involvement of the Dutch company Lima Holding B.V., a rental company in cranes and aerial work platforms. The case got moving when the Palestinian NGO Al Haq brought a criminal complaint against the company in the Netherlands, alleging that the company was complicit in war crimes by contributing to the construction of a security barrier between the West Bank and Israel and by assisting the building of an industrial area near an Israeli settlement in the West Bank.

Following an investigation, the Dutch Public Prosecution Service decided in 2013 not to pursue the prosecution of Lima B.V. and its leadership. The Prosecution Service confirmed that the company ‘has rented out cranes and aerial working platforms that were used for construction works in the occupied territory’ and emphasized that the ‘building of the barrier in occupied territory has been considered a violation of International Humanitarian Law (...). Dutch companies are required to refrain from any involvement in violations of the International Crimes Act or the Geneva Conventions’.³² Yet, the Prosecution Service considered that criminal prosecution was not opportune, considering that Lima B.V. was taking steps to end its activities in Israel and the Occupied Territories and had only made a minor contribution to the building of the barrier and the settlements: ‘[c]ranes and aerial working platforms have been used only occasionally and only for a few days, sometimes after having been rented to third parties’.³³

Even without an official prosecution, the *Riwal* case has triggered a public debate in the Netherlands and resulted in the withdrawal of several Dutch corporations from Israel and the Occupied Territories. The pension fund PGGM, the water company Vitens, and the consulting engineering firm Royal Haskoning DHV all halted their cooperation with Israeli companies.

2.4 *Rabobank*

In February 2017, the human rights group SMX Collective filed a criminal complaint with the Dutch public prosecutor’s office against Rabobank – one of the biggest Dutch banks – and its board of directors.³⁴ The group is accusing Rabobank of laundering the criminal profits of Mexican drug cartels. By doing so, the bank allegedly also facilitated the crimes of these criminal groups and should therefore be prosecuted for contributing to crimes against humanity. In the United States of America, Rabobank is under investigation for failing to monitor money laundering practices by its local subsidiary in Calixico, a town on the border with Mexico in California. The bank closed down this local office in 2015. The Dutch prosecutor’s office has stated that it will assess whether the complaint contains starting points for criminal investigation.

³² <https://www.om.nl/algemeen/english/@31796/no-further/>, last visited 5 January 2017.

³³ *Idem*.

³⁴ <http://nos.nl/artikel/2156175-aangifte-tegen-rabobank-voor-misdrijven-tegen-de-menselijkheid.html>

3. Cases before civil courts

In 2008, the Dutch NGO Friends of the Earth The Netherlands, representing four Nigerian farmers, started a civil lawsuit in the Netherlands against the oil company Royal Dutch Shell (RDS) and its subsidiary Shell Petroleum Development Company of Nigeria (SPDC).³⁵ The plaintiffs filed three separate lawsuits concerning the impact of oil spillages in three villages – Oruma, Goi, and Ikot Ada Udo. The Oruma lawsuit claims that oil spillages occurred on 26 June 2005 as a result of a broken pipeline, whilst SPDC only closed the hole in the pipeline on 29 June 2005. Allegedly, the oil flowed into the plaintiffs’ farmland and fishponds, polluting them, and making them unfit for use. The plaintiffs further claim that the clean-up only started in November 2005 and that neither the environment near Oruma, nor their oil-polluted property were adequately cleaned by Shell Nigeria. With regard to the allegations of negligence, the plaintiffs argue that Shell Nigeria acted negligently by allowing the oil spill to occur, or at least it did not prevent or limit it, and did not adequately clear the oil. The plaintiffs also allege that RDS was negligent because it did not ensure that its subsidiary in Nigeria acted with sufficient care, although it was able and obligated to do so. The other two lawsuits make similar claims regarding oil spillages in Goi and Ikot Ada Udo.

On 13 May 2009, Shell submitted a motion arguing that the Dutch courts lacked jurisdiction over the actions of Shell’s Nigerian subsidiary. On 30 December 2009, The Hague District Court rejected Shell’s claim and ruled it *did* have jurisdiction over the plaintiffs’ case. On 30 January 2013, the District Court granted one of the farmer’s claims and ordered Shell to pay compensation, yet the Court dismissed the other claims. In December 2015, a Dutch appeals court reversed the District Court’s dismissal and permitted the single farmer’s claim to go forward.

In June 2009, Shell settled in a case filed in the United States District Court for the Southern District of New York under the Alien Tort Statute, by the next of kin of the late Nobel Peace Prize winner Ken Saro-Wiwa and other Ogoni activists from Nigeria. Shell was accused of complicity in crimes against humanity in the repression of peaceful protests against the pollution and corruption caused by Shell’s extraction of oil in the Niger Delta. Shell allegedly paid security forces to act and assisted them, as well as profiting from the execution of Saro-Wiwa and eight of his allies. The corporation emphasized that the payment of 15.5 million US dollars to the victims’ next of kin was not an admission of guilt, but a humanitarian gesture.³⁶ In a related case the United States Supreme Court ruled that the Alien Tort Claims Act presumptively does not apply extraterritorially and that US courts therefore do not have jurisdiction in this case. In the beginning of 2017, one of these plaintiffs announced that she will bring this case to court in the Netherlands in a civil law suit under Dutch law. The plaintiff is represented by the same lawyers as the one that represented the four Nigerian farmers mentioned above.³⁷

³⁵ Extensive information about this case can be found at: <https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria>, last visited 5 January 2017.

³⁶ Huisman, 2010: 7.

³⁷ <https://fd.nl/ondernemen/1182792/nigeriaanse-activiste-daagt-shell-voor-rechter-in-nederland>.

II. General remarks

4. International crimes in Dutch law

The principle of complementarity enshrined in the Rome Statute stipulates that the primary responsibility for prosecuting international crimes lies with domestic jurisdictions. According to the Dutch legislator, this principle entails that crimes falling under the jurisdiction of the ICC should be criminalized within Dutch law and that the Netherlands must be able to exercise extra-territorial jurisdiction over these crimes.³⁸ On this account, the legislator has enacted the ICA, which implements the international crimes regulated in the Rome Statute in the Dutch legal order.

Articles 3 to 6 ICA define genocide, crimes against humanity, war crimes, and the crime of aggression,³⁹ respectively. An English translation of these definitions can be found in Annex I of this report. The provisions provide an almost literal copy of the crime definitions of the Rome Statute.⁴⁰ The legislator deliberately abstained from translating the Statute's definitions into more specific domestic regulations, even though the Rome Statute provides for more general and abstract crime definitions than Dutch criminal codes. According to the legislator, such translations would deny the international character of the core crimes and their basis in international treaties and customary law.⁴¹ Furthermore, translating international definitions into traditional Dutch regulations would generate the risk of creating undesirable gaps and distinctions with the international framework.⁴²

The preparatory works clarify that Dutch courts need to interpret the subjective and objective elements of international crimes in light of international (case) law and should determine the limitations of criminal responsibility for international crimes in accordance with international standards.⁴³ Indeed, the courts have generally established the meaning of the elements of international crimes with reference to international case law.⁴⁴ We will discuss this issue more elaborately in section VI. of this report, since the choice for interpreting modes of liability according to international standards has important implications for the *mens rea* standards of corporate complicity for international crimes.

In addition to the core crimes falling within the jurisdiction of the ICC, the ICA also criminalizes the autonomous crime of torture. Thus, in addition to torture as a type of war crime or crime against humanity, called *marteling* (Article 4(1)(f), 5(1)(b) and 6(1)(a) ICA)), Dutch law also regulates torture as a distinct crime, called *foltering* (Article 8 ICA). There are important differences between these two types of torture. On the one hand, the distinct crime of torture is broader in scope than torture as a type of war crime or crime against humanity, since it does not have to be committed in a specific context of systemic violence, such as an armed conflict or an attack against a civilian population. On the other hand, torture as

³⁸ *Kamerstukken II* 2001/02, 28337, 3, para. 1.

³⁹ The crime of aggression was added to the ICA in 2016 to comply with the criminalization of aggression as agreed at the Review Conference of the Rome Statute in 2010 in Kampala.

⁴⁰ Before the introduction of the ICA, the Dutch definition of genocide differed from the international definition by adding groups that are defined by specific ideological beliefs (*levensbeschouwing*) to the list of protected groups. This distinction had limited value, since groups with ideological beliefs generally coincide with religious groups. The ICA follows the definition of genocide in de Genocide Convention and the Rome Statute.

⁴¹ *Kamerstukken II* 2001/02, 28337, 3, para. 2.

⁴² *Idem*.

⁴³ *Idem*.

⁴⁴ E.g. Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082, para. 11.3.2.3.1.1.

a distinct crime sets additional requirements in relation to the perpetrator's official capacity and his criminal purpose. Following the definition of torture in the Torture Convention, it is required that the perpetrator was 'a public servant or other person working in the service of the authorities',⁴⁵ who acted with the aim of (i) extracting information or a confession from the victim or a third person; (ii) punishing the victim for an act he or a third person has committed or is suspected of having committed; (iii) intimidating the victim or a third person; or (iv) coercing him to do or permit something, or discrimination on any ground (Article 1(1)(e) ICA). By contrast, torture as a war crime or crime against humanity only requires that the victim was in custody or under the control of the perpetrator, without stipulating a specific criminal purpose (Article 1(1)(d) ICA).

Since its introduction, the ICA has been amended several times. Two amendments deserve particular attention. First, in 2010, the legislator has introduced a new provision – Article 8a ICA – that criminalizes enforced disappearance as a separate crime. The crime of enforced disappearance does not have to be committed in the context of a widespread or systematic attack against a civilian population – as is the case for enforced disappearance as a type of crime against humanity. Instead, it suffices that a person is arrested, held in custody, or otherwise deprived from his freedom by a state or political authority that refuses to give information on the person's faith or place of custody, so that the person loses his legal protection. The fact that the victim was killed, assaulted (by a group), or raped, and the fact that victim was a minor, elderly, wounded, pregnant, or otherwise vulnerable person constitutes an aggravating circumstance and raises the maximum sentence from 15 year's to life imprisonment. Article 8a ICA implements the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. In the preparatory works, the legislator accepts that enforced disappearance does not occur in the Netherlands, as persons can only be deprived of their liberty following detailed procedural safeguards for detainment. Yet, Dutch courts may be required to assess cases of enforced disappearance when persons, who have allegedly committed this crime abroad subsequently move to, or visit the Netherlands. In interpreting the crime of enforced disappearance, judges are encouraged to be take account of the Rome Statute and the Elements of Crimes, which provide relevant guidance.

Second, in 2011, the legislator added a fourth sub-clause to Article 1, which stipulates that a number of ordinary domestic crimes – such as incitement, money laundering, handling stolen goods, and participation in a criminal organization – will be adjudicated as international crimes when they relate to (*betrekking hebben op*) one of the crimes regulated in the ICA, i.e. the core international crimes and torture. The equal status of these specified domestic crimes and international crimes has important consequences for the jurisdiction of Dutch courts over such domestic crimes,⁴⁶ and for the regulation of extradition, prescription, and superior responsibility. In the explanatory memorandum, the legislator justifies its amendment of the ICA by observing that crimes like money laundering and incitement are regularly employed to prepare international crimes, and seek to facilitate such crimes.⁴⁷ They can therefore be considered just as serious and reprehensible as international crimes.

⁴⁵ The term 'public servant' has a broad meaning and includes any person, who is assigned by the public authorities to perform state-related tasks (Supreme Court, 25 October 1915, *NJ* 1915, p. 1205).

⁴⁶ On the issue of jurisdiction, see the report of Van Gelder and Ryngaert. Van Gelder & Ryngaert 2016.

⁴⁷ *Kamerstukken II* 2009/10, 32475, 3, Article III.

The Dutch legislator has recognized that other crimes, such as piracy, slavery, and terrorism are sometimes qualified as international crimes. Yet, these crimes have not been implemented in the ICA, since they do not fall within the jurisdiction of the ICC. Criminal responsibility for such crimes can be established on the basis of the DPC, European legislation, or directly binding international conventions.

5.-6. Criminal responsibility under Dutch law

a. Personal criminal liability

The principle of personal liability – also known as *nulla poena sine culpa* – lies at the heart of the Dutch framework of criminal participation. The thought that individuals can only be held responsible for crimes to which they made a contribution (*actus reus*) with a guilty mind (*mens rea*), is widely accepted. Criminal responsibility can only be established if a person caused some type of harm for which he is to blame. Whilst the principle of personal liability is not explicitly regulated in the DPC,⁴⁸ the legislator recognized it as an essential feature of Dutch law when drafting the definitions of modes of liability.⁴⁹ Likewise, courts have continuously recognized the principle of personal liability when interpreting the legal boundaries of criminal liability. In a landmark judgment in the *Milk and water (Melk en water)* case from 1916, the Supreme Court abandoned the doctrine of *fait materiel*, which basically held that criminal responsibility for minor offences can be established even without proving that the accused acted with a guilty mind. In its judgment, the Supreme Court emphasized that criminal liability cannot be established in the absence of all blameworthiness (*afwezigheid van alle schuld*). The accused always needs to have acted with a certain level of culpability.⁵⁰ In recent case law on group criminality, the Supreme Court continues to emphasize that criminal responsibility cannot be based on the accused's mere membership of a group.⁵¹ Criminal responsibility always requires at least some kind of guilt and legally relevant contribution – actively or passively – to the commission of crimes. There is no place for vicarious liability.

Notwithstanding these general starting-points, we should beware that the principle of personal liability has acquired a different meaning in Dutch law over the past decades. For the purpose of this report, three developments deserve particular attention. First, as noted in section I., in 1976 the concept of corporate criminal responsibility was introduced.⁵² Pursuant to Article 51 DPC, '[o]ffences can be committed by natural persons and *legal persons*' (emphasis added). This provision was enacted in response to the increasing importance of corporations in modern society. Without engaging in a complex theoretical discussion, the Dutch legislator held that

by criminalizing the conduct of legal persons just like the conduct of natural persons, it is made clear that acts of natural persons – operating in the context of a legal person and together fulfilling the legal requirements of

⁴⁸ Indeed, it can be argued that by starting each crime definition in the DPC with the terms 'the person who', the principle of personal criminal responsibility has been included in the Code.

⁴⁹ Toorenburg 1998, p. 7.

⁵⁰ Supreme Court, 14 February 1916, *NJ* 1916, p. 861; Van Luijk 2015, p. 448.

⁵¹ Yet, there is the possibility of holding an accused accountable for the separate crime of participation in a criminal organisation (see section VI.)

⁵² Prior to this date, corporate responsibility was only accepted for economic offences.

a crime – can be attributed to the legal person. This equalization is based on a certain fiction, yet this is not objectionable *per se*.⁵³

In Dutch practice, the principle of personal liability does not entail – as has been suggested by Ligeti – that ‘criminal liability of heads of business remains mere law in the books that will never be applied’.⁵⁴ Article 51 DPC is definitely not a dead letter or a paper tiger, but has been applied regularly, in particular in relation to economic crimes.

Second, Dutch courts have tailored traditional modes of liability to the increasing complexity of social interactions and to the fact that criminal conduct is more and more organized and committed on a large scale. By doing so, Dutch law has started to show some collective traits. To a certain extent, accused can be held liable for another person’s acts or omissions, in particular when they held a position of authority that enabled them to exercise a certain level of control over the conduct of others. We will elaborate on (the consequences of) this development in sub-section II.c. when we explain the law on co-perpetration and actually directing.

Third, it should be noted that Dutch law incorporates several membership crimes, such as participation in a criminal organization (Article 140 DPC) or public assault (Article 141 DPC). To be convicted of these crimes, it is not required that the accused was directly involved in the commission of a *crime*. Instead, it suffices that the accused contributed to a group’s *criminal endeavor* more generally. Thus, the accused can be convicted for a membership crime based on a rather tenuous and loose relation between his acts and the actual crimes committed. We will elaborate on these types of membership liability in section VI.

b. Unitary or differentiated participation

Articles 47 to 51 DPC (see annex II for an English translation) provide for a differentiated participation system that distinguishes between perpetration and different modes of participation. There have been several studies into the possibilities and need for moving towards a unitary participation system, but these have never resulted in a fundamental revision of the law.⁵⁵

The most basic distinction in Dutch law is that between perpetrators who commit a crime and participants/accessories⁵⁶ who contribute to the crime of the perpetrator. The concept of perpetration applies when one person commits a crime by himself by fulfilling all elements of the crime definition. Participation captures other types of involvement in crime and addresses situations in which multiple persons engage in criminal conduct together. The responsibility of accessories depends on – is derivative of – the responsibility of the perpetrator. This is known as the principle of dependency, or *accessoriteit*.⁵⁷ The principle entails that accessories can only be punished when a criminal act is committed by a perpetrator.⁵⁸ ‘Commission’ includes attempt and preparation. Thus, the crime does not have to be completed for the accessory to be held responsible. The principle of dependency can create difficulties

⁵³ Translation by authors.

⁵⁴ Ligeti 2006, p. 91.

⁵⁵ Van Toorenburg 1998; De Hullu 2015, p. 517; Keulen *et al.* 2010, p. 97-120.

⁵⁶ The terms ‘participant’ and ‘accessory’ will be used interchangeably in this report.

⁵⁷ De Hullu 2015, p. 438.

⁵⁸ Indeed, there is the possibility that in cases of co-perpetration – which is a type of accomplice liability – there is no perpetrator, but only a group of co-perpetrators, i.e. accessories. Kronenberg & De Wilde 2015, p. 130.

when accessories act from a remote position and do not directly engage in criminal conduct. To address such difficulties, Dutch law includes a number of inchoate and collective offences that criminalize participation in group endeavor (see section VI.). Furthermore, the DPC entails a specific provision on ‘attempt to instigate’. In contravention to the principle of dependency, Article 46a DPC stipulates that criminal responsibility for attempt to instigate can be established when the inducement was completed, yet did not result in the commission of crimes due to circumstances outside the instigator’s control.

Looking at Articles 47-49 DCC more closely, we witness in a distinction between different modes of accomplice liability, i.e. co-perpetration, indirect perpetration, instigation, and aiding. In addition, Dutch law recognizes two *sui generis* modes of liability that specifically apply to corporate and international crimes, i.e. actually directing and superior responsibility. All these modes of participation can – at least in theory – be clearly distinguished from each other, yet they can be combined and cumulated. Thus, accused can, for example, be held accountable for instigating co-perpetration, or for aiding indirect perpetration.⁵⁹ The only limitation to such accumulations is that the accused meets the requirements of all joined modes of liability.

The distinction between perpetrators and accessories has limited normative and practical value. Perpetrators, co-perpetrators, indirect perpetrators, instigators, and actual directors are all punished as principals.⁶⁰ Thus, with the exception of aiders, and in some cases superiors, Dutch law does not consider accessories less blameworthy than perpetrators. On this account, Dutch doctrine and practice do not attach much weight to the distinction between different types of accomplice liability and accept that the boundaries between them are somewhat diluted.⁶¹ Because aiders receive a mandatory sentence reduction (see section j.), there is reason for clearly differentiating aiding from other types of participation, in particular co-perpetration. Yet, this is a challenging task with which Dutch courts continue to struggle.⁶² In a landmark judgment from 2014, the Supreme Court has therefore encouraged the Public Prosecution Service to issue cumulative charges and to indict accused under multiple modes of liability in case of doubt. Thus, courts can select the most appropriate mode of liability, depending on the evidence presented at trial.⁶³

In literature, it has been carefully submitted that problems with distinguishing modes of liability may be avoided when courts are not required to convict accused under *one* specific mode of liability, but only need to ascertain in general terms that the requirements of *a* mode of liability are met.⁶⁴ We doubt whether this suggestion will be implemented in practice, since Dutch law continues to attach value to distinguishing between modes of perpetration and participation from the perspective of fair labelling. Charging and convicting accused as accessories who contribute to the crime of a perpetrator is considered important, because it gives expression to the particular role they played in the commission of crimes.⁶⁵

⁵⁹ Supreme Court, 24 January 1950, *NJ* 1950, 287. De Hullu 2015, p. 508-509.

⁶⁰ For co-perpetrators, indirect perpetrators, instigators this is explicated in the DPC, but not for actual directors. Yet, considering they are punished in the same way as perpetrators, De Hullu argues they are more analogous to principal perpetrators, than to aiders. De Hullu 2015, p. 432-433.

⁶¹ De Hullu 2015, p. 433, 437, 472, and 514.

⁶² De Hullu 2015, p. 496-497.

⁶³ Supreme Court, 2 December 2014, ECLI:NL:HR:2014:3474, *NJ* 2015, 390.

⁶⁴ Wolswijk 2015, p. 14. We note that Wolswijk also criticizes the overlap between perpetration and participation and calls for a stricter division between these two modes of liability.

⁶⁵ De Hullu 2015, p. 436.

Perpetration

It has been argued⁶⁶ that the legislator intended that perpetration would only apply when one person *physically* commits a criminal offence and thus by himself fulfills all *actus reus* elements of an offence with the requisite level of intent.⁶⁷ Legal scholarship has in this respect referred to Van Hamel's classic description of the criminal act as a deliberate bodily movement ('*gewilde spierbeweging*').⁶⁸ Indeed, physical commission is still the most paradigmatic – and least problematic – type of perpetration. Having said that, from the 1930s, case law has gradually broadened the concept of perpetration beyond physical commission towards so-called 'functional perpetration' (*functioneel daderschap*).⁶⁹ This concept is particularly relevant for addressing types of system criminality, such as the core international crimes.

Functional perpetration is a 'jurisdictional artifact'⁷⁰ that was first developed in the context of economic crimes and came to full bloom in the Supreme Court's *Iron wire case* (*Ijzerdraad*). In this case, a business-owner was prosecuted for having completed – through his export manager – a forged form in order to obtain an export license for iron wire. The accused argued that he had neither completed or sent the form, nor exported the iron wire himself. In response to this argument, the Supreme Court accepted that

acts (...) such as completing forms in violation of the law, sending those forms to the Import and Export Office and the export of merchandise, could (...) be qualified as 'acts of the accused', if he had the *power of decision* whether those acts occurred or not, and if those acts belonged to the realm of activities which the accused, as appearing from the general course of daily events, *accepted or used to accept*.⁷¹

By reasoning in this way, the Supreme Court allowed for holding the business-owner – who was in a position to pull the strings from behind the scenes – responsible as perpetrator, rather than as accessory. In subsequent case law, the Supreme Court has confirmed that an accused can be convicted as functional perpetrator if he (i) had *power* over the acts of the physical perpetrator, and (ii) *accepted* the commission of crimes by the physical perpetrator. The notion of power connotes to the accused's factual control over the crimes and his ability to prevent or stop the physical perpetrator from engaging in criminal conduct.⁷² This can, for example, be established when crimes were committed in a corporate context in which the accused controlled his subordinates' conduct. As such, '[t]he characteristic feature of functional

⁶⁶ In her authoritative dissertation on functional perpetration, Van Woensel (1993, p. 7-43) argued that it was not so much the legislator, but legal doctrine that wielded a physical concept of *actus reus* (see also Hornman 2016, p. 25 and De Jong 2016, p. 745). That being said, the gradual development of functional perpetration can only be understood against the background of an physical interpretation of criminal conduct.

⁶⁷ De Jong 2007, p. 113.

⁶⁸ Van Hamel 1927, p. 187; De Hullu 2015, p. 157-158.

⁶⁹ Rölöng in his annotation to Supreme Court, 23 February 1954, *NJ* 1954, 378. On this topic, see Gritter 2007, p. 1-25; Van der Wilt 2009, p. 616; Van Woensel 1993, p. 45-59

⁷⁰ Van der Wilt 2009, p. 616.

⁷¹ Supreme Court, 23 February 1954, *NJ* 1954, 378.

⁷² Gritter 2007, p. 20-21; Hornman 2016, p. 36-38; Sikkema 2010, p. 40; Van der Wilt 2009, p. 616.

perpetration is that the accused, by virtue of his function and his authority over others, is capable of prompting others to commit crimes'.⁷³

The concept of acceptance traditionally entailed a subjective criterion of *dolus eventualis*,⁷⁴ which required that the functional perpetrator at least tolerated the crimes committed by the physical perpetrator. Yet, in more recent case law, the Supreme Court has stipulated that 'acceptance' *also* includes not taking reasonable measures of care to prevent criminal conduct. By thus interpreting 'acceptance' in objective terms, the Supreme Court significantly broadened the concept of functional perpetration.⁷⁵ Having said that, the Court continues to stress that any *mens rea* standard required by the underlying offence should always be fulfilled by the functional perpetrator personally.⁷⁶ Liability cannot be established vicariously, which means that *dolus* or *culpa* can never be attributed to the accused. Thus, the mere fact that the functional perpetrator failed to take the necessary measures that could be reasonably expected does not automatically entail that functional perpetrator grossly disregarded his duty of care, let alone did so intentionally.⁷⁷

Interestingly, the Supreme Court has recently noted that the Public Prosecution Service in the Netherlands seems reluctant to charge remote perpetrators of non-economic crimes as functional perpetrators. In these cases, the Prosecution Service usually relies upon more traditional modes of liability, such as co-perpetration, which results in unnecessary complexities.⁷⁸ Thus, the Supreme Court seems to encourage a broader use of functional perpetration, also outside the traditional realm of economic offences.

Co-perpetration

Co-perpetration is the most common type of participation in Dutch law and is well-accepted by scholars and practitioners. It is regulated in Article 47 of the DPC, which stipulates that co-perpetrators are punished as principals. The interpretation of co-perpetration is largely left to courts, which have applied the concept to a wide variety of situations.

The paradigm case of co-perpetration is where several persons together fulfill the *actus reus* of a criminal offence and jointly act towards the completion of a crime. However, following the 'functional' understanding of perpetration, Dutch law accepts that co-perpetration is not limited to such situations. In the landmark *Container theft* case (*Containerdiefstal*), the Supreme Court has clarified that it is not required that co-perpetrators fulfill any of the *actus reus* elements of the crime with their own hands, nor that they are present at the scene of the crimes. Instead, it suffices that co-perpetrators 'deliberately and closely cooperated' in the commission of crimes, which can also be based on the accused's essential role during the planning of a crime.⁷⁹ Today, the deliberate and close contribution test still constitutes the central requirement for co-perpetration.

⁷³ Van der Wilt 2009, p. 617.

⁷⁴ See, Van Elst 1997, p. 33-34; Knigge 1992, p. 141; Van Woensel 1993, p. 96-98; Wolswijk 2001, p. 1089.

⁷⁵ Supreme Court, 21 October 2003, *NJ* 2006, 328; Supreme Court, 8 December 2015, *NJ* 2016, 23; Gritter 2007, p. 22; De Hullu 2015, p. 162-163; Kessler 2007, p. 205-206; De Valk 2009, p. 410.

⁷⁶ Supreme Court, 23 February 1954, *NJ* 1954, 378.

⁷⁷ Doorenbos 2011, p. 96; Hornman 2010, p. 392; Sikkema 2010, p. 46.

⁷⁸ Supreme Court, 2 December 2012, ECLI:NL:HR:2014:3474, *NJ* 2015, 39.

⁷⁹ Supreme Court, 17 November 1981, ECLI:NL:HR:1981:AC7388, *NJ* 1983, 84.

