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Individual Liability for Business Involvement in International Crimes

(International Colloquium Section I,
Buenos Aires, 20-23 March 2017)

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ITALIAN REPORT ON INDIVIDUAL LIABILITY FOR BUSINESS INVOLVEMENT IN INTERNATIONAL CRIMES

*By Vincenzo Militello**

1 Introduction

In Italy, the cases in which international criminal liability of individuals responsible for corporations has been discussed have been of a predominantly financial nature, concerning instances of international corruption and related offences (*i.e.* fraudulent invoices).[1] Such situations have a criminological background that is very different from that discussed in section I of the XX AIDP Congress, which applies the wide issue of 'criminal responsibility and corporate business' solely to international crimes and deals with the possibility and limits of their imputation to the individuals responsible for corporations involved in committing such crimes. The related explanatory document specifies the field of international crimes to be considered here, excluding all those that have a conventional nature different from the fundamental crimes covered by the Statute (core-crimes),[2] or at least that do not represent other 'grave violations of human rights.'[3]

Despite this significant limitation, a comparison with the Italian experience can be useful even on the specific subject, as at its core lies the general problem of extending criminal liability for a crime to multiple subjects different from those that directly carried out the illicit conduct of the specific offence. Therefore, if we consider that the criteria of criminal liability are independent from the legal interests violated by the crime and the economic status of their respective perpetrators, and that such factors can become relevant only after the prior identification of the criteria of imputation in criminal law, the Italian experience may be interesting in many aspects for a comparative analysis of the fundamental problems involved in the specific topic.

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[1] Reference is made to different, recent cases of top managers of important multinational holdings with corporate headquarters in Italy (eg Finmeccanica for a public procurement in India or ENI for the acquisition of an oilfield in Nigeria).

[2] On the possible different definitions of international crimes, see R Borsari, *Diritto punitivo sovranazionale come sistema* (Cedam 2007) 39; G Werle, *Diritto dei crimini internazionali* (It tr of *Voelkerstrafrecht*, BUP 2009) 26, 51.

[3] This notion also encompasses crimes such as 'torture, slavery and slave-related practices, disappearances, rape, and population misplacement': see C Bassiouni, 'Assessing Conflicts Outcomes: Accountability and Impunity' in C Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia 2010) 6. They are deemed not included within the core crimes and should be seen as 'treaty-crimes', and as such excluded from the International Criminal Court's jurisdiction: A Zimmermann, 'Art 5' in O Triffterer (ed), *Commentary on the Rome Statute* (Nomos 1999) n 1 ff

First, the Italian experience can contribute with respect to the general discipline of individual complicity to crimes. Furthermore, it can contribute with respect to the application of such general norms to cases in which criminal organizations infiltrate economic activity, through means of close ties with entrepreneurs who profit from relationships with criminal groups. Lastly, it can assist with corporate criminal liability for crimes committed by its managers, at least with respect to the identification of individual positions that are relevant in determining criminal charges to the corporation: They can in fact be helpful *in the converse*, meaning in deriving from the involvement of a corporation in a collective act, the individual liability for individuals responsible for such corporations.

2 General Remarks

2.1 On the Relation Between the Italian Legal System and International Crimes

The Italian legal system quickly (1999) ratified the Statute of the International Criminal Court,[4] in accordance with Italy's efforts, which resulted in the Rome conference to finalize the text of the Statute and approve the accompanying Convention.[5] The subsequent process of bringing Italy's legal system into compliance with the new requirements established by the Statute has been more problematic and remains incomplete. Despite various legislative drafts, emanating both from parliament and the ministries, it was not until 2012 that steps were taken to bring Italy's domestic legal system into conformity with the Statute.[6] Moreover, it was only a partial adaptation, which concentrated on the procedural aspects of the relationship between Italy's jurisdiction and the International Criminal Court, without addressing the descriptions of the conduct penalized by the Statute. Therefore, discrepancies remain between such conduct and the state of the corresponding crimes in Italy, as well as in the descriptions of illegal conduct of identical classifications and in the lack of domestic criminalization of certain international crimes.

Genocide, which has been criminalized in Italy since 1967 in slightly different terms than the relevant UN Convention of 1948 and the corresponding provision in article 6 of the Rome Statute, provides an example of a discrepancy in the first category.[7] The Italian norms are mainly structured according to the model of attempted crimes, in order to thereby punish even conduct directed at (and therefore preceding) the occurrence of a harm to the life and safety of individuals belonging to a specific nationality, ethnicity, race, or religious group.[8] The quoted Convention also obliged the signatory states to criminalize conduct preceding or following the death or grave injury of members of the group, such as conspiracy, solicitation, and attempt. Therefore, the discrepancies exist more in the methods of

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[4] Law 12.7.1999 n 232 'Ratifica ed esecuzione dello Statuto istitutivo della Corte Penale Internazionale'.

[5] See C Bassiouni, 'Introduzione alla corte penale internazionale' in P Reale (ed), *Lo statuto della corte penale internazionale* (Cedam 1999) 31 f; Werle (n 2) 25 f.

[6] See Law 20.12.2012 n 237, *Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte Penale Internazionale*. The previous drafts were proposed from a commission of experts led by Benedetto Conforti that presented two texts, respectively, on international cooperation and substantive criminal law, in 2003).

[7] Law 9.10.1967 n 962, Prevenzione e repressione del delitto di genocidio.

[8] See eg S Massi, 'Il genocidio. Il diritto dei popoli e la tutela del gruppo nazionale, etnico, razziale o religioso' in E Mezzetti (ed), *Diritto penale internazionale, II Studi* (Giappichelli 2007) 179 ff.

incrimination than in the spectrum of the criminalized conduct. The Statute also covers solicitation to genocide and attempted genocide, although through corollary norms distinct from the basic underlying prohibition (respectively Art. 25*e* and Art. 25*f*). Therefore, the most significant difference is with respect to the Statute's lack of norms criminalizing simple conspiracy that is not followed by the perpetration of the crime, which is punishable under Italian law (Art. 7 Law 962/1967).

With respect to international crimes not explicitly provided for by the domestic legal system, for a long time the most glaring omission — at least because it has already been the subject of a European Court of Human Rights judgement against Italy for failure to protect fundamental rights protected by the relevant convention[9] and because our own jurisprudence has called attention to it[10] — was the crime of torture, which is instead foreseen by multiple supranational sources at various levels.[11] This omission was finally overcome only by the law 110/2017.[12]

However it cannot be neglected that the vast class of crimes against humanity, even in its most limited definition provided by article 7 of the Statute, is not explicitly addressed in the Italian legal system. Even individual illegal conduct amongst those listed by the international norms that are criminalized by the Italian legal system (eg murder, slavery and sexual violence) are punished in and of themselves, outside the particular context (being committed as part of an extended or systematic attack) that is their foundation as international crimes.[13] Regarding war crimes, as they are addressed in the articulate, and not always linear, list in article 8 of the Statute, the conformity with domestic norms is limited. Only some penalized conducts can be found in the wartime military criminal code, which despite some significant updates that expanded its applicability to all armed conflicts[14] and

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[9] *Cestaro v Italia* (App no 6884/11) ECHR 7 April 2015.

[10] Judgement of the Italian Court of Cassation (Cass pen), sect V, 5 July 2012, n 38085, 121 ff.

[11] In particular: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (ratified and implemented in Italy with the law 3.11.1988, n 498); Optional Protocol to the Convention, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 (ratified and implemented in Italy with the law 9.11.2012, n 195); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed in Strasbourg in 1987 (ratified and implemented in Italy with the law 2.1.1989 n 7).

[12] Law 14.7.2017 n. 110, *Introduzione del reato di tortura nell'ordinamento italiano*. On the preparatory works, see G Lanza, 'Verso l'introduzione del delitto di tortura nel codice penale italiano: una fatica di Sisifo' (2016) Diritto Penale Contemporaneo (DPC) <http://www.penalecontemporaneo.it/d/4501-verso-l-introduzione-del-delitto-di-tortura-nel-codice-penale-italiano-una-fatica-di-sisifo> accessed 20 June 2017.

[13] On the relevance of the context element in international crimes, see eg F Moneta, 'Gli elementi costitutivi dei crimini internazionali: uno sguardo trasversale' in A Cassese, M Chiavario and G De Francesco (eds), *Problemi attuali della giustizia penale internazionale* (Giappichelli 2005) 6; A Sereni, 'Responsabilità penale personale e contesto del reato nello statuto della corte penale internazionale' [2006] Indice penale (IP) 799.

[14] The law 31.1.2002 n 6 amended art 165 of the wartime military criminal code ('cpmg'), so as to include any case of armed conflict, as defined through law 27.2.2002 n 15 (that where 'at least one of the parties uses weapons in a militarily organized and prolonged manner against the other party to carry out war activities'). This includes military activities carried out abroad by Italian armed forces.

recognized the individual illegal conducts included in article 8 of the Statute,[15] still requires a more comprehensive harmonization with the Statute.[16]

2.2 On the Different Models of Responsibility for Complicity to Crime

The current Italian penal code (ItPC: references without other indication are all made to this text) — in contrast to its 1889 predecessor — adopts an *'undifferentiated (or unitary) participation system'* to crime. In this model, if multiple parties have contributed to the perpetration of a crime (at least in the form of attempt), all the participants, regardless of the nature of their respective contribution to the joint execution of the crime, are considered equals as concerns co-liability for the committed crime and penalized with the punishment provided for such crime in an equal manner, at least as an initial approach (Art. 110).[17] The other possible model of responsibility for complicity to crime, known as the *'differentiated participation system'* for the distinction between principal actors and accomplices, does not have direct normative relevance, at least with regard to the respective punishments. However, it is still used in the doctrine, particularly by followers of the theory of 'accessories', to establish liability for complicity in crimes.[18]

Deviations (both aggravating or mitigating) to the punishment prescribed for the specific crime are provided for within the Italian penal code, to adjust the punishment to the specific contribution, without ever achieving a clear structural difference between the principal actor and the accomplice, or ever allowing the punishment of a participant to depend on that of any other participant. Specifically, an exception is provided for only in limited cases of a contribution of minimal importance to the preparation or execution of a crime, for which the judge can reduce the punishment (Art. 114). The punishment for a crime committed in cooperation with other participants is mandatorily increased under certain circumstances (Art. 112), some of which entail conduct attributable to specific roles undertaken in the preparation and perpetration of a crime (see more below text to n. 27).

Even in the recent debate over penal code reforms, the choice of the unitary participation system to the crime appears to be fundamentally confirmed.[19] Rather, efforts to describe the

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[15] In particular, the offences of 'Kidnapping of hostages' and 'Other offences against individuals protected by international conventions' (art 184-bis and 185-bis Military Penal Code of War, introduced by Law 2002 n 6).

[16] See M Nunziata, *Corso di diritto penale militare* (5th edn, Jovene 2015) 354.

