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Individual Liability for Business Involvement in International Crimes National Report – Croatia

I. Foreword

1. Public debate in Croatia

Although the issue of individual liability for business involvement in international crimes *stricto sensu* is not itself a matter of intensive public debate in Croatia, debates on a related issue, that of individual liability for business and political involvement in privatization and ownership transformation scandals still flourish. Impunity of businessman for serious economic crimes reinforces impunity for gross violation of human rights, especially in war-torn societies and in societies that are in transition, such is Croatia. Croatia is still facing a particular legal situation regarding combating serious economic crimes committed in the period of privatization and ownership transformation and during the war period (hereinafter referred to as **transitional economic crimes**).¹

Since the economic offences committed in the transitional period during the Homeland War and peaceful reintegration (1990-1998) were not originally prosecuted in the period of their commission, Croatia amended its Constitution on June 16, 2010 and abolished the statute of limitations with retroactive effect for war profiteering, economic crimes and corruption offences. Specific catalogue of crimes is listed in the **Law on Exemption from Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization**, which was passed in May 2011 with the following condition: if disproportioned new gain resulted from those crimes by abusing the situation of war imminent threat to the independence and territorial integrity of the country.² The explanation for the Constitutional amendment was that such crimes are considered extremely serious and continue to undermine Croatian society; they should therefore not be afforded privilege under the country's statute of limitations.³ By that, Croatian society declared the enormous importance of addressing transitional economic crimes, practically **equalizing**

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¹ Ivičević Karas E., Roksandić Vidlička, S., The Relevance of Asset Recovery Policies in Transitional Societies: The Croatian Perspective in Katalin Ligeti & Michele Simonato (eds.), Chasing Criminal Money Challenges and Perspectives On Asset Recovery in the EU, Hart Publishing, 2017 (forthcoming).

² Official Gazette, No. 57/11. (hereinafter: Law on Exemption).

³ See the Proposal of the Decision to amend the Constitution of the Republic of Croatia, September 2009; https://www.pravo.unizg.hr/download/repository/prijedlog_izmjena_Ustava_2009.pdf [20.1.2017].

transitional economic crimes with core international crimes.⁴ The leading politicians of that time believed that the amendments will contribute to the restoration of justice and the return of the moral principle in the economic development of Croatian society.⁵

In order to clearly understand the current debate in Croatia, it must be noted that on July 24, 2015, almost five years after the Constitutional amendment, the Constitutional Court controversially decided that the abolition of retroactivity cannot apply to offences for which the statute of limitations expired before June 16, 2010, when Constitutional amendments were introduced.⁶ Thus, the 2015 decision has significantly limited the ability of the state to punish economic offences committed in the transitional period because, for the great majority of privatization and ownership transformation scandals committed during the Homeland War, the statute of limitations has already expired.

Unless the 2015 decision of the Constitutional Court is altered, Croatian society will apparently not have a serious confrontation with the transitional crimes committed by perpetrators who clearly took advantage of a situation of war and disorder during the time in which they were committed. It can be said that the proclamation of non-application of this constitutional provision by the Constitutional Court in the individual case (of the former prime minister Sanader case) actually legalized wide spread political white-collar crime that occurred during the privatization that occurred in part simultaneously with and exploiting the Homeland War. In fact, the Constitutional Court could have taken another path in its decision making and, based on the principle of proportionality, could have decided otherwise giving the priority to the principle of social justice. These grave economic offences were committed in the transitional period in the time of conflict and peaceful reintegration when the rule of law did not function in its entirety. Therefore, in part of Croatian society and for some legal scholars, Croatian approach to prosecution of those economic crimes became part of a special narrative known as ‘fighting transitional economic crimes.’⁷

The decision of the Constitutional Court divided Croatian legal scholars on how Croatia should approach transitional justice crimes and individual liability of businessman for

⁴ Art 31(4) of the Constitution: The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatization and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law, or those not subject to the statute of limitations under international law. Any gains obtained by these acts or in connection therewith shall be confiscated.

⁵ E.g. Kosor, J. (former Prime Minister), 2011: <http://www.index.hr/vijesti/clanak/kosor-nista-vise-nece-biti-isto-za-one-koji-su-se-bogatili-dok-je-mladost-ginula-u-ratu/549275.aspx> [20.1.2017]

⁶ Constitutional court decision: No: U-III-4149/2014., July 24, 2015.

⁷ Roksandić Vidlička, S., Severe Economic Crimes Committed in Transitional Periods – Crimes under International Criminal Law? in Mapping the Criminological Landscape of the Balkans, Getoş Kalac, A.-M., Albrecht, H.-J.; Kilchling, M.(eds), Berlin: Max-Planck-Institut; Duncker and Humblot, 2014., 467-498.; Novoselec, P.; Roksandić Vidlička, S.; Maršavelski, A., Retroactive prosecution of transitional economic crimes in Croatia – testing the legal principles and human rights, in The Routledge Handbook of White-Collar and Corporate Crime in Europe, van Erp, J.; Huisman, W.; Walle, G.V. (eds), Abingdon; New York: Routledge, 2015. 198-217.; Roksandić Vidlička, S.; Maršavelski, A., Criminal responsibility of political parties for economic crime: Democracy on The Relativity of Wrongdoing: Corruption, organized crime, fraud and money laundering in perspective, Van Duyne, P. et al. (eds.), Wolf Legal Publishers, 2015., 329-346 Also, the elective subject is formed at the Faculty of law, University of Zagreb in the ac. year 2016/2017 under the name Transitional justice, Corruption and Economic Crimes.

transitional economic crimes.⁸ On the other hand, general public opinion - as can be seen from numerous articles in newspapers, political parties statements etc.,⁹ - is that those crimes should be prosecuted regardless of the statute of limitation.

In any case, Croatian experience and legal debate could serve as a valuable contribution to worldwide jurisprudence in (re)building new transitional societies and its market economies and in establishing individual liability for business involvement in international crimes.

2. The main cases of business involvement in international crimes in Croatia

The most renowned case that symbolizes the debate in Croatia sketched out above is the case against former prime minister of Croatia, Ivo Sanader for corruption scandal and the abuse of authority (for one war profiteering case and for one privatization case).

In August 2011, prosecution indicted Ivo Sanader due to the fact that during negotiations regarding the terms of a loan to be granted by Austrian bank, Hypo-Alpe-Adria International AG, to the Government of the Republic of Croatia he, as Croatian Deputy Minister of Foreign Affairs, allegedly made a deal that the bank pay him, in return for that bank's entry into the Croatian market, a commission in the cash amount of seven million Austrian schillings, which the bank indeed paid, over the course of 1995. The crime was classified as a war profiteering crime and an abuse of office and authority as it was committed during a difficult situation the country was going through during the Homeland War, due to a high inflation and extremely high interest rates on loans which made it difficult to find banks ready to grant favorable loans.

In addition to these charges, in September 2011 prosecution charged Sanader for receiving a €10 million bribe, while serving as Prime Minister of Croatia, from Zsolt Hernadi, the chairman of the management board of the Hungarian oil company MOL, in return for transferring the controlling rights from the Croatian oil company INA to MOL. These two indictments merged into one trial and the trial judgment was rendered on November 20th, 2012.¹⁰

⁸ Comp. e.g. different opinions expressed by criminal law scholars on this Constitutional change, Derenčinović D., Doprinos Ustavnog suda Republike Hrvatske u definiranju okvira za tumačenje ustavne odredbe o nezastarijevanju ratnog profiterstva i kaznenih djela počinjenih u vrijeme pretvorbe i privatizacije, *Sveske za javno pravo* (2233-0925) 21 (2015); 7-14 and Roksandić Vidlička, S., Possible Future Challenge for the ECtHR?: Importance of the Act on Exemption and the Sanader Case for Transitional Justice Jurisprudence and the Development of Transitional Justice Policies, *Zbornik Pravnog fakulteta u Zagrebu* 64 (2014), 5/6; 1091-1119. Also see Novoselec, P., Nezastarijevanje kaznenih djela vezanih uz ratno profiterstvo i proces pretvorbe i privatizacije, *Osvrt na odluku Ustavnog suda u „slučaju Hypo“*, *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 22, broj 2/2015, 437-451; Novoselec, P., Novosel, D. Nezastarijevanje kaznenih djela ratnog profiterstva i kaznenih djela iz procesa pretvorbe i privatizacije. *Hrvatski ljetopis za kazneno pravo i praksu*, 2011, 18/2; Amicus cur@e, Nezastarijevanje – Adversus hostem aeterna auctoritas, *informer* 6143, January 19, 2013., For caution in implementation of retroactivity regarding politically sensitive crimes see: Munivrana Vajda, M.; Roksandić Vidlička, S., *Novije promjene u uređenju zastare u Republici Hrvatskoj - na tragu političke instrumentalizacije ili težnje ka ostvarenju pravednosti?*, *Žurnal za kriminalistiku i pravo*. XVIII (2013), 2; 43-60.

⁹ E.g. <http://www.poslovni-savjetnik.com/aktualno/ratni-i-privatizacijski-profiteri-od-danas-spavajte-s-jednim-okom-otvorenim>; <http://blog.vecernji.hr/danijel-tatic/kako-je-munjevitom-brzinom-stasala-nova-klasa-ratnih-profitera-8276>. [20.1.2017]. Some political parties even call for implementation of lustration of those involved in such crimes, see <http://totalinfo.hr/stipe-petrina-lustracija-da-ali-prvo-ratne-profitere-i-one-koji-su-svercali-s-neprijateljima> [20.1.2017]

¹⁰ Indictment No. K-US-48/11, IS-US-6/11, August 31, 2011. See details on official web page: www.dorh.hr/PodignutaOptuznicaProtivIveSanadera01 [20.1.2017].