The *deliberate* contribution requirement entails a subjective criterion, which pertains to the accused's *mens rea*.⁸⁰ Dutch law requires that the accused intended to cooperate with the other co-perpetrators *and* intended to commit the crimes with which he is charged. The latter only extends to the elements for which the applicable crime definition stipulates a requirement of intent.⁸¹ Thus, in case of strict liability offences, it does not have to be established that the co-perpetrators intended to commit an offence. The standard of intent is normally *dolus eventualis*, i.e. knowingly accepting of a significant risk that crimes will be committed. The Supreme Court accepts that the accused does not have to foresee or intend the specific way in which a crime was committed. Instead, it suffices that the accused acted with so-called 'global intent', i.e. that he intentionally brought about the legal elements of the crime charged, irrespective of the particular mode of employment.⁸²

The co-perpetrator's intent is most clear when it is based on his agreement and deliberation with others to commit a crime. Yet, intent can also be proven by tacit approval. De Hullu in this respect clarifies that when the accused was willfully present at the crime scene, did not intervene, nor dissociated himself from the crimes, the totality of circumstances may imply that the accused silently accepted the commission of crimes.⁸³ Moreover, practice shows that the co-perpetrator's intent will often be inferred from his objective conduct, which is regulated by the *close* contribution requirement.⁸⁴

The requirement that the co-perpetrator's contribution must be sufficiently *close* ascertains that his contribution carries a certain weight – offering mere assistance to crimes does not suffice. In assessing the weight of the accused's contribution, courts can take account of a variety of factors, such as the common execution of a crime, the interchangeability of roles, the equality of the co-perpetrators' contribution, the existence of a common plan,⁸⁵ and the distribution of tasks between the co-perpetrators.⁸⁶ It does not have to be established with whom the accused cooperated. Responsibility for co-perpetration may arise even when it is unclear who the other co-perpetrators were, whether they met the requirements of co-perpetration, and whether they had a defence.⁸⁷ Supreme Court case law clarifies that giving moral support, being present at the scene of the crimes, or not-withdrawing from the commission of crimes are in themselves insufficient for establishing criminal responsibility for co-perpetration.⁸⁸ Indeed, the principle of personal liability would be violated if criminal responsibility for co-perpetration is established exclusively on the basis of such forms of moral complicity. Yet, it is recognized that in combination with other contributions – such as, planning crimes, or actively encouraging the physical perpetrators – being present at the crime scene, not-withdrawing from the crime-scene, and association with physical perpetrators may justify a conviction for co-perpetration.⁸⁹

For some time, courts have applied the close contribution requirement rather broadly. Accused were held responsible as co-perpetrators, even though they only helped to prepare crimes, or made a mere minor

⁸⁰ De Hullu 2015, p. 453.

⁸¹ De Hullu 2015, p. 464-265.

⁸² The precise meaning of 'global intent' is uncertain and has therefore been criticized in literature. Postma 2015, para. 4.2.

⁸³ De Hullu 2015, p. 465.

⁸⁴ De Hullu 2012, p. 447.

⁸⁵ See section IV.

⁸⁶ Supreme Court, 16 December 2014, ECLI:NL:HR:2014:3637, para. 3.2.2.

⁸⁷ De Hullu 2015, p. 463.

⁸⁸ Supreme Court, 16 December 2014, ECLI:NL:HR:2014:3637, para. 3.2.2; Supreme Court, 22 December 2009, ECLI:NL:HR:2009:BK3356, *NJ* 2010,193.

⁸⁹ De Hullu 2015, p. 455, fn. 129-133.

contribution to criminal offences, e.g. standing at the look-out, or sharing in the criminal booty. On this account, Van der Wilt commented that co-perpetration under Dutch law essentially consists of sympathizing or consenting with the acts of the physical perpetrator, i.e. failing to prevent his partner from engaging in criminal conduct.⁹⁰ This broad interpretation of co-perpetration has been criticized in literature. Scholars have argued that co-perpetration has developed into a ‘bottomless pit’⁹¹ and has been inflated to the extent that co-perpetration and aiding can no longer be clearly distinguished.⁹² Moreover, scholars have considered that co-perpetration shows traits of collective criminal responsibility, because liability can be based on the mere fact that an accused aligned himself with a group and gave moral support to this group by going along with its criminal endeavors. Thus, co-perpetrators are allegedly convicted for being part of a criminal group, rather than for their individual criminal contributions.

In response to such critiques, the Dutch Supreme Court has recently emphasized the need for distinguishing more clearly between co-perpetrators, who *commit* a crime together with others, and aiders, who merely *facilitate* the crime of a principal perpetrator. In particular, the Supreme Court has stressed that the close contribution criterion entails that each co-perpetrator should make an essential (*wezenlijke*) intellection or material contribution to the crimes charged that carries sufficient weight.⁹³ The essential contribution requirement under Dutch law differs from the essential contribution standard used by the ICC in relation to co-perpetration. Unlike the ICC, Dutch law does not require that the co-perpetrators’ contribution was a *conditio sine qua non* for the commission of crimes and that each of the co-perpetrators had the material ability to thwart these crimes by withholding their contribution. Instead, the Dutch essential contribution requirement entails that co-perpetrators should in principle contribute directly to the objective elements of crimes by participating in the common execution of a criminal offence.⁹⁴ Acts of assistance that are committed before or after the commission of the crimes – such as, providing information, standing on the look-out, or driving the get-away car – will normally not generate liability for co-perpetration. Whilst there is still room for establishing criminal responsibility for co-perpetration based on such acts of facilitation, the Supreme Court finds that this decision requires additional explanation.⁹⁵ In particular, it should then be clarified how the accused’s lack of involvement in the physical perpetration of crimes is compensated by his prominent role before or after the crimes were committed.⁹⁶ When the accused primarily operated after the commission of crimes, he will only be qualified as a co-perpetrator under exceptional circumstances.⁹⁷

It follows from the considerations above that recent Supreme Court case law differentiates between co-perpetration and aiding by relying on the accused’s objective conduct:⁹⁸ whilst aiders merely assist the commission of crimes by others, co-perpetrators must contribute to crimes in an essential way.⁹⁹ Thus, the Supreme Court seems to emphasize the individual contribution of each co-perpetrator. At the same time,

⁹⁰ Van der Wilt 2007, para. 2.1.

⁹¹ Holland 1995.

⁹² Postma 2015, para. 2.1.

⁹³ Supreme Court, 2 December 2014, ECLI:NL:HR:2014:3474, *NJ* 2015, 390.

⁹⁴ *Idem*.

⁹⁵ *Idem*.

⁹⁶ *Idem*.

⁹⁷ Supreme Court, 24 March 2015, ECLI:NL:HR:2015:713/716/718; Supreme Court, 21 April 2015, ECLI:NL:HR:2015:1094.

⁹⁸ Van der Wilt 2007, para. 2.

⁹⁹ This approach has raised critique in scholarship by Rozemond. He recalls that the characteristic feature of co-perpetration is cooperation, i.e. a willful coordination of acts between a group of persons with a view to achieving a common purpose. Thus, co-perpetration does not only concern the accused’s individual contribution, but also – and perhaps more importantly – requires that he attuned his acts with those of others in order to reach a mutual goal. Rozemond 2014, p. 896.

the Court maintains – in a somewhat contradictory way – that co-perpetration is essentially based on the cooperation between persons, rather than the factual contributions of individual accused. In this way, the Supreme Court leaves some room for establishing responsibility under co-perpetration even though it is uncertain what role each of the co-perpetrators played in the commission of crimes, as long as it can be established that they worked closely together before, during, and/or after the commission of crimes, and that one of the co-perpetrators physically committed the crime.

Indirect perpetration

Indirect perpetration is regulated in Article 47 DPC. It applies to situations in which a person uses another to commit a crime. The indirect perpetrator acts as the *auctor intellectualis*, i.e. the person who pulls the strings from behind the scene.

On an *actus reus* level, indirect perpetration first requires that the accused induced another person to commit a crime. The indirect perpetrator must take the initiative and see that a physical perpetrator commits an offence.¹⁰⁰ In Dutch case law, there is little attention for the question of what level of influence the indirect perpetrator should have over the commission of crimes. It is only required in general terms that the indirect perpetrator caused a psychological change in the physical perpetrator's mind, which entails that the latter would not have committed the crime without having been induced by the former.¹⁰¹ It is accepted that inducement includes both active behavior and a passive failure to intervene.¹⁰²

According to Supreme Court case law, there does not have to be a personal relation between the indirect perpetrator and the physical perpetrator. In the *Pigeon blood* case (*Duivenbloed*), the Supreme Court, for example, applied the concept of indirect perpetration to a situation in which five friends had performed a public play, in which one of them was supposedly shot and kidnapped by the others.¹⁰³ Concerned bystanders reported this violent crime to the police, not knowing it was all an act. The five friends were convicted as indirect perpetrators of falsely reporting a crime, because they induced the commission of a crime, even though they did not know the bystanders, and were not affiliated with them in any way.¹⁰⁴

Secondly, it is required that the induced perpetrator who commits the crime physically acts as an innocent agent, who cannot be held criminally responsible. In the so-called *Mound* case (*Terp*), the Supreme Court decided that it is irrelevant for what reason the physical perpetrator cannot be punished.¹⁰⁵ Thus, in contrast to international case law on indirect perpetration, Dutch law does not require that the indirect perpetrator was used as a will-less tool to commit crimes. Indeed, the physical perpetrator may be innocent, because he was completely controlled by the indirect perpetrator (for example, in situations of duress or mental incapacity), but the physical perpetrator may also be unpunishable simply because he did

¹⁰⁰ Dolman, online resource, para. 4a.

¹⁰¹ This requirement is not explicated in case law, but has been recognized in legal doctrine. De Hullu 2015, p. 475.

¹⁰² De Hullu 2015, p. 475; Van Woensel 1993, p. 128.

¹⁰³ Supreme Court, 18 October 1960, *NJ* 1961, 415.

¹⁰⁴ *Idem*.

¹⁰⁵ Supreme Court, 19 December 1910, *W.* 9122; Harteveld 2007, p. 155-157. Similarly, Toorenburg 1998, p. 12.

not have the required capacity (for example, being a public servant), whilst otherwise acting maliciously.¹⁰⁶

Thirdly, on a *mens rea* level, indirect perpetration requires that the accused acted intentionally and that he intended to commit the crimes charged (so-called ‘double intent’). The latter only extends to the elements for which the applicable crime definition stipulates an intent requirement.¹⁰⁷ *Dolus eventualis* normally suffices, which means that the commission of crimes must have been a significant risk of the accused’s acts of which he was aware and that he accepted. This accords for small deviations between what the indirect perpetrator intended and the crime the physical perpetrator ultimately committed (see sub-section i.).

Whilst indirect perpetration plays a prominent role in ICC case law, it is hardly used in Dutch practice anymore.¹⁰⁸ It used to be relevant for prosecuting economic crimes,¹⁰⁹ but in these cases preference is currently given to functional perpetration or actually directing. These modes of liability similarly relate to intellectual perpetrators who control the commission of crimes from a distance, yet they do not set the stringent requirement of acting through a non-criminal physical perpetrator. On this account, De Hullu has argued that indirect perpetration no longer has any added value and can be missed.¹¹⁰

Instigation

Article 47 DPC criminalizes instigation. Instigation entails the intentional inducement of another to commit a crime by means of gifts, promises, abuse of power, violence, threat, deception, or by providing opportunity, means or information. The instigator acts as the intellectual perpetrator, i.e. as the person who triggers the commission of crimes from a remote position. Instigation basically stipulates three requirements.

First, it is required that the instigator takes the initiative and sees that a physical perpetrator commits an offence. It must be established that the instigator brings about a psychological change in the mind of the physical perpetrator.¹¹¹ In this sense, instigation resembles indirect perpetration. However, other than indirect perpetration, instigation only applies when the physical perpetrator is not an innocent agent, but is criminally liable himself.¹¹² Like the ICC,¹¹³ the Dutch Supreme Court accepts that the physical perpetrator may have been receptive to the instigator’s inducement and may himself already have contemplated to commit the crime charged.¹¹⁴ He may even have made suggestions about the commission

¹⁰⁶ Supreme Court, 9 February 2010, ECLI:NL:HR:2010:BK0688.

¹⁰⁷ Dolman, online resource, para. 4c.

¹⁰⁸ De Jong 2007, p. 123.

¹⁰⁹ Toorenburg 1998, p. 15; De Hullu 2015, p. 477.

¹¹⁰ De Hullu 2015, p. 476-478.

¹¹¹ Krabbe 2007, p. 138-139.

¹¹² De Hullu 2015, p. 478, fn 276. De Hullu himself finds that the physical perpetrator does not necessarily have to be criminal himself for instigation.

¹¹³ ICC, *Prosecutor v. Bemba*, Trial Chamber, judgment, 19 October 2016, ICC-01/05-01/13, para. 93.

¹¹⁴ Supreme Court, 3 January 1934, *NJ* 1934, p. 549; Supreme Court, 28 June 1937, *NJ* 1938, 173; Court of Appeal ‘s-Hertogenbosch, 16 October 1998, *NJ* 1999/81.

of crimes, as long as the instigator ultimately activated the perpetrator's unconditional disposition to commit a crime.¹¹⁵

Second, it is required that the instigator employs one of the listed means of inducement: gifts, promises, abuse of power, violence, threat, deception, or providing opportunity, means, or information. In case law, 'providing information' has been interpreted extensively as 'giving factual information that is important for the commission of a crime, because it enables the commission of a crime by the physical perpetrator'.¹¹⁶ 'Promises' are (silent) commitments to comply with an agreement.¹¹⁷ 'Abuse of power' implies a hierarchical relation of *de facto* power between the instigator and the physical perpetrator.¹¹⁸ 'Violence' at first sight relates to all types of physical abuse,¹¹⁹ whilst 'threats' include both physical threats and other types of intimidating statements.¹²⁰ As these observations demonstrate, the means of instigation are defined in broad terms and include normal conduct, which is in itself not criminal (e.g. providing information). Moreover, the means of instigation allow for inducing others, without knowing who will be activated to complete this task. For example, instigators can use the internet or advertisements in the newspaper to spur others to commit a crime. Indeed, Article 47 stipulates that instigators induce a *crime*, not a *person*. Despite being broad in scope, the list still excludes some means of instigation such as, encouragement, persuasion, begging, provoking, or daring.

Third, on a *mens rea* level, instigation requires that the accused acted with the intent to induce *and* to commit the crime charged. Again, the standard of *dolus eventualis* applies, which means that the commission of crimes must have been a significant risk of the accused's acts of which he was aware and that he accepted. This broad standard allows for 'brushing away' minor differences between the intentions of the instigator and the crime that was actually committed (see sub-section i.).¹²¹ Note that the instigator's intent only needs to cover the elements for which the crime definition stipulates a requirement of intent and does not have to relate to objective circumstances and consequences, or elements governed by negligence. Having said that, in relation to strict liability offences (*overtredingen*), the Supreme Court seems to require that the instigator intended that the defined crime conduct be committed, even though the physical perpetrator himself does not have to commit the crime intentionally.¹²²

Article 47 DPC explicates that instigators will be held liable as principals. Although their responsibility is derivative, instigators are not perceived as less blameworthy, but are put on equal footing with perpetrators. Indeed, there are important parallels between instigation and functional perpetration. Most importantly, both modes of liability apply to the *auctor intellectualis* of crimes. On this account, functional perpetration is nowadays often used in lieu of instigation, in particular in the field of economic crimes.¹²³ The derivative nature of instigation entails that instigators can only be held responsible for crimes that were actually committed, or that were at least prepared or attempted. Thus, an accused cannot be held responsible as instigator when he tried to induce another to commit a crime, but the physical

¹¹⁵ De Hullu 2015, p. 485. See for example, Supreme Court, 9 February 2016, *NJ* 2016, 119; Supreme Court, 27 February 2001, ECLI:NL:HR:2001:AB0260.

¹¹⁶ Supreme Court, 27 February 2001, ECLI:NL:HR:2001:AB0260, *NJ* 2001, 308.

¹¹⁷ Supreme Court, 28 June 1937, *NJ* 1938, 173. See also, De Hullu 2015, p. 483.

¹¹⁸ Supreme Court, 1 June 1976, *NJ* 1977, 42; Supreme Court, 14 May 1991, *NJ* 1991/769.

¹¹⁹ Case law about the meaning of this means of incitement is almost absent. De Hullu 2015, p. 484.

¹²⁰ De Hullu 2015, p. 484-485.

¹²¹ De Hullu 2015, p. 481.

¹²² *Idem*.

¹²³ De Hullu 2015, p. 487; Van Woensel 1993, p. 151.

perpetrator did not follow up on this inducement – for example, because he changed his mind – or committed a completely different crime. To account for this liability gap, ‘attempt to instigate’ is criminalized separately in Article 46a DPC. This provision stipulates that the attempt to instigate another to commit a crime by employing one of the means of instigation is punishable, provided that no higher sentence is imposed than may be imposed for an attempt to commit the crime, or where such attempt is not punishable, for committing the crime itself.

Aiding

Article 48 DPC deals with aiding – an accessorial mode of liability relating to forms of criminal assistance. Although the distinction between aiding and other types of participation is gradual, aiding has a special place in the Dutch framework of criminal responsibility.¹²⁴ Considering that aiding governs types of criminal assistance, aiders are not considered as principals, but as less blameworthy secondary parties. They accordingly perceive a mandatory sentence reduction of 1/3 (see sub-section j.).¹²⁵ In this sense, Dutch law is analogous to Belgium and German law, where aiders receive a similar sentence reduction, because of their subsidiary role. The fact that aiders are less blameworthy than principals is also reflected in the fact that aiding attempted crimes and aiding misdemeanours is not punishable.

Article 48 DPC distinguishes between assistance *during* the commission of crimes (simultaneous aiding) and assistance *preceding* the criminal conduct (consecutive aiding). Contributions after the fact – such as, obstructing the discovery of crimes – can in principle not be qualified as aiding.¹²⁶ Simultaneous aiding traditionally governs all types of assistance, such as standing on the look-out, whilst consecutive aiding specifically relates to providing opportunity, means, or information to commit a crime. Having said that, in 2011, the Supreme Court nuanced the distinction between simultaneous and preceding aiding and argued that they cannot be strictly distinguished.¹²⁷

The *actus reus* of aiding consists of rendering aid that furthered, facilitated, or enabled the commission of crimes.¹²⁸ It is not required that the aid was decisive or substantial, was a *conditio sine qua non* for the commission of crimes, or that the accused made an ‘adequate causal contribution’ to the crimes.¹²⁹ Moreover, the Dutch concept of aiding does not entail a requirement of ‘specific direction’, i.e. it does not have to be established that the aider’s assistance was specifically directed at the commission of crimes by the perpetrator. Instead, it suffices that the aider’s assistance ‘had a certain effect’ on the offence, in the sense that it supported the offence, or made it easier for the principal to commit the offence.¹³⁰ Thus, Dutch law seems to set a lower standard than the *ad hoc* Tribunals, which require that the aider made a *substantial* contribution to the commission of crimes.¹³¹ In fact, the Dutch ‘certain effect’ standard

¹²⁴ De Hullu 2015, p. 498-499.

¹²⁵ This has been criticized by some scholars. Toorenburg 1998, p. 236-241.

¹²⁶ De Hullu 2015, p. 433. De Hullu rightly nuances this point by explaining that the boundaries between simultaneous aiding and *ex post facto* aiding are fluid.

¹²⁷ Supreme Court, 22 March 2011, ECLI:NL:HR:2011:BO2629, NJ 2011, 341, para. 2.2.

¹²⁸ Supreme Court, 10 June 1996, ECLI:NL:HR:1997:ZD0749, NJ 1997, 585.

¹²⁹ Supreme Court, 8 January 1985, ECLI:NL:HR:1985:AC0143, NJ 1988, 6. See also, De Hullu 2015, p. 495.

¹³⁰ Supreme Court, 22 March 2011, ECLI:NL:HR:2011:BO2629, NJ 2011, 341.

¹³¹ Huisman & Van Slidregt 2010, p. 820; Van der Wilt 2007, para. 2.2; Van der Wilt 2008, p. 564.

appears to fit better with recent ICC case law, which stipulates that aiding does not entail a specific *actus reus* threshold, but merely requires that the accused made a causal contribution to the crimes charged.¹³²

Under Dutch law, assistance can be provided during the planning, preparation, or execution of a crime. Physical presence at the scene of the crimes is not required.¹³³ Typical forms of assistance that normally qualify as aiding are, providing tools that were used to commit crimes, driving the get-away car, or providing information that enables others to commit a crime. It is not required that the aider and the principal perpetrator knew each other, or discussed how each of them would contribute to the commission of crimes.¹³⁴ Cooperation between the aider and principal perpetrator is not necessary. Assistance can also consist of passive conduct – i.e. intentionally failing to prevent the commission of crimes by others – but only if the accused had a duty to intervene.¹³⁵ This relates to the concept of *Garantenstellung*, which entails that persons in the position of guarantor carry higher responsibilities. By thus assessing the contribution requirement of aiding in light of the accused’s personal duties, Dutch law provides for a flexible standard, which is receptive to the accused’s position of power and authority. In this sense, Dutch law complies with ICTY case law, which similarly takes account of the specific responsibilities of the accused in assessing the *actus reus* standard of aiding.¹³⁶

On a *mens rea* level, aiding requires that the accused intentionally assisted the acts of the perpetrator *and* intended to commit the crimes charged. The first requirement of intent to assist warrants that persons who aided crimes *negligently* – for example, by accidentally giving information to a perpetrator – cannot be held accountable. Yet, the relatively low *mens rea* standard of *dolus eventualis* under Dutch law expands criminal responsibility for aiding to accused who were aware and accepted the significant risk that their conduct assisted the commission of a crime. In this sense, Dutch law sets a lower *mens rea* threshold than the ICC and the *ad hoc* Tribunals, which require that the accused acted with positive knowledge of assisting crimes.¹³⁷

The second requirement of intent ascertains that the aider intended the crimes for which he stands trial. In principle, the aider’s intent only needs to extend to the elements for which the crime definition stipulates a requirement of intent and does not have to relate to objective circumstances and consequences, or elements governed by negligence.¹³⁸ Dutch law does not require that the aider was aware of the specific details of the perpetrator’s plan or knew how this plan would be implemented.¹³⁹ Instead, it only needs to be established that the aider had ‘global knowledge’ of the type of crime that was going to be committed. In assessing this standard, courts may take account of circumstances such as the type of acts the accused committed (did he engage in criminal conduct, or was his contribution neutral and remote?) and the position of the accused in the criminal endeavour (was the accused an expert with extensive experience, or a marginal figure with little capabilities?). By thus applying the standard of intent rather leniently, Dutch law accommodates for minor differences between the crimes intended by the aider and the crimes actually committed by the physical perpetrator (see section i.).

¹³² ICC, *Prosecutor v. Bemba*, Trial Chamber, judgment, 19 October 2016, ICC-01/05-01/13, para. 93-94.

¹³³ This already follows from the fact that Article 48 criminalizes preceding aiding.

¹³⁴ De Hullu 2015, p. 496.

¹³⁵ De Hullu 2015, p. 491.

¹³⁶ Van der Wilt 2007, para. 2.2.

¹³⁷ *Idem*. In addition, the ICC requires that the accused acted purposely. ICC, *Prosecutor v. Bemba*, Trial Chamber, judgment, 19 October 2016, ICC-01/05-01/13, para. 97-98.

¹³⁸ De Hullu 2015, p. 493, fn. 376.

¹³⁹ Dolman, online resource, para. 4b.

Actually directing

Individual criminal liability of actual directors (*feitelijk leidinggevers*)¹⁴⁰ – i.e. persons who gave directions to corporate actions that resulted in a criminal offence – is closely connected to the liability of corporations. A precondition to hold a person accountable as actual director is that the corporation – more precisely, the legal person¹⁴¹ – in which he was involved committed or participated in a criminal offence. Corporate criminal liability is thus a prerequisite for liability of the actual director – the actual director only comes into view after it has been established that the corporation has committed an offence.¹⁴² In this light, the legal elements of the offence must be met by the legal person. It is not required that the actual director personally meets those elements, nor that he has the required capacity (*kwaliiteit*) to commit the offence. From a dogmatic perspective, it is the corporation that commits the offence. Even though the responsibility of the actual director depends on the responsibility of the corporation (*accessoriteit*), actually directing reflects a personal approach. The allegations against the actual director do not have to coincide with the allegations made at the corporation.¹⁴³

The nature and level of involvement required for actually directing have long been debated. To a certain extent this discussion is still reflected in the various English translations used for the term *feitelijk leidinggeven*. Nearly every publication on this topic in English uses another terminology and voices a different kind of involvement. De Doelder uses the phrase ‘actually giving guidance to the forbidden action’,¹⁴⁴ Gritter and Keulen translate *feitelijk leidinggeven* as ‘actually controlling the commission of the offence’, and Van der Wilt opts for a literal translation as ‘factual or *de facto* leadership’.¹⁴⁵ Whilst the latter is in itself correct, this description emphasizes the accused’s position within the corporation – being one of *de facto* leadership¹⁴⁶ – rather than the actual conduct that is required in order to be criminally liable. In our view, the requisite conduct is best reflected in Van Strien’s translation of ‘actually directing’.¹⁴⁷ The *feitelijk leidinggever* does more than giving subtle guidance – he or she directs the events, either implicitly, explicitly, or from behind the scenes. Having said that, it is accepted that the actual course of events may differ to a certain extent from the behavior that was anticipated, taken into account, or even foreseen. Moreover, the actual director does not have to fully control the corporation’s

¹⁴⁰ The text of article 51 DPC allows for the prosecution and punishment of those natural persons within the legal person that either ordered (*opdrachtgeven*) or actually directed (*feitelijk leidinggeven*) the offence. Since actually directing also encompasses ordering, which is considered to be of more limited scope (De Hullu 2015, p. 503), the aforementioned no longer has any real meaning in practice and therefore will be not be touched upon in this report.

¹⁴¹ Section VII will deal with this in more detail.

¹⁴² It is not necessary that the corporation is also prosecuted, can be prosecuted (for example, because the legal person ceased to exist), or can be punished (for example, because it can invoke a justification or excuse) (Hornman 2016, p. 42). Especially with regard to small companies a *ne bis in idem* problem may arise if both the corporation and its management are prosecuted and punished.

¹⁴³ De Hullu 2015, p. 500. The same goes for allegations made against other actual directors. The reproach made against various actual directors might vary depending on their internal position, manner of involvement, and specific responsibility.

¹⁴⁴ This translation is also used by Van Gelder & Ryngaert 2016 in their national report to the AIDP on jurisdictional issues. In their report on food regulation, Smit & Hartmann 2016 follow Van Strien 1996.

¹⁴⁵ De Doelder 2008; Gritter & Keulen 2011; Van der Wilt 2009.

¹⁴⁶ The accused is not required to have an official leading position within the corporations (top) hierarchy. Even low level managers or persons without any formal link to or position within the company can qualify as actual directors, hence the terminology of a *de facto* leading position (De Hullu 2015, p. 503; Wolswijk 2007, p. 84-85). The fact that the actual director him or herself is in a position of hierarchical subordination to others, does not exclude that he or she can qualify as an actual director (Supreme Court, 21 January 1992, *NJ* 1992, 414).

¹⁴⁷ Van Strien 1996.

behavior, nor is it required that those who physically commit the offences are aware of the fact that they are silently supported by an actual director.

On an *actus reus* level, actually directing allows for a broad application, encompassing forms of active involvement, as well as passive engagement. Besides actively and effectively controlling and steering the corporation's behavior, actually directing also encompasses situations where the illegal acts are an inevitable consequence of the general policy set out by the actual director. Furthermore, it covers situations in which the accused contributed to the offence to such an extent that he must be regarded as the person taking the initiative for illegal conduct.¹⁴⁸ A clear example of the latter is a case in which the director of a small airport implicitly suggested to a subordinate that it would be a good idea to mislead the authorities about the necessity to grant an exemption to the ban of night flights – an insinuation that the subordinate took to heart.¹⁴⁹ Passive involvement can generate liability when the actual director (i) knew the corporation is or will engage in criminal activities, and (ii) omitted to take measures to either halt or prevent the (further) occurrence of these activities, despite (iii) being authorized, or at least able, and (iv) reasonably bound to do so.