[17] On the Italian system of complicity to crimes, see recently, among the criminal law textbooks, eg F Mantovani, *Diritto penale*. Parte generale (PG) (9th edn, Cedam 2015) 507 ff; G Fiandaca and E Musco, *Diritto penale*. PG (6th edn, Zanichelli 2009) 493 ff; C Fiore and Stefano Fiore, *Diritto penale*. PG (5th edn, Utet 2016) 565 ff; M Romano and G Grasso, *Commentario sistematico al codice penale* (vol. II, 4th edn, Giuffrè 2012) 138.

[18] Underlying the difference between the principal actor and the accomplices, see G Marinucci and E Dolcini, *Manuale di diritto penale.* PG (5th edn upd E Dolcini and G Gatta, Giuffrè 2015) 454 ff; Fiore and Fiore (n 17) 577-80.

[19] Critically on this point, L Monaco, 'La riforma dell'art 110 del cp. italiano. Spunti introduttivi' in G Vassalli (ed), *Problemi generali di diritto penale, Contributo alla riforma* (Giuffrè 1982) 119.

minimum contribution necessary to be held liable as an accomplice and for a more direct link between the subject matter and the principle of culpability have prevailed.[20]

2.3 The Constitutional Principle of Personal Criminal Liability and the Evolution of its Interpretations

The Italian legal system affirms the principle of personal criminal liability at the constitutional level (Art. 27 par. 1 of the Italian Constitution, It. Const.). In the current penal code (1930), which precedes the Constitution of 1948, the principle at issue is not explicitly indicated, but has for some time been derived by interpretation from the aforementioned constitutional principle. The difference between these two parts of the Italian legal system reflects two different interpretations of the principle of personal criminal liability that have succeeded each other in time in the debate of scholars and in jurisprudence, despite a more static normative framework.

In a first and more limited sense, the constitutional principal bases criminal liability on the individual, as a single person who provides his own contribution to a crime. As such, all *liability for the actions of others*, both individuals and groups to which one belongs for reasons other than those related to the perpetration of a crime (family, social class, political party, ethnicity, race, or religion) are excluded. This original reading of the Italian constitutional principle is significant in excluding forms of *collective criminal liability*, even if they are due to the particular roles that the individual holds within the collective unit. The direct consequence (which is of particular significance to the here discussed subject) is the prohibition on calling an individual to answer for crimes solely because he is the legal representative of a corporation, or he holds a top-ranking position in the corporate hierarchical structure (this is known as the prohibition against '*position liability*').[21]

The second, more comprehensive and now generally accepted interpretation, considers the crime attributable to the subject as an individual only when he is in a condition to prevent the execution of the crime, and thus when this was foreseeable and avoidable by the actor. Accordingly, the constitutional form is now read as the affirmation of the principle of '*criminal liability for personal guilty conduct*'.[22] The gradual progression of the Constitutional Court, which foresaw the shift toward applying the subjective requirements (in the form of

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[20] 'Relazione allo Schema di delega legislativa per l'emanazione di un nuovo codice penale', in *Documenti Giustizia*, 1992. See, V Militello, 'Agevolazione e concorso di persone nel progetto 1992' [1993] IP 576 f; Romano and Grasso (n 17) 141 f; A Gullo, *Il reato proprio* (Giuffrè 2005) 275 f; G Denora, *Condotta di agevolazione e sistema penale* (ESI 2006) 241 f; P Coco, *L'imputazione del contributo concorsuale atipico* (Jovene 2008) 345 f; M Helfer, *Il concorso di più persone nel reato* (Giappichelli 2013) 218.

[21] For this interpretation, shared by the Italian Constitutional Court (It Const Court) since the judgements 3/1956 and 107/1957, see C Grosso, 'Responsabilità penale' in *Novissimo Digesto italiano* (UTET 1968) 710 ff; A Alessandri, 'Art 27 primo comma' in G Branca and Alessandro Pizzorusso (eds), *Commentario alla Costituzione. Rapporti civili* (Zanichelli 1991) 16 ff; S Canestrari, L Cornacchia and G De Simone, *Manuale di diritto penale. P.G.* (Mulino 2007) 173 ff

[22] Mantovani (n 17) 296; Fiandaca and Musco (n 17) 639; M Romano, *Commentario sistematico al codice penale* (vol. I, 3rd edn, Giuffrè 2004) 325; F Palazzo, *Corso di diritto penale*. PG (6th edn, Giappichelli 2016) 28 f; D Pulitanò, *Diritto penale* (6th edn, Giappichelli 2015) 291; A Pagliaro, *Principi di diritto penale*. PG (7th edn, Giuffrè 2003) 325 ff; G De Vero, *Corso di diritto penale* (vol. I, 2nd edn, Giappichelli 2011) 165.

intent or negligence) for all the elements of a crime, played an important role in this development.[23]

The transposition into legislation of this more meaningful interpretation of the '*personality of criminal liability*' arising out of an interpretative context has, however, been very limited. The push of the constitutional decisions of 1988, which had been characterized as 'historic,' had a direct effect only on the criterion of imputation in the circumstances. The criterion for imputation was modified in 1990, requiring fault in at least those circumstances that aggravate liability.[24] However, for all other cases traceable to the general category of strict liability (as discussed in the last part of article 42), an analogous norm of general adaptation to the Constitutional Court's new interpretation is still lacking. Under these conditions, the principle of the '*personality of criminal liability*' has undergone its most recent change through the interpretation of ordinary jurisprudence, which, although only in certain cases, now makes the imputation of every event relevant to the crime depend on the ascertainment of concrete fault by the actor, even in cases in which this occurs in relation to an activity that is already criminally prohibited.[25]

Such interpretation leaves space for multiple positions in the adaptation of the single ordinary norms to the constitutional principle, with consequent discrepancies in the way in which the principle of individual liability is actually applied in the various incriminations. With respect to the specific problem of the complicity of individuals, the two norms originally leading back to theories of strict liability refer to the liability of a participant, on the one hand, for a crime of a different nature than that which was intended (Art. 116), and on the other hand, in the case of a variation in the nature of the offence due to the particular characteristics of one of the participants (Art. 117).[26] Before having a closer look at the ways to overrule the conflicts of these two norms with the principle of culpability, we must consider the various forms of participation in the offence.

2.4 The Punishment for Ordering, Instigating, Aiding and Abetting, and Other Forms of Accessory Liability

According to the general norm regarding accomplice liability (Art. 110) and the related, above-mentioned, '*undifferentiated (or unitary) participation system*' to crime, liability is also established for all the positions of those individuals involved in the planning and execution of a crime, with conduct that is different from, or is in addition to, that directly described by

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[23] It Const Court 42/1965 (on art 116); 364/1988 (on art 5); 1085/1988 (on art 626); 322/2007 (on art 609 *sexies*). On such evolution, eg, M Donini, *Teoria del reato. Una introduzione* (Cedam 1996) 20 ff; De Vero (n 22) 161 ff

[24] Law 7.2.1990 n 19 *Modifiche in tema di circostanze, sospensione condizionale della pena e destituzione dei pubblici dipendenti*. See, A Melchionda, 'La nuova disciplina di valutazione delle circostanze del reato' [1990] Rivista italiana di diritto e procedura penale (RIDPP) 1433; A Melchionda, *Le circostanze del reato* (Cedam 2000) 18 ff, 761 ff; G Marconi, Il *nuovo regime di imputazione delle circostanze aggravanti* (Giuffrè 1993); S Putinati, *Responsabilità dolosa e colposa per le circostanze aggravanti* (Giappichelli 2008).

[25] With reference to the specific offence of *Morte o lesioni come conseguenza di altro delitto* (art 586) (Death or injuries as a consequence of another offence), Cass pen, SU 22.1.2009 n 22676, in *Cassazione Penale*, 2009, 4564. In general, see F Basile, *La colpa in attività illecita* (Giuffrè 2005).

[26] See F Argirò, Le fattispecie tipiche di partecipazione (Jovene 2012) 47-54.

the norm criminalizing the underlying crime. In particular, the conduct of those who induce, solicit, aid, or facilitate the execution of a crime is therefore already criminalized by the general norm and punishable with the sentence prescribed for the specific crime at issue. However, in sentencing the specific contributions of each individual to the joint perpetration of the crime, the following are also relevant: *ordering, instigating, aiding and abetting and other forms of accessory liability.*

The reference to *ordering* the execution of a crime indicates the exploitation of an unequal relationship between accomplices that becomes significant as an aggravating factor in the sentencing for the crime committed. Specifically, there is an increase in sentencing by one third for the crime committed if one accomplice has *induced* another to commit a crime on the basis of a pre-existing role of authority, direction, or supervision (Art. 112 par.1 n. 3).[27] An identical increase is called for one who, outside the context of the aforementioned pre-existing relationships, *promoted, organized,* or *directed* the perpetration of the crime at issue, thereby assuming a leadership role in another's criminal conduct (Art. 112 par. 1 n. 2). Further increases in sentencing are applied when an analogous leadership role is accepted by an individual who commits a crime by *availing himself* of someone who cannot be held liable or punished due to personal characteristics (Art. 112 par.1 n. 4 and par. 2). Lastly, an aggravated sentence for the exploitation of a role of superiority is also applied in cases of necessary complicity for a crime, in which organizations of multiple individuals designed to achieve illicit ends, or licit ends through illicit means, are directly criminalized. Particularly, the sentence for one who *promotes, constitutes, organizes, or directs* (as a *leader*) the criminal organization is greater than for an individual who merely *participates* in such an organization (Arts. 416 par. 1-3 and 416 *bis* par. 1-2).

The remaining conducts of *instigation and aiding and abetting (facilitation)* are fundamentally included in the punishable forms of participation, thanks to the oft mentioned unitary system between the various participatory conducts set forth in article 110. The fundamental problem that remains, however, is that of delineating the minimum requirements of such participatory conduct, and in particular, whether or not an individual contribution of a causal nature to the crime is required. Here, the doctrine mainly distinguishes between material contributions to preparations or the execution of a crime (*facilitation and other forms of material participation*) and those during the scheming phase of a crime (*instigation and other forms of moral complicity*).[28] In summary, the favour towards maintaining the aforementioned requirement, pertaining to the actual event with all of its actual temporal and spatial characteristics, prevails in the doctrine. This pertains not only to material complicity, but also, with the necessary modifications, to moral complicity, as will be subsequently better explained.

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[27] There is a further increase in sentencing when the author of the induction is a parent (art 111 para 2 and art 112 para 3).

[28] See eg Romano and Grasso (n 17) 172 ff.

2.5 The Punishment for Moral Complicity

In conformity with the aforementioned principle of equal contributions to the commission of a crime, the Italian legal system also punishes moral complicity to a crime. Such complicity includes any contribution to the joint execution of a crime (that was at least attempted) that does not materialize into material support, but is based more in ideas and psychological support. The principal, general, form of such complicity is the *instigation* to commit a crime, including creating *ex novo* an intent to commit a crime in one who did not have such an intent (*inducing*), *reinforcing* a pre-existing intent held by an accomplice, the *agreement* to perpetrate a crime, and providing *technical advice* on the means by which to commit a crime.