As the judges pointed out in the first judgment against Sanader,¹¹ he, as the former Prime Minister of the country abused his position for his own enrichment and not for the common good. The conviction was confirmed by the Supreme Court, which further explained what was to be seen as war profiteering, especially when it comes to public officials:

Although the basic content of the war includes armed struggle, the war, however, is not just about conflict. War is a broader, more complex phenomenon because it involves other forms of struggle (political, economic, information) which have great importance for the preparation and conduct of war. Given that, it is justifiably established by the trial court, that war profiteering does not only make only previously known forms of this phenomena, such as raising the price of goods due to shortages, selling weapons to defend the country with disproportionately high prices, but also the behavior of which the defendant is guilty of... Taking the provision from the agreement [Loan agreement between K.L. & H. b. with the political support of Austria] by the person to whom the primary duty was to represent and defend the interests of Croatia and not to worry about his own illegal profit... and bearing in mind all aforementioned circumstances which marked the incriminated period, [that action] cannot be described in any other way other than war profiteering.¹²

In 2016 some other major proceedings against businessman for alleged war profiteering and privatization misuse were initiated based on the Law on Exemption (e.g. *Gavrilović case*).¹³

3. The main cases of business involvement in international crimes before Croatian civil courts

Croatia does not have a mechanism similar to the US Alien Tort Claims Act.¹⁴ Therefore, except for some international arbitrations linked to the privatization, civil law mechanisms have not been used in Croatia to address business involvement in international crimes. Moreover, no trust fund for victims of “transitional economic crimes” or for business involvement in international crimes has been established, like in some other transitional countries (e.g. South Africa).

In this context a recent **arbitration decision** of UNCTIRAL Tribunal in the INA MOL dispute must be mentioned.¹⁵ In December 2016 UNCITRAL found that Croatia’s claim that MOL-INA deal should be declared null and void based on MOL's involvement in bribery of Sanader, corporate governance and MOL’s alleged breaches of the 2003 Shareholders Agreement should be dismissed, due to the fact that “ having considered most carefully all of Croatia's evidence and submissions on the bribery issue, which have been presented in a most painstaking and comprehensive way, the tribunal has come to the confident conclusion that

¹¹ Zagreb County Court Judgment 2012.

¹² VSRH I Kž-Us 94/13-10, 3 April 2014.

¹³ <http://www.jutarnji.hr/vijesti/crna-kronika/gavrilovicu-potvrdili-optuznicu-za-ratno-profiterstvo-on-se-javio-iz-floride-ne-da-nisam-uzeo-novac-za-sebe-nego-ni-putne-troskove-nisam-zaracunao/5129662/> [20.1.2017].

¹⁴ Alien Tort Claims Act 1789.

¹⁵ MOL owns a 49% stake in INA, holds management rights in the oil and gas production? which have been challenged by Croatian government, owning a 44.8% stake. MOL initially bought a 25% stake in INA from the Croatian government in 2003 and increased it later.

Croatia has failed to establish that MOL did in fact bribe [Mr.] Sanader.”¹⁶ As mentioned in the previous section, due to Constitutional court decision Croatian government was not able to present evidence of final conviction for bribery.

Finally, despite the absence of civil cases, it must be noted that Croatian companies are becoming more and more aware of their possible responsibility for involvement in international crimes and other human rights violations, and are increasingly gaining knowledge on **regulations in corporate social responsibility**, following the relevant EU policies and regulations, and business and human rights discourse (e.g. UN Guiding Principles on Business and Human Rights).¹⁷

II. General Remarks (in a nutshell)

1. Core crimes in Croatian criminal legislation

Croatia has a rather long tradition of proscribing genocide, war crimes and several other offences against international humanitarian law which were introduced already in 1951.¹⁸ With minor amendments, these crimes have remained almost unaltered through the years, even after Croatia gained independence in 1991 and enacted its first Croatian Criminal Code in 1997 (CC1997).¹⁹ This Code was in force until 1 January 2013 when the new Criminal Code (hereinafter: CC) entered into force.²⁰

The new Criminal Code has not introduced revolutionary changes into the regulation of **international core crimes**; yet both the concept and the content of these offences have been slightly adjusted in order to mirror the ICC Statute more closely. The new chapter on Crimes against Humanity and Human Dignity now opens the Special Part of the Criminal Code, thus symbolically emphasizing the extreme gravity of the offences contained in this chapter. Genocide (art. 88 CC) is the first offence, followed by the Crime of Aggression (art. 89 CC), Crimes against Humanity (art. 90 CC) and War Crimes (art. 91 CC). Definitions of all these offences are manifestly modelled after the definitions of the ‘core crimes’ in the ICC Statute; however some peculiarities reflect the previous development of these crimes in Croatian, i.e. former Yugoslavian legislation. First of all, in line with the old concept of the core crimes, taken over from the former Yugoslav legislation, the perpetrator is not only a person who takes part

¹⁶ <http://molincroatia.com/media/mol%E2%80%99s-press-releases-and-statements-regarding-ina#dec24>; Parts of arbitration decision cited according to data available at: <http://www.jutarnji.hr/vijesti/hrvatska/mol-objavio-dijelove-odluke-arbitraznog-suda-u-sporu-oko-upravljackih-prava-u-ini-evo-sto-stoji-u-rjesenju-tribunala-koji-je-odbacio-hrvatsku-tuzbu/5499475/>. [20.1.2017].

¹⁷ "Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework", developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. E.g. <http://www.agrokor.hr/en/the-agrokor-group/corporate-social-responsibility/> <http://www.vipnet.hr/un-globalni-sporazum> [20.1.2017].

¹⁸ See Munić Vajda, M., *Noviji razvoj međunarodnih zločina i zapovjedne odgovornosti u hrvatskom kaznenom pravu*, in Nogo, S. (ur.), *Međunarodna krivična dela*, Intermex, 2013, 258.

¹⁹ This Code was amended on a number of occasions, the most important being the amendment from 2004, which for the first time defined crimes against humanity as a distinct criminal offence as well as the concept of superior responsibility.

²⁰ Official Gazette 125/11, 144/12, 56/15, 61/15.

in fulfillment of the statutory elements (the so-called being of the crime, German: *Tatbestand*) of these offences or essentially contributes to their commission, but also a person who orders their commission even when this order is not acted upon (art. 88(2), art. 90(2), art. 91(4) CC).²¹ However, in order to qualify a person issuing such an order as a perpetrator, Croatian case law now rather uniformly requires proof not only that the accused had a commanding function, but that taking into consideration all the concrete circumstances of each particular case, he or she, “was obviously in *de facto* position to issue orders and control unlawful actions of his or her subordinates ...”²²

The Criminal Code also retained the criminalization of ‘public and direct incitement to aggression’ (art. 89(3) CC), thereby going beyond the requirements of the ICC Statute and presumably international customary law. This provision, introduced back in 1977,²³ gives effect to the prohibition of war propaganda in article 20 of the International Covenant on Civil and Political Rights and article 39 of Croatian Constitution.²⁴ Another peculiarity of Croatian regulation of the crime of aggression in comparison to the ICC Statute and international customary law can be found in article 89(2) CC, which provides for the punishment of whoever takes part in aggressive operations of the armed forces. In other words, ordinary soldiers of the invading army are not considered mere accomplices, but principle perpetrators of the crime of aggression, as without their participation the crime of aggression cannot be committed.²⁵

When it comes to war crimes, the most important distinguishing feature in comparison to the ICC is elimination of distinction between international and non-international armed conflicts (although both categories are explicitly referred to). In the explanatory report the legislator *expressis verbis* stated that “all the provisions [of war crimes] are equally applicable to both international and non-international armed conflicts.”²⁶

In addition to the core crimes briefly described above, Chapter IX incriminates a whole set of other offences amounting to serious violations of international humanitarian law, humanity and human dignity. Torture (art. 104 CC), slavery (art. 105 CC), trafficking in persons (art. 106 CC) a number of terrorism related offences (art. 97-102 CC), and other serious violations of human rights under specific circumstances may form ‘core crimes’, but in the absence of *chapeau* requirements, constitute separate, distinct crimes).

2. Other relevant offences amounting to serious violations of human rights

²¹ Without a specific provision, ordering would most likely be punishable as an accessory form of participation in the offence, and if unsuccessful, i.e. not followed by an unlawful act, it would be punishable as an attempt, which means that the punishment could be mitigated (art. 37(2) CC). Unlike with other crimes, when it comes to crime of aggression (art. 89), the responsibility of political and military leadership does not arise when the order is issued, but only when acted upon, i.e. when it actually leads to a war of aggression.

²² Supreme Court of the Republic of Croatia, VSRH KŽ 847/92.

²³ Article 152 of the Criminal Code of the former Socialist Federal Republic of Yugoslavia (Official Gazette SFRJ Nos. 4/77, 13/85, 36/77, 26/86, 74/87, 57/89 and 3/90).

²⁴ Official Gazette, Nos. 56/90, 135/97, 113/00, 28/01, 76/10.

²⁵ See more in Turković, K., Munivrana Vajda, M., Crime of Aggression and National Law – Croatia in Kreß, C.; Barriga, S. (eds.), *The Crime of Aggression, a Commentary*, Volume 1, Cambridge University Press, 2017, 863-879.