On a *mens rea* level, it must be established that the actual director can be said to have intentionally promoted the illegal conduct of the corporation.¹⁵⁰ This means that he knew and accepted that the corporation was or would become involved in criminal activities. This knowledge criterion is key for the liability of the actual director, since one can only direct conduct of which one is aware.¹⁵¹ Having said that, actually directing does not require in-depth knowledge of the alleged criminal conduct. Detailed knowledge about when, where, and how the offence is committed is not necessary.¹⁵² It suffices that the actual director knows the offence or similar offences are taking place, or are about to take place. Yet, knowledge entails more than a vague feeling that something within the corporation might be wrong.¹⁵³ Ignorance due to poor management does not suffice, no matter how blameworthy that ignorance might be¹⁵⁴ – mismanagement in itself is not a crime. Indeed, willful blindness is not excused,¹⁵⁵ but this standard is difficult to meet in large and/or complex businesses in which the top management's involvement in the day-to-day activities is limited.¹⁵⁶

g. Extraneus

For the commission of certain crimes, the DPC requires that the perpetrator acted in a certain (official) capacity. For example, Article 343 DPC criminalizes the knowing prejudice of creditors by the director or commissioner of a corporation that is declared bankrupt. In this case, the perpetrator's official capacity is part of the crime definition, which means that the crime cannot be proven if the accused did not act within this capacity. However, once it is established that the perpetrator acted in an official capacity, persons lacking this capacity can be held accountable as participants provided they were aware of the

¹⁴⁸ Supreme Court, 26 April 2016, *NJ* 2016, 375.

¹⁴⁹ Supreme Court, February 1987, *NJ* 1987, 662.

¹⁵⁰ Supreme Court, 16 December 1986, *NJ* 1987, 321 and 322.

¹⁵¹ Mulder 1988, p. 216 and 219; Doorenbos 2014, p. 33 and 40.

¹⁵² Van Elst 1997, p. 59-60; De Hullu 2015, p. 507.

¹⁵³ Brants 1988, p. 52.

¹⁵⁴ Hornman 2016, p. 441.

¹⁵⁵ Supreme Court, 13 January 2004, *NJ* 2005, 63; Mulder 1988, p. 218; Sikkema 2010, p. 77; De Valk 2009, p. 432-433.

¹⁵⁶ See for a more extensive analysis on this Hornman 2016.

perpetrator's official capacity, or at least knowingly accepted this as a significant risk (*dolus eventualis*).¹⁵⁷

For the purpose of this study, it is noteworthy that the requirement of an official capacity is one of the characteristic elements of torture as a distinct crime. Pursuant to Article 8(a) ICA, torture is committed by public servants or other government officials. Article 8(b) ICA extends liability to public servants and government officials who instigate or intentionally permit torture and to persons who commit torture on the instigation or with the permission of a public servant or government official. This sub-clause complements the general rule on the attribution of *extraneus* crimes. Thus, it also seems possible to establish criminal liability for aiding or co-perpetrating instigation of torture, if the aider or co-perpetrator acted with *dolus eventualis* in relation to the instigator's official capacity.

Article 50 DPC stipulates that defences cannot be attributed to other participants. Thus, courts will need to assess the applicability of defences for each perpetrator and participant separately. Likewise, aggravating or mitigating circumstances concerning the perpetrator's personal capacity, which are not part of the crime definition should be established for each participant individually. For example, being a public servant (Article 44 DPC) and recidivism (Article 43a-c DPC) constitute aggravating circumstances in relation to the perpetrator, but do not justify imposing a higher sentence on other participants.¹⁵⁸

h. Personal commission

Although it has been argued differently in the past – especially with regard to corporate criminal liability¹⁵⁹ – it is now widely accepted in legal doctrine that all offenses in principle allow for a functional interpretation. This means that all statutory provisions can generally be interpreted in such a way that the criminal offence is fulfilled indirectly through the acts of someone else.¹⁶⁰ As a consequence, offences do not necessarily have to be committed personally, i.e. the accused does not have to physically fulfill the *actus reus* elements of the crime. The only exception hereto is if the offense itself provides for a separate regime distinguishing between physical and non-physical perpetration.¹⁶¹ Having said that, we should recognize that not all offences lend themselves easily for a functional interpretation. Bigamy (Article 237 DPC) forms a prime example of an offence that does not allow for a straightforward functional interpretation.¹⁶² Yet, for murder – a clear physical crime – a functional interpretation has been accepted.¹⁶³ In this light, it is not unlikely that also the core international crimes can be committed functionally. As Dutch law does not require that certain offences are committed personally per se, no special rules apply either.

¹⁵⁷ De Hullu 2015, p. 444 and 467.

¹⁵⁸ De Jong 2007, p. 128.

¹⁵⁹ See, for example Torringa 1984, p. 81-83 and 88 and Van Woensel 1993, p. 86-88. The latter argued that functional perpetration could not be applied in relation to crimes such as rape and physical assault, considering that these crimes could 'only be committed by the physical acts of the perpetrator'.

¹⁶⁰ As a consequence, legal persons are seen as equal subjects of criminal law, capable of committing any crime. See De Hullu 2015, p. 164-165; Sikkema 2010, p. 24; De Valk 2009, p. 290-291.

¹⁶¹ See, for example Supreme Court, 2 June 1992, *NJ* 1992, 754 where the underlying offence itself made a clear distinction between those that were actually administering pesticides and those on whose behalf they were administered.

¹⁶² However, if one takes into account that legal persons can also participate in offences, the idea of a municipality committing this crime by knowingly enrolling a second marriage in the public registers, is possible.

¹⁶³ Supreme Court, 29 May 1990, *NJ* 1991, 217.

i. *Crimes of excess*

All forms of perpetration and participation require that the accused acted intentionally and intended the crimes for which he stands trial. Thus – as a starting-point – accused cannot be held responsible for crimes of excess that he did not intend. For instigation, this general rule has been regulated in Article 47(2) DPC, which stipulates that instigators are only liable for crimes they intended to induce.¹⁶⁴ An important exception to this rule concerns the objective, non-personal aggravating circumstances – for example, the unintended death of the victim following an assault. Such circumstances can be attributed to the instigator, even if they were not covered by his intent.¹⁶⁵ In literature, it has been argued that a similar approach applies to co-perpetration, indirect perpetration, and actually directing.¹⁶⁶ This means that the perpetrator and participant can each be charged with and held responsible for different crimes (e.g. manslaughter for the perpetrator and assault, resulting in the victim's death for the co-perpetrator), depending on their personal intent.

This is not the case for aiding. Pursuant to Article 49(4) DPC, aiders are convicted for the same crime as the perpetrator, even if they themselves did not intend to commit this crime. The derivative and dependent character of aiding justifies that the *qualification* of the aider's conduct 'follows' the qualification of the principal.¹⁶⁷ The aider's personal intentions only limit the maximum *sentence* that can be imposed, which warrants that aiders cannot be punished for crimes beyond their intentions. In 2011, the Supreme Court imposed an important restriction on this rule by stipulating that there must be a 'sufficient connection' between the crime intended by the aider and the crime that was in fact committed, thus warranting that the two are not radically different.¹⁶⁸ According to De Hullu, a 'sufficient connection' can at least be established when the intended crime was encompassed by the crimes committed.¹⁶⁹ For example, the aider intended to commit a burglary and the principal perpetrator committed a burglary plus an aggravating circumstance, such as the use of violence.

In practice, the issue of diverging intentions does not arise very often. Differences in intent are usually mitigated by using a broad interpretation of *dolus eventualis*, which gives courts some leeway to establish criminal responsibility for collateral crimes. In relation to co-perpetration, David and Roef in this respect note that '[t]he concept of *dolus eventualis* can facilitate the attribution of deviations from the common plan greatly in the event that the defendant knowingly and willingly exposed himself to a considerable chance that a certain consequence would result from his actions'.¹⁷⁰ Whether this criterion is met depends *inter alia* on the dangerousness of the pre-arranged conduct and the tools that were used. When a group of persons, for example, agrees to commit a crime by using fire arms, the concept of *dolus eventualis* can be used to attribute collateral damage to all of them.¹⁷¹ This is specifically so, considering that Dutch law accepts that intent is established in global terms, which means that the accused does not have to foresee or accept the specific way in which crimes are committed. Instead, it should only be established that the

¹⁶⁴ This rule only applies when the instigator intended to commit a less serious crime.

¹⁶⁵ De Hullu 2015, p. 481; Noyon/Langemeijer & Rummelink, Article 47, note 34.

¹⁶⁶ De Hullu 2015, p. 446 and 466; Postma 2014, p. 35.

¹⁶⁷ See for a nuanced appraisal of this rule, Van Sliedregt 2009, p. 749.

¹⁶⁸ Supreme Court, 22 March 2011, *NJ* 2011, 342.

¹⁶⁹ De Hullu 2015, p. 493-494.

¹⁷⁰ Keiler & Roef 2016, p. 256.

¹⁷¹ Keiler & Roef 2016, p. 262.

accused intended to fulfil the elements of a crime more generally. In this way, difficult questions about what the participants intended precisely and how to deal with issues of diverging intent are mostly circumvented. This has the effect that Dutch criminal law accepts certain discrepancies between the intent of the principal and the accomplice.¹⁷² The attribution of crimes only becomes problematic when there is no ‘common core’ of intent, because the crimes committed deviate fundamentally from the crimes intended by the accused.¹⁷³ The only exception to this rule is stipulated in Article 47 (2) DPC concerning attempt to instigate, which allows for holding instigators responsible for the crimes they tried to induce, yet failed to effectuate (see sub-section II. c.).

The issue of crimes of excess and the possibilities for holding accused responsible for collateral crimes has recently come to fore in a landmark judgement of the Supreme Court in the *Nijmegen scooter* case (*Nijmeegse scooter*).¹⁷⁴ In this case, two accused had planned to rob a hotel. However, before entering the hotel, they detected a nondescript police car and absconded. During their flight, they ignored a red signal and hit a pedestrian, who later passed away as a result of her injuries. The question before the Supreme Court was whether both accused could be held accountable as co-perpetrators of causing death by negligence, even though this crime was not part of their common plan. The Court took as a starting-point that the accused’s flight cannot be strictly distinguished from the planning of the robbery.¹⁷⁵ According to the Court, it is not unlikely that the flight was a *probable prospect* of the robbery and was encompassed by the accused’s plan to rob the hotel. Therefore, the accused’s responsibility for causing death by negligence must be evaluated in the context of their joint criminal endeavour of robbery. The precise meaning of the *Nijmegen scooter* case for the issue of crimes of excess is still to be determined. At first sight, it seems that the Supreme Court has created a rather broad basis of criminal responsibility that allows for attributing crimes that are a likely consequence of previously agreed upon criminal conduct. Participants may be held liable for unplanned crimes when these crimes were causally linked to the commission of other crimes, which were contemplated.¹⁷⁶

j. Sentencing

As made clear in section II.b., the differentiation between modes of liability has little normative or practical value under Dutch law. Pursuant to Article 47 DPC, perpetrators, co-perpetrators, indirect perpetrators, instigators all qualify as principals and can therefore receive a similar sentence. Whilst actually directing is regarded as a *sui generis* type of liability, actual directors are put on par with principals and may therefore be punished equally. Only aiders are perceived as less blameworthy, since they merely support or facilitate the commission of crimes without playing a determinative role. Accordingly, Article 48 DPC stipulates that the maximum sentence for aiders is reduced with 1/3. A similar rule applies in relation to superiors who negligently fail to prevent or punish the criminal conduct of their subordinates (see section V. 18.)

¹⁷² Van der Wilt 2006, p. 249.

¹⁷³ De Hullu 2015, p. 447 and 466.

¹⁷⁴ Supreme Court, 17 December 2015, ECLI:NL:HR:2013:1964.

¹⁷⁵ *Idem*, para. 2.3.2.-2.3.3.

¹⁷⁶ This decision has been criticized by Rozemond, who argues that the Supreme Court unjustly emphasizes the causal relation between the accused’s robbery and their *flight* from the police, which is not a crime in itself. Considering that the accused are charged with negligent death, Rozemond argues that the Court should rather have assessed whether the pedestrian’s *death* was a probable prospect of the accused’s plan to rob a hotel. Rozemond 2009, p. 843-844

We should beware that the fact that Dutch law only provides for a sentence reduction for aiders and superiors, whilst placing the other participants on equal footing with perpetrators, does not entail that role variance has no influence on sentencing. The sentencing ranges in the Netherlands are broad and courts have wide discretionary powers to determine an appropriate sentence, depending on the facts of the case and the personal circumstances of the accused. Thus, courts can tailor the accused's sentence to his role in the commission of crimes, irrespective of the mode of liability under which he is convicted.

III. Corporate complicity and *actus reus*

7.-8. Responsibility for 'neutral acts'

As buyers or suppliers, corporate officials can fund serious violations of human rights or assist perpetrators of international crimes by providing logistical support or information. In general, the involvement of corporate officials in international crimes can have two forms: contributing (directly) to the commission of crimes, or benefiting from crimes by others.¹⁷⁷ Most of these acts are not directly criminal in nature and constitute indirect or remote types of involvement – they are so-called 'neutral acts' or 'dual-use contributions'.

In international criminal law, there has recently been much debate about the criminality of neutral acts. This debate was spurred by an innovative judgment of the *Perišić* Trial Chamber of the Yugoslav Tribunal (which has been rejected afterwards) in which the Chamber ruled that the *actus reus* of aiding does not only entail that the accused's assistance had a substantial effect on criminal conduct.¹⁷⁸ In addition, it must be established that the accused *specifically directed* his assistance at the commission of crimes. This judgment can be seen as an attempt to limit criminal responsibility for remote and neutral contributions and to make sure there is a sufficiently close link between the assistance offered by the accused and the crimes for which he stands trial.

In the Netherlands, there is no similar discussion about the criminality of neutral acts. In fact, it is generally accepted that criminal responsibility can be established based on neutral or 'dual use' contributions. Acts such as providing goods, material means, or financial services can potentially all be qualified as types of criminal contributions, as long as (i) there is a causal connection between the acts of the accused and the crimes committed, and (ii) the accused acted with a criminal mind. Thus, the accused's *mens rea* can transform neutral acts from innocent to criminal conduct. As will be made clear in section IV., Dutch *mens rea* standards are generally quite low (*dolus eventualis* is accepted), which suggests that ascertaining criminal responsibility for neutral acts is easy. Yet, practice shows that establishing responsibility for international crimes based on neutral conduct of corporate officials can be challenging. For example, the District Court in *Kouwenhoven* held that the fact that the accused cooperated with others to deliver arms to Charles Taylor and his forces is insufficient for establishing that he participated in the commission of war crimes, since arms can also be used for legitimate aims (e.g.

¹⁷⁷ Huisman 2010, p. 11-12.

¹⁷⁸ ICTY, *Prosecutor v. Perišić*, Trial Chamber, judgment, 6 September 2011, IT-04-81. The debate on 'specific direction' has been well-described in different blogposts on EJIL Talk: <http://www.ejiltalk.org/tag/specific-direction/>, last visited 5 January 2017.

fighting a war).¹⁷⁹ According to Van den Herik, this finding can be explained by the lack of a sufficient causal connection, since ‘it is difficult to connect small arms deliveries to specific crimes’.¹⁸⁰

Dutch case law on the remote involvement of corporate officials in international crimes is scarce, especially insofar as it concerns neutral acts. Yet, some insights can be drawn from the *Van Anraat* case concerning the provision of TDC – a toxic chemical – to the regime of Saddam Hussein. In this case, the Court of Appeal stated that the ‘TDG, in the quantities as supplied by the defendant (...) could only serve for the production of mustard gas’. Moreover, it established that Van Anraat knew this and made efforts ‘to conceal the nature and the final destination of the chemicals’.¹⁸¹ By reasoning in this way, the Court basically assessed the accused’s *actus reus* in light of his *mens rea*, in particular his knowledge about the conditions surrounding the conduct. The accused’s criminal intent transformed a neutral trade-deal into a criminal contribution. A similar approach can be witnessed in case law concerning the selling of resources that can be used for the production of synthetic drugs, as well as for legitimate purposes. In such cases, courts assess the accused’s *actus reus* in light of his *mens rea* and focus on determining whether the accused at least acted with *dolus eventualis* to contribute to the manufacturing of illegal substances. This assessment is based on a combination of subjective and objective considerations, such as: did the seller know how the resources would or could be used; and is it a well-known fact that these resources can be used to produce illegal substances, especially when purchased in high volumes, or under suspect conditions? Courts can establish that the accused was aware of the intended use of the materials if certain materials can only serve for the production of illegal substances, especially when they are produced and sold in large quantities.¹⁸² Furthermore, the circumstances under which a business deal was made are relevant. For instance, were the resources sold in combination with other materials or goods that are generally used for the production of illicit substances, were the resources discovered in the presence of other materials to produce illegal substances,¹⁸³ or was the business deal made in a (un)usual manner? With regard to the latter, inappropriate labelling, large sums of cash money, and the absence of proper administration, serve as ‘red flags’.¹⁸⁴

Besides trading in chemicals, selling software also constitutes a neutral type of business involvement that can be relevant for the commission of international crimes. That such involvement can have devastating consequences is demonstrated by the fact that technology provided by IBM helped facilitate the Nazi regime in its execution of the Holocaust.¹⁸⁵ In most cases, providing or developing software, whilst knowing that it *will* be used for illegal purposes, can under Dutch law be qualified as aiding.¹⁸⁶ Mere knowledge that software *can* be used in that way will not suffice. Under certain circumstances, selling or developing software can also qualify as co-perpetration. For example, the District Court of Zwolle-Lelystad in 2012 convicted an accused as co-perpetrator for developing software that allowed retailers to

¹⁷⁹ District Court The Hague, 7 June 2006, ECLI:NL:RBSGR:2006:AX7098.

¹⁸⁰ Van den Herik 2009, p. 223-224.

¹⁸¹ Court of Appeal The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676 (official Dutch verdict) and ECLI:NL:GHSGR:2007:BA6734 (English translation), par. 11.10.

¹⁸² See, for example District Court Limburg, 24 February 2016, ECLI:NL:RBLIM:2016:1522 and Court of Appeal Arnhem-Leeuwarden, 23 September 2015, ECLI:NL:GHARL:2015:7280.

¹⁸³ Cp. District Court Oost-Brabant, 8 September 2016, ECLI:NL:RBOBR:2016:4946.

¹⁸⁴ See for example District Court Oost-Brabant, 11 February 2016, ECLI:NL:RBOBR:2016:538 and Court of Appeal Arnhem-Leeuwarden, 23 September 2015, ECLI:NL:GHARL:2015:7281 and 7278.

¹⁸⁵ See Black 2001.

¹⁸⁶ See for example District Court Limburg, 10 November 2016, ECLI:NL:RBLIM:2016:9644 concerning an ICT employee who developed software that enabled a mushroom farm to commit labour exploitation of Polish workers at the request of his employer (Article 273f DPC).

omit certain sales from their official sales volume and thereby commit different types of tax fraud.¹⁸⁷ Yet, as discussed in section II., when acts of assistance that are generally considered as aiding, are qualified as co-perpetration, courts must explain why such seemingly minor contributions constitute an essential contribution and thus justify a conviction for co-perpetration.¹⁸⁸ In the case of the Zwolle-Lelystad District Court, it was, for example, relevant that the accused did not only develop software, but did so on his own initiative – without a prior request from the users – and actively promoted his software by giving detailed instructions to interested parties on how to use the software.¹⁸⁹

Indirect involvement as a separate offence

When neutral contributions cannot be linked to the commission of international crimes, because they are too detached, neutral contributions are often qualified as separate offences that are related to, but still independent of the ‘core’ international crime. These separate offences create what could be called a back-up option or second line of defense when the accused’s involvement in or awareness of the core crimes cannot be proven. Without going into too much detail, we would like to highlight the following separate offences:

- Benefitting from someone else’s crime by obtaining certain objects or profits, whilst concealing its criminal origin, can be qualified as money laundering (Article 420bis and 420quater DPC). Dutch law requires that these objects or profits originate from *a* crime (*afkomstig uit enig misdrijf*). This can even be a crime committed outside of the jurisdiction of the Netherlands, given that the act of concealment (*witswasgedraging*) – e.g. labeling illegal profits as legitimate business profits – takes place in the Netherlands.¹⁹⁰
- Even without being directly personally involved in the commission of group crimes, one can be liable for membership of a criminal organization – i.e. an organization that seeks to commit crimes (Article 140 DPC; see section VI).¹⁹¹ This requires that the accused had positive knowledge (*onvoorwaardelijk opzet*) of the organization’s criminal purpose and actively participated in this organization through acts that either served or were directly related to the realization of the criminal purpose.¹⁹²
- Violations of EU trade embargo’s and restrictions, UN Security Council resolutions, and other international instruments are enforced through the Sanctions Act (*Sanctiewet*). Insofar as indirect involvement breaches one of these international sanction measures, it constitutes a separate offence under the Sanctions Act.¹⁹³ A well-known example of the application of this Act is the

¹⁸⁷ District Court Zwolle-Lelystad, 8 May 2012, ECLI:NL:RBZLY:2012:BW5187.

¹⁸⁸ Once it has been established that the company or an employee of the accused acted as an aider or co-perpetrator, the Public Prosecution Service can also prosecute leading officials as actual directors or functional perpetrators of that same offence. See section II. As also mentioned in the same section, Dutch criminal law only requires that the contribution had at least some substance. It is not required that this contribution was a *conditio sine qua non* for the commission of the underlying offence.

¹⁸⁹ District Court Zwolle-Lelystad, 8 May 2012, ECLI:NL:RBZLY:2012:BW5187.

¹⁹⁰ Enneking *et al.* 2015, p. 133; Kristen 2010, p. 146-151.

¹⁹¹ Enneking *et al.* 2015, p. 133-134; Kristen 2010, p. 151-155.

¹⁹² Kristen 2010, p. 154.

¹⁹³ See for more information: <https://www.government.nl/topics/international-peace-and-security/contents/compliance-with-international-sanctions/implementation-of-sanctions-in-the-netherlands>, <http://www.toezicht.dnb.nl/en/2/51-221956.jsp>, and http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/Netherlands%20UN%20Sanctions%202006%20E.pdf, last visited 5 January 2017.

Kouwenhoven case in which the accused was not only prosecuted as an aider of war crimes, but also for violating the Sanctions Act.

- Dutch law imposes several notification requirements or duties of care upon companies or persons engaging in certain activities. Most of these requirements are directed against financial institutions and serve to either prevent or help discover criminal activity. For example, there is an obligation to notify the Dutch Finance Intelligence Unit¹⁹⁴ in case of so-called ‘unusual transactions’ (*ongebruikelijke transacties*) in order to prevent money laundering and financing of terrorism.¹⁹⁵ Furthermore, companies can be required to do a client research and trace the identity of the ‘ultimate beneficial owner’ (UBO) before concluding a business deal. Finally, and of a different nature, the Prevention Abuse of Chemicals Act (*Wet voorkoming misbruik chemicaliën*) imposes a number of notification requirements on ‘operators as mentioned in Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors’.

9.-10. Omission liability

Under Dutch law, omissions can only be punished if there was an obligation to act, i.e. a duty of care.¹⁹⁶ The scope of this duty of care is defined by the accused’s *de facto* position within the corporate hierarchy, his possibilities to intervene, the nature and gravity of the underlying offence, the accused’s knowledge, and his assessment, based upon the information available.¹⁹⁷ In this light, we agree with Vest that the accused’s duty depends on the type of business-conduct. When a corporation is pursuing activities that do not entail a typical risk of perpetrating or contributing to international crimes – such as producing tea – it cannot be assumed that business leaders have a duty to intervene in the commission of crimes by their subordinates.¹⁹⁸ By contrast, when corporations are working in sectors, such as the exploitation of natural resources, or the production and sales of weapons, ‘business-typical risks, which can contribute to an armed conflict or gross human rights violations, may easily arise’.¹⁹⁹ In those cases, the corporate leadership has a more active duty to prevent the commission of crimes by their subordinates. We therefore anticipate that prosecutions of corporate officials for omissions will mainly concern the latter category of ‘risky businesses’.

Some modes of liability under Dutch law lend themselves more easily for an omission-based approach than others. A specific type of omission liability for international crimes is superior responsibility, which will be further discussed in section VI. In addition, functional perpetration and actually directing are relevant. Whilst these modes of liability encompass both active and passive involvement,²⁰⁰ liability is

¹⁹⁴ <https://www.fiu-nederland.nl/en>, last visited 5 January 2017.

¹⁹⁵ Violating such a notification obligation sometimes leads to a large settlement. See for example <https://www.om.nl/actueel/nieuwsberichten/@96507/groothandel-leverde/> (in Dutch) regarding a wholesale company in agricultural and horticultural products that accepted a 2 million Euro settlement to avoid prosecution on money laundering and aiding in the production of hemp.

¹⁹⁶ Gritter 2009, p. 15; Wolswijk 2005.

¹⁹⁷ The exact scope and nature of these responsibilities is still unclear. For an argument to ground responsibility on the organizational typology of the corporation and the internal position of the accused, see Hornman 2016.

¹⁹⁸ Vest 2010, p. 872.

¹⁹⁹ *Idem*. Cp. Huisman 2010.

²⁰⁰ For actually directing this was recently reaffirmed by the Supreme Court in its judgement of April 2016. See Supreme Court, 26 April 2016, ECLI:NL:HR:2016:733, *NJ* 2016, 375.

normally based on the inadequacy of supervision.²⁰¹ In particular, the Supreme Court has accepted that a functional perpetrator's failure to fulfil the level of care that can reasonably be expected to prevent criminal acts from occurring (due diligence), can be regarded as acceptance of these acts.²⁰² Indirect perpetration and instigation require that the accused acted as *auctor intellectualis*. On this account, omission-like constructions – whilst theoretically possible – seem highly unlikely in practice. By contrast, aiding through omission is more probable. It is accepted that one can aide through omission by creating an opportunity, for instance by allowing access to a location or person.²⁰³ The main issue in such cases will be to prove that these supportive acts were *intentionally* omitted.²⁰⁴ Also for co-perpetration, establishing the accused's criminal intent will be the principal focus in cases of omission. As was mentioned in section II., Dutch criminal law does not require that co-perpetrators are physically present when the offence is committed.²⁰⁵ Thus, co-perpetration by omission is theoretically possible, yet the requirement of making an *essential* contribution seems to limit establishing liability on the basis of passive conduct.

IV. Corporate complicity and *mens rea*

11. Common plan

None of the modes of liability under Dutch law explicitly requires the existence of a common plan or agreement. Even in relation to co-perpetration – which is based on the cooperation between multiple persons – Dutch law does not stipulate that persons acted according to a common plan. The existence of a common plan only constitutes one of several relevant factors that can be used to determine whether the co-perpetrators cooperated in a deliberate and close way.

Having said that, it is noteworthy that the common plan has recently acquired increasing attention in discussions and writings about co-perpetration. In the previously discussed *Nijmegen scooter* case, Advocate-General Knigge suggested that the common plan has a dual function in Dutch case law on co-perpetration. It (i) provides a starting-point for determining whether the accused deliberately and closely cooperated in the commission of crimes to which he did not physically contribute, and (ii) constitutes a factor for assessing whether the accused intended to commit the crimes charged.²⁰⁶ According to Knigge, if indeed the accused together with others pursued a certain plan, he can be qualified as a co-perpetrator of crimes that were part of this plan – even though he did not play a role in the actual commission of these crimes – and it may be assumed that he intended to commit the crimes following from the common plan. Admittedly, the Supreme Court has never endorsed Knigge's findings and has not accepted the common plan as a necessary requirement of co-perpetration. Yet, Knigge's findings have spurred a discussion in

²⁰¹ See for example Supreme Court, 16 December 1986, ECLI:NL:HR:1986:AC9607 and ECLI:NL:HR:1986:AC9608, *NJ* 1987, 321 and 322.