However, mere instigation — under any of the aforementioned forms — if it is not followed by the perpetration of a crime, or at least an attempt to commit a crime, does not generally carry any criminal punishment. Nevertheless, if the individual is dangerous, security measures may be imposed by the judge (Art. 115). The principle is important because it excludes punishment for *attempted complicity in a crime* (confirming the converse of *complicity in an attempted crime*).[29] It is also limited in cases where the instigation or agreement concern crimes against the state (that were subsequently not even attempted) (Arts. 302 and 304) or occurs publicly (Art. 414). In such cases, the instigation is independently criminalized and must be able to produce the result, as is the case with attempt.[30]

Despite these important examples of independent offences, the issue of instigation as a contribution to a crime reflects, although through specific features, the more general problem of the minimum requirements for each participatory conduct: specifically, whether a causal link with respect to another's illicit activity is required (on the basis of an *ex post* verification), or whether its ability to influence the result is sufficient to render such conduct relevant (following an *ex ante* logic). The prevailing opinion in the doctrine requires a causal link even for moral complicity, intended as effectively influencing another's determination to commit a crime. As in every other situation where causation is relevant, it must be verified whether this particular 'psychological' causation could be considered as a *condicio sine qua non*, the formula that hypothetically eliminates the condition to verify if the result also disappears, in its concrete realization. This requires the use of theoretical schemes (so-called covering laws, *'leggi di copertura'*) that verify at least the statistical regularity of the cause-effect link between the conduct and the event that occurred.[31]

The possibility of applying to psychological interactions the same causal characteristics of material contributions is, however, called into doubt by those who consider the parity between the two concepts merely a juridical fiction. The unique nature of psychological

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[29] On the value of this principle for the structure of the participation in a crime, see eg Fiore and Fiore (n 17) 570-72.

[30] See F Schiaffo, *Istigazione e ordine pubblico* (Jovene 2004) 209 ff; E Gallo and E Musco, *Delitti contro l'ordine costituzionale* (Patron 1984) 45-47; V Mormando, *L'istigazione* (Cedam 1995) 48 ff.

[31] See Romano and Grasso (n 17) 180 ff. More generally Romano (n 22) 412 ff; Fiandaca and Musco (n 17) 510 ff; Marinucci and Dolcini (n 18) 461; Pulitanò (n 22) 419. In the case law, on 'psychological causation', see the recent judgement on the deaths related to the earthquake in L'Aquila: Cass pen, IV, 19.11.2015 n 12478, 73 ff.

processes, which renders them not attributable to regular patterns, and the self-responsibility of the parties who interact with each other, are used to challenge the imputation of liability on actors other than the perpetrator of the crime.[32] In this theoretical framework, moral complicity would highlight a more general problem of the complicity of persons, related to the uselessness of *ex post* causal criteria and requiring instead the use of *ex ante* prognostic evaluations of the dangerousness of the ideation or psychological support with respect to the act subsequently materially carried out by others.[33]

However the exclusion from complicity of mere *passive presence* at the scene of the crime is common because this does not increase the dangerousness of the event, unless specific obligations to impede the conduct of third persons exist (which could establish participation by omission in the crime committed).[34] Similarly, *approval* of the event is irrelevant if it does not reinforce the intent of the actor.[35] However, in the case law, such a reinforcing effect has been identified in various cases, even without expressly renouncing the general causational requirement.[36] Accordingly, regarding the subjective element, even in moral complicity, the indirect intent towards the offence committed by others, and therefore, the individual acceptance of the risk of such event (under the so-called theory of '*dolus eventualis*') is considered sufficient.[37]

Particularly significant — and interesting in comparison with the hierarchical structure of corporations operating in legal fields — is the reinforcement of another's criminal intent through *tacit consent*. Unlike its traditional effect of exempting from liability, tacit consent has been used in jurisprudence to establish accomplice liability for crimes connected to criminal organizations with rigid, oligarchic structures, particularly in cases where one of the bosses participates in meetings during which it is agreed to commit a murder, and he limits himself to not opposing the action, when such non-opposition still reinforces others' criminal intent.[38] Despite the recognition of such a basis for criminal responsibility connected to a particular position within an organizational structure, care is taken to ensure that this does not result in an automatic affirmation of responsibility, which would violate the principle of personality (Art. 27 par. 1 It. Const.). Therefore, proof that the contribution is causally effective is required, even if obtained through logical inferences, but only in cases of 'substantial inconceivability that the considered occurrence would have happened absent

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[32] See eg D Castronuovo, 'Fatti psichici e concorso di persone. Il problema dell'interazione psichica' in G De Francesco, C Piementose and E Venafro (eds), *La prova dei fatti psichici* (Giappichelli 2010) 194 ff.

[33] For a recent overview of those so-called 'non-causal' theories, see Coco (n 22) 87 ff.

[34] On the distinction between complicity by omission and mere, not punishable moral approval of a crime, see in recent case law, Cass pen, I, 23.9.2013 n 43273 (Rv 256859).

[35] The criminal irrelevance of the mere moral approval of a criminal offence is underlined eg in Pagliaro (n 22) 563.

[36] Cass pen, II, 22.10.2013 n 50323 (Rv 257979); Cass pen, V, 22.03.2013 n 2805 (Rv 258953); Cass pen, I, 21.01.2015 n7845; Cass pen, III, 16.07.2015 n 34985.

[37] Cass pen II, 19.5.2016 n 20793 (Rv 267038).

[38] Cass pen, I, 26.2.2015 n 19778 (Rv 263568); Cass pen, V, 12.1.2012 n 14991 (Rv 252322); Cass pen, V, 31.1.2007 n 7660 (Rv 236523).

the involvement of the boss'.[39] In this context, it is necessary to appreciate all the elements that can be drawn from the organizational and operational characteristics of each criminal organization considered. However, it remains an arduous task to make such a scheme compatible with the theory of causation as an essential, affirmative influence on the crime committed by others. The issue, thus far only considered in the context of moral complicity, will now be analysed more generally.

2.6 The Minimum Objective Requirement of Complicity: Causality or Increase of the Risk?

As just discussed in the context of moral complicity, an individual's contribution to the perpetration of a crime must have — according to the prevailing opinions in the doctrine and jurisprudence — causal relevance in the same sense that such a notion exists in the case of a crime committed by a single individual. The participant's conduct must therefore be a necessary condition for the execution of the crime.[40] However, even in cases in which an individual's conduct is not irreplaceable in so far as the crime would have been committed regardless, an effort is made to track an actual link between the concrete actions involved in the commission of a crime, or at least, with the psychological influence on the actor's intent.[41]

Moreover, the case law distinguishes between complicit participation with causal effect and that having the role of facilitating the crime, allowing for both forms. The latter form of complicity is composed of conduct that, without being a necessary condition to a crime committed by others, is limited to diminishing its 'difficulties or uncertainty of success'.[42] In the doctrine, authoritative sources continue to underline the incompatibility with the rigid causal framework of a norm such as Art. 114, which acknowledges the relevance – although with a potential mitigating effect on sentencing – as a form of complicity, even in cases where the individual's contribution was only 'of minimal importance' to the collective perpetration of a crime.[43]

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[39] Cass pen, VI, 27.2.2015 n 8929 <www.penalecontemporaneo.it> (p 25); Cass pen VI, 15.11.2007 n 3194 (Rv 238402).

[40] Such a requirement was reaffirmed, for example, in the jurisprudential evolution related to the possible participation with respect to mafia-style organizational crimes (so-called *external participation in mafia-type association*): Cass pen, Plenary Session (SU) 28.12.1994, n 16 [1995] *Cassazione Penale* 842; Cass SU 20.12.2005, n 33748 [2005] *Rivista Penale* 1169; Cass pen SU 21.5.2003, n 22327, Rv 224181; Cass pen, V, 9.3.2012, n 15727 [2012] *Cassazione penale* 3800; Cass pen I, 9.5.2014, n 28225 (see also below n 89).

[41] References above n 33.

[42] See Cass pen, VI, 22.05.2012 n 36818 (Rv 253347); Cass pen, V, 13.04.2004 n 21082 (Rv 229200). On the relevance of abetting conduct, eg Cass pen, IV, 15.6.2016, n 28251; Cass pen, VI, 30.10.2014, n 7621; Cass pen, VI, 13.5.2014, n 36125; Cass pen, IV, 10.12.2013, n 4383; Cass pen, IV, 22.5.2007, n 24895.

[43] Most recently, Donini, 'Il concorso esterno 'alla vita dell'associazione' e il principio di tipicità penale' [2017] Diritto Penale Contemporaneo 21. See also Pagliaro (n 22) 556; Mantovani (n 17) 514, 540. Prevailing case law applies the mitigating circumstance of art 114 cp only in cases where the individual contribution had been of limited causal impact: Cass pen, III, 17.11.2015, n 9844; Id III, 16.7.2015, n 34985; Cass pen, I, 9.5.2013, n 26031; Cass pen, VI, 24.11.2011, n 24571; Cass pen, I, 31.5.2011, n 29168; Cass pen, II, 26.1.2011, n 6922. In some cases, however, reference is made not to an absolute evaluation, but to a relative one, where the contribution of each accomplice is compared to the others: Cass pen, IV, 9.10.2008, n 1218; Cass pen, II, 24.11.1998, n 201.

It cannot however, overcome the critique according to which the reference to the *ex ante* danger of the conduct at the ideational stage or psychological support with respect to the event subsequently materially realized by others would transform participation in criminal activity into an *attempt to complicity*, which, as already mentioned, is outlawed in the Italian legal system.[44] Supporters of finding relevance in complicity of facilitating conduct (not causal conduct) do not deny that the relationship between the totality of the complicit conduct and the criminal event must include the ordinary causal requirement. On the contrary, a crime, which is at least attempted, must exist as a result of the interaction of the various types of conduct of the accomplices.[45] Ultimately, their criminal relevance (that is, the conformity of the conduct with a previous provision, foreseeing a specific offence as a 'type' (so called, in Italian criminal theory, '*tipicità penale*') is founded on the link between the general norms incriminating complicity (Art. 110 ff.) and the different specific offences. In the consequent new offences, characterized by the plurality of subjects, individual conducts receive their respective relevance from the way each type contributes to the whole causation of the result. The increased risk by a single facilitating conduct does not substitute the requirement of causality between the collective conduct and the related harm. Therefore, there would not be any feared transformation of complicity in a crime into an attempt to complicity.

It will, however, be necessary to verify how and how much the individual conduct facilitated the perpetration of the crime that results from the combination of the various types of conduct of the accomplices. It is certainly important to specify the means through which such an influence can occur in order to protect against abuses and excessively resorting to facilitation as a means of charging in the complicity of individuals. In this context, the principle of personal criminal liability is respected as long as the contribution is included in the entirety of the complicit conduct, assisting in the timing, means, likelihood of success, or the overall ability of successfully executing the crime, as long as it is supported by the intent of the joint execution of such crime.