²⁶ Turković, K. *et al.* Komentar Kaznenog zakona Narodne novine, 2013, 141. Whether this was in fact achieved is a matter of debate. For a critical appraisal see Munivrana Vajda, M., *Međunarodni zločini prema novom Kaznenom zakonu*, Hrvatski ljetopis za kazneno pravo i praksu, (Zagreb), vol. 19, 2/2012, 835-836.

When discussing individual liability for business involvement in international crimes in Croatia, transitional economic offences already analyzed in the introductory chapter, must be emphasized as **serious violations of human rights**. As already explained, **certain economic offences** such as different types of fraud, counterfeiting and abuse of position of authorities,²⁷ if resulted in a disproportioned new gain by exploiting the Homeland War (*war profiteering*) as well as economic criminal offences of *privatization and ownership transformation* committed “during the Homeland war, peaceful reintegration, warfare and imminent endangerment of independence and territorial integrity of the state,” can be seen as offences amounting to serious violations of human rights **akin to international crimes**. The gravity of these crimes in Croatian context is illustrated by explanation of the drafters of the new Constitutional provision that “*these offences are considered, both by the general public and by the experts, as extremely serious criminal offences for which it is necessary, just and justifiable to deny the application of statute of limitations, in particular having in mind the time of their commission, surrounding circumstances and caused consequences.*”²⁸ Since before this constitutional amendment statute of limitation was abolished solely for core international crimes, by abolishing the statute of limitation, Croatia has symbolically placed those crimes side by side to core international crimes.²⁹

3. Individual modes of responsibility

The principle of personal criminal liability (and culpability) is one of the paramount principles of Croatian criminal law. According to article 4 CC, no one may be punished unless he or she is guilty of the committed criminal offence, i.e. unless he or she is culpable in the specific case with respect to the committed act. Croatian criminal law adopts a **differentiated, dualistic model of participation**, which distinguishes between principal actors on one side and accessories on the other side. Principal actors are individual or sole perpetrators, indirect perpetrators and co-perpetrators (art. 36(1) and (2) CC). If on the basis of a joint decision a number of persons commit a criminal offence so that each one of them participates in the carrying out of the act or otherwise substantially contributes to the commission of the criminal offence, each one of them shall be punished as the perpetrator. Negligent liability of co-perpetrators is based on a joint violation of due care (art. 36(3) CC).

The law further clarifies that accessorial liability consists out of aiding and abetting and instigation (art. 39(1) CC) and is accessorial in nature, meaning that it depends on the wrongfulness of the conduct of the principal actor and its legal qualification. Although the so-called control theory is no longer explicitly endorsed in the Criminal Code, since the legislators decided to leave the interpretation of the dividing line between principal and accessorial liability to doctrine and case law, this theory is still seen as a dominant theory serving to distinguish

²⁷ The full list of offences may be found in the Law on Exemption.

²⁸ See Croatian Government’s Proposal of the Decision to amend the Constitution of the Republic of Croatia, from September 2009, https://www.pravo.unizg.hr/download/repository/prijedlog_izmjena_Ustava_2009.pdf [20.1.2017].

²⁹ Another issue, already discussed above is whether the abolishment of the statute of limitations has a retroactive effect.

principals from accessories.³⁰ Generally speaking, while principal actors control the commission of a crime, accessories do not have such control, but only contribute to its commission.

According to article 37 CC, **instigation** is punishable equally as commission. This article, however, does not specify the manners in which instigation may take place. An instigator must seek to exert psychological influence on the main perpetrator to make a decision to commit a criminal offence and this can be done in many different ways, such as encouragement, persuasion, request and promises of awards. This means that even purely moral complicity (e.g. in the form of peer pressure and approval) may constitute punishable instigation under Croatian legal order, although moral forms of complicity will more often constitute aiding and abetting. Ordering may also constitute one form of instigation.³¹ A causal link is required. Yet, although the action of an instigator must be the cause behind the decision of the main perpetrator, it need not be the only cause behind such decision of the main perpetrator.³²

Similarly, **aiding and abetting** must also causally contribute to the commission of an offence, but does not have to reach the level of a *conditio sine qua non*, without which the commission of a crime would have been impossible. The main perpetrator does not even have to be aware of the assistance. Intentional aiding and abetting is simply proscribed by article 38 CC, but the law does not define or describe the notion. Provided that the causal link is satisfied (that it facilitates, accelerates or intensifies commission), any assistance to the commission of the offence may suffice.³³ This means that aiding and abetting may also be and often will be psychological in nature (moral complicity), including different forms of approval and encouragement when the perpetrator has already made his or her mind, and even mere presence.³⁴

As far as subjective requirements (*mens rea*) of **complicity** are concerned, both instigation and aiding and abetting must be **intentional**, but *dolus eventualis* suffices. In legal literature it is often stated that accessories must act with the so-called double intent.³⁵ The intent must refer both to the criminal offence of the main perpetrator and to accomplice's own act of instigation or aiding and abetting. In the case of **excess** of the perpetrator, the crime that is not embraced by the intent of other accomplices will not be attributable to them. The conclusion that participants in a crime should not be held liable for incidental and unintended departures from the criminal enterprise is based on article 39(1) CC, which states that every co-perpetrator and accomplice should be punished according to his or her own guilt. In other words, excess of one participant in the offence cannot have an adverse effect on other participants. However, the

³⁰ E.g. Novoselec, P.; Bojanić, I., *Opći dio kaznenog prava*, Zagreb, 2013, 326. For a similar approach at the ICC see Munivrana Vajda, M., *Distinguishing Between Principals and Accessories at the ICC – Another Assessment of Control Theory*, *Zbornik Pravnog fakulteta u Zagrebu*, Vol.64 No.5-6, 2014, 1039-1060.

³¹ Note, however, that when it comes to international core crimes, under certain circumstances elaborated in the case law as explained above, ordering is punishable not as an accessorial form of accomplice liability, but as commission (perpetration), attaching principal liability, even if unsuccessful.

³² For a more detailed account see Munivrana Vajda, M.; Ivičević Karas, E.; *Criminal Law. Croatia*, Wolters Kluwer, 2016, 101 with further references.

³³ Novoselec, P.; Bojanić, I. 347.

³⁴ E.g. VSRH, I Kž-101/90.

³⁵ E.g. Novoselec, P.; Bojanić, I, 345, 349 and Bačić, F.; Pavlović, Š, *Komentar Kaznenog zakona*, Oganizator, Zagreb, 2004, 191.

judges need to consider if the other participants tacitly accepted the conduct which went beyond the original plan, in which case, all the participants will be responsible.

In case of *delicta propria*, when the person acting does not hold an official position or another attribute required by the statutory description of an offence (*extraneus*), that person may not be punished as a perpetrator even if fulfilling all the statutory elements of that offence him or herself. In those cases, the legal literature is uniform, the contribution may be qualified as instigation or aiding and abetting instead.³⁶

Finally, a word on the **impact of different modes of participation on the sentence**. According to articles 37(1) and 38 CC, accessories are punishable as if they themselves have committed the offence. Depending on the circumstances, the court may impose an even harsher sentence on an accomplice than on the principal actor. However, at the same time, the legislator allows for mitigation of punishment for aiders and abettors (art. 38 CC). This possibility does not stretch to instigators, which are seen as “spiritual fathers of the offence” and therefore sometimes even as “the main culprits.”³⁷

III. Corporate Complicity and Actus Reus

1. Responsibility for neutral acts

As Burchard emphasizes,³⁸ difficulties lie in proving an **objective link** between an *ancillary and neutral business contribution* on the one hand and the *eventual commission* of a core international crime. In order to establish individual criminal liability of businessmen, as Vest writes,³⁹ a twofold test is needed. First, to establish the factual relationship between the provision of material, goods or services and the perpetration of an international crime: 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. Second, according to Vest, the business leader must have acted at least with knowledge that an international crime will be committed by the principal perpetrator. Hence, he has to know specifically for which purpose his partner will use his products, performance or service.⁴⁰ Whereas we believe that the test should be applicable in Croatia as well, it needs to be emphasized that in Croatia *dolus eventualis*, in principle, suffices for aiding and abetting international crimes.

In Croatia, neutral acts such as providing goods or material means generally used for lawful ends (e.g. vehicles, computer programs or chemicals); providing goods or material means dangerous in nature (e.g. weapons), supplying financial services; providing financial means; providing logistical support (e.g. passing on certain information) and benefiting from

³⁶ E.g. Bačić, F., Pavlović, Š., 187. The exception is the crime of aggression, the only international crime which specifically requires a certain position in the form of a leadership element, as *extranei* to this crime are punishable as perpetrators according to explicit provision.

³⁷ Novoselec, P.; Bojanić, I, 346, Bačić, F.; Pavlović, Š., 184-185.

³⁸ Burchard, C. (2010): Ancillary and Neutral Business Contributions to Corporate-Political Core Crime, Initial Enquiries Concerning the Rome Statute. *Journal of International Criminal Justice* 8/3, pp. 919-946., 938.

³⁹ Vest, H., Business leaders and the Modes of individual Criminal responsibility under International Criminal Law, *Journal of International Criminal Justice*, 2010, 8/3, 853.

⁴⁰ *Ibid.*

the commission of international crimes could lead to **accomplice liability** for core international crimes, according to the general provisions analyzed above, provided that the *mens rea* and the causal link between *mens rea* and *actus reus* can be established.