²⁰² Supreme Court, 21 October 2003, ECLI:NL:HR:2003:AF7938, *NJ* 2006, 328; Supreme Court, 8 December 2015, ECLI:NL:HR:2015:3487, *NJ* 2016, 23; see section II under 5.

²⁰³ See, for example Supreme Court, 16 August 2005, ECLI:NL:HR:2005:AT6058, *NJ* 2005, 490.

²⁰⁴ Supreme Court, 14 April 2015, ECLI:NL:HR:2015:949, *NJ* 2015, 338

²⁰⁵ Supreme Court, 17 November 1981, ECLI:NL:HR:1981:AC7387, *NJ* 1983, 84.

²⁰⁶ Conclusion Advocate-General, 29 October 2013, ECLI:NL:PHR:2013:1080, para. 3.16.

scholarship about how the requirement of a common plan can regulate criminal responsibility for co-perpetration and how it can contribute to our understanding of what it actually means to co-perpetrate crimes. For example, Rozemond has called upon the Supreme Court to pay more attention to the notion of ‘cooperation’ between co-perpetrators,²⁰⁷ which according to him entails a collaboration between persons who work together and attune their actions according to a common plan.²⁰⁸

We agree with Knigge that the existence of a common plan can provide a useful background for assessing the cooperation between persons, who participate in criminal conduct together. In particular, in a business context and in cases of system criminality, participants will usually act together pursuant to (business) plans and will collectively pursue a (corporate) policy. This suggests that the existence of a common plan will be especially relevant in cases of corporate complicity for international crimes. It is therefore unfortunate that the Dutch Supreme Court has neither explained, nor regulated the meaning and scope of the common plan very precisely, thus leaving the role of corporate plans and policies in attributing crimes committed by one corporate official to others rather unclear. In particular, the lack of an explicit common plan requirement has hindered a principled discussion about what the nature of the common plan should be – i.e. whether the common plan should be inherently criminal or not – or how it can be proven that crimes were committed pursuant to a common plan.

Insofar as the Supreme Court has explained what it means to act pursuant to a common plan, case law advances a flexible approach. In relation to co-perpetration, it is, for example, not required that the common plan specifies which crimes will be committed and how this will be done, nor that the co-perpetrators agree upon the number and identity of the victims.²⁰⁹ Moreover, it does not have to be established that the co-perpetrators made explicit arrangements about the implementation of the common plan, or about what would happen in case of unexpected interruptions.²¹⁰ Thus, it is accepted that criminal plans develop in the course of time and are adjusted according to changed circumstances. This flexibility may meet the complexities of empirical reality and contributes to the effective prosecution of system criminality, but can be critically observed from the perspective of legal certainty and individual liability.

12. Intent

General requirements

As became clear in section II., Dutch law generally requires that all participants act intentionally both in relation to their participation *and* in relation to the crimes for which they stand trial (so-called ‘double intent’). It seems that the intent of (functional) perpetrators, indirect perpetrators, and co-perpetrators should only be established insofar as this is required by the crime definition.²¹¹ Thus, their intent need not encompass any objective circumstances or consequences (for example, in the case of intentional assault resulting in the victim’s death), or elements covered by negligence.²¹² In literature, it has been debated whether this is also the case for aiding, instigation and actually directing. The starting-point is that the requirements of intent for these modes of liability expand to all elements of the crime definition, at least

²⁰⁷ Rozemond 2015, p. 895.

²⁰⁸ Rozemond 2015, p. 895-896.

²⁰⁹ Conclusion Advocate-General, 29 October 2013, ECLI:NL:PHR:2013:1080, para. 3.17-3.18.

²¹⁰ *Idem*.

²¹¹ Postma 2014, p. 25-26.

²¹² De Hullu 2015, p. 444; Postma 2014, p. 31. There is debate about this point. Knigge 2005, p. 295.

insofar as they relate to the criminal act.²¹³ This is indeed accepted in relation to misdemeanors,²¹⁴ which are strict liability offences. Thus, in these cases, the participants' intent goes beyond the intent of the perpetrator. At the same time, scholars have argued that aiders, instigators, and actual directors do not have to intent to commit crimes of negligence (e.g. causing death by negligence), and most author do not require that these participants intended to commit the objective consequences or circumstances.²¹⁵ This also follows from Article 47(2) and 49(4) DPC. It has also been contested whether the intent of accomplices should include the principal's intent, i.e. that the accomplice should at least knowingly accept the significant risk that the principal intended to commit a certain crime.²¹⁶ Yet, it seems that this is more a theoretical, rather than a practical discussion, since this is hardly ever an issue in case law.

As to the level of intent, Dutch law recognizes three categories. In addition to intent in the first degree (*dolus directus*, or *doelopzet*) and intent in the second degree (*dolus indirectus*, or *noodzakelijkheidsbewustzijn*), Dutch law generally accepts conditional intent (*dolus eventualis*, or *voorwaardelijk opzet*). Thus – unlike the Rome Statute – the DPC allows for establishing criminal responsibility when the accused knowingly accepted the significant risk that crimes would be committed. As was specified in section II., *dolus eventualis* may be established in global terms, which means that the accused does not have to foresee the details of crimes charged, or the specific way in which the crimes would be committed.

For some crimes, the DPC requires that the perpetrator acted with a higher standard of intent, such as purpose (*oogmerk*), or actual knowledge (*dolus indirectus*). This higher *mens rea* standard does not have to be shared by aiders and persons actually directing crimes.²¹⁷ Instead, they only need to have acted with *dolus eventualis* in relation to the perpetrator's purpose/knowledge, i.e. they should have knowingly accepted the significant risk that the perpetrator committed crimes with a specific purpose or knowledge. It is not clear whether this lower standard of intent also applies to other participants, or whether they do have to share the perpetrator's aggravated intent. Scholarly writings on this issue present different views. On the one hand, Postma has argued in relation to instigation and co-perpetration that when the crime definition sets a standard of purpose, the instigators and co-perpetrators only need to act with *dolus eventualis* of the perpetrator's purpose, without sharing it themselves.²¹⁸ On the other hand, Knigge has argued in relation to co-perpetration that this mode of liability should be put on par with perpetration, which means that co-perpetrators should act with the same level of intent as perpetrators.²¹⁹ Thus, co-perpetrators will need to act with purpose themselves if the crime definition so requires.

²¹³ Knigge 2005, p. 298; Postma 2014, p. 26-27.

²¹⁴ This does not apply for aiding, since aiding a misdemeanor is not criminal.

²¹⁵ Postma 2014, p. 31.

²¹⁶ Knigge 2003, p. 299; Van der Wilt 2006, p. 248-249.

²¹⁷ Supreme Court, 22 September 1987, *NJB* 1988/7, p. 98; Hornman 2016, p. 73-74 and 475. In this sense actually directing differs from functional perpetration where the perpetrator him or herself must meet the *mens rea* level set out in the crime definition. After all, he or she personally commits – perpetrates – the offence. In case of actually directing, it is the corporation that is the perpetrator, not the actual director. As such, it is the corporation that has to fulfil the crime definition, including the *mens rea* requirements. The actual director merely has to have *dolus eventualis* that the corporation meets those *mens rea* norms set out in the crime definition. In a nutshell, this means that the threshold for establishing liability on the basis of functional perpetration is lower in comparison to actually directing when the underlying offence is a misdemeanor (*overtredingen*) or a *culpa* crime, but higher or at least equal in case of crimes of intent.

²¹⁸ Postma 2014, p. 33.

²¹⁹ Knigge 2005, p. 315.

The ambiguity on this point in literature can be explained by the fact that the question of whether the participants need to share the perpetrator's higher standard of intent does not seem to play an important role in practice. For example, in relation to the crime of theft – which is committed with the *purpose* of misappropriation – courts usually infer the co-perpetrators' qualified intent from their intentional cooperation.²²⁰ Yet, recent case law on terrorism and human trafficking – which both entail a specific purpose requirement – gives expression to a stricter approach.²²¹ For example, in a judgment from 2008, the Court of Appeal in The Hague emphasized that whether the accused – who was charged as co-perpetrator – acted with a terrorist purpose depends on which results *he* aimed to reach.²²² This reasoning suggests that the accused can only be convicted of co-perpetrating terrorism if he personally acted with a terrorist purpose, and that *dolus eventualis* of the perpetrator's purpose does not suffice. It remains to be seen whether a similar approach applies to other types of domestic crimes with a higher standard of criminal intent.

Intent for international crimes

In relation to international crimes, Articles 3 to 7 ICA specify that perpetrators and participants should act and commit crimes intentionally. Having said that, there is one mode of liability – superior responsibility – which allows for establishing criminal responsibility based on negligence. This mode of liability will be further discussed in section VI.

For most crimes under the ICA, a general standard of intent suffices, which means that criminal responsibility can be established on the basis of *dolus eventualis*. Thus, crimes such as murder and rape can be qualified as war crimes when the accused knowingly accepted the significant risk that his conduct would result in the commission of these crimes. In relation to crimes against humanity, the ICA specifically requires that the accused had *knowledge* of the widespread or systematic attack against the civilian population. The term 'knowledge' suggests a threshold of intent in the second degree (*dolus indirectus*), yet it is unclear how the courts will interpret this standard, since there is no case law on this point yet. In relation to the crime of persecution, it is not immediately evident that Dutch law – like international statutes – requires that the accused acted with discriminatory intent. Article 4(1)(h) ICA only stipulates that persecution is committed on political grounds, *because* the victim belonged to a certain group. At first sight, the term 'because' points to the relevance of a certain motive, rather than a higher standard of intent.

In relation to genocide and torture as a distinct crime (*foltering*), *dolus eventualis* does not suffice. The ICA stipulates explicitly that genocide is committed with the *aim* of destroying a protected group, whilst torture as a distinct crime requires that the accused acted with the *aim* of (i) extracting information or a confession from the victim or a third person; (ii) punishing the victim for an act he or a third person has committed or is suspected of having committed; (iii) intimidating the victim or a third person; or (iv) coercing him to do or permit something, or based on discrimination on whatever ground. Under Dutch

²²⁰ At least, we are not familiar with any cases in which this issue arose.

²²¹ Article 83a DPC defines terrorism as committing a certain crime with the purpose of frightening the population; forcing the government to perform, omit, or accept certain conduct; or disrupting or destroying a country's political, constitutional, economic, or social structures. Human trafficking is criminalized in Article 273f DPC. <http://wetten.overheid.nl/BWBR0001854/2016-07-01>, last visited 5 January 2017.

²²² Court of Appeal The Hague, 2 October 2008, ECLI:NL:GHSGR:2008:BF5225.

law, the requirement of acting with a particular aim usually includes both intent in the first and in the second degree, i.e. acting with a specific purpose and acting with positive knowledge of the commission of crimes.²²³ Yet, in relation to genocide and torture – which have their basis in international law – courts seem to follow international standards, which means that it must be established that the accused acted with a particular purpose (*doelopzet*).²²⁴

As became clear above, it is still unclear whether the participants should share these specific types of intent. Scholarly work points in different directions and there is no conclusive case law. We tend to support the position of Knigge. Taking the principle of fair labelling as a point of reference, we concede that participants who are qualified as principals – i.e. co-perpetrators, indirect perpetrators, actual directors, and instigators – can indeed only be convicted of genocide or torture if they shared the perpetrator’s criminal aim. This does not apply to aiders, who only assist the crimes of the principal and therefore receive a mandatory sentence reduction (see section j.). Under traditional Dutch law, aiders only need to be aware and accept the significant risk (*dolus eventualis*) of the intentional commission of a crime by the principal. However, in case law, the question has risen whether this standard also applies to international crimes, since international criminal courts have set a higher standard of *actual knowledge* of the perpetrator’s intent (*ad hoc* Tribunals), or knowledge that the crimes will occur in the ordinary course of events (ICC).²²⁵ More generally, the differences between Dutch and international *mens rea* standards have stirred a debate about whether the traditional Dutch *mens rea* standards also apply to international crimes, or whether the subjective elements of these crimes must be assessed according to international standards.²²⁶

In this regard, the District Court in *Van Anraat* established that when international *mens rea* standards differ significantly from domestic law, international obligations to criminalize and prosecute international crimes demand that prevalence is given to international standards.²²⁷ On this account, the District Court adopted an international interpretation of the *mens rea* standards of aiding genocide, thereby considering that ‘the aider’s knowledge is an essential element of international criminal responsibility for genocide’, which is not recognized by Dutch law.²²⁸ Conversely, in relation to aiding war crimes, the District Court applied Dutch law, arguing that the Dutch and international *mens rea* standards on this point are largely similar.²²⁹ The Court did not see a fundamental distinction between the Dutch *dolus eventualis* requirement and the international standard of knowledge of the principal’s intent to commit war crimes.

On appeal, the Court of Appeal criticized the District Court’s reasoning. According to the Court of Appeal, ‘the question which degree of intention is required for a conviction on account of complicity in

²²³ De Hullu 2015, p. 253, Knigge/Wolswijk 2015, p. 130 en Hazewinkel-Suringa/Rommelink 1996, p. 203.

²²⁴ Courts have never explicitly rejected the general Dutch interpretation of purpose, but have generally referred to international case law in explaining what the requirement of purpose means in relation to genocide and torture. In his doctoral dissertation, Lintz explains that a similar approach applies to terrorism – also here *dolus* in the second degree will not suffice due to the particular nature of the crime. Lintz 2007, p. 60-61.

²²⁵ District Court The Hague, 23 December 2005, ECLI:NL:RBSGR:2005:AX6406, para. 6.5.1; ICC, *Prosecutor v. Bemba*, Trial Chamber, judgment, 19 October 2016, ICC-01/05-01/13, para. 98.

²²⁶ Van de Wilt 2013b.

²²⁷ District Court The Hague, 23 December 2005, ECLI:NL:RBSGR:2005:AX6406, para 6.3.

²²⁸ District Court The Hague, 23 December 2005, ECLI:NL:RBSGR:2005:AX6406, para. 6.5.1. Interestingly, whilst generally rejecting that the accomplice’s intent needs to include the intent of the principal, Van der Wilt has argued that – in light of the special character of genocide – the accomplice should at least have *dolus eventualis* with regard to the specific intent of the principal *genocidaire*. Van der Wilt 2006, p. 249.

²²⁹ District Court The Hague, 23 December 2005, ECLI:NL:RBSGR:2005:AX6406, para. 6.5.2.

genocide’,²³⁰ has not been answered consistently in international case law. In particular, the Court considered that it is not clear yet whether under international criminal law ‘the accessory must have “known” that the perpetrator acted with a genocidal intention or that a lesser degree of intention is sufficient, compared to or similar to the conditional intention as accepted in the Dutch legal system’.²³¹ Given that international criminal law on this point ‘does not seem to have crystallized out completely’,²³² it is not evident that Dutch *mens rea* standards are set aside in favour of international standards.

In a recent judgment against former Dutchbat colonel Karremans, the Court of Appeal in Arnhem came to a yet another conclusion. In a so-called ‘Article 12 procedure’ – in which surviving relatives of three Srebrenica victims complained against the decision of the Public Prosecution Service not to prosecute Karremans – the Court of Appeal decided that Karremans’s responsibility for aiding genocide in Srebrenica should be assessed according to international *mens rea* standards, considering that

the international tribunals, who have particular expertise in relation to the interpretation and application of international criminal law because of their composition and the large number of international crimes cases they have adjudicated, have developed a *stable and balanced* system of criminal participation in genocide. (...) According to the Court of Appeal, this system would be obstructed if Dutch judges, who merely operate in the ‘periphery’ of international criminal law, would adopt a different criterion than the tribunal.²³³

Following case law of the ICTY, the Court of Appeal held that criminal responsibility for aiding genocide can only be established if Karremans had positive knowledge of the genocidal intent of the principal perpetrators. Since such positive knowledge could not be established, the Court of Appeal rejected the victims’ complaint against the decision not to initiate a prosecution.²³⁴

The Appeals Chamber’s decision and the reasoning on which it is based can be criticized. In particular, it can be questioned whether international criminal courts have indeed developed a *stable and balanced mens rea* standard for aiding genocide. Recent discussions about the so-called ‘specific direction’ requirement give expression to uncertainties and controversies in relation to the exact nature and scope of the subjective legal elements of aiding. Moreover – even when accepting that there exists a stable and balanced system within the *ad hoc* Tribunals – we witness diversity and fragmentation when taking account of the *mens rea* standards for aiding that other international courts have developed. For example, Article 25(3)(c) of the ICC Statute does not implement the Tribunals’ *knowledge* standard, but instead stipulates that aiders should act with the *purpose* of assisting the commission of crimes by the principal. In this respect, it is unfortunate that the Dutch court in *Karremans* has not explained why it preferred the Tribunals’ knowledge standard over the ICC’s standard of purpose.

The courts’ judgments in *Van Anraat* and *Karremans* have stirred a scholarly debate about which *mens rea* standards should be used to assess criminal responsibility for international crimes, and to what extent traditional Dutch *mens rea* standards need to be tailored to the specific nature of international crimes. In

²³⁰ Court of Appeal The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676 , r.o. 7.

²³¹ *Idem*.

²³² *Idem*.

²³³ Court of Appeal Arnhem, 29 April 2015, K14/0339, para. 11.1 (emphasis added). For a discussion of this judgment, also see Spijkers 2016, p. 19-24.

²³⁴ This decision has been confirmed by the ECtHR. ECtHR, *Mustafić-Mujić a.o. v. the Netherlands*, 30 August 2016, appl. no. 49037/15.

literature, arguments have been presented both in favour of an international and a domestic interpretation of criminal participation. On the one hand, Keijzer has carefully signalled that the principle of legality – which requires that the law is foreseeable and applied equally – may be served best when domestic courts interpret modes of liability for international crimes according to international standards, in particular when they act on the basis of universal jurisdiction.²³⁵ On the other hand, Huisman and Van Sliedregt have maintained that because international criminal law is largely modelled on domestic law, ‘it is only natural that domestic courts when adjudicating international crimes rely on municipal law and doctrine when interpreting modes of liability, even if national standards are not in complete conformity with international standards’.²³⁶ To do otherwise would cause undesirable inequality within the domestic legal order between cases concerning common crimes and those concerning international crimes. Similarly, Van der Wilt holds that neither international, nor domestic law requires that Dutch courts follow international standards, considering that ‘domestic courts have their own responsibility to search for adequate solutions and should not shy away from applying the constructs with which they are familiar’.²³⁷

We expect that debates about the proper assessment of *mens rea* standards for international crimes will continue in the future, until the Dutch Supreme Court issues a principled decision on the matter. Whilst latest court decisions adopt international *mens rea* standards, we are in favour of a more nationalistic approach and would suggest that courts follow domestic *mens rea* standards when assessing criminal responsibility for international crimes.

Establishing intent of corporate officials

It has often been argued that proving that corporate officials *intended* to perpetrate or participate in international crimes is difficult.²³⁸ On this account, it is interesting that the Dutch courts in *Van Anraat* were able to determine that the accused acted with the requisite *mens rea* for aiding. Indeed, the courts established that Van Anraat knew he delivered toxic substances to Iraq, knew these substances could be used as a precursor for chemical weapons, and that there was a probable chance that these weapons would be used against Kurdish civilians.²³⁹ Furthermore, there was evidence that Van Anraat tried to conceal the nature and destination of his shipping, and continued his supplies to the Iraqi regime, even after being informed about the massacre in Halabja in 1988. The facts of the *Van Anraat* case and the reasoning of the courts in this case suggest that the possibilities for establishing intent depend on several factors.

First, it is relevant that Van Anraat basically directed a one-man business and that there were direct links between Van Anraat and Hussein. Van Anraat had also lived in Iraq during the relevant period. Thus, in terms of proximity, Van Anraat was relatively close to the crimes and the direct perpetrators,²⁴⁰ which helped to prove that he knew of the commission of crimes and that he was assisting these crimes by delivering TDG to Hussein. When corporations are organized in more complex ways and when there are more links in the supply chain between the delivery of goods and the actual commission of crimes,

²³⁵ Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822, *NJ* 2009, 481.

²³⁶ Huisman & Van Sliedregt 2010, p. 810. Similarly, Van der Wilt 2013a, p. 229.

²³⁷ Van der Wilt 2006, p. 255.

²³⁸ E.g. Farrell 2010, p. 879.

²³⁹ Court of Appeal The Hague, 9 May 2007, para. 11.6-11.13

²⁴⁰ Huisman & Van Sliedregt 2010, p. 823.

establishing intent will likely be more difficult. Indeed, as Huisman and Van Sliedregt explain, when prosecuting corporate officials who work in large enterprises, it can be ‘difficult to establish the “guilty mind”, because it is often spread over a number of people’²⁴¹ as a result of dispersed responsibility and information flows.

Second, in *Van Anraat*, the court was able to infer Van Anraat’s criminal intent from his acts, considering that he had delivered precursors, which – under the specific circumstances of the case – had to be at least partly employed for making chemical weapons.²⁴² Thus, Van Anraat’s contribution was in itself clearly criminal and could only be meant for committing crimes. In such cases, establishing knowledge of crimes is relatively unproblematic. By contrast, it will be more difficult to establish criminal intent when the accused made a neutral, or dual-use contribution to crimes (see section III.). This is evidenced by the reasoning and decision of the Dutch courts in the *Kouwenhoven* case. Kouwenhoven had good relations with Charles Taylor and accompanied him on diplomatic and foreign missions. Thus, in terms of proximity, Kouwenhoven was relatively close to the commission of crimes, just like Van Anraat. Still, the courts held that Kouwenhoven’s connection with Taylor did not automatically mean he supported the commission of international crimes by Taylor, nor that he was aware that such crimes were being committed.²⁴³ According to Buruma, the courts’ refusal to establish Kouwenhoven’s intent despite his proximate position can be explained by the fact that he traded in conventional weapons that could be employed for both legal and illegal purposes.²⁴⁴ Here, we can draw an interesting analogy with the work of Kaleck and Saage-Maass, who have argued that

[b]usinessmen trading per se dangerous goods will need to have less knowledge of the actual criminal purpose for which the main perpetrator acquired the goods, to be criminally liable; whereas in the case of other goods, the trader will have to know more details about the circumstances in which the goods will be used to commit international crimes to be liable for aiding and abetting.²⁴⁵

The Dutch courts have not explicitly accepted such a dual standard, yet it seems fair to say that indeed establishing criminal intent in case of neutral acts will be difficult if there is no further information about the accused’s knowledge of how his assistance affected the commission of crimes. This is so, because intent will usually be inferred from the accused’s objective conduct. When such conduct consists of neutral, or dual-use contributions – which is often the case with businessmen – the objective circumstances do not indicate a certain criminal involvement, which makes inferring intent particularly challenging. The difficulties increase if we recall that establishing the accused’s guilty mind is essential for qualifying neutral acts as criminal contributions. As we have explained in section III., the accused’s intent is used to ‘color’ the criminal character of neutral contributions – i.e. neutral contributions become criminal in light of the accused’s criminal intent. Yet, where the accused’s intent cannot be inferred because of the neutral nature of his conduct, whilst the neutral acts cannot be considered criminal, because of they cannot be ‘colored’ by evidence of criminal intent, we run into circular problems. To

²⁴¹ Huisman & Van Sliedregt 2010, p. 821. Similarly, Farrell 2010, p. 880.

²⁴² Van Anraat argued that he thought that the TDG he provided to the regime of Hussein would be used in the textile industry, but this argument was implausible, because there were no textile factories in Iraq at the relevant time.

²⁴³ Huisman & Van Sliedregt 2010, p. 823.

²⁴⁴ Buruma 2010. Interestingly, Van den Herik has rejected Buruma’s argument. In her view, if the Court had been able to establish that Kouwenhoven had indeed delivered arms to Liberia, it would not have been difficult to establish the *mens rea* requirement of aiding, since it was commonly known that ‘all warring parties in Liberia committed serious violations of international humanitarian law as of 1999’. Van den Herik 2009, p. 223.

²⁴⁵ Kaleck & Saage-Maass 2010, p. 720-721.

avoid such difficulties, the Dutch Public Prosecution Service has preferred to not (only) prosecute corporate officials as accomplices of international crimes, but (also) for separate crimes, such as illegal arms trade (see section III.). Whilst still being linked to system criminality and gross human rights violations, these separate crimes allow for establishing criminal responsibility based on a looser link between the accused and the commission of international crimes.

13. Negligence

Under Dutch law, negligence belongs to the realm of *culpa*. The DPC does not provide a clear definition of *culpa*, but case law has clarified that it basically entails considerable culpable carelessness (*verwijtbare aanmerkelijke onvoorzichtigheid*).²⁴⁶ This means that the accused acted contrary to a(n) (un)written norm (objective), *and* must have foreseen that his carelessness could have serious consequences (subjective). Together, these requirements ascertain that the accused was required to act differently, and was also able to do so.

Culpa should be clearly distinguished from the different types of *dolus*. Whilst *dolus* requires that the perpetrator at least *accepted* the commission of crimes as a significant risk of his actions, *culpa* governs situations in which a person was negligently ignorant (unconscious *culpa*), or believed in the positive outcome of his conduct (conscious *culpa*).²⁴⁷

As said before, in relation to international crimes, Articles 3-7 of the ICA specify that perpetrators and participants should act intentionally, thus excluding *culpa*. Having said that, there is one mode of liability – superior responsibility – which allows for establishing criminal responsibility based on negligence. This mode of liability will be discussed in section VI.

V. Corporate complicity and indirect perpetration

14.-15. Indirect perpetration using an organisation

In early case law, the ICC has presented indirect perpetration (‘commission through another person’) under Article 25(3)(a) Rome Statute as an effective means to hold political and military figures responsible for crimes committed by their subordinates.²⁴⁸ In interpreting indirect perpetration, the ICC has drawn from the German doctrine of *Organizationsherrschaft*, which requires that the accused controlled the acts of the physical perpetrator from a distance by using his authority over a hierarchical organization to which the perpetrator belonged.²⁴⁹ ICC case law clarifies that the superior must have exercised such control over the apparatus that the subordinates acted as mere ‘gears in a giant machine’ who produced the criminal result ‘automatically’.

²⁴⁶ De Hullu 2015, p. 264.

²⁴⁷ De Hullu 2015, p. 262.

²⁴⁸ In practice, no one has yet been convicted based on this mode of liability.

²⁴⁹ ICC, *Prosecutor v Katanga*, Pre-Trial Chamber, 1 October 2008, ICC-01/04-01/07-717, para. 395-518.

Like international criminal law, Dutch criminal law allows for establishing criminal responsibility for committing crimes through other persons. Yet, there is not one mode of liability that captures the full scope of indirect perpetration as it is regulated in the Rome Statute. Instead, criminal responsibility for committing crimes through others is divided amongst different modes of liability, in particular indirect perpetration (*doen plegen*), functional perpetration, and actually directing. In some way, all of these modes of liability show similarities with the ICC's notion of *Organizationsherrschaft*, whilst also differing in important respects.

Indirect perpetration

Just as indirect perpetration under the Rome Statute, the Dutch concept of indirect perpetration applies to persons who control the commission of crimes from a distance and who perpetrate crimes by using another person. Thus, the indirect perpetrator acts as the *auctor intellectualis*, i.e. the person who pulls the strings from behind the scene. The international and the Dutch concept of indirect perpetration both require that the indirect perpetrator had a decisive influence on whether and how a crime is committed. Under both concepts, the indirect perpetrator sees that a physical perpetrator commits an offence by causing a psychological change in the physical perpetrator's mind. Neither the Dutch, nor the international concept of indirect perpetration require a personal relation between the indirect perpetrator and the physical perpetrator. This allows for applying indirect perpetration even when the direct and indirect perpetrator were only loosely connected, and were structurally and geographically remote from each other.