Finally, it must be specified that in the cases of *complicity by omission*, the distinction with mere connivance, which is not punishable, requires that the individual have a specific duty towards the legal interest violated by the crime committed by others. More generally, in Italian criminal law, failing to impede an event by omission is equated with the corresponding positive conduct that causes the event only when the subject has a legal obligation to act (Art. 40 par. 2). The basis of criminal liability for omission is therefore connected to the existence of a legal obligation, even only in a role of a contract, bearing on specifically identified individuals who are equipped with the necessary powers to avoid the harm to the legal interest protected by the norm.[46] In the presence of a legal duty and the possibility to influence the development of the events in such a way as to impede the

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[44] Eg Marinucci and Dolcini (n 18) 460; Fiore and Fiore (n 17) 588.

[45] See F Albeggiani, 'Imputazione dell'evento e struttura obiettiva della partecipazione criminosa' [1977] L'Indice Penale 21.

[46] On those limits, see Mantovani (n 17) 523 ff; Romano and Grasso (n 17) 189. More restrictively, see Fiandaca and Musco (n 17) 629. In case law, see Cass Pen, IV, 10.6.2010, n 38991 (<www.penalecontemporaneo.it>).

endangering or harming of the legal interest, the subject will hold a guaranteeing position towards the safety of the legal interest, and his potential inactivity will be equated to having caused the forbidden event.

2.7 The Subjective Requirements (*Mens Rea*) of Complicity

In general, it is required that the individual must *intend the criminal act*, with the *awareness of cooperating with others* to perpetrate it, but the awareness need not be reciprocated, allowing other accomplices to ignore the role of others in their conduct. In such a case, however, the regulations on criminal complicity by individuals in article 110 and following of the Italian Penal Code will apply exclusively to the co-participant who has unilaterally participated in the conduct of the other, but not to the individual who was not aware of it.

Nor is a prior agreement by all accomplices (which is usually the case) required or a coordinated essential contribution by each: It is sufficient that the different types of conduct converge towards the joint realization of the crime.[47] The agreement can also be realized spontaneously, even during the execution of the crime, and the single individual can unilaterally agree to another's illegal conduct, with the intent to contribute to it (in the terms described above).[48]

Particularly, an individual must intend the joint result corresponding to a crime as much as his specific contribution to such. The intent can come as any of the forms of intent possible for the crime as committed by an individual: specific, general, or reckless disregard. If the complicit crime committed requires a particular result that must support the conduct, even if it is not necessary that such a result be reached (so-called specific intent), it is enough that one of the accomplices intends the result (even if not the executor of the illicit conduct), but the other accomplices must know that the co-participant intends the result.[49]

Furthermore, the penal code provides for *complicity in crimes of negligence* (Art. 113), to be understood as true negligent complicity in negligent crime. In this case, individual intent is not centred on the occurrence of the crime, but only on conduct in common with other individuals that violates a cautionary rule regarding the occurrence of an event, as long as such an event is foreseeable and avoidable by the individual accomplice.

The requirement of awareness and intent of a joint perpetration is thus not to be considered a wilful intent, in that it does not apply to the entire criminal event executed with others. At the same time, the requirement is necessary to avoid mere complicity in negligent causes that are completely independent from each other. With regard to the concrete event that occurs, the conduct of the individual accomplice must violate a cautionary rule; otherwise there would not be the possibility of reproach for individual action.

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[47] A prior organization of roles and tasks of each participant, although minimal, is an essential requirement for crimes of an associative nature: see below text to n 81.

[48] See C Pedrazzi, *Il concorso di persone nel reato* (Priulla 1952) 83; M Gallo, *Lineamenti di una teoria sul concorso di persone nel reato* (Giuffré 1957) 95 ff; Mantovani (n 17) 523; Pagliaro (n 22) 544; Fiandaca and Musco (n 17) 513. In the case law, Cass I, 15.1. 2013, n 18745 (Rv 255260).

[49] Romano and Grasso (n 17) 194.

In the doctrine and the case law, different positions regarding the possibility that each co-participant answers for the crime with a different subjective requirement persist. Such a possibility is certainly admissible within the reconstruction of criminal complicity within the model of multi-subject offences. These are formed by combining the specific offence with the general rules on criminal complicity: Their number corresponds to all the co-conspirators to the crime, whereas regarding the respective contents, each can express a different subjective requirement. In this way, the various accomplices, though all sharing the intent of the joint realization, can answer to the crime with different subjective elements.[50]

Specifically, there can thus be an *intentional complicity to a crime of negligence* when an individual wants the criminal result and takes advantage of the actions of others through a conduct that does not violate the specific norm related to the specific event that results (and thus not constituting the necessary elements for incrimination for the negligent crime).[51] On the other hand, the aforementioned provision in article 116, which provides criminal liability for the participant when the crime committed is of a different nature than that desired, expressly acknowledges the possibility of different types of liability for the same event and particularly, at least in the main reconstruction widespread in current law, of *negligent complicity to an intentional crime*. A different argument holds that, according to article 110, the crime is the same for each co-participant, which imposes that the relative *mens rea* must also be the same; if the latter changed, it would necessarily also change the crime.[52] Under this approach, article 116 is seen not as conforming to the differentiated theory, but as an exception to the general principle of the undifferentiated principle of complicity, affirmed by article 110.

The case law, despite being largely dominated by the theory that negates the possibility of a heterogeneity of subjective elements between co-participants to the same crime, admits in a residual manner intentional complicity in a negligent crime by others, which could be but a possible manipulation and unilateral adhesion to the other's intentional conduct.[53] Although not frequent, there are recognitions within the jurisprudence even with respect to the admissibility of intentional complicity in another's intentional crime.[54] Finally, in *intentional complicity to a crime of omission*, the *awareness* of the accomplice must envelop the legal duty to impede another's illicit action.

2.8 The Case of Contribution by a Person Not Holding the Special Position Required in a Crime

The Italian penal code contains a specific norm that extends liability to a person not holding a special position (*extraneus*) in a crime requiring the perpetrator to hold such a position (Art. 117). Nevertheless, to respect the principle of personality in criminal liability, it is required

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[50] See A Pagliaro, 'La responsabilità del partecipe per il reato diverso da quello voluto (1966)', in *Il diritto penale fra norma e società, Scritti 1956-2008* (Giuffrè 2009) I, 546; Pagliaro (n 22) 544.

[51] Mantovani (n 17) 523; Pagliaro (n 22) 553; Romano and Grasso (n 17) 246.

[52] Fiandaca and Musco (n 17) 535; O Vannini, *Quid iuris? In tema di concorso di persone nel reato, III* (Giuffrè 1952) 32.

[53] Eg Cass pen IV, 9.10.2002, n 39680, Rv 223214.

[54] Cass pen IV, 12.11.2008, n 4107. See also Romano and Grasso (n 17) 247.

that the *extraneus* actor could at least know the particular qualifications of the criminal actor (*intraneus*).

More particularly, in Italy, criminal responsibility for crimes that must be committed by individuals with specific personal characteristics or qualities (so-called '*reati propri*') could also be extended to individuals lacking such personal characteristics. It is true that limiting such crimes to certain individuals reflects that their position allows them to order the harm or endangerment of the protected legal interest. However, a grave gap in protection would exist if liability for such special offences were limited only to those individuals holding the necessary qualifications.[55] Moreover, the criminal relevance of the unqualified individual can be established through the link between the special norm which criminalizes the conduct of the qualified individual and the general norm on the complicity of individuals (Art. 110), thereby creating a new, parallel, multi-subject criminal provision capable of uniting in one bundle the various conducts of the different accomplices.[56]

The complicity of the *extraneus* individual in a crime requiring the perpetrator to possess certain characteristics or qualities ('*reato proprio*') can be of two types. The first is that in which an unqualified individual participates in such a crime, as governed by the general norm governing the complicity of individuals (Art. 110).[57] This solution is applicable every time an *extraneus* individual participates in the joint execution of the crime ('*reato proprio*') knowing the subjective qualifications of the *intraneus* actor.

The second possibility represents an exception to the first and concerns the complicity of individuals in crimes requiring the perpetrator to possess certain characteristics when the *extraneus* individual is not aware of his accomplice's qualifications. This case is covered by the abovementioned provision of article 117, which extends criminal participation by affirming a complicit liability that reaches further than the general principles governing the subjective element in the complicity of individuals. In particular, article 117 requires that the *extraneus* actor intends to commit the joint crime, whose nature changes due to the effect of the qualification of the *intraneus* actor. The waiver in article 117 on intent therefore only concerns the subjective qualifications, and no other element of the offence.[58] In the original framework of the code, article 117 regulates a case of strict liability, since the accomplice answers for the crime requiring personal characteristics in an offender ('*reato proprio*') even if he is not aware of an element of the crime (precisely, the personal characteristics of the perpetrator).[59] To avoid a clear contradiction with the aforementioned current interpretation

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[55] See Mantovani (n 17) 535. In the case law, Cass pen, 18.12. 1990, in *Foro amministrativo*, 1991, c 1675; Cass pen, 26 maggio 1986, in *Rivista Penale*, 1987, p 890; Cass, 13.4.1981, in *Giustizia Penale*, 1982, c 91, m 90.

[56] R Dell'Andro, La fattispecie plurisoggettiva in diritto penale (Giuffrè 1956) 15 ff; G Sammarco, Le condotte di partecipazione al reato (Jovene 1979) 150; Marini, Lineamenti del sistema penale (Giappichelli 1993) 739.

[57] G Insolera, 'Concorso di persone nel reato' in *Digesto delle discipline penalistiche, II* (Utet 1988) 491.

[58] Romano and Grasso (n 17) 268-73; see also G Bettiol, *Sul reato proprio*, in *Scritti giuridici* (Cedam 1966) 454; M Boscarelli, *Contributo alla teoria del 'concorso di persone nel reato'* (Cedam 1958) 98-99.

[59] See Insolera (n 57) 493; Marini (n 56) 775-76; M Gallo, *Lineamenti di una teoria sul concorso di persone nel reato* (Giuffrè 1955) 127 (as an example of *dolus generalis*).

of article 27 par. 1, it is necessary to require the unqualified individual to hold certain subjective requirements.