In addition, some **separate offences** are also applicable in Croatian legal system such as financing of terrorism (art. 100 CC). Similarly, whoever makes or procures weapons, explosive devices, the means required for their making, or poisons which he/she knows are intended for the commission of a criminal offence, or enables another to obtain them shall be punished by imprisonment (art. 330 (1)) CC). Article 331 CC could be of avail as well (Unlawful Possession, Making and Procurement of Weapons and Explosive Devices). This article, regulates that punishment will be inflicted upon whoever makes or improves, produces, procures, stocks, offers for sale, sells or purchases, mediates in the purchase or sale, possesses, transfers or transports chemical or biological weapons or other means of combat prohibited under international law and especially to whoever sells or exports weapons to a country in which children are used as mercenaries.

2. Responsibility for omission

In Croatia a criminal offence may be committed by acting or by omitting to act (art. 20(1) CC). In brief, responsibility for omission attaches to whoever fails to avert the consequence of a criminal offence described under the law shall be liable for omitting to act if he/she is legally bound to avert such a consequence, if the omission to act is by its effects and meaning tantamount to committing the said act by acting (art. 20(2) CC). One could claim that a duty to act is based on the duty of care of businessman. This duty includes due diligence, implantation of effective compliance programs, reporting etc. (see more in Chapter VII). According to the **UN Guiding Principles**, business have to properly analyze and understand their human rights impacts through due diligence and should take necessary steps to prevent and minimize human rights violations. The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁴¹

A perpetrator who has committed a criminal offence by omitting to act may be punished less severely, unless the criminal offence in question can be committed only by omission to act (art. 20(3) CC). To conclude, **managers have a duty to act** which makes them criminally responsible for any omission that causes harm (of course when all other elements of a criminal offence are met).⁴²

As stated in Zerk's report: under the doctrine of separate legal personality, a **parent company** and its subsidiaries are treated as separate legal entities. The result is that parent

⁴¹ UN Guiding Principles, principle 13. According to the Commentary of the same article, for the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

⁴² Compare, Engelhart M., Economic Criminal Law in Germany, German law Journal, 2014, 703.

companies are not automatically treated as being responsible for the act of subsidiaries, even subsidiaries that are wholly owned. But even if the parent may not be held responsible on the basis that it owned the subsidiary it might potentially be liable under other legal principles of accessory liability if it ordered, incited, organized, assisted or facilitated the offence.⁴³ The same is applicable to Croatia and the same could be applied to “**corporate owners**,” especially, for international crimes for which there is the obligation to “act” (see more in Chapter VII). The same theory of separate legal personality, could be applied to top-ranking corporate officials and other corporate officials. Individual corporate officials could be prosecuted for aiding and abetting crimes committed by their companies (and vice-versa) and be responsible (see more in Chapter VII). Moreover, corporate owners, top-ranking corporate officials and other corporate officials could be responsible as **commanders**, according to art. 96 CC. Although this concept is analyzed in detail below, here it needs to be emphasized that superior liability for international crimes may attach even to those who fail to exercise proper control negligently (art. 96(4) CC).

IV. Corporate Complicity and *Mens Rea*

1. A prior agreement or a common plan

According to the article 36(2) CC, if on the basis of a joint decision a number of persons commit a criminal offence so that each one of them participates in the carrying out of the act or otherwise substantially contributes to the commission of the criminal offence, each one of them shall be punished as the perpetrator. The common plan or agreement **need not be explicit**: it can be tacitly concluded or implied. Without it, however, two or more persons cannot be considered co-perpetrators, but if they cause the same consequence independently from each other, only parallel perpetrators.⁴⁴ As a rule, common plan or agreement must be reached prior to the commission of an offence; still in certain cases a co-perpetrator may join the plan and execution of the offence after its commencement, but prior to its completion (successive co-perpetration) In line with the control theory the prevailing view is that successive perpetrators should not be held responsible for elements realized before they joined in, but only for their own contribution.⁴⁵

For a specific category of crimes, crimes against humanity (art. 90 CC), act of perpetrator must constitute a part of attack, but there is no requirement as exists in the article 7(2) of the ICC Statute that attack is a course of conduct pursuant to or in furtherance of a State or organizational policy to commit such an attack.⁴⁶

⁴³ Zerk J., Corporate liability for gross human rights abuses, Towards a fairer and more effective system of domestic law remedies, A Report prepared for the Office for the UN High Commissioner for Human Rights, 2013, 37.

⁴⁴ Whereas each co-perpetrator is liable for the whole completed offence, regardless of whether he or she personally completed the offence, when it comes to independent, parallel perpetrators, each is responsible only for his or her own causal contribution.

⁴⁵ More in Munivrana Vajda, M.; Ivičević Karas, E., 100.

⁴⁶ Munivrana Vajda M., Kaznena djela protiv čovječnosti i ljudskog dostojanstva u Posebni dio kaznenog prava, Pravni fakultet Sveučilišta u zagrebu, 2013, 16.

For **complicity**, no common plan is necessary, but intent as mental element is required.⁴⁷ The main perpetrator does not even have to be aware of the assistance, as explained above.

2. Required *mens rea*

As Dutch cases (Kouwenhoven and van Anraat) suggest, those who support international crimes knowingly or with intention can face criminal sanctions.⁴⁸ In Croatia as in many other national legal systems, unlike in front of the ICC,⁴⁹ ***dolus eventualis*** suffices to prove such a crime. According to art. 26. CC criminal offence may be committed with direct (*dolus directus*) or indirect intent (*dolus eventualis*). A perpetrator is acting with direct intent when he/she is aware of the elements of a criminal offence and wants or is certain of their realization. A perpetrator is acting with indirect intent when he/she is aware that he/she is capable of realizing the elements of a criminal offence and agrees to this.

Intent must refer to all objective elements of the offence. To the extent that the crime presumes additional objective element aside from conduct and specific consequences, it suffices for liability if the perpetrator is aware that a circumstance exists.⁵⁰

As far as specificities of international crimes are concerned, for crimes against humanity, the perpetrator must act with the knowledge of the attack against civilian population (art. 90 CC). Regarding war crimes (art. 91 CC), perpetrator must be aware of the ongoing armed conflict as well as of the protected status of victims and property. For genocide (art. 88 CC), the perpetrator must act with a special intent – to destroy a particular group or its part (genocidal intent). However, for the accomplices it suffices that they act with awareness that perpetrators are committing international crimes.⁵¹ For the crime of aggression (art. 89 CC), on the subjective side of the required intent, the perpetrator must be aware of his or her leading position and he/she must be aware of the facts due to which the action of the armed forces clearly contradicts the charter of the UN. The persons participating in the activities of the armed forces (para 2. of the same article), must be aware of these facts as well.

Therefore, unless otherwise provided, in Croatia businessman who support international crimes not just knowingly or with intention, but with *dolus eventualis* could face criminal sanctions.

3. Responsibility for negligent conduct/participation

As already explained above, negligent liability of co-perpetrators is based on a **joint violation of due care**. Negligent co-perpetration is proscribed, yet it cannot extend to international core crimes which generally require intentional conduct. Corporate owners, top-ranking corporate officials and other corporate officials can be found responsible for negligent

⁴⁷ Novoselec, P., Bojanić I., *Opći dio kaznenog prava*, Pravni fakultet u Zagrebu, 2013, 344.-349.

⁴⁸ Van Ho., T., *Transnational Civil and Criminal Litigation* in Michalowski S. (ed.), *Corporate Accountability in the context of Transitional Justice*, Ashgate, 2013, 56.

⁴⁹ See Werle G., and Jessberger, F., *Principles of International Criminal Law*, 3ed, Oxford, 2014, 182.

⁵⁰ Novoselec, P., Bojanić, I., 2014., 345 etc; Compare Werle G., and Jessberger, F., *Principles of International Criminal Law*, 3ed, Oxford, 2014, 182.-183.

⁵¹ Novoselec, P., Bojanić I., 332.

conduct only on the basis of the concept of command responsibility (article 96(3) and (4) as elaborated below).

V. Corporate Complicity and Indirect Perpetration

Indirect perpetration is a recognized form of perpetration in the Criminal Code (art.36(1)). It is well-established that direct perpetrator, a person used as a tool, need not be an innocent agent, although this will be the case with respect to most forms of indirect perpetration.⁵² However, even though the doctrine of **indirect perpetration using an organization** (whereby both the direct perpetrators, members of an organizational machinery of power, and indirect perpetrator, i.e. a perpetrator behind the desk, can be found responsible), is a doctrine familiar to Croatian legal scholars⁵³ so far it has not received recognition by Croatian courts.

This doctrine is theoretically applicable to business involvement in commission of international crimes. Corporations may be organized hierarchically, and in such settings it is possible that the leading figure (either a corporate owner, a top-ranking official or other corporate official acting as *de facto* leading organ) uses others and company's structures for committing the crime. In such cases it will be difficult to apply the concept of co-perpetration, which requires an **agreement or a common plan**. When it comes to indirect perpetration (in general) there is no agreement between indirect perpetrator and direct perpetrators, which are used only as a tool and are obedient. More specifically, in cases of indirect perpetration using an organization, execution of an offence is based on an order and not on mutual agreement or a common plan.⁵⁴ Equally missing in most cases of indirect perpetration is another requirement for co-perpetration; that of **coordinated essential contribution**, since the indirect perpetrator in general does not make any causal contribution at the time of commission in the traditional sense.⁵⁵ Qualifying such situations as co-perpetration would also lose out of sight different structure of the two concepts; co-perpetration is horizontal in nature, whereas indirect perpetration through an organization is characterized by its vertical structure.