Notwithstanding the basic similarities above, there are also important differences between the Dutch and international concept of indirect perpetration. On the one hand, the Dutch concept of indirect perpetration is more restrictive than its international equivalent, since it is only applicable when the physical perpetrator acted as an innocent agent, who cannot be held criminally responsible. On the other hand, the Dutch concept of indirect perpetration has a broader scope. Other than indirect perpetration under international law, it does not require that the physical perpetrator acted as a will-less tool. Indeed, the physical perpetrator may be innocent because he was completely controlled by the indirect perpetrator (for example, in situations of duress or mental incapacity), but it is also possible that the physical perpetrator is not punishable simply because he did not have the required capacity (for example, being a public servant), whilst otherwise acting maliciously. Moreover, the international and Dutch concept of indirect perpetration possibly set different *actus reus* requirements. Whilst both concepts require that the indirect perpetrator sees that the crime is committed, it is not unlikely that Dutch courts and the ICC will apply this requirement of indirect perpetration in different ways. Possibly, the *actus reus* requirement of control as adopted by the ICC, sets a higher threshold than Dutch law, which even allows for controlling the commission of crimes by means of a passive failure to intervene. Also on a *mens rea* level, Dutch law sets a lower standard than international law. Unlike the ICC, Dutch law does not require that the commission of crimes was a virtual certainty, or would occur in the ordinary course of events, but merely stipulates that the indirect perpetrator acted with *dolus eventualis*.

Because indirect perpetration under Dutch law only applies in case of innocent agency, the concept hardly plays a role in Dutch practice anymore. Arguably, indirect perpetration can play a more prominent role in international crimes cases, since these crimes are regularly committed by low-level soldiers acting under

force constituting duress, or by child soldiers who are too young to be held accountable. Nevertheless, we do not expect that indirect perpetration will take prominence in cases against corporate officials. As said, the indirect perpetrator is the intellectual architect of crimes who is responsible for designing the criminal scheme – a role that does not fit well with the facilitating and enabling contribution of corporate officials.

Functional perpetration

The links between indirect perpetration and the Dutch concept of functional perpetration have been signaled in literature before, in particular insofar as it concerns indirect perpetration in the form of *Organisationsherrschaft*. According to Van der Wilt, ‘although “functional perpetration” has definitely a different pedigree and *champ d’application* from *Organisationsherrschaft*, both concepts show remarkable resemblance when applied in the context of large state organizations which engage in international crimes’.²⁵⁰ Indeed, like indirect perpetration, functional perpetration applies to intellectual perpetrators, who control the commission of crimes from behind the scenes by exercising power over their subordinates. Whilst functional perpetration is technically not limited to corporate complicity, the notions of power and control entail the existence of a *de facto* hierarchy between the functional and the physical perpetrator, most likely following from a division of responsibilities within an organization.²⁵¹

Having said that, we should note that the organization plays a different role in functional perpetration than in *Organisationsherrschaft*. Unlike *Organisationsherrschaft*, which focuses on the features of the organization, functional perpetration is based on the inter-personal relationship between the indirect perpetrator and the physical perpetrator.²⁵² The organization mainly serves to link the man behind the scenes to the physical perpetrator on the ground, i.e. it provides a context that shapes the relationship between these persons. Other than *Organisationsherrschaft*, functional perpetration does accordingly not impose any limitations on the types of organizations through which an intellectual perpetrator might act, nor does it require a strict hierarchical command structure, or a large number of members who served as fungible tools in the hands of the functional perpetrator. Furthermore, functional perpetration does not stipulate that the organization through which the perpetrator acted was pursuing a criminal goal, or that the commission of crimes was a regular consequence of the organization’s policies: ‘offences may just be incidents in a corporation which pursues lawful goals by lawful means, a corporation even with an unblemished reputation’.²⁵³

When we look more specifically at the *actus reus*, it seems that functional perpetration stipulates a lower threshold than indirect perpetration. Whilst indirect perpetration requires that the accused controlled the commission of crimes and acted in such way that the crimes would not have occurred without the accused’s contribution, functional perpetration allows for establishing criminal responsibility based on both active conduct, and the accused’s failure to prevent the crimes committed by persons under his control. In this respect, we should bear in mind that functional perpetration – unlike indirect perpetration – does not require that the accused had complete control over the commission of crimes, nor that the physical perpetrators acted as mere fungible tools. Control is considered to be a gradual and flexible

²⁵⁰ Van der Wilt 2009, p. 615.

²⁵¹ Gritter 2007, p. 20; Hornman 2016, p. 36; De Hullu 2015, p. 162; Sikkema 2010, p. 40.

²⁵² Similarly, Van der Wilt 2009, p. 617.

²⁵³ Van der Wilt 2009, p. 617.

concept, which does not hamper that the physical perpetrator acts as an autonomous agent, who himself determined if and how a crime would be committed.²⁵⁴ Yet, it does have to be established that the functional perpetrator had the ability to blow the whistle on the physical perpetrator.²⁵⁵

In relation to the *mens rea* requirements of functional perpetration, Dutch law requires that the functional perpetrator knowingly accepted the criminal conduct of the physical perpetrator. As previously discussed in section II., the Supreme Court in *Drijfmet* established that ‘acceptance’ includes a lack of care, or at least allows for inferring the accused’s acceptance from his lack of care. Thus, the Court at first sight seems to set a more objective standard than is accepted in relation to the ICC’s concepts of indirect perpetration,²⁵⁶ which requires actual awareness and acceptance of the crimes committed by others. Functional perpetration arguably puts less emphasis on the intentions of the accused and in this sense creates a broader basis for establishing criminal responsibility. Indeed, functional perpetration still requires that the accused fulfilled the subjective elements of the crime, yet since *dolus eventualis* is accepted, also here Dutch law provides for a lower threshold than ICC case law.

Resuming, we can conclude that functional perpetration seems to provide for a broader and more flexible concept for establishing criminal responsibility for international crimes than indirect perpetration (in the form of *Organizationsherrschaft*). Accordingly, functional perpetration can be a useful tool in international crimes cases that aptly captures the systemic and organized context in which these crimes are usually committed. Nevertheless, we concede that it may be difficult to apply functional perpetration to corporate officials. Case law on this point is lacking, but we expect that it will often be difficult to establish that corporate officials to some extent controlled the commission of crimes from a distance, and intended to commit international crimes, in particular when such crimes require a specific (discriminatory) purpose.

Actually directing

Actually directing resembles the international concept of indirect perpetration insofar as it specially concerns accountability of an organization’s leadership. Both actually directing and indirect perpetration apply to persons who control the commission of crimes through their specific position within an organization. Yet – unlike indirect perpetration – actually directing is not limited to specific types of organizations, but can be applied to all corporations that are recognized legal persons. It is not required that the organization is hierarchically organized or consists of a large number of individuals. In fact, actually directing can even be applied to entrepreneurs without staff (freelancers).²⁵⁷

The unique feature of actually directing – and this is also how it differs from indirect perpetration – is that the criminal liability of actual directors depends on the liability of the corporation in which they operate. Accused can only be held accountable as actual directors when the corporation as such acted as a perpetrator of or participant in a criminal offence (see section II. and VII.). In theory, corporate criminal liability can be established based on the acts and intentions of any associated person. However, in relation

²⁵⁴ Van Dijk 2008, p. 8, 10.

²⁵⁵ Gritter 2007, p. 20-21.

²⁵⁶ Admittedly, it is argued in literature that some form of awareness of the criminal conduct is still required. See De Hullu 2015, p. 164; Sikkema 2010, p. 44.

²⁵⁷ Hornman 2016, p. 64-65, 474.

to international crimes, Van der Wilt argues in favor of a stricter approach that focuses on the corporation's top directors and stipulates that corporate responsibility should be established based on the conduct of the senior leadership.²⁵⁸ Whether Dutch courts will follow Van der Wilt's view remains to be seen. Yet, we accept Van der Wilt's argument and consider it very unlikely that a corporation will be held liable for international crimes without involvement, or at least awareness, of the senior corporate management.

On an *actus reus* level, actually directing has a broad scope of application. It includes situations in which the illegal acts were an inevitable consequence of the general policy set out by the actual director, or in which the actual director knowingly failed to take reasonable measures to stop or prevent the (further) commission of crimes. This *actus reus* standard is significantly lower than the contribution requirement of indirect perpetration under international law. It is not required that the accused made an indispensable contribution in the sense that the crimes would not have been committed without the accused's involvement. Having said that – similar to indirect perpetration – actually directing does require that the accused held a position of authority, which enabled him to intervene and end the criminal conduct at any desired moment.

The *mens rea* requirements of actually directing are also lower than those of indirect perpetration. For actually directing, *dolus eventualis* suffices. The accused needs to have known and accepted the significant risk that the crime charged or similar illegal conduct was (about to be) committed. Knowledge of the specific crimes committed is thus not required (see section II.). By contrast, under international law a higher standard of *dolus indirectus* applies, which requires that the indirect perpetrator knew the commission of crimes was a virtually certain result of his conduct.

VI. Corporate complicity and collective/inchoate crimes

16. Accomplice liability

Corporate officials may be held responsible under all types of accomplice liability that were discussed in section II., i.e. co-perpetration, indirect perpetration, instigation, aiding, and actually directing. As became clear in section IV., there has been extensive debate about the question of whether the Dutch *mens rea* requirements of accessorial liability can also be applied in international crimes cases. We should add here that the drafting history of the ICA in general – thus not only in relation to *mens rea* elements – clarifies that judges need to follow the Rome Statute when Dutch law does not recognize certain liability principles stipulated in the Statute, or when Dutch law significantly deviates from the Statute.²⁵⁹ At the same time, it is recognized that it would be impractical and cause undesirable uncertainty when judges need to apply international liability theories and defences, which differ slightly from Dutch law.²⁶⁰ Thus, courts have 'a residual discretion to apply domestic criminal law, especially if the case law of the

²⁵⁸ Van der Wilt 2013a, p. 66-77.

²⁵⁹ *Kamerstukken II* 2001/02, 28337, 3, para. 2.

²⁶⁰ *Idem*.

international criminal courts fails to offer clear guidance'.²⁶¹ Following this thought, case law presents a combination of domestic and international standards of criminal liability.

In section III. and IV., we have already identified several challenges that Dutch courts may encounter when applying the Dutch *actus reus* and *mens rea* elements of accomplice liability to corporate officials in international crimes cases. We will not repeat these here. Instead, we will add a more general reflection on the derivative nature of accomplice liability, and explain how this complicates the establishment of criminal liability of corporate officials in international crimes cases. It is generally accepted that accomplice liability pertains to the relation between different parties who each play their own role and jointly strive towards committing crimes. This entails that accessories must be linked to specific crimes and that it must be clarified whether and how they contributed to the crime of others.²⁶² For example, in relation to aiding – which is usually the most appropriate mode of liability for corporate officials – it must be established that the accused assisted the acts of the principal perpetrator and that his conduct had a 'certain effect' on the commission of crimes. This can be difficult in international crimes cases against corporate officials who usually operate from a remote position and contribute to crimes in an indirect – and sometimes neutral – way. Hence, the possibilities for establishing liability of corporate officials depend on their proximity to the crimes: 'the closer the business conduct is linked to the criminal act of the principal perpetrators and the more concrete the business conduct is adapted to the latter, the higher the possibility of the business leader's liability'.²⁶³

The *Van Anraat* case constitutes a 'clear case' in which the accused's conduct could indeed be linked to specific war crimes, i.e. had a certain effect on these crimes. After extensive expert research – the District Court was able to establish that (i) Van Anraat had delivered TDG to Saddam Hussein, (ii) the TDG was used in the production of mustard gas; and (iii) the mustard gas was used in attacks against civilians. In this respect, it was relevant that Van Anraat was the sole supplier of TDG from 1985, which means that subsequent attacks with mustard gas could not have been carried out without the accused's assistance (*conditio sine qua non*). Moreover, it seems important that Van Anraat did not direct a multinational company with complex organization structures, but basically was an individual trader, which helped to trace the supply of TDG to Van Anraat. Yet, not all cases will present such clear evidence of a link between the aider's contribution and the crimes committed: 'even with a low causality standard, it may still be difficult to provide the effective proof that ties the international arms traders to specific international crimes'.²⁶⁴ Illustratively, in *Kouwenhoven*, the District Court considered that the linkage requirement of aiding was not met, partly because it could not establish that the weapons delivered by Kouwenhoven were actually used to commit war crimes.²⁶⁵

It seems that Dutch law can address the difficulties with establishing accomplice liability in international crimes cases against corporate officials in three ways. First, courts may tailor the elements of accomplice liability to the unique features and challenges of international crimes cases.²⁶⁶ In this respect, it is noteworthy that the District Court of The Hague has convicted an Afghan undersecretary for co-

²⁶¹ Van der Wilt 2008, p. 562.

²⁶² Cupido 2015, p. 152.

²⁶³ Vest 2010, p. 853. Also see, Kaleck & Saage-Maass, p. 721-722.

²⁶⁴ Van den Herik 2009, p. 224.

²⁶⁵ On appeal, the Court of Appeal found that it could not even be established that Kouwenhoven had delivered weapons to Taylor. See also, Farrell 2010, p. 895.

²⁶⁶ De Hullu 2015, p. 458.

perpetrating torture, considering that he had factual authority over the physical perpetrators, knowingly accepted the significant risk that torture would be committed, and could have distanced himself from these acts, yet failed to do so.²⁶⁷ Thus, rather than evaluating the deliberate and close cooperation between the accused and the physical perpetrators – which is the normal criterion for co-perpetration under Dutch law – the court used arguments that better fit the concept of superior responsibility.

Of course, it can be contended that by reasoning in this way, the court is mixing up different modes of liability and thus causes confusion about the requirements of each of them. Indeed, the Supreme Court has recently stressed that the practice of proving one mode of liability by using standards and requirements that are drawn from another mode of liability, causes confusion and should not be pursued. The Supreme Court in this respect particularly referred to cases in which co-perpetration was proven based on criteria for actually directing.²⁶⁸ Yet, this finding does not alter the fact that the requirements of accomplice liability are phrased in general terms, which leaves room for tailoring these requirements to the specific circumstances of individual cases. In this way, courts can respond to the challenges of prosecuting international crimes and can interpret traditional modes of liability in a slightly different way in order to account for the unique position of corporate officials.²⁶⁹ Whether and how they will do so is still uncertain and will need to be clarified in future case law.

Second, Dutch law as a general rule provides for corporate criminal responsibility. Pursuant to Article 51 DPC, corporations can be held liable for committing international crimes if (i) the criminal offence can reasonably be attributed to the company, and (ii) the company acted with the requisite *mens rea* to commit the offence (see section II.). Indeed, establishing corporate criminal responsibility is challenging and convicting a company for participating in international crimes sends out a different message than holding individual businessmen criminally liable. At the same time, we anticipate that in some cases corporate criminal responsibility may provide a useful alternative for accomplice liability of corporate officials. As Kaleck and Saage-Maass have pointed out, in international crimes cases it may be difficult ‘to narrow down the accusation to a specific action of a specific actor’, in particular when corporations are composed of complex structures and webs of relations and when they are located at great distance from the crime scene.²⁷⁰ Dutch corporate criminal responsibility tackles this problem. It does not require linking one individual to the crimes and establishing the intentions and knowledge of individual persons. Rather, it allows for a more abstract assessment of whether the (illegal) conduct took place *within the sphere* (scope) of the legal entity. This entails looking into objective facts, such as whether the criminal conduct was part of the normal business activities; whether the company had the power to decide whether the criminal offence was committed; and whether the company fulfilled the level of care that could reasonably be expected.

The fact that holding an abstract entity liable for criminal conduct is sometimes easier than establishing individual liability can be illustrated by recent case law on the responsibility of the Netherlands and the Dutchbat troops for the Srebrenica massacre. In 2011, a civil court granted the torts claim of a group of Srebrenica victims and established civil liability of the Dutch state for the death of three Muslim men. In particular, the court found that Dutchbat contributed to the evacuation of Bosnian Muslim men from

²⁶⁷ District Court The Hague, 14 October 2005, ECLI:NL:RBSGR:2005:AU4347.

²⁶⁸ Supreme Court, 2 December 2014, ECLI:NL:HR:2014:3474, para. 3.3.1.

²⁶⁹ Similarly, Buruma 2007.

²⁷⁰ Kaleck & Saage-Maass 2010, p. 716.

Srebrenica, whilst the leadership knew there was a real risk that the men would be executed by Serbian troops.²⁷¹ Interestingly, in a subsequent criminal complaint procedure against colonel Karremans – the leader of the Dutchbat troops in Srebrenica – the Arnhem Court of Appeal found insufficient evidence to establish that he had consciously accepted the significant risk (*dolus eventualis*) that the Muslim men would be killed.²⁷² The Court thereby stressed that the civil court’s findings concerning Dutchbat’s knowledge of crimes do not automatically entail that individual Dutchbat leaders also knew and accepted the commission of war crimes by Serbian troops. Of course, the different judgments in the civil and criminal court can be explained by the different standards of proof under civil and criminal law, but – as Spijkers rightly notes – it also relates to the distinction between institutional knowledge and personal knowledge: ‘there were enough factors for Dutchbat [as an abstract entity, *MC/MH/WH*] to realize what was going to happen to the Bosnian Muslims, but that does not mean individual members of Dutchbat were fully aware’.²⁷³ In light of this observation, it seems plausible that corporate responsibility can sometimes be a more effective tool to address business involvement in international crimes. We therefore endorse the plea of the European Coalition of Corporate Justice, which has advocated for better and more elaborate regulations of corporate liability in Europe.²⁷⁴

A third way in which Dutch courts may be able to circumvent the difficulties of establishing accomplice liability is by resorting to inchoate or collective crimes. These types of crimes often do not require that the conduct of corporate officials is linked to specific international crimes, but allow for establishing criminal responsibility based on looser connections between the accused and the crimes charged. This will be discussed further in the next sub-sections.

16. Participation in a criminal organization

Article 140 DPC criminalizes participation in a criminal organization (see annex II). The provision is based on the French concept of *association de malfaiteurs*. It provides for an autonomous type of criminal responsibility based on an accused’s contribution to an organization that seeks to engage in criminal conduct.²⁷⁵ As De Hullu explains, Article 140 DPC has long been a dormant provision that was hardly used in practice.²⁷⁶ However, participation in a criminal organization has quickly developed into a much-used concept that has been applied to a wide variety of cases, including cases of white collar crime. For example, in the *Klimop* case, participation in a criminal organization was used to hold the corporate management of a real estate agency responsible for their involvement in large-scale fraud and obfuscation.²⁷⁷ Furthermore, in the *TCR* case, a company director was *inter alia* convicted for participating in a criminal organization directed at illegally discharging waste and toxic substances.²⁷⁸

Article 140 DPC sets four distinct requirements. First, there needs to be an organization. The term ‘organization’ refers to an enduring – non-incidental – and/or structured collaboration between the

²⁷¹ Court of Appeal The Hague, 5 July 2011, ECLI:NL:GHSGR:2011:BR0132, para. 6.7.

²⁷² Court of Appeal Arnhem-Leeuwarden, 29 April 2015, ECLI:NL:GHARL:2015:2968, para. 12.

²⁷³ Spijkers 2016, p. 24.

²⁷⁴ Kaleck & Saage-Maass 2010, p. 723.

²⁷⁵ The accused who contributes to a criminal organization can also be a legal person.

²⁷⁶ De Hullu 2015, p. 439.

²⁷⁷ Court of Appeal Amsterdam, 27 February 2015, ECLI:NL:GHAMS:2015:658.

²⁷⁸ <http://www.volkskrant.nl/archief/hoofdverdachte-tcr-veroordeeld-tot-zes-jaar-cel-a383512/>, last visited 5 January 2017.

accused and at least one other person.²⁷⁹ A corporation will usually fall within the scope of this definition. It is not required that the accused knew the other members of the criminal organization, or that he cooperated with them.²⁸⁰ Moreover, it is not required that the organization continuously consists of the same persons – membership of the organization may vary.²⁸¹ Yet, occasional types of cooperation in which persons work together just shortly – such as in cases of mob violence – do not suffice.²⁸² In this sense, participation in a criminal organization differs from conspiracy and JCE, which apply more broadly to incidental acts of violence between two or more persons. Interestingly, Ten Voorde in this respect notes that structure and endurance are communicating vessels: a loosely organized group of people who commits the same type of crimes over a long period of time can qualify as an organization, just like a highly structured organization that existed only shortly and was directed at the commission of a wide variety crimes.²⁸³ In case law, it has been clarified that relevant facts from which the existence of an organization can be inferred, are, for example, the existence of common rules, deliberations between the members, the division of tasks, common planning, and the existence of a certain hierarchy.²⁸⁴ Though the existence of common rules is a relevant *factor*, the Supreme Court has stressed that it is not a *requirement* for establishing that a criminal organization existed.²⁸⁵ In some cases, the complexity of the criminal offence has been used as evidence to prove that crimes were committed by an organization, rather than by individual perpetrators.²⁸⁶ However, according to Van der Wilt, the organized character of crimes is itself insufficient for establishing the involvement of a criminal organization.²⁸⁷

Second, it is required that the organization had a *criminal* purpose. Thus, the organization needs to act with the aim of committing or participating in crimes.²⁸⁸ It is not required that these crimes are in fact realized.²⁸⁹ Moreover, case law clarifies that the commission of crimes does not need to be the organization's principle aim, that the organization does not have to be set-up to commit crime, and that it is not necessary that the organization's *raison d'être* was to engage in criminal conduct.²⁹⁰ Instead, it is well possible that the organization sought to reach a lawful goal by criminal means.²⁹¹ Recall, for example, the previously mentioned *Klimop* and *TCR* case in which regular corporations were qualified as criminal organizations, because they conducted business in criminal ways. We should bear in mind that it is the organization – rather than the individual participants – that needs have a criminal purpose. This criminal purpose may change over time.²⁹² To establish the organization's criminal purpose, account can be taken of the enduring and structured nature of the cooperation, and the planned and organized character of activities directed at the commission of crimes.²⁹³ It is noteworthy that Article 140a DPC

²⁷⁹ E.g. Supreme Court, 16 October 1990, ECLI:NL:HR:1990:AD1248, *NJ* 1991, 442, para. 13.1; Supreme Court, 10 July 2001, ECLI:NL:HR:2001:AD8636, *NJ* 2001, 687. On this issue, also see De Vries-Leemans 1995, p. 31-36; De Hullu 2015, p. 440.

²⁸⁰ Van der Wilt 2007, para. 3.

²⁸¹ Ten Voorde 2012, online resource.

²⁸² Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082, para. 10.6.1.1.3.

²⁸³ *Idem*.

²⁸⁴ Court of Appeal Amsterdam, 17 December 2010, ECLI:NL:GHAMS:2010:BO7690, para. 3.1.3.1.

²⁸⁵ Supreme Court, 2 February 2010, ECLI:NL:HR:2010:BK5193.

²⁸⁶ Supreme Court, 15 May 2007, ECLI:NL:HR:2007:BA0502.

²⁸⁷ Van der Wilt 2007, para. 3.

²⁸⁸ Supreme Court, 16 October 1990, ECLI:NL:HR:1990:AD1248, *NJ* 1991, 442, para. 12.1.

²⁸⁹ Ten Voorde 2012, online resource.

²⁹⁰ De Hullu 2015, p. 440; Kristen 2010, p. 153. This has been criticized by De Vries Leemans 1995, p. 296-303.

²⁹¹ Van der Wilt 2007, para. 3.

²⁹² Ten Voorde 2012, online resource.

²⁹³ Supreme Court, 15 May 2007, *NJ* 2008, 559; Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082, para. 10.6.1.1.2.

provides for a separate criminalization of participation in an organization that has the purpose to commit terrorist crimes. The maximum sentence for participation in a terrorist organization is higher than for participation in a criminal organization, namely 15 years instead of 6.

Third, the accused must have *participated* in the criminal organization. According to Supreme Court case law, this requirement entails two elements. It must be established that the accused ‘*belonged* to the organization, and *contributed* to or *supported* acts that are beneficial to or that directly relate to the criminal purpose’ of the organization.²⁹⁴ Thus, people who contribute to the organization without being a member do not fall within the scope of Article 140 DPC.²⁹⁵ At the same time, mere membership of a criminal organization does not suffice. It must be established that the accused made a contribution to the organization that was related to the organization’s criminal purpose. The contribution requirement is broad in scope and the legislator has clarified that in principle any type of contribution – possibly even omissions²⁹⁶ – can suffice.²⁹⁷ In particular, we should beware that the accused does not have to participate in specific crimes, nor is it required that the accused’s contribution was criminal in itself.²⁹⁸ The accused only needs to intentionally further the objectives of the criminal organization, not the commission of crimes. The accused’s contribution could accordingly consist of lawful acts that are relatively far removed from the actual commission of crimes. The Supreme Court has even accepted that developing or upholding a corporate policy in which crimes can be committed, can be qualified as contributing to a criminal organization.²⁹⁹ At the same time, the Supreme Court has stressed that there must be a sufficiently close connection between the acts of the accused and the criminal aspects of the organization.³⁰⁰ On this account, the Court has held that the accused’s contribution must be aimed at or directly related to the *criminal* purpose of the organization. Following this thought, Keijzer has argued that the requirement of a ‘contribution to’ or ‘support of’ the criminal organization entails that the accused advanced or furthered the commission of crimes, in the sense that he increased the risk that crimes would be committed.³⁰¹ This notion of risk advancement excludes innocent contributions – such as allocating a meeting room – from the scope of Article 140 DPC, since such contributions do not increase the risk of criminal conduct.³⁰² Indeed, case law has clarified that merely attending meetings and incidentally participating in activities, is in principle not sufficient for establishing that the accused is committed to the organization.³⁰³ This means that Article 140 DPC does not apply to corporate officials who were part of a criminal organization, but whose contribution cannot be linked to the criminal – but only to the lawful – activities of this organization.

²⁹⁴ Supreme Court, 29 January 1991, DD 91.168/169; Supreme Court, 18 November 1997, ECLI:NL:HR:1997:ZD0858. In principle, the contribution consists of active conduct, rather than the passive failure to intervene. Ten Voorde 2012, online resource.

²⁹⁵ Though it has been accepted that one can participate in – rather than perpetrate – the crime of Article 140 DPC from outside the organization. Supreme Court, 3 July 2012, ECLI:NL:HR:2012:5132. Ten Voorde 2012, online resource.

²⁹⁶ Kristen 2010, p. 155.

²⁹⁷ *Kamerstukken II*, 2002/03, 28463, 10, p. 10.

²⁹⁸ Supreme Court, 8 October 2002, *NJ* 2003, 64. In literature, there have been proposals for requiring a closer connection between the acts of the accused and the organization’s criminal purpose. De Vries Leemans 1995, p. 49-58, 176-210, 276-292.

²⁹⁹ Supreme Court, 10 February 2015, ECLI:NL:HR:2015:264.

³⁰⁰ Supreme Court, 29 January 1991, DD 91.168/169; Supreme Court, 18 November 1997, ECLI:NL:HR:1997:ZD0858.

³⁰¹ Supreme Court, 3 July 2012, ECLI:NL:HR:2012:BW5178, *NJ* 2012, 658, m.nt. Keijzer, para. 4.

³⁰² *Idem*.

³⁰³ Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082, para. 10.6.2. The Court refers to *Kamerstukken II*, 1991/92, 22 268, 5, p. 15.

In relation to criminal liability of corporate officials, it is specifically noteworthy that Article 140(4) clarifies that participation includes financing a criminal organization, or recruiting new members. The relevance of financial participation became clear in a recent case in which several accused were convicted for participating in the terrorist organization of the Tamil Tigers because of their contribution to fund-raising activities and their involvement in the financial administration of the Dutch branch of this terrorist group.³⁰⁴ Interestingly, the accused in this case were operating from the Netherlands, which shows that participation may encompass activities that are geographically remote from the scene of the actual crimes. Finally, we should note that participation in a criminal organization as founder, leader, or director constitutes an aggravating circumstance for which the maximum sentence is increased with 1/3 (Article 140(3) DPC).