However, the interpretation sometimes provided in the case law, requiring, by article 117, the awareness of the *intraneus* actor's qualifications, must be critiqued.[60] In such a fashion, however, the aforementioned norm is deprived of autonomous meaning and would become a copy of article 110.[61] Instead, a literal analysis of article 117 confirms how the effective awareness of the qualifications should be excluded. The norm refers to the actor who possesses the qualifications or the relationship with the offended party; it therefore indicates a qualified individual who was aware of his own subjective qualifications.[62] Then again, for those who do not have knowledge of the qualifications, it states that if the nature of the crime changes for certain individuals participating in the crime, the others shall be liable for the same crime. In other words, the norm equates to the change in the nature of the crime for those who are aware of the personal qualifications required by law, the extension of liability for the same offence even in other accomplices not aware of the qualifications.[63] If effective knowledge of the qualification is not required, responsibility for such a crime with personal qualifications is given when the accomplice without these qualifications has at least the possibility of knowing them. In other words, with respect to situations in which the crime changes due to the particular characteristics of a co-participant, the constitutional interpretation requires that the mistake regarding those subjective characteristics by other participants be attributable to fault, or at least be avoidable. Moreover, both cases are not without potential conflicts with the principle of culpability, such that projects reforming the penal code have chosen to not propose an analogous provision again.[64]

An additional and delicate issue regarding the complicity of persons in crimes with personal qualifications (*reato proprio*) concerns the role that the qualified individual must play in the execution of the crime. According to some, the *intraneus* actor must always act as the principal, and complicity in such crimes would therefore exist only when the qualified individual carries out his role as provided for in the same way as if he was the only actor.[65] This solution, however, is only appropriate in systems that allow for the theory of accessories and a differentiated participation system, with a distinction between the principal and accomplice, as in Germany, but is not appropriate in the Italian system, which uses a unified participation system, even in the context of complicity in such crimes.

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[60] Cass Pen, II, 19.3.1992, [1992] RIDPP 322.

[61] T Padovani, Le ipotesi speciali di concorso nel reato (Giuffrè 1973) 112; A Fiorella, L'errore sugli elementi differenziali del reato (Giuffrè 1979) 93; S Seminara, Tecniche normative e concorso di persone nel reato (Giuffrè 1987) 397; Insolera (n 57) 492.

[62] Should he not be aware of the qualification, the criminal provision of a '*reato proprio*' is not applicable: Romano and Grasso (n 17) 225. For a different point of view, see Padovani (n 61) 110-11.

[63] M Pelissero, 'Consapevolezza della qualifica dell'intraneus e dominio finalistico sul fatto nella disciplina del mutamento del titolo di reato' [1996] RIDPP 328.

[64] On the issues related to constitutionally-oriented interpretations of the norm, see Gullo (n 20) 276.

[65] A Latagliata, *I principi del concorso di persone nel reato* (Morano 1964) 222; Fiandaca and Musco (n 17) 527; Cass pen 12.5.1992, in *Cassazione penale*, 1994, 1512.

Except in the more limited case of crimes that must be committed personally, also exclusively by a specific individual,[66] complicity exists even when it is the *extraneus* actor who carries out the criminal conduct while the qualified individual provides only a supplementary contribution that does not constitute the elements of the crime.[67] Such an individual contributes his own qualifications to the joint realization, without which the conduct of the *extraneus* actor would either result in a different crime or lack criminal relevance.

In this sense, even the employee of an organization who holds merely executive functions may be liable for complicity to a crime committed in the management of the organization, equally with any individual outside the organization. The requirements for such complicit responsibility, however, vary depending on whether the complicity occurs through active conduct or failed impediment. In the first case, the *extraneus* actor answers according to all the possible forms of participation (material or moral) and to the underlying crimes with personal qualifications (*reato proprio*), according to the objective and subjective requirements necessary for all forms of complicity. In the second form, the *extraneus* actor who does not impede the illicit event from happening answers for the crime only if he had a legal duty to impede the event, as seen generally (text to n. 46). Here, the division of functions within the organization, which are irrelevant in the case of complicity by a positive action, serve to establish whether the *extraneus* actor undertook the legal duty to prevent the event from occurring.[68] In either case, the *extraneus* actor can be complicit to a crime of omission precisely through forms of moral complicity, as in this case, participation through material contribution is not applicable.[69]

Finally, the non-responsibility of the qualified individual due to a lack of fault does not exclude the responsibility of the other participants for the crime with special qualifications (*reato proprio*) (in accordance with Arts. 111, 112 last par. and 119 par. 2).[70]

2.9 The Case of Excess of the Perpetrator (Divergence Between the Crime Committed by the Perpetrator and the One Agreed Upon With the Accomplices)

The Italian legal system provides that in the case in which multiple individuals agree to commit a crime and one of the participants commits a different crime, even a co-participant who did not want to commit the different crime must answer for it when it is a result of his actions or omission. Therefore, criminal liability for the committed crime is extended to the participant who did not possess the required intent, although in cases in which such a crime

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[66] In such crimes (such as incest or providing false testimony), the *extraneus* actor cannot satisfy the criminal elements of the offences, which require a specific conduct that must be undertaken by the qualified subject. See eg M Pelissero, *Il concorso nel reato proprio* (Giuffrè 2004) 347.

[67] Cass pen 30.4.1991, n 187201. G Contento, *Corso di diritto penale, II* (Laterza 1996), 493; Mantovani (n 17) 535.

[68] A Pagliaro, 'Responsabilità penale tributaria e fatto del dipendente' (1984) in *Il diritto penale fra norma e società, Scritti 1956-2008* (n 49) IV, 451-52.

[69] Cass pen, III, 30.10.2015, n 43809, [2016] *Giurisprudenza italiana* 972.

[70] Eg Cass pen, 17.5.1983 [1984] *Rivista Penale* 163.

is more serious than that initially desired, the punishment is reduced for the participant lacking the respective intent for the more serious crime (Art. 116).

As already mentioned, this provision represents one of the most significant cases of discord with the principle of personal criminal liability in article 27 It. Const. Since 1965, the Constitutional Court has worked on overcoming this contradiction, requiring that at least a minimum coefficient of guilt (foreseeability of the undesired event) accompany material causation, even in the case in question.[71] The case law of the Supreme Court, following the indictions of the Constitutional Court, subsequently identified such a coefficient in the possibility, by the participant, of foreseeing the undesired, more serious crime, thereby no longer considering mere material causation sufficient to trigger criminal liability. As of today, the participant who did not desire the more serious crime actually committed can be charged with the more serious crime only where its commission was foreseeable at the moment of the perpetration of the illicit activity.

Moreover, two different hermeneutic approaches regarding the nature of foreseeability of the crime that actually occurred are present in the jurisprudence. According to an older approach, this requirement must be considered in the abstract, based on a mere a priori comparison between the two offences. In a second approach, which is actually more compatible with the constitutional reading of the principle of the personality of criminal liability, it is instead deemed necessary that the committed crime be a foreseeable evolution of the illicit action originally intended, on the basis of each specific situation, thus preferring a judgement of concrete foreseeability.[72]

3 Corporate Complicity and Responsibility of the Management

3.1 Responsibility of Corporations and Complicity of the Management in International Crimes Against Fundamental Human Rights

The Italian legal system, established within the continental European judicial tradition, has long been anchored to the principle encompassed in the aphorism *societas delinquere non potest*. As is known, this precludes corporations as collective entities from being called to answer directly for crimes committed by single individuals who belong to the respective organizations; only the individuals remain responsible for such crimes.

Following an international trend that began towards the end of the last century, and in compliance with some supranational obligations, at the beginning of the 2000s, the Italian judicial system also partially modified its position on this matter, introducing a form of liability of entities for crimes.[73] The main reasons for this decision, which was ultimately adopted by domestic legislators, have been present for some time in the international debate, starting with the necessity to avoid the dispersion of liability through corporations' complex

[71] It Const Court, 13.5.1965, n 42.

[72] Cass pen, V, 18.6.2013, n 34036; Cass pen, I, 15.11.2011, n 4330; Cass pen, VI, 29.4.2010, n 32209; Cass pen, V, 8.7.2009, n 39339.

[73] Legislative Decree (Lgs D) 8 June 2001 n 231 (and related Law 300/2000).

organizational structures, thereby assuring impunity for the subjects who committed the illicit act.[74]

Despite the current domestic legal system therefore identifying a direct and independent form of criminal liability for organizations,[75] organizations cannot answer for international crimes that are grave violations of human rights and of specific interest here. This is not due as much to the particular criteria for attributing liability to a legal person,[76] but more because the aforementioned offences are not included amongst the crimes attributable to organizations, identified by article 24 ff. Lgs. D. 231/2001. The model of liability that is adopted is not one of a general extension to organizations of criminal liability for all crimes for which individuals may be liable (which exists in other legal systems, even in the Continental legal tradition, such as France), but one of identifying specific crimes for which a legal person may be liable. Such offences remain therefore a *numerus clausus*, although they have progressively increased in number in the fifteen years the system has been in place.

The criminal liability of individuals who act in the name of the organization is different. Such individuals can be called to answer for the crimes committed by the organization where the objective and subjective requirements concerning the complicity of individuals, as discussed above, are fulfilled. Therefore, in the case in which one or more so-called 'neutral' acts (in the sense that they are, *per se*, not unlawful, but socially widespread in the common life)[77] are realized within the joint realization of the international crimes that are the subject of this study, the individual can be held liable for his own conduct if he has contributed significantly to the criminal execution (in the objective and subjective terms already indicated). The subjective aspects of participation become even more relevant in these cases: The subject must be aware that the particular act, which is lawful in and of itself, assumes significance as a contribution to the execution of a joint crime and must have the intention to provide such a contribution with his conduct. On the other hand, if the 'neutral' acts give 'substantial assistance' towards the realization of the considered crimes, the aforementioned attenuating circumstance of minimal participation (Art. 114), which exists

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[74] See F Bricola, 'Il costo del principio *societas delinquere non potest* nell'attuale dimensione del fenomeno societario' [1970] RIDPP 951 ff; more recently, C De Maglie, *L'etica ed il mercato, La responsabilità penale delle società* (Giuffrè 2002) 271; G De Simone, *Persone giuridiche e responsabilità da reato, Profili storici, dogmatici e comparatistici* (ETS 2012).

[75] Legal scholars and the case law have widely debated the legal nature of said responsibility (De Simone (n 74) 324 ff): at turns, it has been argued that it is a proper criminal liability: G De Vero, *La responsabilità penale delle persone giuridiche* (Giuffrè 2008), an administrative liability (G Marinucci, '"Societas puniri potest": uno sguardo sui fenomeni e sulle discipline contemporanee' [2002] RIDPP 1201; M Romano, 'La responsabilità amministrativa degli enti, società e associazioni: profili generali' [2002] Rivista delle società 393; or a new kind of liability, a sort of *tertium genus* (eg Cass pen, II, 30.01.2006, n 3615; Cass pen, I, 16.07.2010 n 27735; D Pulitanò, 'La responsabilità da reato degli enti: i criteri di imputazione' [2002] RIDPP 417).

[76] See eg De Vero (n 75); C Paliero, 'Soggettivo e oggettivo nella colpa dell'ente: verso la creazione di una gabella delicti?' [2015] Le Società 1285.

[77] Like supplying goods (eg vehicles, computer programs or chemicals), services (eg financial), logistic support (eg passing on certain information).

whenever the relevance of the individual causal contribution was, according to an absolute criterion, only limited, is not applicable.