In situations described above, however, it is possible to treat the **leading figure**, who is taking advantage of the organizational structure of the corporation, as an **instigator**. Due to the theory of limited accessoriness, for an instigator to be held responsible, the principal offender

⁵² For different forms of indirect perpetration compare Pavišić et al, Komentar Kaznenog zakona, Narodne novine, 2007, 154, Bačić, F.; Pavlović, Š., 156-158.

⁵³ Pavišić, B.; Veić, P., Komentar Kaznenog zakona, Zagreb, 2001,152.

⁵⁴ Bojanić, I., 118, who further explains that awareness that a person is an addressee of an order is not sufficient for a finding of common agreement and consequently of co-perpetration. If that was the case, every situation of successful instigation would turn into co-perpetration.

⁵⁵ His or her contribution in most cases will be limited to issuing an order to others. Bojanić acknowledges that the role of the person in the background (German „*Täter hinter dem Täter*“) could perhaps be seen as a substantial contribution to the commission in the preparatory stages, but definitely reject the subjective component of co-perpetration. Bojanić, I., Posredno počiniteljstvo na temelju organizacijske vlasti, Pravni vjesnik 19 (3-4): 109-122, 2003, 120. Furthermore, contribution of the person behind the desk boils down to planning and ordering which cannot in itself be seen as substantial contribution to the commission of the crime as that would merge subjective and objective component of co-perpetration into one. In addition, the whole execution of the offence is relinquished to direct perpetrators.

(in this case direct perpetrator) need not be culpable. It suffices that the principal offender commits an act which fulfills the statutory elements of the offence and is unlawful.⁵⁶ Yet, some authors emphasize that qualifying the acts of the leading figure (within the corporation) as acts of an instigator, i.e. mere accomplice, would not adequately reflect his or her leading role in the commission of the crime.⁵⁷ Unlike an instigator, a person issuing an order in cases of control over an organization need not make an effort in order to search for and recruit direct perpetrators or to surmount their possible resistance. This, coupled with fungibility of direct perpetrators demonstrates that their role is subsidiary in comparison to the role of the person issuing an order, i.e. indirect perpetrator. Hence, qualifying acts of a person behind the desk, who is governing the organized apparatus of power as mere instigation would not fully correspond to reality.⁵⁸

Still, having in mind the complete **lack of any case law** on this matter, it is difficult to say whether the doctrine of indirect perpetration using an organization would be seen as applicable to corporate owners or top-ranking corporate officials by Croatian courts, both generally and in connection with international crimes. Some Croatian case law indirectly addresses the notion of indirect perpetration in connection to war crimes prosecution, but unrelated to the corporate dimension of the issue.⁵⁹ In literature, it has been argued that this legal construct should be reserved to organizations of mafia type, completely detached from law with a strict and highly hierarchically organized structure, in which direct disobedient perpetrators are easily replaceable, and this will normally not be the case when it comes to corporations and corporate complicity.⁶⁰ On the other hand, some argue that, especially having in mind the context of global financial and economic crises as well as the rising problem of unemployment, it is unrealistic to expect that the corporate subordinates will reject to obey an unlawful order from the corporate official.⁶¹ This would presumably mean that an order from a

⁵⁶ In such situations it would be possible to apply the concept of instigation to an indirect perpetrator using an organization even according to the theory of strict accessoriness, which requires determination of guilt on the part of the principal.

⁵⁷ See Novoselec, P., *Aktualni problemi hrvatskog gospodarskog kaznenog prava*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 14, 2/2007, 380 et seq.

⁵⁸ Bojanić, I., 119.

⁵⁹ In those cases, however, the conviction was not based on the doctrine of indirect perpetration and a relevant provision of general part (now art. 36(1) CC), but on explicit provision of the special part of Criminal Code which equates ordering of war crimes with their (physical) perpetration, as explained above in part 2 of this report. Croatian case law hints that in those cases ordering could perhaps be seen as (indirect) perpetration even without a specific provision in that regard. For example, in case against B.G. the Supreme Court emphasized that the “defendant used his *de facto* command powers over soldiers, direct executors [of war crimes]”. VSRH I Kž 84/10-8. The case law, however, does not further provide an answer to the question of type of indirect perpetration, but having in mind that the soldiers generally remain responsible perpetrators of international crimes, the concept of using an organization seems the closest. On the theoretical applicability of different concepts, including indirect perpetration, on superior orders see Kos, D.; *Zapovjedna kaznena odgovornost*, 4, available at:

http://www.vsrh.hr/CustomPages/Static/HRV/Files/DKos-Zapovjedna_kaznena_odgovornost.PDF, [24.1.2017]

⁶⁰ Comp. Novoselec, P., *Uvod u gospodarsko kazneno pravo*, Zagreb, 2009, 23. and Vuletić, I., *Dometi koncepta “organiziranog aparata moći”* Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 21, 1/2014, 23-38, 34., who analyze Roxin’s argument that in such cases two preconditions are not met: 1) direct perpetrators are not easily replaceable (as they usually need to have special qualifications for their position); 2) there is no alienation/detachment of corporation from the legal order, since corporations usually and predominantly act in accordance with law.

⁶¹ Vuletić, I., 36. Yet, foreign literature on this matter calls such a dilution of the concept through inclusion of economic pressures and corporate cultural expectations of compliance into question. See Kyriakakis, J.,

business leader would be almost automatically complied with by obedient and replaceable employees.⁶² In addition, Croatian context demonstrates that companies are sometimes established solely with the purpose of avoiding the reach of the legal system, bypassing the rules and committing economic criminal offences.⁶³ This would presumably indicate detachment of the corporation from the governing legal regime. Reliance on this reasoning to justify the application of the doctrine to corporations, especially in connection with international crimes, however does not seem entirely persuasive. Although the authors are aware of the potential strength of the corporate culture and structure, still in most cases this will not reach the threshold of automatic compliance with the orders.⁶⁴

Therefore, the concept of indirect perpetration through an organization could be applied by Croatian courts only in certain exceptional situations in which, e.g. corporations are serving only as a shield for a mafia type of organization acting within the corporation or when corporations are used mainly for criminal purposes. In such situations, general requirements for this type of indirect perpetration may easily be present and theoretically there would be no obstacle to apply the concept of indirect perpetration using an organization to a top-ranking corporate official in connection with any offence, including international crimes. Limited debate on this issue in Croatian legal literature speaks in favor of such a conclusion.⁶⁵ In other cases, accessory liability will probably be more appropriate.

VI. Corporate Complicity and Collective/Inchoate Offences

1. Membership in a criminal group and participation in a conspiracy

Croatian Criminal Code recognizes and incriminates conspiracy, but solely as an inchoate offence.⁶⁶ According to article 327 CC whoever conspires with another to commit a criminal offence for which a punishment of imprisonment exceeding three years may be imposed under the law, shall be punished by imprisonment not exceeding three years. Theoretically speaking, as there is no case law to support this claim, corporate owners and other corporate officials could be held responsible for **taking part in a conspiracy** aimed at committing international crimes. The problem that may arise in such cases is how to treat corporate officials who were only a part of a collegial organ which made a decision to conspire, and in particular how to treat a person who was outvoted, but more about this issue in the next chapter.

Developments in international criminal law and the case of business involvement in international crimes, *International Review of the Red Cross*, Vol. 94, no. 887, 2012, 997.

⁶² Yet, as has been pointed out in comparative literature on this matter, potential specialty skills of employees may make their fungibility more difficult, Kyriakakis, J., 995.

⁶³ Vuletić, I., 36

⁶⁴ Modern corporations are generally not based on a rigid hierarchical organizational structure, but “around maximizing productivity rather than formalizing a culture of obedience to superiors”. Kyriakakis, J. 995, further quoting Olasolo.

⁶⁴ Ibid.

⁶⁵ See Vuletić, I., 36.

⁶⁶ For the different functions of conspiracy in common law see Bonnie et al., *Criminal Law*, Foundation Press, New York, 2004, 709.

Although conspiracy in Croatia does not have its second common law function, that of aggravating the punishment, similar effects are produced by articles 328 and 329 CC, which incriminate **criminal associations**. According to article 328(4) CC, a criminal association is an association made up of three or more persons acting in concert with the aim of committing one or more criminal offences that are punishable with imprisonment for a term longer than three years. It does not include associations randomly formed for the immediate commission of one criminal offence, as is the case with conspiracy. Yet, the effects of this more severe and permanent form of conspiracy are similar to the second function of conspiracy. Committing a criminal offence as a member of such an association or inciting or assisting another to commit a criminal offence as a member of such an association carries an aggravation of penalty (art. 329 CC).⁶⁷ At first glance, this scenario seems most apt for situations in which corporations are serving only as a shield for a mafia type of criminal organization acting within the corporation. Yet, Croatian courts have already found the concept applicable to business involvement in transitional economic crime.⁶⁸ Similar reasoning could be applied when considering the role of businessman in international crimes.