Fourth, Article 140 DPC stipulates that the accused acted intentionally. The accused's intent entails both his participation in the criminal organization and the organization's criminal purpose. Thus, it is not required that the accused intended to commit specific *crimes*, or even that he knew that the organization sought to commit specific crimes. Instead, it only needs to be established that the perpetrator had positive knowledge of the organization's *criminal purpose*. Since positive knowledge is required, *dolus eventualis* does not suffice.³⁰⁵ In case of participation in a terrorist organization, the accused should additionally knowingly accept the significant risk – here *dolus eventualis* is sufficient – that the organization may commit terrorist crimes.³⁰⁶ Establishing the accused's criminal intent requires a case-by-case assessment that cannot be captured in general rules. Yet, we can assume that the commission of crimes by the accused is sufficient for proving that he was aware of the criminal purpose of the organization in which he participated.

The observations above suggest that Article 140 DPC creates a broad basis of accountability and can be applied to corporate officials who have pursued a criminal policy within their organization. Indeed, Article 140 DPC has provided a useful means for effectively fighting organized crime that has been successfully used to charge and convict corporate officials for organized crimes. Also in international crimes case, Article 140 DPC may prove to be a useful tool for holding businessmen accountable. The provision allows for intervening in the early stages of criminal conduct, because it is not required that a crime was actually committed, or even prepared or attempted. Moreover, corporate officials can be held responsible under Article 140 DPC, even if they did not participate in specific crimes.³⁰⁷ Criminal responsibility is linked to the accused's participation in a criminal *organization*, not to the commission of *crimes*. According to Kristen, (multinational) corporations can be qualified as organizations.³⁰⁸ Kristen also argues that corporations who accept the commission of crimes as a way to reduce costs act with a *criminal purpose*.³⁰⁹ Yet, when the commission of crimes is a mere incident, or constitutes an insignificant aspect of the corporation's policies, the criminal purpose of the corporation cannot be established. To determine whether the commission of crimes indeed constitutes a sufficiently prominent

³⁰⁴ Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082.

³⁰⁵ Supreme Court, 18 November 1997, *NJ* 1998, 225, para. 5.3; Supreme Court, 8 October 2002, *NJ* 2003, 64; Supreme Court, 5 September 2006, *NJ* 2007, 336.

³⁰⁶ Court of Appeal The Hague, 30 April 2015, ECLI:NL:GHDHA:2015:1082, para. 10.6.1.1.2.

³⁰⁷ Ten Voorde 2012, online resource.

³⁰⁸ Kristen 2010, p. 152. Also see, Supreme Court, 30 September 1997, ECLI:NL:HR:1997:ZD7001.

³⁰⁹ Kristen 2010, p. 151.

aspect of the corporation, account can be taken of the importance of crimes for the corporation, the frequency and duration of crimes, and whether the crimes ‘fit’ the corporation’s activities.³¹⁰

Notwithstanding the broad scope of Article 140 DPC, we still anticipate several challenges in applying this provision to corporate officials in international crimes cases. In particular, it may be challenging to prove that corporations that are involved in lawful business conduct qualify as *criminal* organizations that seek to commit international crimes. Surely, in relation to so-called ‘risky businesses’ – e.g. the weapons industry – proving the criminal purpose of an organization may be possible. Yet, where it concerns branches of business that are only remotely linked to criminal conduct – e.g. the food industry – establishing a criminal purpose may be more difficult. In such cases, the commission of international crimes does usually not constitute a significant aspect of the corporation’s policy. A possible exception are cases concerning large and complex organizations, where several sub-branches function relatively autonomous, and where one sub-branch may be involved in the commission of international crimes, whilst another is in no way related to criminal conduct. Of course, there is also the possibility that corporate officials contribute to the criminal purpose of another organization, for example because they supported this organization financially. Yet, in such cases it must still be established that the officials were a member of this organization and had positive knowledge of the organization’s criminal purpose, which is not always evident. In this light, we are keen to see how the recent criminal complaint against Rabobank for participation in Mexican drug cartels that are allegedly responsible for committing crimes against humanity (see section II.), will be assessed.

16. Conspiracy

Under Dutch law, conspiracy does not constitute a general mode of liability, but only applies to specific crimes that threaten state security. In modern practice, conspiracy is particularly used in relation to terrorism. With regard to the international crimes that are the subject of this study, we should note that there is no prohibition on conspiracy to commit war crimes, crimes against humanity, aggression, or torture. Only conspiracy to commit genocide is proscribed as a separate crime in Article 3(2) ICA (see annex I). This was considered necessary in light of Dutch obligations under Article III of the Genocide Convention. Conspiracy to commit genocide can be punished with a maximum prison sentence of 20 years,³¹¹ which is significantly higher than the normal punishment of 10 years’ imprisonment for conspiracy to commit other types of crimes.³¹² The legislator considered the higher maximum sentence in relation to genocide justified, because of the particular seriousness of genocide and the obligation of states to effectively prevent genocide.

Article 1(3) ICA explains that the term ‘conspiracy’ in Article 3(2) DICA has the same meaning as in Article 80 DPC (see annex II), which provides a general definition of conspiracy. Article 80 DPC basically stipulates two requirements: a plurality of persons and a meeting of minds.³¹³ Together, these requirements ascertain that two or more persons agree that at least one of them will commit a crime.

³¹⁰ Kristen 2010, p. 153.

³¹¹ The provision specifies that the punishment for conspiracy is the same as the punishment for attempt. Pursuant to Article 45 DPC, the maximum punishment for attempting crimes for which a life prison sentence can be imposed, is 20 years.

³¹² Only conspiracy to hijack an aircraft can be punished with 15 years imprisonment. Article 385a DPC.

³¹³ Van der Wilt 2007.

These persons do not have to be organized in a specific way. Conspiracy can be applied to incidental types of cooperation and loose networks.³¹⁴ Moreover, the agreement between the conspirators does not have to be concluded or drawn up in a specific way, yet it should be serious and concrete.³¹⁵ In this way, Article 80 DPC provides for a broad inchoate crime that even covers the very early stages of planning. Other than attempt and preparation, conspiracy does not require that the accused commenced the execution of the criminal offence, or that he obtained certain goods or information that were meant to commit a crime. The mere agreement concludes the conspiracy and provides a basis for liability. Whilst the commission of certain preparatory acts is of course relevant for proving the existence of an agreement, Dutch law does not explicitly require an overt act.³¹⁶

Despite being broad in scope, it is doubtful whether conspiracy constitutes a useful tool for holding corporate officials liable for genocide. In particular, it will generally be difficult to establish that corporate officials agreed with others to commit genocide. Their actions are mostly driven by commercial interests and needs. They may further or enable the commission of genocide, but it is unlikely that corporate officials will engage in agreements to commit this crime.

17. Joint Criminal Enterprise liability

Dutch law does not recognize the concept of Joint Criminal Enterprise (JCE) as such. Yet, there are in particular two concepts, which – each in their own way – display similarities with the JCE doctrine: (i) co-perpetration, and (ii) participation in a criminal organization.

Co-perpetration

Like JCE, co-perpetration applies to situations in which a group of persons – who share a criminal intent – works together to commit crimes.³¹⁷ It is not required that these persons are organized in a formal structure, nor does their cooperation have to be previously arranged or formulated. Co-perpetration and JCE both encompass flexible plans that develop spontaneously as events unfold. Furthermore, neither of these concepts requires that the crimes are specified in detail. Criminal responsibility can be established, even though the accused did not foresee the specific way in which the crimes would be committed. Since Dutch law accepts *dolus eventualis*, criminal responsibility for co-perpetration encompasses foreseeable crimes that the accused knowingly accepted. Thus – at least to some extent – co-perpetration also encompasses JCE III.

Despite these basic analogies, we should beware of several important differences between JCE and co-perpetration. First – unlike JCE – the Dutch concept of co-perpetration does not require the existence of a common plan. Whilst the existence of a plan can be relevant for establishing the close and deliberate contribution between joint perpetrators, it is not an essential feature of co-perpetration. Conversely, the criminal plan constitutes a core element of JCE. Interestingly, international criminal courts have

³¹⁴ *Kamerstukken I*, 2003/04, 28 463, C (MvA), p. 4

³¹⁵ Lintz 2005, p. 1147.

³¹⁶ Lintz 2005, p. 1139.

³¹⁷ Although the existence of a common plan between the co-perpetrators is not explicitly required under the Dutch concept of co-perpetration. Rozemond 2014, p. 843-844.

established JCE liability on the basis of broad plans – sometimes encompassing the ethnic cleansing of entire regions – and have applied JCE to heterogeneous groups with participants from different ranks and files.³¹⁸ By contrast, Dutch courts normally use co-perpetration when a small group of persons worked together to reach a specific criminal goal. Co-perpetrators usually know each other and are not hierarchically structured – they stand in a horizontal relation and exercise an equal level of authority.

Second, in *Brdanin* the ICTY has decided that the physical perpetrators do not have to share the common plan and do not have to be part of the JCE.³¹⁹ Thus, it is possible that senior officials are held responsible for the crimes committed by their subordinates, even though these subordinates did not share the senior officials' common plan. Conversely, Dutch law requires that the physical perpetrator was part of the collaboration between the co-perpetrators,³²⁰ which means that the physical perpetrator needs to be a co-perpetrator himself. By combining co-perpetration with functional perpetration, indirect perpetration, or instigation, Dutch courts can construct a broad type of liability that captures horizontal and vertical types of participation, just like JCE. However, this is almost never done in practice.

Third, on an *actus reus* level, Dutch law requires an equal division of tasks between co-perpetrators. The Supreme Court has recently emphasized that each co-perpetrator should make an *essential* contribution to the crimes, which means that assisting crimes can in principle not constitute co-perpetration.³²¹ The essential contribution standard in Dutch law on co-perpetration appears to set a higher threshold than JCE, which requires a mere *significant* contribution. The significant contribution standard only entails that the accused made the joint enterprise more efficient or effective,³²² and thus allows for establishing criminal responsibility based on relatively minor and remote conduct.³²³

Fourth, both JCE and co-perpetration allow for establishing criminal responsibility based on *dolus eventualis*. Yet, whilst JCE only stipulates a *dolus eventualis* standard in relation to extended crimes that follow from a common criminal plan, under Dutch law *dolus eventualis* can be applied even if the co-perpetrators did not commonly intent to commit another crime. It suffices that the accused knowingly accepted the significant risk that the crime charged was committed. Indeed, the Dutch concept of co-perpetration adds a requirement of deliberate cooperation. This requirement shares similarities with the ICTY's requirement that the JCE participants share the intent to commit a crime together, though it may put a different emphasis, i.e. sharing the intent to commit crimes versus sharing the intent to cooperate. In any case, these requirements do not play a major role in case law, and will therefore not bring about a significant distinction between co-perpetration and JCE.

Participation in a criminal organization

³¹⁸ ICTY, *Prosecutor v. Kvočka et al.*, Trial Chamber, judgment, IT-98-30/1-T, 2 November 2001, para. 307; ICTR, *Prosecutor v. Rwamakuba*, Trial Chamber, judgment, ICTR-98-44C, 20 September 2006, para. 25. This was explicitly accepted by the ICTY Appeals Chamber in *Brdanin*. ICTY, *Prosecutor v. Brdanin*, Appeals Chamber, judgment, IT-99-36-A, 3 April 2007, paras. 420-425

³¹⁹ ICTY, *Prosecutor v. Brdanin*, Appeals Chamber, judgment, IT-99-36-A, 3 April 2007, paras. 393-419.

³²⁰ Although it is not required that all co-perpetrators were physically involved in the commission of crimes.

³²¹ See section II.

³²² ICTY, *Prosecutor v. Kvočka et al.*, Trial Chamber, judgment, IT-98-30/1-T, 2 November 2001, para. 309.

³²³ Such as setting up political structures, offering false information to the media, providing weapons or other military equipment, creating 'the political climate in which violent crimes could prosper', or 'ripening the minds' of citizens for a campaign of ethnic cleansing. Yanev 2016, p. 165; Van der Wilt 2009, p. 175.

There are important analogies between JCE and participation in a criminal organization. Both concepts are based on the allegiance between a group of persons, who seek to commit crimes together. JCE and participation in a criminal organization establish an indirect link between the accused and the commission of crimes. In particular, it is not necessary that the accused directly participated in the commission of crimes. Article 140(3) DPC, for example, clarifies that participation in a criminal organization includes supporting the organization financially, raising funds, recruiting members, or providing other means to the organization.

Notwithstanding these analogies, there are also significant differences between JCE and participation in a criminal organization. First and foremost, whilst the former is a mode of liability, the latter is a separate crime. Thus, under Article 140 DPC, accused are not convicted for the crimes committed by their subordinates, but for the distinct crime of participation of a criminal organization.

Second, the existence of a criminal *organization* is a core feature of Article 140 DPC. The organization needs to constitute an enduring – non-incidental – and/or structured collaboration (see sub-section 15). On this account, Article 140 DPC primarily plays a role in cases of complex, organized criminality. By contrast, JCE liability applies to all groups of persons acting pursuant to a common plan. The common plan can be developed in an *ad hoc* manner and may be adjusted to changing circumstances. Thus, JCE applies more broadly to all types of mob violence.³²⁴ Moreover, the fact that JCE relates to a common plan between individual persons, whilst Article 140 DPC emphasizes the role of the organization as an abstract entity, may have the effect that in the former case more attention is paid to the cooperation between individual participants.

Third, JCE and participation in a criminal organization display distinct *actus reus* requirements. Whilst Article 140 DPC requires that the accused advanced the criminal *organization* by increasing the risk that crimes are committed, JCE members need to have made a significant contribution to a *common plan*. Though important, this difference should not be exaggerated. On the one hand, the ICTY has accepted that the significant contribution requirement is applied in a broad way so that JCE liability can be based on loose links between the accused and the crimes charged. On the other hand, in relation to participation in a criminal organization, the Dutch Supreme Court has stressed that the accused's contribution must be aimed at or directly related to the *criminal* purpose of the organization. Whilst it is accepted that the accused does not have to participate directly in the commission of crimes, the Supreme Court thus ascertains there is a sufficiently close connection between the acts of the accused and the criminal aspects of the organization.³²⁵

Fourth, on a *mens rea* level, Article 140 DPC only requires that the accused had *knowledge* of the organization's criminal purpose. By contrast, JCE requires that the accused shared with other JCE members the *intent* to further the common purpose, in the sense that he wished that this purpose would be implemented. Moreover, the accused must have intended to commit the crimes within the scope of the common purpose, and must have acted with at least *dolus eventualis* in relation to crimes outside of the common purpose. This standard in principle warrants a closer and more direct relation between the accused and the commission of crimes than Article 140 DPC.

³²⁴ We recognize that Article 140 DPC has also been applied more broadly – for instance in situations of football violence or squatters – but it seems to us that this is not the prototype of participation in a criminal organization.

³²⁵ Supreme Court, 29 January 1991, DD 91.168/169; Supreme Court, 18 November 1997, ECLI:NL:HR:1997:ZD0858.

Lacunae in Dutch law?

The observations above show that the Dutch concepts of co-perpetration and participation in a criminal organization display important analogies with the JCE doctrine. At the same time, we should recognize that these concepts do not cover the full scope of JCE. There may still be cases in which JCE liability could have added value in prosecuting corporate officials for international crimes. In particular, it seems that the essential contribution requirement for co-perpetration under Dutch law will be difficult to establish in relation to corporate officials, who are normally not closely and directly involved in the commission of crimes. To a certain extent, participation in a criminal organization (and aiding and abetting) can be applied as a backstop in cases where the accused participated in criminal conduct in a more remote and non-essential way. Yet, this concept has its own limitations (e.g. establishing the criminal purpose of the organization, and the accused's knowledge thereof) and can arguably not aptly express the responsibility of leadership figures.³²⁶ In this respect, we should beware that the maximum sentence for the separate crime of participation in a criminal organization is only six years. Indeed, the maximum sentence for founders, leaders, and directors of the organization is raised to 8 years' imprisonment, but even then there is still a large gap with the possible life sentences for committing or contributing to international crimes.

18. Superior responsibility

The concept of superior responsibility has been recognized in Dutch law since 1952. The concept was first regulated in Article 9 War Crimes Act (*Wet Oorlogsstrafrecht*), which stipulated that 'persons who intentionally allow their subordinates to commit war crimes' can receive the same punishment as the principal perpetrator. With the implementation of the Rome Statute in the Dutch legal order, Article 9 War Crimes Act was replaced with Article 9 ICA, which provides for a more elaborate and precise concept of superior responsibility. The provision reads as follows:

Equally punishable for international crimes are superiors who: (a) intentionally permit their subordinates to commit an international crime; and (b) intentionally fail to take necessary and reasonable measures against subordinates who have committed or who are about to commit international crimes.

Punishable with a maximum sentence of two third, are superiors who negligently fail to take necessary and reasonable measures against subordinates of whom they could reasonably expect to have committed or were about to commit international crimes.

This provision basically includes three requirements, pertaining to the accused's (i) *mens rea*, (ii) status as superior, and (iii) failure to prevent or punish crimes. Unlike Article 28 Rome Statute, the Dutch concept of superior responsibility does not require that crimes were committed *as a result* of the superior's failure to exercise control properly.

On a *mens rea* level, Article 9 ICA distinguishes between intentional (sub-section 1) and negligent (sub-section 2) superior responsibility. Intentional superior responsibility entails *dolus eventualis*, which means that the accused must have knowingly accepted the significant risk that his subordinates have committed

³²⁶ Keulen 2007, p. 231.

or will commit international crimes. This standard is at least met when the accused actively called upon others to commit violent acts, even if he did not know of each crime that was subsequently committed. The standard of negligence pertains to *culpa*, which means that a superior should at least have reasonably suspected that his subordinates had committed or were about to commit crimes. A superior acts negligently when he had access to information about the criminal conduct of his subordinates, yet failed to gather such information or chose to ignore it.³²⁷ Thus, it is not required that the superior had positive knowledge of the commission of crimes by his subordinates. Instead, Dutch law puts an active duty on the superior to seek information about possible criminal activities. In this sense, Dutch law stipulates a lower *mens rea* requirement than the ‘knew of had reason to know’ standard adopted in international case law, and shows resemblance with the ‘should have known’ standard for military officials under the ICC’s Rome Statute. Considering that negligence entails a low *mens rea* standard, negligent superior responsibility yields a lower level of blameworthiness, and therefore comes with a 1/3 sentence reduction. Interestingly, unlike Article 28 of the Rome Statute, Dutch law applies the standards of intent and negligence to both military and civilian superiors.

In relation to the second requirement of the accused’s status as superior, Article 1(1)(b) ICA distinguishes between (i) military commanders and persons who effectively act as commander, such as the Minister of Defence, and (ii) civilian leaders, including government officials, directors of corporations, and other businessmen. In determining who qualifies as superior, the accused’s official position of authority is not determinative. All persons, who exercise *de facto* power over their subordinates and who are able to effectively control the acts of others by giving orders or instructions can be qualified as superior.³²⁸ Drawing from ICTY case law, the Dutch legislator has emphasized that having mere influence over the acts of subordinates is insufficient.³²⁹ In a recent torture case, the question arose whether the involvement of advisers retracted from the accused’s effective control. The Court of Appeal in The Hague answered this question negatively, arguing that – in the circumstances of the case at hand – the participation of advisers did not change the hierarchical structure of the organization and did not have the effect that the accused could no longer exercise authority over his subordinates.³³⁰

Finally, superiors are required to take necessary and reasonable measures. Though the drafting history does not clarify what this requirement entails exactly, the term ‘reasonable’ at least suggests that the measures a superior is required to take, depend on his particular responsibilities and *de facto* abilities. Superiors cannot be expected to do the impossible, but may only be required to take those measures that are within their power and competence, and that are practically feasible. The drafting history suggests that superiors should at first try to prevent the commission of crimes.³³¹ Yet, when such measures have no effect, or have not been taken, adequate repressive measures after the commission of crimes are required.

The observations above demonstrate that Dutch law provides for a broad concept of superior responsibility. The concept shows analogies with actually directing, yet – other than actually directing – superior responsibility does not depend on the establishment of corporate criminal liability. Whilst superior responsibility is based on international law, at several points Dutch law sets lower standards than the ICC’s Rome Statute – e.g. no causality requirement, negligence standard for non-military superiors.

³²⁷ *Kamerstukken II* 2001/02, 28337, 3, para. 7, Article 9.

³²⁸ *Idem*.

³²⁹ *Idem*.

³³⁰ Court of Appeal The Hague, 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143, para. 10.5.

³³¹ *Kamerstukken II* 2001/02, 28337, 3, para. 4b.

Moreover, the drafting history clarifies that the requirements of superior responsibility can be assessed in slightly different ways depending on whether they are applied to military commanders, government officials, or business leaders.³³² Thus, superior responsibility may be attuned to the unique position of corporate officials. For example, corporate officials may not be able to take disciplinary measures and punish the perpetrators of crimes themselves, but can be required to notify the competent authorities for investigation and prosecution. By applying superior responsibility in such a flexible way, Article 9 ICA potentially provides an effective basis for holding senior corporate officials accountable for their failure to prevent the crimes committed by their subordinates.

Having said that, we expect that the requirement that corporate officials had effective control over the commission of crimes by their subordinates will often be difficult to establish in practice. This is specifically so in cases against owners of large business enterprises and top-ranking business leaders, since ‘the higher the superior-subordinate relationship extends and the further it transgresses organizational lines, the more actual authority and effective responsibility are likely to diminish’.³³³ In this respect, we should also be mindful that modern enterprises often consist of multiple control centres that are not always linked together in a strict hierarchy, so that power and responsibilities are dispersed.

Indeed, Dutch practice suggests that applying superior responsibility to corporate officials brings a number of difficulties. Whilst superior responsibility has been used in several Dutch international crimes cases concerning torture, genocide, and war crimes, this was often unsuccessful. For example, in *Kouwenhoven*, the District Court and Court of Appeal both rejected to establish superior responsibility. The courts’ reasoning is not very precise, but it seems they considered that Kouwenhoven did not have effective control over the physical perpetrators of war crimes, because he did not exercise any management authority, and because it could not be established that Kouwenhoven approved the deployment of his personnel for criminal purposes.³³⁴ The Court also noted that many of the perpetrators were former militia whose participation in the armed conflict could be explained by the fact that they took up their old position, rather than by the fact that they were deployed by the accused.³³⁵

VII. Corporate complicity and ‘white collar crime’ doctrine

19. Delegation and responsibility

Thus far, serious questions with regard to delegation in the Netherlands have only risen with regard actually directing and functional perpetration, as these modes of liability most clearly concern hierarchical accountability. The paradigm case of co-perpetration is still the joint execution of the offence. Yet, it is possible that each co-perpetrator fulfils certain elements of the crime, which together constitute the offence. In this light, delegation for co-perpetration is possible and does not impede liability, as long as

³³² *Kamerstukken II* 2001/02, 28337, 3, para. 7, Article 9.

³³³ Stoitchkova 2010, p. 163.

³³⁴ Court of Appeal The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068, para. 9.21.

³³⁵ *Idem*.

the ‘close and deliberate cooperation’ test is met.³³⁶ We should recall here that the Supreme Court closely monitors the findings of lower courts on the accused’s ‘close and deliberate cooperation’. It recently emphasised that the mere fact that the accused fulfilled the criteria for functional perpetration by having power of decision over the criminal events and accepting these offences, does not automatically imply that the accused closely and deliberately cooperated with others.³³⁷ All modes of liability are thus clearly distinguished.

Delegation is not without limitations, nor without problems. First of all, it is noteworthy that the subordinate to whom certain tasks and responsibilities are delegated will be accountable for all criminal activity that falls within his scope of responsibilities. Subordination to others does not exclude liability, provided that the required measures fall within the subordinate’s authority.³³⁸ Thus, the subordinate cannot hide behind his superiors. Likewise, the delegation of certain tasks by a superior does – at least in theory – not alter the fact that the superior still has *de jure* authority and *de facto* power to intervene. The primary question is whether the superior is bound to intervene or may rely on his subordinate. This depends on the specific circumstances of the case. In general, it seems that in case a subordinate has been specifically entrusted to act, such actions will no longer be expected of the superior. Only if it becomes clear – either along the way or from the outset – that the subordinate is not able or willing to respond adequately, the superior must step in³³⁹ – otherwise, the primary responsibility lies with the subordinate. An exemption is made when the subordinate is personally involved in criminal conduct. In that case, delegation to subordinates or a division of tasks has no meaning and the superior will be bound to intervene personally from the start.³⁴⁰

Both delegation and division of tasks are subject to a reasonableness test, which entails a normative assessment.³⁴¹ Subordinates are only expected to do what is reasonable and delegation and division of tasks are not allowed when this leads to unreasonable outcomes. As such, it is likely that delegation and division of task will be rejected if these concern responsibilities relating to the corporation’s core activities or activities that could endanger the company’s existence.³⁴² Moreover – even if delegation and a division of task are themselves accepted – courts may still find that by delegating or dividing the tasks the accused knowingly accepted the significant risk that certain illegal conduct could occur (*dolus eventualis*), thus establishing a sufficient basis for criminal liability.³⁴³

While delegation as such will not discharge the superior, it can create a – potentially impregnable – hurdle to establish liability. After all, all forms of complicity in crimes require that the accused is, at least to a certain degree, aware of the criminal conduct. In particular in relation to actually directing, it has been confirmed several times that one can only direct criminal acts of which one is aware.³⁴⁴ Considering that

³³⁶ The Containertheft-case mentioned in section II forms a prime example. Supreme Court, 17 November 1981, ECLI:NL:HR:1981:AC7387, *NJ* 1983, 84.

³³⁷ Supreme Court, 1 July 2014, ECLI:NL:HR:2014:1593, *NJ* 2014, 513.

³³⁸ See e.g. Supreme Court, 16 June 1981, ECLI:NL:HR:1981:AC7243, *NJ* 1981, 586; De Hullu 2015, p. 504; Hornman 2016, p. 62-64 and 209; Sikkema 2010, p. 68; Wolswijk 2007, p. 84-85 and 90-91.

³³⁹ District Court Rotterdam, 18 April 1986, ECLI:NL:RBROT:1986:AC9305, *NJ* 1986, 666; Court of Appeal The Hague, 2 December 1987, ECLI:NL:GHSGR:1987:AB8201, *NJ* 1988, 433.

³⁴⁰ Supreme Court, 16 June 1981, ECLI:NL:HR:1981:AC7243, *NJ* 1981, 586; Hornman 2016, p. 65-68.

³⁴¹ De Hullu 2015, p. 507.

³⁴² See for example District Court Rotterdam, 6 February 2014, ECLI:NL:RBROT:2014:1436.

³⁴³ See for example District Court Overijssel, 25 June 2015, ECLI:NL:RBOVE:2015:2999.

³⁴⁴ See section II.

delegation potentially reduces the possibilities for the superior to gain knowledge of such conduct, delegation may effectively shield him from liability.