As concerns the specific issue of the liability of corporate owners for *complicity by omission* in crimes governed by the Statute and other grave violations of human rights, its fundamental admissibility in principle must be affirmed, although in the Italian legal system, there have not yet been concrete instances of such liability. Specifically, corporate administrators (Art. 2392, Italian Civil Code) and auditors (Arts. 2403 and 2407, Italian Civil Code) are liable, respectively, for crimes connected to the management of the corporation and for the same crimes when committed by the corporate administrators. The specific crimes here considered could be included in such crimes if the corporate policy implemented by the top-ranking corporate officials, or not impeded by auditors, supported conduct by others constituting grave violations of human rights.

3.2 The Subjective Requirements of the Complicity of Management in International Crimes Against Fundamental Human Rights

As is the case generally (see text to n. 47), for the complicity of the management to a crime of an organization, a prior agreement or a common plan is not required amongst the participants to find a willingness to participate for the complicity of an individual actor. It is sufficient that each individual is conscious, even autonomously, of his contribution to the actions of others, in such a way that a unitary, collective action can be considered to exist.

The existence of the general principle does not impede specific exceptions. For example, the principle of prior agreement can be found in the Italian legal system with regard to genocide, as, in a way that is peculiar to domestic law, action becomes criminally punishable even in the absence of the commission of the crime, if one or more people merely agree to commit one or more of the crimes of genocide identified by 1. n. 962/1967. For such crime, the conduct is identified not by a simple generic intent, which is the intent of the illicit conduct, but requires the existence of an additional psychological element by the actor that must guide his action, although without necessarily fulfilling the execution of the crime. In these cases, the requirement of a specific intent underlines the particular harm that distinguishes international crimes from common crimes.

As concerns the intent of the participant to an international crime, once it is clarified that the willingness to cooperate with others does not presuppose a prior agreement, it must be remembered that the individual participant must direct his own willingness to both the principal act sanctioned by the norms and his own contribution towards the illicit conduct. The participant can then be held liable for the international crimes if, in addition to having objectively contributed support that facilitates the perpetration of the crime, he has also made the ultimate realization of the joint activity his own.

More particularly, in the context of complex organizations, the *awareness of the risk* that the implementation of plans of action or the management of the groups could result in the commission of crimes is not sufficient to establish complicity to the crime. As regards the subjective element, only those who are aware of contributing to the joint realization of the crime and want to provide a contribution, to at least facilitate its commission, can be held

liable for complicity. The others who simply accepted the risk that the internal company policy might lead to the commission of a crime cannot be held liable.

Thus, mere acceptance of the risk that the implementation of corporate policy could result in one or more generally identifiable crimes is not sufficient to establish liability, either through intent or negligence, for the top-ranking corporate officials responsible for the management of the corporation and its policies, in the absence of the necessary minimum elements of liability for complicity. The parameter of risk is ultimately a criterion of imputation that is too vague to establish the criminal liability of an individual for complicity in the crimes of one or more parts of the corporation.

On the other hand, where a specific criminal programme, a prior plan of the crime, and the awareness and willingness to realize such a plan exist between the co-participants, and they are followed by its actual realization by the co-participants, all the essential elements that constitute intentional complicity arise. Intent is a valid criterion of imputation that engulfs and overcomes that of the mere foreseeability of the risk of a crime. Analogously, as a prior agreement or a shared and reciprocal awareness of the risk of commission of the crime at issue by each co-participant is not necessary, it is also not required that all the co-participants reciprocally accept the result of the convergence of their individual conduct by assenting or agreeing to it.

Concerning the possible responsibility for negligent complicity to international crimes, it must be underlined that in Italian criminal law, the standard *mens rea* requirement for the imputation of felonies (the most serious offences) is intent. Negligence is an exceptional standard that may be applied only in the presence of an explicit normative provision (but it is normal for misdemeanours, as the least serious offences: Art. 42). Since, therefore, the serious crimes here considered are not explicitly sanctioned in their negligent form, the actor cannot be held liable for his negligent conduct. For the same reason, even negligent complicity in the intentional criminal activity of others, admitted generally by our Supreme Court case law,[78] cannot be the subject of specific criminal punishment in the cases specifically considered here.

4 Corporate Complicity and Indirect Perpetration Through an Organization

The Italian legal system does not provide specific guidelines for cases of complicity by high-ranking corporate officers to international crimes committed by the corporations themselves. In such contexts of illicit conduct, the general guidelines regarding the criminal complicity of individuals are to be applied. In the same manner, top-ranking corporate officers who contributed to the accomplishment of grave violations of human rights or international crimes by bodies of the corporation can be held criminally liable without recurring to the theoretical scheme — of German origins — of the indirect perpetrator ('*autore mediato*').[79] This model would lead to considering such officials criminally liable for

[78] Cass pen, IV, 6.7.2016, n 32567.

[79] Italian criminal law scholars have prevailingly rejected the theory of the indirect participant: Padovani (n 61) 52; Mantovani (n 17) 510; Pagliaro (n 22) 566. For a contrary view, see Moccia, 'Autoria mediata ed apparati di potere organizzati' [1984] Archivio penale 388.

the acts committed by parts of the corporation, regardless of the individual contribution to the perpetration of the crime.

Moreover, we refer to cases in which the crime is committed by lawful corporate entities, such as business organizations that also operate in the context of the free economy, and not the very different cases in which organizations of an illicit nature, acting only in completely unlawful contexts, are the actors. It is important to distinguish the two cases.

If the *organizational structures* are *illicit*, as in the cases of *organized criminal groups*, in order to establish liability for the high-ranking officials of the organization for the crimes committed by other members of the organization, the offences of a criminal association (Art. 416 or 416 *bis*) and the rules that control the relationships between the bosses of a criminal organization and the crimes perpetrated by members of such an organization enter into play.[80]

Furthermore, with respect to the cases in which the illicit act is committed by *lawful organizations (collective entities, businesses, state agencies, etc.)*, to face the delicate question of the liability of high-ranking officials of the corporation for crimes committed by the organization's body (both in regard to international and domestic crimes), the model of *indirect perpetration* does not seem to provide guidance. In fact, in such contexts, criminal complicity by the high-ranking officials of a corporation to the crimes of such an organization cannot follow automatically from their high-ranking position and the normal dynamics of the functional mechanisms of power within the corporation. The position of superiority of managers, or other high-ranking officials, even when inferable from the internal structure of the organization and the power dynamics, never suffices as a requirement to find a contribution leading to criminal liability for the crimes committed by other members of the corporation. This is true even if the crimes in question were to objectively conform to an interest of such a collective entity that somehow benefits from such criminal activity.

Such a criterion for attributing criminal liability only as a consequence of a high position in the management system of the organization would be compatible with the theory of indirect perpetration. It can also be compared, through analogy, to other understandings of liability in the context of economic groups.[81] Nevertheless, if incorporated into the Italian legal system, it would contrast with the normative framework on the criminal complicity of individuals, and above all, with the constitutional principle of personal liability, even in its basic interpretation of prohibiting liability for the actions of others.[82]

As a consequence, the complicity of high-ranking corporate officials to crimes committed by the organs of the corporation should be related to the normal criteria of the imputation of criminal liability included in the context of the complicity of individuals in crime, regardless of the seriousness or nature of the committed crime. The high-ranking corporate official will

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[80] For the relevance in this contest of the scheme of imputation based on 'tacit consent' in rigidly hierarchical organizations, see above text to n 38-39.

[81] See V Militello, 'Attività del gruppo e comportamenti illeciti: il gruppo come fattore criminogeno' [1998] Rivista trimestrale di diritto penale dell'economia 367, 376.

[82] On the prohibition of 'position liability' see text to n 21.

therefore be liable for the crimes committed by the corporate bodies, exclusively when his conduct resulted in the necessary minimum requirements of criminal complicity (Art. 110 ff.).[83] Therefore, he will answer for the crime committed by the organization's structure when:

(a) He has at least instigated or induced the actor to commit the crime; or

(b) He has programmed, organized, and planned the crime; or

(c) He has materially contributed, even just through facilitation, to the execution of the crime with the intent of contribution to the joint perpetration.

Moreover, in the case of (b), to justify in personal terms the criminal charge of complicity to the individual top-ranking official, a general planning of the crime, or crimes, committed by the subordinates or other directive organs is not sufficient. A predisposition of the target objectives or a predetermination of the essential traits of others' conduct must exist, or the official must have the effective power to control or impede the others' conduct.

Once the liability of high-ranking officials for complicity has been ascertained, the differentiation of the role he served in the execution of the crime is relevant only in terms of sentencing: The abovementioned aggravating circumstances regulated by article 112 allow more severe sentences for those who have promoted or organized the collaboration in the crime, or who have induced individuals under their authority, direction, or supervision to commit the crime (text to n. 27).

5 Corporate Complicity and Collective/Inchoate Offences

The Italian legal system, in addition to sanctioning the joint realization of a crime through the general norms on individual complicity, also explicitly punishes, in a markedly preventive fashion, the phenomenon of criminal organizations. In fact, specific crimes are provided for in which the involvement of a plurality of individuals is a necessary requirement and not just a possibility, as is the case in the complicity of individuals. To distinguish them, they are referred to as *crimes where complicity is necessary*,[84] and more specifically, *crimes of association*. The latter are crimes attributable to the original model of *criminal association* (Art. 416). In these cases, the criminalized conduct is not the realization by multiple subjects of an action intended to violate a protected legal interest that could be realized independently by one individual. Rather, in an asùsociation for the purposes of delinquency, the criminalized conduct is its organization, which is structurally dedicated to the commission of an indefinite list of crimes considered dangers to the public domestic order.[85]

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[83] Cass pen, V, 13.6.2016, n 32793.

[84] See, recently, I Merenda, I reati a concorso necessario tra coautoria e partecipazione (Dyke 2016) 105.

[85] See V Patalano, *L'associazione per delinquere* (Morano 1971); G Insolera, *L'associazione per delinquere* (Cedam 1983) 91; G Neppi Modona, 'Criminalità organizzata e reati associativi' in CRS (ed), *Beni e tecniche della tutela penale* (Angeli 1987) 107; G De Francesco, 'Associazione per delinquere ed associazione di tipo mafioso' in *Digesto delle discipline penalistiche* (Utet 1988) I, 289; G De Francesco, 'Societas sceleris, Tecniche repressive delle associazioni criminali' [1992] RIDPP 54; G De Vero, *Tutela dell'ordine pubblico e reati associativi* (Giuffrè

At issue is a category of crimes that not only catalyses an international push towards the harmonization of the different national solutions to fight criminal organizations,[86] but also has remarkable flexibility and has had numerous applications in various sectors and activities within the legal system.[87] Despite this, it is not possible to amplify its applicability to the case of top-ranking corporate officials, at least as long as such corporations operate regularly in lawful contexts and as long as we refer to individuals who, in addition to their activities as top-ranking corporate officials of a lawful corporation, do not exercise an active role in a criminal organization. The question becomes problematic when the conduct of one who facilitates the illegal activities of a criminal organization, while at the same time acting as a top-ranking corporate official of a corporation operating in lawful contexts, must be qualified.