2. Responsibility for JCE

In Croatia corporate owners, top-ranking and other corporate officials cannot be held criminally responsible as members of a **joint criminal enterprise**, as JCE is an unfamiliar legal concept in Croatian legal system. In fact, this concept and its use by the ICTY have been powerfully criticized by Croatian scholars.⁶⁹

3. Responsibility pursuant to command responsibility doctrine

On the other hand, the doctrine of **command responsibility** is applicable to civilians and theoretically may apply even to corporate owners and top-ranking corporate officials involved in commission of international crimes (after 2004 when command responsibility as a distinct concept was first introduced in Croatian legislation). Broadly speaking, the doctrine of superior responsibility imposes liability on superiors when they know or should have known about their subordinates' violations of international law, but fail to prevent such acts or punish the perpetrators.⁷⁰ However, in those cases it will be necessary to prove effective authority and control of a corporate owner or a top-ranking official over his or her employees involved in

⁶⁸ This case is the most notable case of high profile corruption involving Ivo Sanader (the former Prime Minister of the Republic of Croatia), Croatian Democratic Union (at the time ruling party in Croatia), corporation Fimi Media, and several high-ranking officials. All were indicted of and convicted by a trial court (the County Court in Zagreb) for associating for the purpose of committing criminal offences (art. 333 of the CC1997) and abuse of office and official authority (art. 337 of the CC1997). It was established that the defendants belonged to the criminal group and that each of them undertook acts in order to achieve the criminal offences. The Supreme Court struck down the judgment and remanded the case for retrial, but on procedural grounds the case is currently being heard by a court of first instance, No: II Kž 343/15-4, 30 September 2015.

⁶⁹ E.g. see Derenčinović, D; Horvatić, Ž., (eds.), *Theory of Joint Criminal Enterprise and International Criminal Law – Challenges and Controversies*, Croatian Academy of Legal Sciences, Zagreb, 2011.

⁷⁰ Parker, B.S., *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, *Hastings Int'l & Comp. L. Rev.*, Vol. 35:1, 2012, 5.

commission of core international crimes; that is his or her material ability to prevent or punish the commission of international crimes,⁷¹ as well as requisite *mens rea* and a failure to act.

Croatian Criminal Code incriminates all **forms of command responsibility** proscribed by the ICC Statute, yet its structure and effects slightly differ in comparison to international criminal law, since the legislators explicitly modelled it after German regulation.⁷² Only the first form of command responsibility incriminated in article 96(1) CC; i.e. intentional failure to prevent subordinates from committing international crimes, is equated with perpetration of international crimes, whereas the other forms of command responsibility (negligent failure to prevent and failure to punish), are seen as separate offences of breach of duty, attaching lower penalties. According to article 96(1) CC a civilian superior or a person effectively acting as a civilian superior who fails to prevent a person under his or her effective authority and control, from committing a criminal offence set forth in articles 88 through 91 CC (genocide, crime of aggression, crime against humanity and war crime exclusively) is punishable as if he or she committed those crimes him or herself, i.e. as a perpetrator.⁷³ A superior who failed to exercise control properly over subordinates under his or her effective authority and control, where the superior consciously disregarded information indicating that the subordinates were committing or were about to commit an international core crime,⁷⁴ where such offences were within his or her effective responsibility and control and where he or she failed to take all necessary and reasonable measures within his or her power to prevent their commission is punishable by imprisonment from three to fifteen years (art. 96(3) CC). If **proper control** in such cases was not exercised by negligence, the punishment is even lower; from one to ten years (art. 96(4) CC). Finally, a superior who does not pass on his or her knowledge of international crimes committed by his or her subordinates to the competent authorities for investigation and prosecution of direct perpetrators subordinated to him or her is punishable by imprisonment from six months to five years (art. 96(5) CC).

In Croatia it is clear that the concept of command responsibility expressed in article 96 will not be applicable to corporate officials involved in commission of ordinary criminal offences or even gross human rights violations, such as torture, abductions, etc., if not committed in connection with an armed attack, a widespread or systematic attack or in pursuance of a genocidal policy. In other words, although the concept is applicable to corporate officials it will be necessary to connect these acts (and acts of subordinates) with chapeau requirement of **international crimes**.⁷⁵

⁷¹ ICTY, Prosecutor v. Delalić *et al.*, No. IT-96-21-T, Trial Judgement, 16 November 1998, para 378.

⁷² See, Turković, K. et al, 146.

⁷³ Only this form of command responsibility was punishable even before the introduction of a specific provision in 2004 according to the general rules establishing liability for omissions based on position of guarantor. More on this concept in Munivrana Vajda, M.; Ivičević Karas, E., 54-55.

⁷⁴ When it comes to military commanders it is sufficient to prove their inadvertent negligence („should have known“, art. 96(2) CC), while in case of civilian superiors it must be proven that these persons consciously disregarded information indicating that subordinates were committing or were about to commit a core international crime. Although the text of this provision obviously follows *expressis verbis* the text of art. 28 of the ICC Statute, it is not entirely in line with Croatian dogmatic and regulation of *mens rea*, i.e. its traditional division on intent and (advertent and inadvertent) negligence. It seems that the *mens rea* standard described in this provision most closely corresponds to advertent negligence (see also Novoselec, P; Bojanić, I. 538), but it remains to be seen whether the same conclusion will be made by Croatian courts in future case law.

⁷⁵ Nevertheless, when it comes to the most serious form of command responsibility– responsibility for intentional failure to prevent occurrence of a consequence where there is a legal duty to act based on position of a guarantor,

Neither Croatian courts nor Croatian scholars have so far engaged in detailed analysis of the nature of **effective control in civilian sphere**, so guidance may be found in jurisprudence of international courts. Civilian superior must “exercise a degree of control ... similar to that of military commanders.”⁷⁶ However, the concept of effective control is not limited to military command-style structures or strict hierarchical relations. The Appeals Chamber of the ICTY highlighted the necessity to prove that the perpetrator was the 'subordinate' of the accused, which does not require “to import a requirement of direct or formal subordination but to mean the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.”⁷⁷ From this it could be concluded that under certain conditions not only can corporate officials enter into superior-subordinate positions with their employees, but also that corporate officials need not have formal authority over the perpetrators of the underlying violation to be held liable.⁷⁸ It follows, presumably, that corporate officials could be responsible as superiors even for the acts of subcontractors, who are formally not corporate employees. Still, even though superior-subordinate relationship may exist, in most cases the level of effective control will probably not reach the necessary high threshold.⁷⁹ Finally, another related issue is that of scope of liability, since even where the existence of a superior-subordinate relationship with effective control can be demonstrated, liability is limited for actions within the scope of that relationship (“where such offences were within his or her effective responsibility and control”).

When it comes to other crimes, general dogmatic position of Croatian jurisprudence is that a superior may be responsible for **failing to avert the consequence** where he or she was legally bound to do so (position of the **guarantor**, art. 20(2) CC). In Croatian legal system one of the well-recognized sources of the guarantor’s duty is a voluntary assumption of a duty, based on an employment contract.⁸⁰ Yet, it is difficult to foresee how far that duty may go (for more on this see Chapter VII). Another theoretical base can be found in the duty of supervision over third persons which represent danger to others, which is particularly applicable to military personnel but may apply to other superiors, including responsible corporate officials as well.⁸¹

To sum up, though it is theoretically possible to stretch the concept of command responsibility for international crimes to superiors within a corporation, due to stringent requirements for this mode of responsibility/criminal offence in reality this will be feasible only in a very narrow set of circumstances.

VII. Corporate Complicity and “White Collar Crime” Doctrine

superiors may be responsible also for other offences according to the general rules on responsibility for omissions (art. 20(2) CC), Novoselec, P; Bojanić, I., 538.

⁷⁶ ICTR, Prosecutor v. Bagilishema, ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 42.

⁷⁷ ICTY, Prosecutor v. Delalić et al., IT-96-21-A, Appeals Chamber Judgment, 8 April 2003, para 303.

⁷⁸ Similarly, Parker, B.S., 22.

⁷⁹ The same reasoning analyzed in the context of indirect perpetration above can apply here as well. In most cases control will be diluted through the shareholder model and horizontal nature of contractual relationship. More as an exception, than as a rule for all companies, sufficient control may be present in companies such as private military security companies. See Kyriakakis, J., 995-997.

⁸⁰ For which they often received a handsome compensation as indicated by Parker, 20. For Croatian position see Novoselec, P; Bojanić, I., 145.

⁸¹ Novoselec, P; Bojanić, I., 146.

1. Delegation of functions to subordinates

As stated by many scholars “**the Business Judgement Rule** is the core doctrine of corporate law, because it has a major implication on the liability of corporate directors, but also influences the relationship between a company’s shareholders and directors. The interpretation of this Rule, as a behavioral standard or as an abstention doctrine, can determinatively influence the judicial findings regarding the liability of directors, who acted in consideration of their fiduciary duties.”⁸² Moreover, **the duty of care** standard, accepted in the white-collar crime doctrine, can work as an effective deterrent of misconduct only in association with a codified Business Judgement Rule with clear determination of the required standard of care⁸³. In Croatia, general provisions on duty of care and business judgment rule apply to all transactions.⁸⁴ Duty of care in principle includes the duty to do everything reasonably possible to be informed on all management actions of other board members.⁸⁵ On the other hand, as in criminal law ignorance of law is no excuse, similarly for directors in relation to their duties it could be said that **ignorance of duties is no excuse**. Introduction of business judgment rule in Croatian legal system with the Amendments of Companies Act⁸⁶ has created a possibility for members of the management and supervisory board to be released from responsibilities for their business decisions if they reasonably assumed, according to proper information while making decisions in question, to act in the interest of company.⁸⁷

From the day that corporate officials are appointed, they **need to fully understand** not just their widely recognized financial duties, but also social, environmental and ethical issues, as well as requirements stemming from the Criminal Code, Company’s Act and associated legislation. A corporate official must act in a way that he/she considers, in good faith, as an action that would most likely promote the success of the company for the benefit of its members as a whole.⁸⁸ As stated in the first paragraph of article 252 of Companies Act, the conduct of a member of the management board is not contrary to the obligation of the manner of handling company affairs if, based on the appropriate information, it is possible to reasonably assume that he or she is acting out of the interests of the company in making corporate decisions.