20. Responsibility for joint decisions

Even though Dutch criminal law rejects collective accountability,³⁴⁵ responsibility for making and taking part in joint decisions is certainly accepted. When a group of persons collectively participated in a decision-making process or later endorsed a decision, all persons in this group will be criminally liable, either as perpetrator, accessory, or member of a criminal organization. In relation to functional perpetration and actually directing, a division of tasks or delegation of responsibilities will not impede liability, as long as criminal behavior is the result of a joint decision. All of those involved at a management level will more or less be equally bound to put an end to criminal activities.³⁴⁶

Questions have risen about the criminal responsibility of corporate officials who opposed criminal behavior, but who were overruled or outvoted by others. In such situations, it is usually accepted that the accused lacked the required *mens rea*. At the same time, it has been argued that merely distancing oneself from the offences by not participating, is not always sufficient to escape liability. Whether one is still bound to intervene depends on the circumstances of the case.³⁴⁷ Even though this issue has not risen in case law yet, in literature various scholars have argued that – in case of serious offences – corporate officials are obliged to either intervene and halt the offences, lay down their position as executives, or inform the authorities in order to evade liability.³⁴⁸ It needs little argument that if such obligation is indeed accepted, it clearly applies to international core crimes and torture, given the heinous nature of these offences.

21.-22. *De facto* position of control

The criminal liability of functional perpetrators and actual directors is based on their *de facto* leading position within an organization. Holding an official (*de jure*) position is not required,³⁴⁹ nor in itself sufficient for imposing liability.³⁵⁰ Decisive is that the accused holds a position that enables him to intervene and halt the illegal acts. Depending on the nature of the underlying offence and the mode of liability under which the accused is prosecuted, his duty of care is activated when the accused knew or could and should have known³⁵¹ that illegal activities were taking place.

³⁴⁵ See section II.

³⁴⁶ Supreme Court, 16 June 1981, ECLI:NL:HR:1981:AC7243, *NJ* 1981, 586; Hornman 2016, p. 66.

³⁴⁷ See for example Court of Appeal Amsterdam 5 March 2004, ECLI:NL:GHAMS:2004:AO5069 where the Court of Appeal argued that the accused was not bound to intervene once senior management decide to push through their decision after obtaining legal advice.

³⁴⁸ Sikkema 2010, p. 73-74; Wolswijk 2007, p. 92.

³⁴⁹ Supreme Court, 16 June 1981, ECLI:NL:HR:1981:AC7243, *NJ* 1981, 586; District Court Haarlem, 29 November 2012, ECLI:NL:RBHAA:2012:BY4666.

³⁵⁰ Supreme Court, 24 August 2004, ECLI:NL:HR:2004:AP1508.

³⁵¹ For more on the applicable standard see section II.

23.-24. Corporate criminal liability

As stated in section II, criminal liability of corporate officials is closely linked to the liability of legal entities. Following the Supreme Court's 2003 *Drijfmet* judgment,³⁵² the criminal liability of legal entities depends upon the question of whether the offence can *reasonably* be attributed or imputed³⁵³ (*toerekenen*) to the legal entity. This has to be assessed by taking into account all circumstances of the case. Attribution can be considered reasonable if the (illegal) conduct took place 'within the sphere' ('scope') of the legal entity. Conduct can be considered to have taken place in the sphere of the legal entity *inter alia* if:

- 1) the act was committed by someone who is employed by or works for the legal entity;
- 2) the act was part of the normal business activities of the legal entity;
- 3) the legal entity benefited from the act; or,
- 4) the legal person had the power to decide whether or not the conduct occurred and accepted either this conduct or similar behavior. Acceptance also includes the failure to fulfill the level of care that could reasonable be requested from the corporation in view of the prevention of the alleged criminal acts.

These criteria are neither cumulative nor exclusive, but are mere relevant factors that can be used to determine corporate criminal liability. In the end, it is the overall reasonableness test that is decisive. In theory, this means that meeting one of the listed criteria could be sufficient to establish liability, but in reality, courts often assess all of them.³⁵⁴ In that assessment, most weight seems to be attached to the second and fourth criterion, whilst the first and third criterion are considered to be in themselves quite weak and indeterminative.

The observations above clarify that Dutch criminal law potentially allows for attributing the acts of any individual who is in any way associated with the corporation to the legal entity. As such, the scope of so-called 'triggering persons'³⁵⁵ is very large. In reality, attribution is more restricted. Acts that are completely unrelated to the *de facto* activities of the corporation will not be attributed to the corporation. Once corporate criminal liability has been established, both the legal entity and the natural persons contributing to the corporate offence can be prosecuted and punished. Both are held accountable under Article 51 DPC. Hence, corporate criminal liability does not hamper or diminish individual responsibility.

The reasonable attribution-test has proven itself over the years. However, when applying this test to international crimes, some specific issues have to be addressed. First, on an *actus reus* level Dutch law on corporate responsibility generally does not require the involvement of the corporation's 'directing minds'. Yet, it can be questioned whether this also holds true for international crimes. Van der Wilt holds a strong

³⁵² Supreme Court, 21 October 2003, ECLI:NL:HR:2003:AF7938, *NJ* 2006, 328. The following description of the *Drijfmet* judgment is largely based on Hornman & Sikkema, 2015, p. 293-297.

³⁵³ The exact meaning of the term *toerekenen* has been heavily debated in legal doctrine. Some interpret the Supreme Courts' approach as a classical derivative model in which corporate criminal liability is derived from the liability of its associated members. We do not support this interpretation. It should be noted that the Supreme Court speaks of the attribution of the (*criminal*) act and *not* of the attribution of the actions of *natural persons*. As such, the criteria set out by the Supreme Court for corporate criminal liability encompass elements of both a *derivative* model and a model of *organizational fault* (Gritter 2004; see for a further analysis in English: Hornman & Sikkema 2015).

³⁵⁴ Hornman 2010, p. 370-401. Punitive administrative law shows a slightly different picture (see Hornman 2016, p. 49).

³⁵⁵ Terminology derived from Valenzano 2014.

argument that indeed for such crimes a closer involvement and awareness of the corporation's leadership are required.³⁵⁶ It remains to be seen how case law will develop on this issue.

Second, the framework set out above on the attribution of the *actus reus* of individuals to a corporate entity was developed by the Supreme Court in a case dealing with several individuals working for *one* legal person. However, most companies – in particular multinational companies – consist of multiple legal persons. In general, such companies have a mother company located in the home state – in this case the Netherlands – and subsidiaries located in a host state – the state where the international crimes are committed or have their effect.³⁵⁷ This means that cases of corporate complicity in international crimes are more likely to deal with groups of companies consisting of separate legal entities. This is not without legal significance, because if the group of companies as a whole lacks legal personhood, which it most likely will, it cannot be punished as such³⁵⁸ – only its individual legal entities can. Moreover, just like natural persons in principle cannot be held responsible for the behavior and intentions of others, legal persons are generally not responsible for the acts and intentions of another legal entity belonging to the same group or taking part in the same business deal. Each legal person bears its own legal responsibility. Thus, when a group of corporations is involved, the question is not only whether the acts and intentions of individuals can be attributed, but also to whom they can be attributed, and whether the acts and intentions of one legal entity can be attributed to another. Especially with regard to so-called joint-ventures, where Dutch companies operate jointly with a local private or state-owned company, attribution to the Dutch company might prove difficult, as the Dutch company might lack the required *de facto* power over the acts of the daughter company.³⁵⁹

Third, we should beware that the mere fact that an act can be attributed to the legal entity, does not automatically imply that the corporation also acted with the required *mens rea*. This requires a separate analysis. Corporate *mens rea* can be established through the attribution of the intentions of one or more associated individuals (the so-called aggregation model), but it can also be founded in organizational deficiencies or policies (the organizational fault model). A combination of these two approaches is also possible.³⁶⁰ In general, corporate *mens rea* can be established without the involvement of the corporations directing minds. It remains to be seen whether the same holds true for international (core) crimes. Again, following Van der Wilt, it can be argued that the mindset of the senior leadership of the corporation is more important when it comes to international crimes than with regard to regular economic crimes.

VIII. Corporate complicity and defences

The general defences recognized under Dutch law are regulated in Article 39 to 43 DPC. In addition, there are two unwritten general defences which have been accepted in case law of the Dutch Supreme court. In the Netherlands, defences are divided into justifications and excuses. Whilst justifications entail

³⁵⁶ See Van der Wilt 2013 and section V.

³⁵⁷ Huisman 2010, p. 39-40.

³⁵⁸ See for more on this Kristen 2010 and Hornman 2016, p. 259-271.

³⁵⁹ See for some examples Huisman 2010.

³⁶⁰ See for more on this Hornman & Sikkema, 2015; Hornman 2016, p. 52-55.

that the *act* committed is not *unlawful*, excuses pertain to the accused's blameworthiness and have the effect that the *accused* is not *culpable*.³⁶¹

The DPC includes four justifications: necessity or conflict of duties (*overmacht als noodtoestand*; Article 40 DPC), self-defence (*noodweer*; Article 41(1) DPC), prescription of law (*wettelijk voorschrift*; Article 42 DPC), and lawful superior orders (*bevoegd gegeven ambtelijk bevel*; Article 43(1) DPC).³⁶² In case law, the Supreme Court has added the justification of absence of substantive unlawfulness.³⁶³ The excuses recognized under Dutch law are: duress (*psychische overmacht*; Article 40 DPC), mental incapacity (*ontoerekeningsvatbaar*; Article 39 DPC), excessive self-defence (*noodweereexces*; Article 41(2) DPC), unlawful superior order (*onrechtmatig ambtelijk bevel*; Article 43(2) DPC), and lack of culpability (which has been recognized in case law).

The general defences are applicable to any type of crime, including murder and rape. There are no *a priori* restrictions, though the requirements of the general defences (in particular, the requirements of necessity and proportionality) will be more difficult to establish in cases of serious crimes. When accepted, general defences provide a complete defence (rather than just working as a mitigating circumstance). This means that in theory, all justifications and excuses can be relied upon by corporate officials who are prosecuted for complicity in international crimes. Yet, in practice corporate officials have so far not appealed to justifications and excuses in these cases, but have adopted other defence strategies. Whilst the defence strategy of Van Anraat focused on his lack of knowledge about the use of supplied chemicals for the production of chemical weapons, the defence of Kouwenhoven focused on the reliability of evidence and on several procedural deficiencies.

Below, we will discuss the justifications and excuses found in Dutch criminal law that could be used in cases of business involvement in international crimes. We will not elaborate on absence of substantive unlawfulness and mental incapacity, since these are most likely not relevant for these types of cases. But first, we will touch upon the *culpa in causa* doctrine, which can prevent corporate executives from using these defences successfully.

Culpa in causa

Under Dutch law, defences can be rejected when the accused was responsible for creating a so-called 'defence-situation', i.e. a situation in which he had to rely upon a defence. This principle is known as the *culpa in causa* doctrine.³⁶⁴ In theory, *culpa in causa* can be applied to all defences,³⁶⁵ but in practice the principle mainly plays a role in cases of necessity and duress, (excessive) self-defence, and mental incapacity. The meaning of *culpa in causa* is difficult to describe in general, because it depends on the

³⁶¹ This distinction relates to the tripartite structure of offences in Dutch law. For an English explanation of this issue, and its effects on the judgment in criminal cases, see Gritter 2014, p. 255-256. For a more elaborate Dutch explanation, see De Hullu 2015, p. 292-295.

³⁶² Gritter 2014, p. 257- 272.

³⁶³ Supreme Court, 29 February 1933, *NJ* 1933, 918.

³⁶⁴ Gritter 2014, p. 257.

³⁶⁵ Van Netburg 1994, p. 9.

facts of the case and the specific defence upon which the accused relies.³⁶⁶ An example of a case in which the doctrine of *culpa in causa* played a role with respect to international crimes concerns accused working for the Nazi oppressors, who were prosecuted for executing civilians during the Second World War.³⁶⁷ The accused claimed necessity, arguing that they would have been killed themselves if they had ignored the orders of their superiors. The Dutch Supreme Court rejected this claim, because of *culpa in causa*, considering that the accused volunteered to join the Nazi's and could thus be blamed for the situation of necessity to arise.

Furthermore, case law in relation to the defence of mental incapacity clarifies that if such incapacity is caused by a psychosis, which itself found its origin in excessive drug abuse, the defence can be denied when the accused was well-aware of the effects that drugs can have on his psyche.³⁶⁸ In such case, the Dutch Supreme Court maintains that by using large quantities of cocaine the accused knowingly put himself in a situation where a psychoses could occur. In case of (excessive) self-defence, the Supreme Court finds that the conduct of the perpetrator before the unlawful attack by the subsequent victim can under certain circumstances justify a rejection of (excessive) self-defence.³⁶⁹ An example of such circumstances is when a perpetrator provoked the subsequent victim and thereby was seeking the confrontation. By contrast, the mere fact that the perpetrator armed himself (illegally) with a weapon, or knew he was running into an aggressive situation is insufficient to establish *culpa in causa*.³⁷⁰

The *culpa in causa* doctrine could be relevant in cases of alleged business involvement in international crimes. In such cases, corporations have regularly created the situation in which they became involved in the commission of international crimes, for example by starting operations in conflict zones, undertaking business transactions with authoritarian regimes, and supplying goods and services that might be used for the commission of international crimes.³⁷¹ In various cases, (non-Dutch) corporate decision-making and risk assessments that preceded the corporate involvement in international crimes have been reconstructed.³⁷²

Necessity and duress

Under Dutch law, the defence of necessity or 'conflict of duties' and duress are considered as two elements of the general defence *force majeure*. Both concepts apply to situations in which the accused faced a dilemma and committed an offence because of pressing circumstances under which he could not reasonably be expected to act differently.³⁷³

³⁶⁶ Gritter 2014, p. 257; De Hullu 2015, p. 380. De Hullu for example argues that *culpa in causa* will be assessed more strictly in relation to self-defence than in relation to *force majeure*.

³⁶⁷ Van Netburg 1994, p. 7.

³⁶⁸ Supreme Court, 9 June 1981, *NJ* 1983, 412.

³⁶⁹ Supreme Court, 22 March 2016, ECLI:NL:HR:2016:456.

³⁷⁰ De Hullu 2015, p. 330.

³⁷¹ Huisman 2010.

³⁷² Prosansky 2007; McBeth 2008.

³⁷³ De Hullu 2015, p. 314-315.

Necessity normally concerns a well-considered decision, resulting in the commission of a criminal offence.³⁷⁴ It is required that the accused was confronted with a conflict of duties: on the one hand, the duty to abide the law and on the other hand, the duty to act upon a higher norm. The landmark-case is the *Optician case (Opticien)* from 1923, in which an optician provided a man with poor eyesight with glasses after the store's closing time, thus violating the local regulation on closing hours for businesses.³⁷⁵ The Supreme Court accepted that the optician had a social duty to help the man – who could not see without glasses – and that he should therefore be discharged. As the *Optician* case shows, the accused who claims necessity must have made the right – i.e. justified – choice between two duties, i.e. must have given prevalence to the highest duty.³⁷⁶ The ‘right’ choice does not necessarily need to be the ‘best’ choice, but it should at least be a reasonable one.³⁷⁷ In assessing whether the accused made indeed a reasonable choice, the requirements of subsidiarity and proportionality are taken into account. The courts have much leeway to assess these requirements in light of the specific circumstances of the case at hand. The notion of *Garantenstellung* plays an important role here. This notion entails that persons with authority – such as police-officers, armed forces, but also private security forces – have special responsibilities, which impose higher duties of care upon them. In addition, the defence of necessity requires that the commission of the crime by the accused was adequate, i.e. could help to solve the conflict of duties.³⁷⁸

The general defence of duress applies when a person committed a crime, because he was faced with such an external mental pressure or ‘force’ (e.g. stress, panic, fear of death) that it cannot reasonably be expected that he acted differently. As Gritter explains, ‘a central question in the examination of a claim of duress is whether the perpetrator *could have* and *should have* resisted the force; only irresistible force may excuse the commission of an offence’.³⁷⁹ This question entails a normative assessment of what could *reasonably* be expected of the accused.³⁸⁰ Courts will thereby take account of the requirements of subsidiarity and proportionality: were there other means available to respond to the pressure, i.e. was there another way out?³⁸¹ In particular when the pressure or force are less acute, the accused is generally expected to seek help, or retreat from the situation. Having said that, the fact that duress qualifies as an excuse – rather than as justification – justifies that the requirements of subsidiarity and proportionality are applied rather leniently. The accused’s response does not have to be perfect, but may be somewhat contrived by the external pressure he faced. Thus, whilst necessity emphasizes that the accused made the right decision, duress sets a more lenient test by taking account of the difficult circumstances under which the accused acted.

Claims of *force majeure* – in particular in the form of appeals to higher norms – have been made in cases of alleged complicity in international crimes. In post WWII case law, accused – including corporate officials – have successfully argued that they only cooperated with the Nazi regime in the commission of crimes out of *force majeure*.³⁸² Also in more recent international crimes cases, corporate officials have sometimes claimed *force majeure*, albeit these cases do not involve Dutch companies and have not been

³⁷⁴ Gritter 2014, p. 263; De Hullu 2015, p. 301.

³⁷⁵ Supreme Court, 15 October, *NJ* 1923,1329.

³⁷⁶ Supreme Court, 12 July 2011, *NJ* 2011, 578.

³⁷⁷ Gritter 2014, p. 264.

³⁷⁸ De Hullu 2015, p. 309.

³⁷⁹ Gritter 2014, p. 265; De Hullu 2015, p. 303.

³⁸⁰ De Hullu 2015, p. 303.

³⁸¹ *Idem*.

³⁸² De Hullu 2015, p. 304; Bronkhorst 1952, p. 244-263.

assessed by Dutch courts. Both Chiquita and AngloGold Ashanti have been accused of financially supporting paramilitary or militia forces, who are guilty of committing international crimes. Whilst AngloGold Ashanti made payments to the FNI in DRC, Chiquita made payments to the AUC in Columbia. Both companies admit the payments, but stress they had to pay to protect the safety of their employees.³⁸³

(Excessive) self-defence

Self-defence applies to persons who commit an offence, which was necessary and required to defend themselves or another person, or their or another person's physical or sexual integrity, or property against an immediate, unlawful attack.³⁸⁴ The term 'immediate' entails that the accused does not have to await an attack, but can defend himself against a future attack. Yet, the mere fear of being attacked is not sufficient. Instead, the attack must reasonably be considered as an immediate attack,³⁸⁵ which suggests that the attack should be imminent in the eyes of an objective observer.³⁸⁶ The requirement of the attack on property should be interpreted strictly in the sense that trespassing (entering someone's property) does not justify self-defence. Having said that, when drafting the ICA the legislator clarified that property expands to the successful completion of a military operation.³⁸⁷ In 2010, the Supreme Court emphasized that self-defence entails that the accused acted with the 'will to defend'. On this account, a claim of self-defence must be denied if the conduct of the accused was aggressive in nature, i.e. directed at confrontation.³⁸⁸ The fact that the attack must be *necessary* entails that a claim of self-defence will be denied if the accused could (factual) and should (normative) have acted differently (principle of subsidiarity), i.e. if effective alternative actions were available. This is the case when the accused could and should have withdrawn from the attack.³⁸⁹ Withdrawal should have been realistic and reasonable, which will be assessed in light of the specific circumstances of the case at hand.³⁹⁰ The accused's self-defence must also be proportionate to the attack, i.e. there needs to be a *reasonable* balance between the interest at stake and the means and intensity of the defence (principle of proportionality). In assessing the requirements of subsidiarity and proportionality, the notion of *Garantenstellung* plays an important role again.

Excessive self-defence relates to a situation in which the accused was allowed to defend himself against an immediate attack, but his defence was disproportionate. Thus, excessive self-defence can only be accepted when the accused was in a situation where 'regular' self-defence was justified, i.e. when there was an unlawful attack on one of the protected interests of Article 41(1) DPC and self-defence was necessary. In that case, the use of disproportionate force may be accepted when this force was caused by a strong emotion – e.g. fear or despair – which itself was caused by the attack (so-called 'double causality')

³⁸³ Huisman 2010; Prosansky, 2007.

³⁸⁴ Gritter 2014, p. 260.

³⁸⁵ Supreme Court, 22 March 2016, ECLI:NL:HR:2016:456.

³⁸⁶ De Hullu 2015, p. 321-322.

³⁸⁷ *Kamerstukken II* 2001/02, 28337, 3, para. 4a.

³⁸⁸ Gritter 2014, p. 261.

³⁸⁹ Supreme Court, 26 January 2016, ECLI:NL:HR:2016:106.

³⁹⁰ Supreme Court, 22 March 2016, ECLI:NL:HR:2016:456.

or *dubbele causaliteit*).³⁹¹ Dutch law recognizes two forms of disproportionality: a disproportionate means of defence (so-called ‘intensive disproportionality’), and a defence which is exercised for too long (so-called ‘extensive disproportionality’).

It is not unlikely that corporate officials rely upon self-defence to justify their acts. Officials who are allegedly involved in international crimes sometimes operate in regions suffering from armed conflict and in other dangerous places. Certain branches of industry run a higher risk than others, because of the nature of their business or the locations from where they operate. Especially contractors of private military companies could find themselves in a situation in which they need to defend themselves against violent attacks. Furthermore, oil and mining corporations have sometimes claimed self-defence in situations where they requested security officers to (violently) put down local protests against their operations.³⁹² Yet, in these cases, the *culpa in causa* doctrine could prevent successfully pleading self-defence, as the corporations took the decision to do business in these dangerous areas and situations.

The defence of excessive self-defence seems most relevant in cases of violent crime, and in cases of direct corporate involvement in international crimes.³⁹³ Such direct involvement is rare, the exception being cases in which contractors of private military companies were involved in violent crimes, such as killing civilians. A case that comes close to alleged excessive self-defence is the killing of 17 civilians at Nissour Square in Bagdad in 2007 by guards of the Blackwater company. The guards claimed to have shot at these civilians, because they were fired upon.³⁹⁴ We are not familiar with any cases of a Dutch military company involved in violent crimes.

Prescription of law and (un)lawful superior orders

The defences prescription of law and superior orders both give expression to the thought that acting on the basis of state authority is not criminal. Prescription of law does not play an important role in Dutch case law, but it can be relevant when the commission of international crimes is permitted under the national law of countries in which Dutch companies operate. Under Dutch law, the prescription of law defence entails a special type of *force majeure* in which the accused is confronted with a conflict of statutory duties: the duty not to commit an offence, and the duty to follow a legal provision.³⁹⁵ The defence only applies when the legal provision had a ‘certain compulsory character’, though it is not required that the provision entailed a duty or obligation.³⁹⁶ Furthermore, the accused must have made the ‘right’ choice from a reasonable point of view, which means that the requirements of subsidiarity and proportionality need to be met. If the statutory duty could have been met without committing the offence, or if the commission of the crime was disproportionate to the statutory duty, the defence of prescription of law will be rejected. In assessing the requirements of subsidiarity and proportionality, Dutch courts have attached specific value to the notion of *Garantenstellung*, considering that in practice the defence of prescription of law is particularly relevant for civil servants.

³⁹¹ For an overview of the conditions for a accepted ground of self-defence see Supreme Court, 22 March 2016, *NJ* 2016, 316.

³⁹² Huisman, 2010. These cases do not involve Dutch companies.

³⁹³ Huisman 2010.

³⁹⁴ Welch 2009.

³⁹⁵ Gritter 2014, p. 264.

³⁹⁶ De Hullu 2015, p. 339-340.

Like prescription of law, the defence of lawful superior orders is regarded a special type of *force majeure*.³⁹⁷ In cases of common domestic crimes, this defence ascertains that a person who commits an offence in the execution of a civil order given by an empowered administrative or state authority, is not criminally liable. Van Rest defines the notion of ‘order’ as ‘a statement of one person to another person, who is obliged to follow-up on this statement because of his subordinate position of authority’.³⁹⁸ This definition clarifies that the defence of superior orders only applies when the authority giving the order had the right to do so and had some kind of control over the person who is executing it. The position of authority can be incidental, but it should be based on public law.³⁹⁹ Thus, orders from corporate officials to their subordinates do not qualify as superior orders under Dutch law. Considering that the defence of lawful superior orders is a justification, it is covered by the principles of subsidiarity and proportionality, whereby the notion of *Garantenstellung* plays a role again. An unauthorized order can generally not absolve criminal liability. Article 43(2) DPC offers an exception to this rule for cases in which the subordinate receiving the order considered in good faith that it was lawful, whilst the execution of the order was within the scope of his subordination.⁴⁰⁰ In that case, the excuse of unlawful superior orders might apply. Yet, the requirements of Article 43(2) DPC are interpreted strictly and will not be easily met.⁴⁰¹ The notion of ‘good faith’ is interpreted in an objective way, which means that the subordinate must be attentive and should refuse orders in case of doubt. The terms ‘within in the scope of subordination’ entail that the order should fit within the accused’s normal duties and activities

As De Hullu notes, the general defences of prescription of law and superior order primarily apply in cases of normal administrative situations, but become controversial in relation to totalitarian regimes and the commission of international crimes.⁴⁰² In post-WWII case law, the defences have been invoked, but claims on prescription of law were generally rejected on the basis that the Nazi laws were not binding, whilst the superior orders defence was dismissed because of *culpa in causa*. Current Dutch law limits claims to superior orders for international crimes in Article 11 ICA. This provision implements Article 33 Rome Statute. It provides that the mere fact that the crime was committed in the execution of an order given by the legislative power of a state, or in pursuance of an order by a superior, does not lift the criminality of the act. Yet, a subordinate who committed a crime in the execution of an order given by a superior while faithfully perceiving the order as authorized, is not punishable. However – following the Rome Statute – this does not apply for orders to commit genocide or crimes against humanity – such orders are always considered unauthorized so that the excuse of unlawful civil orders never applies in these cases.

It is noteworthy that the term ‘superior’ in Article 11 ICA is not limited to military or political leaders, but also includes the corporate leadership. On this account, Article 11 ICA also applies in a business-setting and provides a defence to accused who were ordered to commit international crimes by their corporate leadership.⁴⁰³ It is required that the accused could indeed in good faith consider to act pursuant to a lawful order. Whether this is so, depends on the circumstances of the case and the position of the accused. According to the legislator, in a military context, the existence of a strict hierarchy and the

³⁹⁷ Gritter 2014, p. 265

³⁹⁸ Van Rest quoted in De Hullu 2015, p. 341 (translation by authors).

³⁹⁹ De Hullu 2015, p. 342.

⁴⁰⁰ Gritter 2014, p. 264.

⁴⁰¹ De Hullu 2015, p. 343.

⁴⁰² De Hullu 2015, p. 338.

⁴⁰³ *Kamerstukken II* 2001/02, 28337, 3, para. 4a.

requirement of obedience entail that subordinates may in principle assume their orders are lawful.⁴⁰⁴ *Contrario*, one may argue that in a business-setting – where such strict hierarchical relations and requirements of obedience do not exist – a stricter set applies and subordinates will have to scrutinize the orders of the corporate leadership more critically.

It is noteworthy that until the introduction of the ICA, Article 10 War Crimes Act, Article 3 Implementation Act Genocide Convention, and Article 3 Implementation Act Torture Convention stipulated that the defences of prescription of law and superior orders do not apply to war crimes, genocide and torture, respectively. The Dutch legislator considered that prescription of law and superior orders do not fit well with the nature of international crimes, which violate international humanitarian law and are normally committed pursuant to criminal orders. Moreover, the legislator held that Dutch courts are incapable of assessing foreign legislation and orders in case they exercise jurisdiction over international crimes committed abroad. With the introduction of the ICA, the relevant provisions from the War Crimes Act, and the Implementation Act Genocide and Torture Convention were replaced with Article 11 ICA, which provides for a somewhat more liberal and flexible regulation of prescription of law and superior orders.

In international crimes cases, Dutch multinational companies have regularly justified their acts with arguments that fit with the defence of prescription or superior orders. Companies like Shell and Heineken who came under scrutiny for operating in countries with authoritarian regimes and poor human rights records, have repeatedly claimed that they had to act according to that particular countries' laws and regulations and that it cannot be expected of them to take political standpoints on the desirability of the governments of the countries in which they operate.⁴⁰⁵ Yet, in the Netherlands these arguments have never resulted in the acceptance of a defence of prescription of law or superior orders.