Here, the responsibility criterion of external complicity in a crime of association,[88] the object of a tormented jurisprudential elaboration developed mainly in relation to the more serious crime of a criminal association of mafia-type (Art. 416*bis*),[89] could be taken into account. The purpose is to cover the grey areas of complicity between organized crime and the representatives of corporations, the public administration, and the economy, which represent a fruitful *humus* for the proliferation and reinforcement of the former.[90] In such a way, it is not only the conduct of the individual who participates in a criminal organization that could be aimed at the commission of one of the international crimes studied here that is criminally relevant, but also the conduct of one who, despite not participating in the criminal association, collaborates with it, facilitating the execution of illicit goals through his

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1988); C Grosso, 'Le fattispecie associative: problemi dommatici e di politica criminale' [1996] Rivista Italiana Diritto Procedura Penale 412; M Valiante, *L'associazione criminosa* (Giuffrè 1997); CNDPS (ed), *I reati associativi* (Giuffrè 1998); S Ardizzone, 'Associazione per delinquere in Italia: rilevanza normativa e caratteristiche strutturali' in V Militello and others (eds), *La criminalità organizzata come fenomeno transnazionale* (Iuscrim 2009), 181; L Picotti and others (eds), *I reati associativi: paradigmi concettuali e materiali probatorio* (Cedam 2005); V Militello, 'Associazione di stampo mafioso' in Sabino Cassese (ed), *Dizionario di Diritto Pubblico* (Giuffrè 2006), I 482; G Tona, 'I reati associativi e di contiguità' in A Cadoppi and others (eds), *Trattato di diritto penale, parte speciale III* (UTET 2008), 1063.

[86] Vincenzo Militello, *La rilevanza della nozione di organizzazione criminale nell'Unione europea: percorsi di armonizzazione* (University of Palermo, 2015: research for the EU Parliament S&D Group <www.caterinachinnici.it/wp-content/uploads/2016/01/Rapporto_SD_Nozione_Crim_EU.pdf> accessed 9 July 2017).

[87] On the matter of offences against the State, see G De Francesco, *I reati di associazione politica* (Giuffrè 1985); M Pelissero, *Reato politico e flessibilità delle categorie dogmatiche* (Jovene 2000); V Militello, 'La riforma dei reati contro lo Stato in Italia' in *Scritti in onore di Mario Romano* (Jovene 2011) III, 1621.

[88] On the matter, V Muscatiello, Il concorso esterno nelle fattispecie associative (Cedam 1995); L De Liguori, Concorso e contiguità nell'associazione mafiosa (Giuffrè 1996); A Cavaliere, Il concorso eventuale nel reato associativo (Jovene 2003); C Visconti, Contiguità alla mafia e responsabilità penale (Giappichelli 2003).

[89] Cass pen, II, 13.4.2016 n 18132. For other case law above n 40 and, recently, *Contrada v Italy* (App no 66655/13) ECHR 14 April 2015: on this judgement, see eg Donini (n 43); G Leo, 'Concorso esterno nei reati associativi' (2017) DPC <http://www.penalecontemporaneo.it/d/5153-concorso-esterno-nei-reati-associativi> accessed 9 July 2017.

[90] Eg A La Spina, 'Estortori, estorti, collusi, controllo mafioso dell'economia: una nuova tassonomia e una proposta di politica del diritto' in A La Spina and V Militello (eds), *Dinamiche dell'estorsione e risposte di contrasto tra diritto e società* (Giappichelli 2016) 239.

own conduct, with the awareness of contributing in this way to the existence of the association, even if not necessarily supported by the same *contra ius* objectives of the criminal group.

To hold corporate owners, top-ranking corporate officials or other corporate officials criminally responsible for the international crime here considered, the model of the Joint Criminal Enterprise (JCE) gives no specific help. This concept, originally created by the Appellate Chamber of the ICTY in the *Tadić* case and transformed by it into a routine rule of international law,[91] is not directly recreated in the Italian legal system. As observed above, a criminal association, in addition to a series of other crimes structured on the same model (from mafia associations to subversive associations) is included. Consequently, depending on the form that the JCE takes in the specific case, the participant can be called to answer for his own conduct even under the norms of domestic criminal law.

The three different forms of JCE recognized by international law (*basic, systemic,* and *extended*) are connected by the same objective elements: a plurality of individuals, a common plan, and the participation of the individual in the common plan.[92] However, each requires a different form of *mens rea,* to which different forms of liability from the domestic order can apply.

A member of a *basic* JCE, whose subjective elements must coincide with a willingness shared by the other co-participants to perpetrate a specific crime, will answer for his unlawful conduct according to the scheme of the complicity of individuals as previously described. In contrast, the participant of an *extended* JCE, whose subjective element in international law oscillates between mere foreseeability of the event and acceptance of the risk of the execution of the crime, can fall within the application of the above considered article 116. Lastly, it seems hard to deny the existence of intent, at least in the form of constructive intent (*'dolus eventualis'*), by the individual who has taken part in a *systemic* JCE, whose subjective element must consist of 'personal knowledge of the system of mistreatment' and in 'the willingness to favour such a common system'.[93]

Finally, concerning the command responsibility doctrine, although it is still today one of the preferred tools in international law for identifying and attributing criminal liability in the presence of complex operating structures, it does not find an explicit reference in Italian law. In the international case law, this doctrine has assumed a pronounced protean nature, which includes different illicit manifestations by types of conduct and subjective elements.[94] The fundamental, vertical criminological scheme that distinguishes command responsibility is, however, present under different forms in the Italian legal systems, and through doctrines that will be analysed shortly (i.e. delegation of functions, omitted control, etc.) can establish individual liability for the other corporate directors and managers for the crimes which are

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[91] See in Italy A M Maugeri, La responsabilità da comando nello Statuto della Corte penale internazionale (Giuffrè 2007) 499; S Manacorda, Imputazione collettiva e responsabilità personale, Uno studio sui paradigmi ascrittivi nel diritto penale internazionale (Giappichelli 2008) 252 ff; See also Werle (n 2) 169.

[92] See Manacorda (n 91) 265.

[93] ICTY, *Tadić,* (IT-94-1), *App Ch,* 15.7.1999, para 228.

[94] See Maugeri (n 91) 21 ff; Werle (n 2) 180 ff.

the subject of this study. Furthermore, an analogous scheme of liability operates with respect to liability for crimes of corporations, connected to crimes committed by top-ranking corporate officials (art 5 Lgs D. 231/2001).

6 Corporate Complicity and 'White –Collar Crime' Doctrine

6.1 Conditions and Limits of the Exemption From Criminal Liability for Delegations of Functions to Subordinates.

Even in the Italian legal system, the structural complexity of collective entities and enterprise can sometimes make it difficult to determine who is responsible for crimes committed within the activities of the collective entities. This mainly derives from the fact that individuals at the top of a complex organization often find themselves in the impossible situation of addressing all of their many obligations formally related to their roles. From this arises the necessity for top-ranking corporate officials to avail themselves of the intervention of others and to delegate certain functions to them. It is necessary to clarify if, and under which conditions, the delegation of functions occurs, and if, in these cases, the original obligor is exempted from liability.[95]

The doctrine, originally developed in the case law, of the *delegation of functions* and the principles which regulate it, has been explicitly addressed in Italian legislation through Lgs. D. 81/2008[96] According to the current norm, the delegation of functions is admitted, as it is not expressly excluded, although it is subject to certain limits and conditions. In particular, the delegation must first result from a written order with a specific date and must be accepted by the delegate in writing.[97] The delegation, which must be publicized in an adequate and timely fashion, must also be assigned to individuals possessing all the professional and experiential requirements necessary for the delegated functions. The delegates must also be enabled to exercise the functions attributed to them. As such, the delegates must be vested with the powers of organization, control, and management necessary and required by the nature of the specific delegated functions. They must also be guaranteed autonomy in spending as necessary for the performance of the functions.[98]

Regardless, the delegation of functions does not eliminate the duty of supervision by the delegating individuals with regard to the proper fulfilment of the functions transferred to the delegate. According to the prevailing case law, despite a fundamental recognition of the distribution of powers relating to corporate functions through delegation, liability for failure

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[95] On the different positions thereon, see G Grasso, *Il reato omissivo improprio* (Giuffrè 1983) 185; A Pagliaro, 'Problemi generali del diritto penale dell'impresa' [1985] L'Indice Penale 17; for a contrary view, see T Padovani, *Diritto penale del lavoro, Profili generali* (Angeli 1983) 62; D Pulitanò, 'Posizioni di garanzia e criteri di imputazione personale nel diritto penale del lavoro' [1982] Rivista giuridica lavoro 181.

[96] Legislative Decree 81/2008, Testo Unico in materia di tutela della salute e della sicurezza nei luoghi di lavoro di attuazione dell'articolo 1 della legge 3.8.2007, n 123, as amended by Legislative Decree 106/2009.

[97] Cass pen IV, 13.2.2014, n 7071.

[98] Cass pen IV, 23.1.2012, n 2694; Cass pen IV, 25.2.2010, n 7691.

to supervise by the top-ranking corporate officials, as the individuals originally subject to the duty, must be recognized.[99]

Moreover, to avoid rendering the use of delegations too difficult or even useless, the required supervision by the delegating party cannot be so constant and intense that it transforms into the direct fulfilment of the original duty to which the delegating party is subject. Accordingly, the delegating party's duties cannot have as their basis the concrete, minute conformation of individual fulfilments, which the law entrusts to the guarantor. They must instead pertain only to the correctness of the overall management of risk on the part of the delegate.[100]

The duties of supervision are considered absolved in the case of the adoption and efficient execution of the models of control and organization recalled by article 30, para 4, Lgs. D. 81/2008.[101] Moreover, it must be highlighted that limits are imposed on the transferability of certain duties identified in the analysis of risks connected to the corporate activity and in the drafting of the relevant documents, as well as in the designation of a party responsible for preventive services and risk protection.

Accordingly, in light of what has been illustrated, top-ranking corporate officials could, in principle, exempt themselves from liability for the international crimes here considered in the case of the adoption of the proper organizational models and the consequent control of their implementation. However, it is hard to imagine what an organizational model aimed at preventing the risk of such international crimes would look like, and moreover, that the grave actions over prolonged periods of time that are required for their commission could escape from the controls in the implementation of the general preventive model adopted.