As in Germany, in Croatia it is possible that besides applying the duty to act, criminal liability of corporate officials (managers) could be based on the rules of participation in crimes for **indirect perpetrators**.⁸⁹ Therefore, the concept of indirect perpetration is not only restricted

⁸² Ponta, A.; Catana, R.N., *The Business Judgement Rule and its reception in European countries*, *The Macrotheme Review* 4(7), 2015, 125-142.

⁸³ See more *ibid*, 136.

⁸⁴ Study on Directors’ Duties and Liability, prepared for the European Commission, by Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster (Department of Law, London School of Economics), London, April 2013, LSE Enterprise, 266.

⁸⁵ *Ibid*, 268.

⁸⁶ Official Gazette 107/07, in force from April 1, 2008. First sentence of the article 252 refers to the duty of care standard and now reads: Board members must conduct business of the company with the duty of care (with due diligence and according to standard of conscientious businessman) and keep the business secret.

⁸⁷ See Horak, H.; Dumančić, K., *Pravilo poslovne prosudbe u Hrvatskom i pravu SAD*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (1991) V. 29, Br. 2, 975-1008 (2008), 1006.

⁸⁸ Bruce, M., *Rights and Duties of Directors*, *Bloomsbury Professional*, 11ed, 2011, 59. This conclusion is applicable to Croatia as well.

⁸⁹ See more in Engelhart M., *Economic Criminal Law in Germany*, *German Law Journal*, 2014, 705 referring to the Roxin’s concept of indirect perpetration by the use of organizational powers.

to international crimes, but could be applied to economic crimes as well. That means that corporate officials could be held responsible when they willingly and knowingly used companies' structures to make employees commit the crimes. This approach holds managers liable for abuses of their management powers, they cannot hide behind the veil of the direct perpetrators⁹⁰ (see more about indirect perpetration in Chapter V).

The responsibility for omission is possible regarding the **delegation of authority to subordinates**; in this case person who delegated could be held responsible not only for the selection of person (*culpa in eligendo*) but also for lack of due control over him/her/matter (*culpa in inspiciendo*); these forms of civil liability are also relevant for criminal law, provided that they comply with all other requirements necessary for criminal responsibility, particularly *mens rea*.⁹¹ The issue of accountability for inaction, especially in the case of delegation, was proscribed in *Corpus iuris 2000*, article 12 (criminal liability of the head of business or persons with powers of decision and control within the business: public officers).⁹² According to para 4, the fact that he delegated his powers shall only be a defense where the delegation was partial, precise, specific, and necessary for the running of business, and the delegates were really in a position to fulfil the functions allotted to them. Notwithstanding such a delegation, a person may incur liability on the basis that he took insufficient care in the selection, supervision or control of his staff, or in general organization of the business, or in any other matter with which the head of business is properly concerned. In any case, in connection with the core international crimes, article 96 CC could be applied under the conditions analyzed in the previous chapter.

Article 301 (Failure to Report the Preparation of a Criminal Offence) and 302 (Failure to Report the Commission of a Criminal Offence) of the Criminal Code could be applied as well. In particular article 302(2) CC provides that public official or a responsible person who fails to report the commission of a criminal offence which he/she has come to know about in the course of performing his/her duties, provided the criminal offence in question cannot be prosecuted privately or upon request, could be criminally liable.

Regarding the responsibility of **corporate owners**, there is a general provision in the Companies Act⁹³ that prescribes that if a member abuses the fact that he or she is not liable for the obligation of the company, such member of the company cannot exempt himself from liability by referring to a provision on non-liability for the obligations of the company. Hence, piercing (lifting) of the corporate veil is known to Croatian law.⁹⁴ It could also be applied when determining responsibility of the parent company (under the doctrine of separate legal personality, a parent company and its subsidiaries are treated as separate entities). The decision

⁹⁰ Ibid, p. 706.

⁹¹ Barbić J., Čokaković E., Novoselec P., *Odgovornost direktora*, Biblioteka Kleidoskop, 2012, 187.

⁹² *Corpus Juris 2000* (Draft agreed in Florence. Last meeting of the expert group was held in 1999): If one of the offences ... is committed for the benefit of a business by someone acting under the authority of another person who is the head of business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he knowingly allowed the offence to be committed. The same applies to public officer who knowingly allows an offence to be committed by a person under him. If one of the offences is committed by someone acting under the authority of another person who is the head of business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he failed to exercise the necessary supervision, and his failure facilitated the commission of the offence.

⁹³ Art 10, para 3 and 4 of the Companies Act.

⁹⁴ Karakaš, E., *Piercing the Corporate Veil in Croatia*, in Messmann, S.; Tajti, T. (eds.), *The case law of Central & Eastern Europe*, European University Press, 2007.

whom to sue/prosecute could be taken for strategic reasons, including the fact that subsidiary has limited assets.⁹⁵ In any case, “**the theory of liability (based on supervision)**, necessarily assumes a relationship of control between the defendant company and the primary wrongdoer. In other words, the defendant company’s responsibilities with respect to the behavior of the primary wrongdoer derive from the ability of the former’s control of the behavior of the latter.”⁹⁶ On the other hand, victims of human rights violations could focus on the way that **parent companies** have managed the subsidiary, arguing that their involvement in day-to-day management of the subsidiary (and that of parent company executives) was sufficient to justify a finding that the parent company was liable on the basis of its own actions, or for the court to ignore the corporate veil altogether.⁹⁷

2. Taking part in collective decisions

All members who vote for the decision can be liable as co-perpetrators. All members of the management board are obliged to act with due care and respect the interest and commitments of the company (see the answer to the previous question). The same could be true if a member sustained from voting.⁹⁸ Again referring to the German doctrine, in Croatia **a vote against the decision** does not automatically free from liability the outvoted member. Each board member is a guarantor that operations of the company are conducted in the legal framework and performed in the interests of the company. Therefore, a member is obliged to take actions which would prevent the realization of illegal action, and thus prevent the damage that may arise from it. It can be said that the member who voted against the decision must first, within the body itself, try to convince other members of the malfunction of the decision, inform the Supervisory board, and even potentially all members of the company.⁹⁹ Moreover, according to article 252 and 430 of the Companies Act, all members of the Management Board who have violated their obligations could be also liable jointly (civil law) to debtors. A member could be exempted from the liability if he/she proves that he/she behaved with due care, e.g. if he/she actively took measures to avoid any future damage.¹⁰⁰

3. *De facto* organs

If control of *de facto* organ is effective and acknowledged by corporate officials, *de facto* organs **may be criminally liable**. The corporate officer/manager upon which control is held is called *Strohmann (slamnati čovjek)*. German jurisprudence, which is the role model for Croatia especially in the field of economic criminal law, treats as perpetrators of economic crimes factual bodies provided that their activities are accepted by all members of society and that they have had a dominant role in relation to the holders of formal duties. If the factual authority that would be limited to giving instructions to formally set body he or she would be

⁹⁵ Zerk J., 2013, 49.

⁹⁶ Ibid, 48.

⁹⁷ Ibid, 50.

⁹⁸ Barbić J., Čokaković E., Novoselec P., 2012, 185 calling upon German doctrine Schmid in Müller-Gugenberger/Bieneck (Hrsg.), *Wirtschaftsstrafrecht*, 4. Aufl., 2006, pg. 827.

⁹⁹ Barbić J., Čokaković E., Novoselec P., 2012, 185

¹⁰⁰ Engelhart, M., 2014, 703.

qualified as instigator. German jurisprudence has even developed a doctrine of indications pointing to the existence of factual **dominant role**, such as: determination of business policy, company organization, hiring employees, shaping business relationships with partners, negotiating with creditors. These indicators have found their place also in Croatian jurisprudence.¹⁰¹ The base for the implementation of this institution in Croatia is article 273 of the Companies Act, according to which the person that uses his/her influence in the society could be liable for damage compensation.¹⁰² Furthermore, it is possible to have **joint perpetration** of “de facto authorities” and the straw man, but, as indicated elsewhere, all other elements (*actus reus, mens rea*) must be fulfilled.

4. A position of control over the company without management

As established above in Chapter III, in Croatia a criminal offence may be committed by acting or by omitting to act (art. 20 of the CC). This provision may particularly be applied to **supervisory board** members holding a position of control. The supervisory board supervises the management of the company and is obliged to report to the general assembly about whether the company operates in accordance with the law and regulations of the company (art. 263 and art. 439 of the Companies Act). The supervisory board members who keep **silent** about irregularities, especially serious criminal offences, could therefore be liable for the **failure to act**. In general, members of the supervisory board have a dual role: they are obliged to protect the entrusted assets (acting as a guarantor protector) and the interests of others (as guarantor supervisor).¹⁰³ Therefore, the liability based upon the failure to act could be applicable when members of the Supervisory board failed in performing control by not taking the necessary steps against the members of the board. The only question is whether they failed to act intentionally, where intent is required.

5. Individuals whose activities implicate the responsibility of corporations

As stated in the Report of the United Nations High Commissioner for Human Rights, *improving accountability and access to remedy for victims of business-related human rights abuse*,¹⁰⁴ business enterprises can be involved with human rights abuses in many different ways; because of the adverse impacts that business enterprises may cause or contribute to through their own activities, or by virtue of their business relationships. Ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by such abuses is a vital part of a State’s duty to protect against business-related human rights abuse.¹⁰⁵

According to the Act on the Criminal Responsibility of Legal Entities,¹⁰⁶ corporations in Croatia can be criminally liable for **any crime** (there is no fixed catalogue of crimes) committed by the **responsible person** within the company (no matter whether they have a high

¹⁰¹ See e.g. the judgment No. 6-L-221/2011 from January 19, 2016, County Court in Zagreb.