Lack of culpability

Lack of culpability can be seen as a residual defence, which gives expression to the principle of personal guilt. It warrants that accused cannot be punished in the absence of blameworthiness. Lack of culpability entails four categories: mistake of fact, mistake of law, due diligence, and excusable incapacity. We will only discuss the first three, which seem most relevant for corporate officials in international crimes cases.

The mistake of fact defence applies when an accused excusably errs in relation to the facts that construct the offense.⁴⁰⁶ This defence was accepted by the Supreme Court in the *Milk and water* case (*Melk en water*) from 1916 in which a farmer deceived his customers by secretly diluting his milk with water, which constituted a criminal offense.⁴⁰⁷ The milk was delivered by an employee of the farmer who did not know of the actions of his superior. The Supreme Court concluded that the employee was excusably unaware of the fact he delivered diluted milk and therefore lacked culpability. The defence of mistake of fact can only succeed when the mistake was 'reasonable'. This means that the accused will only be

⁴⁰⁴ *Idem*, Article 11.

⁴⁰⁵ Van Beemen 2006; Van Baar forthcoming.

⁴⁰⁶ De Hullu 2015, p. 364; Gritter 2014, p. 269.

⁴⁰⁷ Supreme Court, 14 March 1916, *NJ* 1916, 681.

excused if an objective observer would have made the same mistake. Thus, the mistake of fact defence entails a normative of assessment of duties of due care whereby the notion of *Garantenstellung* plays a role.⁴⁰⁸

Mistake of law applies when an accused excusably oversees that his conduct violates the law. This defence was introduced in the so-called *Motorpapers* case (*Motorpapieren*).⁴⁰⁹ The accused in this case bought a new motorcycle and asked the local police lieutenant whether his registration was in order. The lieutenant confirmed the paperwork was indeed sufficient. A few weeks later, the accused was fined during a traffic stop for not having the required permit. The accused pleaded mistake of law because he relied upon an explicit authorization from the police lieutenant. This defence was accepted by the Supreme Court. The defence of mistake of law hardly plays a role in case law on common crime, but it has been applied and discussed in relation to corporate criminal liability⁴¹⁰ and could also be relevant in international crimes cases. Whilst corporate officials may not be able to plead ignorance with provisions criminalizing international crimes, mistake of law could become important when the officials have acted upon (mis)informed advice.⁴¹¹ Soft law instruments such as the UN Guiding Principles on Business and Human Rights require companies to conduct human rights impact assessments before starting business in countries with poor human rights records, or before participating in joint ventures or other business transactions with companies that are already involved in such countries. For such assessments and decisions, companies might seek advice from consultancy firms that could misinform them about the applicable law in host countries or about the criminality of their business involvement. Whether one may rely on such erroneous advice depends on the independency and impartiality of the adviser, the competency of the adviser, the complexity of the question asked, and the nature of the advice itself.⁴¹²

The defence of due diligence applies when the accused committed an offence, despite observing the ‘maximum care or such care as can reasonably be demanded to prevent the commission of offences’. If the accused can show that adequate measures were taken to prevent offences, the defence of due diligence may exculpate.⁴¹³ This entails a normative assessment of which measures can *reasonably* be expected from the accused. In this assessment, the notion of *Garantenstellung* plays a role. The fact that corporate officials act within a certain capacity that comes with power and responsibility, may justify imposing a special duty upon them. The defence of due diligence requires that the accused lacks *all* relevant guilt. According to Meyer et al., this requirement is interpreted strictly and only applies in exceptional circumstances when no blame can be attached to the suspect at all.⁴¹⁴ Meyer et al. also note that due diligence is mainly relevant in relation to misdemeanours, as these do not require intent or *culpa*. The need for due diligence arguably diminishes as the requirements for liability increase, particularly when *mens rea* comes into play. In that case, the defence of due diligence effectively comes down to a rejection of intent. This brings us back to the discussion in section IV, on whether the intent of the actual perpetrator of international crimes must also be the intent of his corporate accomplice. It remains to be

⁴⁰⁸ Gritter 2014, p. 258-259.

⁴⁰⁹ Supreme Court, 22 November, 1949, *NJ* 1950, 80.

⁴¹⁰ Keulen 2011.

⁴¹¹ According to De Hullu, situations of misinformed advice are by far the most important situations of mistake of law. De Hullu 2015, p. 367.

⁴¹² Supreme Court, 26 February 2008, *NJ* 2008, 14.

⁴¹³ Supreme Court, 2 February 1993, *NJ* 1993, 476 and De Hullu 2012, p. 361-362.

⁴¹⁴ De Hullu 2012, p. 355 and 362-363.

seen what practical value the due diligence doctrine will have for executives who are prosecuted for complicity to international crimes, since these are the most serious offences that require intent.

It is important to note that certain Dutch statutory provisions – especially in the field of socio-economic and environmental regulation – contain particular due diligence requirements. These requirements entail that the lack of adequate supervision and control could lead to the criminal liability of a company and its executives. However, the question of whether or not the existence of adequate supervision or control measures could exempt legal entities from criminal liability for offences committed by their agents has been debated.⁴¹⁵

IX. Suggestions and conclusion

In this report, we have given an overview of Dutch law concerning individual liability for business involvement in international crimes. The focus has been on the crimes that are regulated in the ICA, i.e. war crimes, crimes against humanity, genocide, aggression, and torture. We have studied these crimes by looking at (the drafting history of) relevant legislation and case law. Because practice in this field is limited, we have sometimes drawn up case law concerning other gross human rights violations, such as terrorism, where necessary.

The report shows that Dutch law provides for a variety of modes of perpetration and participation. To establish criminal responsibility in cases of corporate complicity for international crimes, the concepts of functional (co-)perpetration, actually directing, aiding, and superior responsibility seem to be particularly important. There are some important differences between the requirements of these modes of liability under Dutch and international criminal law.

First, on a *mens rea* level, criminal responsibility under Dutch law can generally be established on the basis of *dolus eventualis*, i.e. knowingly accepting a significant risk that crimes will be committed. This relatively low *mens rea* threshold is not accepted by the ICC, and its use by the *ad hoc* Tribunals in relation to JCE III is controversial. It is still unclear whether this hinders the application of *dolus eventualis* by Dutch courts. Furthermore, we should beware that superior responsibility under Dutch law includes criminal responsibility for negligent omission. Unlike international criminal law, Dutch law does not set a higher *mens rea* standard for civil superiors than for military superiors. For both, negligence suffices, though this comes with a mandatory sentence reduction of 1/3.

Second, also on an *actus reus* level, Dutch law at several points seems to accept a lower standard than international criminal courts. In relation to aiding, an ‘adequate causal contribution’ suffices, which – at least in theory – allows for a looser causal link between the acts of the accused and the crimes committed than the ‘substantial contribution’ requirement accepted by the *ad hoc* Tribunals. For actually directing and functional perpetration, it does not have to be established that the crimes would not have been committed *but for* the accused’s contribution, thus setting a lower threshold than the international control requirement for indirect perpetration.

⁴¹⁵ Hornman 2010.

Third, in relation to the ‘collective elements’ of modes of liability, Dutch law seems to take a more flexible approach than international law. For example, there is no explicit common plan requirement for co-perpetration – the common plan is only *one* of several relevant factors that can be used to assess the cooperation between multiple participants in crime. Furthermore – unlike indirect perpetration as *Organizationsherrschaft* – functional perpetration and actually directing do not require that crimes were committed within the context of large organizations that are hierarchically structured, but can also be applied to small and loosely organized collaborations.

Despite these apparently looser standards of criminal responsibility for corporate complicity under Dutch law, it seems that Dutch courts still struggle with holding businessmen accountable as perpetrators of or participants in international crimes. This relates to the fact that corporate officials are often only remotely involved in criminal conduct and make neutral contributions to crimes, as a side-effect of their corporate policies and efforts. Under these circumstances, it may be challenging to establish that the accused acted with *dolus eventualis*. This is further compromised by the fact that knowledge ‘backfires’ on the accused by raising his duty of care. Thus, it is preferable to know as little as possible, as long as the accused’s ignorance does not constitute wilful blindness. As long as the corporate management can claim to have simply misinterpreted or underestimated certain signals, it will most likely go off the hook. Furthermore, it might be hard to prove that there was a causal link between the acts of the accused and the crimes committed, whilst linking corporate misconduct of a foreign daughter company to Dutch multinationals is also easier said than done.

Considering the difficulties above, it will often be challenging to hold corporate officials for international crimes. Prosecutors – if bringing charges – may therefore prefer alternative grounds for criminal responsibility, such as the dereliction of duties of care, violation of embargoes, or even corruption. Also the concept of participation in a criminal organization – though not used yet in international crimes cases against corporate officials – could provide a useful basis for establishing criminal responsibility. Whilst this enables holding corporate officials at least accountable for *some* crime, the practice can be criticized from the perspective of fair labelling and the expressive function of criminal law. Crimes concerning participation in a criminal organization, dereliction of corporate duties, and violations of weapon embargo’s loosen the link between the corporate officials and the commission of international crimes, and may therefore not properly denote the officials’ moral culpability. Moreover, such separate crimes do not ‘enjoy’ the privileges of international crimes, in terms of universal jurisdiction and non-applicability of statutory limitations.⁴¹⁶

⁴¹⁶ Van den Herik 2009, p. 226.

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Annex I

Relevant provisions from Dutch International Crimes Act

Article 1

1. For the purposes of this Act (...)
 - (b) 'superior' means:
 - (i) a military commander, or a person effectively acting as such, who has effective command or authority over or exercises effective control over one or more subordinates;
 - (ii) a person who exercises effective authority, in a civilian capacity, over or exercises effective control over one or more subordinates; (...)
 - (d) 'torture' as referred to in section 4, subsection 1 (f), section 5, subsection 1 (b) and section 6, subsection 1 (a) means the intentional infliction of severe physical or mental pain or suffering upon a person who is in the custody or under the control of the accused, subject to the proviso that the pain or suffering does not result solely from, and is not inherent in or incidental to, lawful sanctions;
 - (e) 'torture' as referred to in section 8 means the torture as defined in (d) – by or on behalf of a government authority – of a person with a view to extracting information or a confession from him or from a third person, punishing him for an act he or a third person has committed or is suspected of committing, or intimidating him or a third person, or coercing him to do or permit something, or for any reason based on discrimination on any ground whatever; (...)
5. Equal to the crimes regulated in this Act, are the crimes regulated in articles 131 to 134, 140, 189, 416 to 417bis, 420bis to 420 quarter of the Penal Code, if these crimes relate to the crimes regulated in articles 3-8a of this Act.

Article 3

1. Anyone who, with intent to wholly or partly destroy, any national, ethnic or religious group or a group belonging to a particular race, as such:
 - (a) kills members of the group;
 - (b) causes serious bodily or mental harm to members of the group;
 - (c) deliberately inflicts upon the group conditions of life calculated to bring about the physical destruction of the group, in whole or in part;
 - (d) imposes measures intended to prevent births within the group; or
 - (e) forcibly transfers children of the group to another group,shall be guilty of genocide and liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.
2. Conspiracy and incitement to commit genocide which occur in public, either orally or in writing or by means of images, shall carry the same penalties as prescribed for attempted genocide.

Article 4

1. Anyone who commits one of the following acts shall be guilty of a crime against humanity and liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine, if such acts are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) intentional killing;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture (as defined in section 1(1) (d));
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this subsection or any other crime as referred to in this Act;
- (i) enforced disappearance of a person;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character which intentionally cause great suffering or serious injury to body or to mental or physical health.

2. For the purposes of this section:

- (a) ‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in subsection 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) ‘enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children;
- (c) ‘persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (d) ‘enforced disappearance of persons’ means the arrest, detention, abduction of persons, or any other type of restriction of liberty by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom, or to give information on the fate or whereabouts of those persons, or to hide this faith or those whereabouts, so that this person is not protected by the law for a prolonged period of time.

3. For the purpose of this section, ‘extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

Article 5

1. Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions, namely the following acts if committed against persons protected by the said Conventions:

- (a) intentional killing;
- (b) torture (as defined in section 1 (1)(d)) or inhuman treatment, including biological experiments;
- (c) intentionally causing great suffering or serious injury to body or health;
- (d) extensive intentional and unlawful destruction and appropriation of goods without military necessity;

- (e) compelling a prisoner of war or other protected person to serve in the armed forces of a hostile power;
- (f) intentionally depriving a prisoner of war or other protected person of the right to a fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement; or
- (h) the taking of hostages;

shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

2. Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Additional Protocol (I), concluded in Bern on 12 December 1977, to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Netherlands Treaty Series 1980, 87), namely:

- (a) the acts referred to in subsection 1, if committed against a person protected by the Additional Protocol (I);
- (b) any intentional act or omission which jeopardises the health of anyone who is in the power of a party other than the party to which he or she belongs, and which:

- (i) entails any medical treatment which is not necessary as a consequence of the state of health of the person concerned and is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party responsible for the acts and who are in no way deprived of their liberty;

- (ii) entails the carrying out on the person concerned, even with his consent, of physical mutilations;

- (iii) entails the carrying out on the person concerned, even with his consent, of medical or scientific experiments; or

- (iv) entails removing from the person concerned, even with his consent, tissue or organs for transplantation;

- (c) the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health:

- (i) making the civilian population or individual citizens the object of attack;

- (ii) launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

- (iii) launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

- (iv) making non-defended localities or demilitarised zones the object of attack;

- (v) making a person the object of attack in the knowledge that he is hors de combat; or

- (vi) the perfidious use, in violation of article 37 of Additional Protocol (I), of the distinctive emblem of the red cross or red crescent or of other protective emblems recognised by the Geneva Conventions or Additional Protocol (I); or

- (d) the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I):

(i) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies or the transfer of all or part of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Geneva Convention;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(iii) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(iv) making clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organisation, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), of Additional Protocol (I) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives; or

(v) depriving a person protected by the Geneva Conventions or Article 85, paragraph 2, of Additional Protocol (I) of the right to a fair and regular trial shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

3. Anyone who commits, in the case of an international armed conflict, one of the following acts:
- (a) rape, sexual slavery, enforced prostitution, enforced sterilisation or any other form of sexual violence which can be deemed to be of a gravity comparable to a grave breach of the Geneva Conventions;
 - (b) forced pregnancy;
 - (c) subjecting persons who are in the power of an adverse party to the conflict to physical mutilation or medical or scientific experiments of any kind, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such persons or persons;
 - (d) treacherously killing or wounding individuals belonging to the hostile nation or army;
 - (e) killing or wounding a combatant who is in the power of the adverse party, who has clearly indicated he wishes to surrender, or who is unconscious or otherwise hors de combat as a result of wounds or sickness and is therefore unable to defend himself, provided that he refrains in all these cases from any hostile act and does not attempt to escape; or
 - (f) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury, shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.
4. Anyone who, in the case of an international armed conflict, intentionally and unlawfully commits one of the following acts shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine:
- (a) making the object of attack cultural property that is under enhanced protection as referred to in articles 10 and 11 of the Second Protocol, concluded in The Hague on 26 March 1999, to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1999, 107);
 - (b) using cultural property that is under enhanced protection as referred to in (a) or the immediate vicinity of such property in support of military action;

- (c) destroying or appropriating on a large scale cultural property that is under the protection of the Convention, concluded in The Hague on 14 May 1954, for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1955, 47) or the Second Protocol thereto;
 - (d) making cultural property that is under protection as referred to in (c) the object of attack; or
 - (e) theft, pillaging or appropriation of – or acts of vandalism directed against – cultural property under the protection of the Convention referred to in (c).
5. Anyone who, in the case of an international armed conflict, commits one of the following acts:
- (a) intentionally directing attacks against civilian objects, that is, objects that are not military objectives;
 - (b) intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (c) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (d) the transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory;
 - (e) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (f) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - (g) employing poison or poisoned weapons;
 - (h) employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices;
 - (i) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (j) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (k) utilising the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;
 - (l) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (m) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (n) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (o) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (p) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (q) pillaging a town or place, even when taken by assault;
 - (r) conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups or using them to participate actively in hostilities;
 - (s) declaring that no quarter will be given; or

(t) destroying or seizing property of the adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine.

6. If an act as referred to in subsection 4 or 5:

- (a) results in the death of or serious bodily injury to another person or involves rape;
- (b) involves violence, committed in association, against one or more persons or violence against a dead, sick or wounded person;
- (c) involves destroying, damaging, rendering unusable or removing, in association with others, any property which belongs wholly or partly to another;
- (d) involves compelling, in association with others, another person to do, refrain from doing or permit something;
- (e) involves pillaging, in association with others, a town or place, even when taken by assault;
- (f) involves breaking a promise or breaching an agreement concluded with the adverse party as such; or
- (g) involves making improper use of a by the laws and customs protected flag or emblem or of the military insignia and uniform of the enemy, the perpetrator shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

7. Subsection 2 (b) (iv) shall not apply if the act described therein:

- (a) is consistent with the generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party responsible for the acts and who are in no way deprived of their liberty; or
- (b) concerns a case in which blood is donated for transfusion or skin for transplantation, provided that this occurs voluntarily and without compulsion or insistence and only for therapeutic purposes, in circumstances that are in keeping with generally accepted medical standards and supervisory measures intended to protect the interests of both donor and recipient.

Article 6

1. Anyone who, in the case of an armed conflict not of an international character, commits a violation of article 3 common to all of the Geneva Conventions, namely the commission against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those who are placed hors de combat by sickness, wounds, detention, or any other cause, of one of the following acts:

- (a) violence to life and person, in particular killing of all kinds, mutilation, cruel treatment and torture (as defined in section 1 (1) (d));
- (b) the taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment; or
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable;

shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

2. Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts:
 - (a) rape, sexual slavery, enforced prostitution, enforced sterilisation or any other form of sexual violence which can be deemed to be of any gravity comparable to a grave breach of the Geneva Conventions;
 - (b) forced pregnancy;
 - (c) subjecting persons in the power of another party to the conflict to physical mutilation or medical or scientific experiments of any nature whatever, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest and which cause death to or can seriously endanger the health of such persons or persons; or
 - (d) treacherously killing or wounding individuals belonging to the hostile nation or army; shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

3. Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts:
 - (a) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (c) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (d) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (e) pillaging a town or place, even when taken by assault;
 - (f) conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups or using them to participate actively in hostilities;
 - (g) declaring that no quarter will be given; or
 - (h) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the circumstances of the conflict; or
 - (i) giving instructions for the transfer of the civilian population for reasons connected with the conflict, other than on account of the safety of the citizens or where imperatively demanded by the circumstances of the conflict; shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine.

4. Section 5, subsection 6, shall apply mutatis mutandis to an act as referred to in subsection 3.

Article 7

1. Anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in sections 5 or 6 shall be liable to a term of imprisonment not exceeding ten years or a fifth category fine.
2. A term of imprisonment not exceeding fifteen years or a fifth category fine shall be imposed:

- (a) if an act as referred to in subsection 1 is likely to result in the death of or serious bodily injury to another person;
- (b) if an act as referred to in subsection 1 involves one or more outrages committed upon personal dignity, in particular humiliating and degrading treatment;
- (c) if an act as referred to in subsection 1 involves compelling another person to do, refrain from doing or permit something, or
- (d) if an act as referred to in subsection 1 involves pillaging a city or place, even when taken by assault.

3. Section 5, subsection 6, shall apply mutatis mutandis to an act as referred to in subsection 1.

Article 8

- 1. Torture committed by a public servant or other person working in the service of the authorities in the course of his duties shall carry a sentence of life imprisonment or a term of imprisonment not exceeding twenty years or a fifth category fine.
- 2. The following shall be liable to similar sentences:
 - (a) a public servant or other person working in the service of the authorities who, in the course of his duties and by one of the means referred to in Article 47, paragraph 1 (ii), of the Criminal Code, solicits the commission of torture or intentionally permits another person to commit torture;
 - (b) a person who commits torture, if this has been solicited or intentionally permitted by a public servant or another person working in the service of the authorities, in the course of his duties and by one of the means referred to in Article 47, paragraph 1 (ii), of the Criminal Code.

Article 8a

- 1. Anyone who is guilty of enforced disappearance as stipulated in article 4(1) (d) can be punished with a prison sentences of maximum 15 years or a fine of the fifth category.
- 2. When a fact regulated in subsection 1:
 - (a) causes death or serious injury or entails rape;
 - (b) entails group violence, or violence against a person who is ill or wounded;
 - (c) concerns a pregnant woman, a minor, a disabled person, or an otherwise vulnerable individual;
 - (d) concerns a group of persons,the maximum sentence is raised to life imprisonment or 30 years, or a fine of the sixth category.

Article 9

- 1. A superior shall be liable to the penalties prescribed for the offences referred to in § 2 if he:
 - (a) intentionally permits the commission of such an offence by a subordinate.
 - (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.
- 2. Anyone who culpably neglects to take measures, in so far as these are necessary and can be expected of him, where he has reasonable grounds for suspecting that a subordinate has committed or intends to commit such an offence, shall be liable to no more than two-thirds of the maximum of the principal sentences prescribed for the offences referred to in § 2.

3. If, in the circumstances referred to in subsection 2, the maximum sentence prescribed for the offence is life imprisonment, the term of imprisonment imposed shall not exceed fifteen years.

Article 11

1. The fact that a crime as defined in this Act was committed pursuant to a regulation issued by the legal power of a State or pursuant to an order of a superior does not make that act lawful.
2. A subordinate who commits a crime referred to in this Act in pursuance of an order by a superior shall not be criminally responsible if the order was believed by the subordinate in good faith to have been given lawfully and the execution of the order came within the scope of his competence as a subordinate.
3. For the purposes of subsection 2, an order to commit genocide or a crime against humanity is deemed to be manifestly unlawful.

Source: http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_loi190603_entof.pdf
and own translation (Article 1(4) and 8a)

Annex II

Relevant provisions from Dutch Penal Code

Article 40

Not criminal liable is the person who commits an offence as a result of an irresistible force.

Article 41

1. A person who commits an offence is not criminally liable where this is required for the necessary defence of his person or the person of another, or his or another person's integrity or property, against an immediate, unlawful attack.
2. A person exceeding the limits of a necessary defence is not criminally liable, where such excess directly resulted from a strong emotion brought about by the attack.

Article 42

A person who commits an offence in the execution of a legal provision is not criminally liable.

Article 43

1. A person who commits an offence in the execution of a civil order, given by an empowered authority, is not criminally liable.
2. An unauthorized civil order cannot deny criminal liability, unless the subordinate who received the order considered in good faith that the order was lawful, while the execution of the order lay within the scope of his subordinacy.

Article 47

1. The following persons are liable as perpetrators of a criminal act:
 - (1) those who commit a criminal offence, either personally or jointly with another or others, or cause a criminal offence to be committed;
 - (2) those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or by providing the opportunity, means or information, intentionally solicit the commission of a crime.
2. With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.

Article 48

The following persons are liable as accessories to a serious offence:

- (1) those who intentionally assist during the commission of the serious offence;
- (2) those who intentionally provide the opportunity, means or information necessary to commit the serious offence.

Article 49

1. In case of aiding, the maximum penalty is reduced with one third.
2. In case the maximum penalty is a life prison sentence, the maximum penalty for aiding will be 20 years' imprisonment.
3. The additional penalties for aiding a crime are the same as those for the committing the crime.
4. In determining the penalty, account may only be taken of those crimes that the aider intentionally enabled or promoted, as well as the consequences of these crimes.

Article 50

Personal circumstances that exclude, reduce, or increase the accused's liability, are only taken into account in relation to the persons whom they concern.

Article 51

1. Criminal offences can be committed by natural persons and legal persons.
2. In the event of a criminal offence being committed by a legal person, a criminal prosecution can be instituted and the penalties and measures laid down in acts of parliament can be imposed where appropriate:
 - (a) against the legal person, or
 - (b) against those who ordered and those who actually directed the prohibited act, or
 - (c) against both those named under (a) and (b).
3. For the application of the above subsections, the following bodies are treated the same as legal persons: a company without corporate legal status, a partnership, a shipping company and a 'doelvermogen' (capital assets set aside for a special purpose).

Article 80

A conspiracy exists from the moment two or more persons have agreed to commit a crime.

Article 140

1. Participation in an organization that has the purpose to commit crimes, will be punished with a maximum penalty of 6 years' imprisonment, or a fine of the fifth category.
2. Participation in the continuing operation of an organization that has been forbidden by a Dutch court or by the public administration, or in relation to which a declaration in the sense of Article 5a(1) Code on conflict resolution corporations has been issued, will be punished with a maximum penalty of 1 year imprisonment, or a fine of the third category.

3. For founders, leaders, and directors of the organization the maximum penalty can be increased with 1/3.
4. Participation under sub-clause 1. includes providing financial or other material support to an organization, and recruiting new members for the organization.

Article 140a

1. Participation in an organization that has the purpose to commit terrorist crimes, will be punished with a maximum penalty of 15 years' imprisonment, or a fine of the fifth category.
2. Founders, leaders, and directors can be punished with life imprisonment, or with a temporary prison sentence of maximum 30 years, or a fine of the fifth category.
3. Article 140(4) applies equally to the crime of Article 140a.

Source:

Gritter (2014) (Article 40-43),

https://www.unodc.org/res/cld/document/nld/1881/penal_code_1881_excerpts_html/Netherlands_Penal_Code_1881_excerpts.pdf (Article 47-48), Van Strien (Article 51), own translation (Article 49, 50, 80, 140, and 140a)

Annex III

About the authors

Dr. M. Cupido

Dr. Marjolein Cupido holds an LL.M. in criminal law (*summa cum laude*) from Leiden University. In 2015, Dr. Cupido defended her doctoral dissertation – entitled 'Facts Matter: A Study into the Casuistry of Substantive International Criminal Law' – at VU University Amsterdam. She is currently assistant professor at the department of Criminal Law and Criminology of VU University Amsterdam and fellow of the Center for International Criminal Justice. In 2016, Dr. Cupido was appointed honorary judge in the District Court of Rotterdam. From February 2017 to July 2017, she is a visiting professional at the International Criminal Court (ICC). In her current research, Dr. Cupido focuses on criminal liability in domestic and international criminal law. Her work has been published in international journals, such as the *Journal of International Criminal Justice*, the *Leiden Journal of International Law*, and the *Melbourne Journal of International Law*.

Dr. M. Hornman

Dr. Mark Hornman holds an LL.M. in Criminal Law from the Radboud University in Nijmegen. In July 2016, Dr. Hornman joined the Department of Criminal Law and Criminology of VU University as assistant professor. Previously, he was a lecturer and Ph.D. candidate at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University. During this period, he was also associated with the Utrecht Centre for Accountability and Liability Law (Ucall). In June 2016, Dr. Hornman defended his doctoral thesis, entitled 'De strafrechtelijke aansprakelijkheid van leidinggevenden van ondernemingen. Een beschouwing vanuit multidimensionaal perspectief' [translation: Criminal Liability of Corporate Executives. A Multidimensional Approach (with a summary in English)] at Utrecht University. His current research focuses on the liability of (groups of) corporations and their leading officials.

Prof. W. Huisman

Wim Huisman is a professor of criminology and head of the School of Criminology of VU University Amsterdam, the Netherlands. The research of Prof. Huisman concerns white-collar crime, corporate crime, and organized crime. Recently funded research projects focus on criminal careers of white-collar offenders, corporate complicity to gross human rights violations, causes of corruption, and the prevention of food fraud. Prof. Huisman is editor of the 'Routledge Handbook on White-Collar and Corporate Crime in Europe' (2015). He is also founder and board member of the European Working Group on Organizational Crime (EUROC) of the European Society of Criminology. Currently, Prof. Huisman is chair of the Netherlands Society of Criminology.