¹⁰² Barbić J., Čokaković E., Novoselec P., 2012, 183-184.

¹⁰³ Barbić J., Čokaković E., Novoselec P., 2012, 186.

¹⁰⁴ UN General Assembly Distr.: General, 10 May 2016, A/HRC/32/19

¹⁰⁵ Ibid.

¹⁰⁶ Official Gazette No. 151/03, 110/07, 45/11 and 143/12.

or low rank) as long as the duty of the company is breached or by it the company or third person has benefited with illegal gain or it was expected that a company or the third person benefits from it (art. 3 of the Act).¹⁰⁷ The definition of responsible person is given in article 87(6) of Criminal Code, according to which the responsible person shall mean a physical person conducting the affairs of a legal person or a physical person to whom the running of affairs from the legal person's sphere of activity has expressly or effectively been confided. It also applies to responsible persons in public bodies or in bodies of local and regional governments. The corporation is usually allowed to defend itself by showing that it implemented effective due diligence measures to prevent the criminal acts.

6. Shielding or diminishing individual criminal liability

There is a possibility that individual criminal liability might be shield or diminished where corporations themselves are held responsible, or vice – versa. According to article 23 of the Act on Criminal Responsibility of Legal Persons, the criminal procedure could be held only against companies if there are impediments to run a procedure against individual. According to article 24, applying the **principle of opportunity** could lead to prosecution only of individual if the company has not enough assets. Finally, according to article 12a, if the legal person reported the crime before its discovery, it could lead to remission of punishment.

In addition, general provisions of Criminal Code apply, starting from article 47 that regulates determination of punishment. When determining the type and measure of punishment, the court shall, starting from the degree of guilt and the purpose of punishment, assess all the circumstances affecting the severity of punishment by type and measure of punishment (mitigating and aggravating circumstances). Also, according to article 48 of the Criminal Code, if expressly so provided by law, the court may pronounce a **less severe sentence** than the one prescribed for a particular criminal offence, especially where special mitigating circumstances exist, in particular if the perpetrator has reconciled with the victim, if he/she has fully or in greater part repaired the damage caused to the victim by the criminal offence or if he/she has made serious efforts to repair the said damage, provided the purpose of punishment can also be achieved by such a less severe sentence. The court may pronounce a sentence less severe than the one prescribed for a particular criminal offence also when the state attorney and the defendant have agreed on this, which could be particularly important in cases where companies have committed international crimes and responsible persons were whistleblowers.

Moreover, according to article 50 of the Criminal Code, the court may **remit the punishment** of a perpetrator where, the perpetrator has sought to avert or reduce the consequences of a criminal offence committed by negligence and has repaired the damage caused by it.¹⁰⁸ Finally, article 35 of the Criminal Code could be applicable as well. According

¹⁰⁷ Also, there is an administrative liability for corporations (see the special report on corporate liability and Barbić, J, Osobe koje vode poslove kao odgovorne osobe i određenje predstavnika pravne osobe po zakonu o odgovornosti pravnih osoba za kaznena djela, Hrvatski ljetopis za kazneno pravo i praksu, 10 (2003), Vol. 2, 779-84; Pavlović, Određenje pojma odgovorne osobe u dualističkom i monističkom ustroju organa dioničkog društva u hrvatskom trgovačkom i kaznenom pravu s refleksijom na Europsko društvo (Societas Europea), Pravo u gospodarstvu 1/2008, 54-65.

¹⁰⁸ When the court is authorized to remit the punishment of a perpetrator, it may also reduce the punishment regardless of the limits proscribed.

to this article punishment of a co-perpetrator or participant who voluntarily prevents the commission of a criminal offence or voluntarily performs an act in order to prevent the commission of a criminal offence, which offence remains unfinished for a reason independent of his/her act, may be remitted.

VIII. Corporate Complicity and Defenses

Croatian criminal law recognizes a number of grounds for excluding responsibility, which are as a matter of theory applicable to top-ranking corporate officials in connection with the international crimes.¹⁰⁹ Yet in reality it will be difficult to apply all these grounds to corporate involvement in (extraterritorial) commission of international crimes.

Criminal liability extends **broadly extraterritorially** to crimes committed abroad according to the principles of flag, active personality, passive personality, protective principle, principle of representation and the universality principle (articles 11-17 CC). Although generally required, the principle of double criminality does not apply when it comes to international crimes, as these crimes violate not only Croatian legal norms, but also international law (art. 16 CC).¹¹⁰ This means that even if the perpetrator abided by national laws of the country of the *locus delicti commissi* whilst committing international crimes that alone cannot serve as a defense in Croatia.

The more complicated issue for Croatian courts would arise if corporate activity or activity of perpetrators of international crimes was **legal pursuant to the legislation applicable at the time** in Croatia. Croatian courts follow a very traditional and formalistic approach to the principle of legality, expressed in article 2 and 3 of the CC, which prohibit retroactive application of legislation.¹¹¹ Yet, case law of the ECHR which is a source of law in Croatia indicates that if it was sufficiently foreseeable and accessible to the perpetrators of international crimes that their conduct constituted a criminal offence according to international law, their conviction would not breach the principle of legality.¹¹²

Furthermore, a **legitimate business activity** argument would also not serve as a defense *per se* in cases of complicity in international crimes. In other words, a corporate officials may be responsible even for **neutral acts** which would according to applicable legislation constitute a legitimate act carried out in the ordinary course of a business if these acts causally contribute to commission of international crimes and there is a proof of a requisite *mens rea*. In such cases, corporate officials could be responsible **even if the business was not located** in the country where international crimes were committed. In this context it is perhaps worth mentioning that

¹⁰⁹ Munivrana Vajda, M.; Ivičević Karas, E.; 67 et seq.

¹¹⁰ Novoselec, P; Bojanić, I., 110.

¹¹¹ Unless it is more lenient to perpetrator (art. 3(2) CC).

¹¹² See e.g. the case of the European Court of Human Rights, *Streletz, Kessler and Krenz v. Germany*, (Applications nos. 34044/96, 35532/97 and 44801/98. Article 2 of the CC also states that no one shall be punished on account of any act which prior to its commission did not constitute a criminal offence under national *or international law* (emphasis added by the authors), yet the following part of provision adds a requirement of a punishment prescribed by law, which will be missing where offence was not prescribed by Croatian law. For Croatian debate on the application of the principle of legality on retroactive abolishment of statute of limitations, see footnote 8.

a crime is considered committed not just where the perpetrator acted, but also where the accessory acted or should have acted (art. 9(2) CC).

As far as **due obedience** is concerned, orders of the authorities may have an exculpatory effect only in the context of military relations (art. 380 of the CC).¹¹³ In all other cases, a subordinate must refuse to carry out an order which involves the commission of a criminal offence.¹¹⁴

Fear per se in Croatia is not a valid defense, yet it may become one in connection to coercion (duress) or more general state of necessity. When it comes to duress, a corporate official would have to prove that his or her involvement in international crime was committed in the face of a death threat or a threat of serious bodily injury. Depending on the harm done, **duress** will either constitute a ground of justification or an excuse.¹¹⁵ In other cases, when the threat was of damage to company property or profit it is generally understood that corporate officials (or company itself) could not plead the defense of necessity.¹¹⁶

Finally, broadly speaking, an individual making substantial contribution to the criminal activity of the perpetrators cannot be exempted from criminal liability by proving **lack of command authority or influence over the perpetrators**. This can serve as a defense only to certain modes of liability as explained above (indirect perpetration, command responsibility), but in no way may negate accessorial liability. If other elements of liability are present (a requisite *mens rea* in particular), a company, i.e. its officials can be held criminally liable for providing a third party with the means to commit international crimes through arms-length business transactions and without any close personal relationships or particular political or economic leverage.

IX. Conclusion

This extensive analysis of Croatian criminal justice system leads us to conclusion that in Croatia there are no legal impediments to impose individual liability for business involvement in international crimes and in other serious violations of human rights. Limited experience in prosecution of business/political involvement in transitional economic crimes indicates different potential avenues to attach individual liability for corporate complicity in serious violations of human rights. Yet, lack of political will may hinder effective prosecution.

¹¹³ And not even in the military context if it was obvious that by carrying out the order he/she was committing genocide, crime of aggression or crimes against humanity or another obviously unlawful act.

¹¹⁴ See, e.g. Art. 27(1) of the State Officials Act, Official Gazette 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15.

¹¹⁵ A justification (art. 22(1) CC) presupposes the following conditions: a) a state of imminent danger which threatens the perpetrator himself or another person and which could not have been averted otherwise, b) use of least detrimental means and c) that the harm done is inferior to the averted harm. The last precondition will be difficult to satisfy in case of international crimes, which means that duress and necessity will more likely serve only as an excuse. Exculpatory necessity is regulated in article 22(2) and it requires: (a) that the imminent danger (constituted by coercion) was not brought on by the defendant himself or herself; (b) that the resulting harm was not disproportionately greater than the harm threatened and (c) that the defendant was not obliged to expose himself or herself to danger.

¹¹⁶ Novoselec, P., 2009, 33.

Specific position of Croatia as a country that has been going through transition requires other transitional justice measures to be implemented alongside effective implementation of criminal law that would address the role of businessman in committing atrocities.¹¹⁷

¹¹⁷ Truth Commissions can be one of the tools.