6.2 The Criminal Liability for Taking Part in Collective Decisions Giving Rise to the Offence (Collegiate Offences)

A problem of significant relevance in the context of the Italian criminal legal system is tied to the question of the so-called 'collegiate offenses.' When the main decisions of the collective entities are generally taken through deliberations of collegiate organs, there may be a problem of verifying whether top-ranking officials are criminally liable when they take part in such decisions that result in criminal situations. Indeed, if in these cases, the liability of the crime appears reflected on the entire collegiate organ, such a circumstance must also comply with the fundamental principal of personality of the criminal liability, with the consequent necessity of identifying the features of individual liability.

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[99] Eg Cass Pen IV, 7.2.2008 n 13953; Cass pen IV 6.7.2007 n37610; Cass pen IV, 22.6.2000 n 9343.

[100] Cass IV, 22.6.2015 n 26279.

[101] Here is the text: 'The organizational model must also provide for an appropriate system of control over the implementation of the same model and the maintenance of the suitability of the measures adopted over time. The review and possible modification of the organizational model should be adopted when significant violations of the rules on accident prevention and workplace hygiene are detected, or when the organization and activity, due to scientific progress and technology, change.'

It can be recognized that a form of criminal participation can be found in participation with a vote in favour of a criminal collegiate deliberation.[102] In these cases, the conduct of each co-participant does not constitute in itself the essential elements of an offence, but combines with other identical conduct with which it blends to form the unitary nature of the final decision. However, in these cases, the criminal relevance of participation in collegiate deliberations does not derive from its causal (or not) value.[103] Therefore, it does not appear necessary to determine if the vote of the individual is necessary in reaching the required *quorum* for the final decision. In such cases of so-called 'multiple causation', the responsiblity of each individual participating in the deliberation shall be affirmed, in as much as his contribution gives rise to a form of cumulative causation, and thereby contributes to the fulfilment of the event. The relevance of the individual contribution of the co-participant derives from the direct matching with the legal model and not from a causal relationship with one of the elements of the offence.

Still within the limits of the implementation in the Italian legal system of the international crimes, in the case that collective decisions by a corporate collegiate body should result in a form of participation in the crimes herein considered, having participated with a vote in favour of the final deliberation appears sufficient as a contribution to establish criminal liability.

6.3 The Criminal Liability of De Facto Corporate Owners, Top-ranking Corporate Officials and Other Corporate Officials

The Italian legal system provides explicit guidelines regarding the cases in which corporate managers and officers are the ones actually performing activities typically related to the qualifications or function formally attributed to another party. In order to foster the principle of effectiveness, the party formally invested with the qualification or title of the function contemplated by the law is equated with those who must carry out the same function, even if differently qualified, or those who exercise, in a continuous and significant manner, the powers inherent in the qualification or function.[104]

However, two prerequisites are necessary.[105] First, it is necessary that, from a qualitative perspective, the exercise of the powers typically related to the qualification or function be significant. It must not be the case of an atypical or marginal exercise of powers. Moreover, from a quantitative perspective, there must be a continuity of the exercise of the aforementioned powers; it is not sufficient for it to be an occasional or episodic exercise.[106]

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[102] Romano and Grasso (n 17) 173.

[103] See U Giuliani-Balestrino, *I limiti della compartecipazione criminosa* (Giuffrè 1988) 134; M Donini, 'La partecipazione al reato tra responsabilità per fatto proprio e responsabilità per fatto altrui' [1984] RIDPP 175.

[104] E Ambrosetti, E Mezzetti and M Ronco (eds), *Diritto penale dell'impresa* (Zanichelli 2012) 32; P Veneziani, 'L'estensione delle qualifiche soggettive (art 2639)' in A Lanzi and A Cadoppi (eds), *I reati societari* (Cedam 2007) 296.

[105] Eg O Di Giovine, 'L'estensione delle qualifiche soggettive', in A Giarda and S Seminara (eds), *I nuovi reati societari: diritto e processo* (Cedam 2002) 47.

[106] Cass pen, V, 4.5.2016 n 39681.

According to the dominant case law, it is not necessary that all the powers of the managing body be present.[107]

If the aforementioned conditions exist, the *de jure* party and the *de facto* party are considered to possess the same powers and duties,[108] and thus, consequently, the *de facto* party assumes the same responsibilities of the *de jure* party.[109]

In conclusion, even the party that *de facto* takes on the qualifications and functions entrusted to the corporate manager or director is considered criminally liable. However, in light of the crimes here considered, his liability is still recognized solely within the limits of the current narrow adaptation of the Italian system to the international normative framework.

6.4 Individual Criminal Liability of Members of Controlling Corporate Bodies

The Italian legal system provides for criminal liability for members of controlling corporate bodies for the omitted impediment of crimes realized within the context of corporate management. Particularly, starting at the beginning of this century, the controls have multiplied, and consequently, the possibility of criminal liability for controlling officers has grown.

The potential conflict — between the principle of personal criminal liability and the legislative provision top-ranking officials' duties to supervise their subordinates — has been brought to the attention of the Constitutional Court on multiple occasions. The Court has specified that the relevance in criminal law of some subjective positions does not prejudice the assessment of the requirements of the responsibility, specifically with reference to the subjective elements of a crime.[110] More generally, the typical scheme of criminal liability for failing to impede (omission) implies — with respect to the constitutional principles of legality, personality of liability, and culpability — the presence of three requisites: the existence of a supervisory role by the controlling organ, which creates a judicial duty to impede the offences of others; the proof of a causal nexus according to article 40, par. 2, between the failed use of the powers of prohibition and the crime; and, in the case of complicity to an intentional crime, proof of the necessary subjective element.[111]

Moreover, it seems useful to specify that part of the Italian case law relies on the theory of so-called 'warning signals' to establish possible forms of liability for omitted control when it is lacking the manifest evidence of a voluntary and premeditated participation by the controlling party in the crime committed by a third party.[112] When the aforementioned conditions occur, the party in charge of supervision, who failed to exercise the necessary

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[107] Cass pen, V, 29.12.2015 n 51091; Cass pen, V, 2.3.2011 n 15065; Cass pen, V, 17.10.2005 n 43338.
[108] Cass pen, III, 5.7.2012 n 33385; Cass pen, V, 11.1.2008 n 7203.
[109] Cass pen, V, 11.1.2008 n 7203.
[110] It Const Court, judgements 198/1982, 173/1976, 39/1959.
[111] See N Pisani, Controlli sindacali e responsabilità penale nelle società per azioni (Giuffrè 2003); F Centonze, Controlli societari e responsabilità penale (Giuffrè 2009) 48.
[112] Cass pen, V, 4.5.2007, n 23838; Cass pen V, 26.1.2006, n 7208; Cass pen, V, 5.10.2012 n 23000.

control, can be held liable for the crimes at issue within the limits of the Italian criminal legislation's adaptation to the international norms.

6.5 Corporate Liability for Activities of Individuals: Requisites and Forms of Relation

Especially in light of a possible introduction in the future of corporate criminal liability for the here considered international crimes, it is important to briefly consider how Lgs. D. n. 231/2001 identifies the parties whose activity implicates corporate responsibility. The parties whose actions implicate corporate responsibility are those who possess the representative, administrative, or management functions of the entity, or of one of its organizational bodies possesing financial and functional autonomy, or by individuals who exercise, even *de facto*, the management or control of such a body, as well as individuals subject to the direction or supervision of such parties (art 5).

As regards the objective and subjective conditions necessary to give rise to corporate liability, it is necessary, for the objective part, that the aforementioned parties, regardless of whether they hold a top-ranking position, or are subject to another's supervision, to perpetrate one of the crimes for which corporate criminal liability is admitted (which is not the case for the international crimes here considered) in the interest or advantage of the corporation.[113]

The subjective elements of the imputation of individual liability to the corporation are different depending on the party who executed the criminal activity. Where the party at issue is one who, based on functional criteria, is in a top-ranking position (art 6),[114] the corporation does not answer for the crime 'if it can demonstrate to have adopted and effectively implemented organizational and managerial models sufficient to prevent crimes such as the one that occurred'. However, a sort of presumed responsibility, shifting the burden of proof, would exist, given that it is presumed that top-ranking officials act according to the will of the corporation.

When the crime is instead committed by individuals subject to the direction and supervision of others, the corporation answers for the crime only if the failure to fulfil managerial and supervisory duties made the perpetration of such a crime possible. Nevertheless, such a failure is excluded if the corporations, before the commission of the offence, have adopted an organizational model that is able to prevent the crime.

An important element in the legislation relating to corporate liability is therefore represented by organizational models inspired by *compliance programmes* of North American origins. The failure to comply with such models creates the rise of an 'organizational fault' which establishes the subjective liability of the corporation.[115]

As far as the possible effects on the responsibility of the individuals in the case of corporate liability for the crime are concerned, it is necessary to state that article 8 of Lgs. D. 231/2001 highlights the direct and autonomous nature of the liability of legal persons with respect to

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[113] Cass pen, VI 9.2.2016 n 12653; Cass pen, SU, 24.4.2014 n 38343; Cass pen, SU 2.7.2008 n 26654.
[114] Tribunale Milano, XI, 26.6.2008.
[115] Cass SU 24.4.2014 n 38343.

the physical persons who have acted in its interest or to its advantage. The provision sets forth that corporate liability exists even when the perpetrator of the crime has not been identified or is not imputable, as well as when a crime is quashed for a reason other than amnesty.

In particular, conduct by the corporation that is different than, and independent from, that attributable to the perpetrator of the crime at issue is punishable. The legislation does not aim to introduce additional forms of punishment for the physical person who perpetrated the crime. The decree therefore creates a punitive model that has, as its subject, the corporation, an entity that is autonomously identifiable and distinguishable from the physical persons of its members. Therefore, a physical person's liability cannot be shielded or diminished when a corporation is held responsible.

7 Corporate Complicity and Defence

As regards the international crimes primarily considered here, there are no particular justifications or excuses that exclude or limit criminal liability for top-ranking corporate officials.

According to article 51, co. 1 of the Italian Penal Code, the punishability of an individual is precluded when the individual is performing a duty imposed by law. In order for the illicit conduct not to constitute a crime, it is necessary that the duty being fulfilled falls within the scope of the personal duties of public law, where the individuals that can benefit from the exception are public authorities, those charged with the performance of a public service, or private individuals carrying out a service of public necessity.

The lack of punishability for the fulfilment of a duty deriving from a legal norm occurs when the individual holds, in a certain situation, two contrasting duties (antinomy). In identifying which duty prevails, in light of the principle of specificity, the prevailing duty is the one identified by the special law, and makes an exception to the general law. Where there is not a rigorous logical relationship of specificity between the incompatible norms, the determination of the prevailing norm will instead be made using an evaluative criterion, where the duty whose performance satisfies a more important interest will prevail.[116]

Potential laws of foreign legal systems that impose, as a duty, the commission of criminally relevant acts on the basis of the internal legal system do not provide any excuse when the crime is committed in Italian territory.

Concerning due obedience, in the Italian legal system, an individual who has committed an offence while carrying out an illegitimate order is criminally liable (Art. 51, par. 3). The party who received the order has the duty to check both the formal and substantive legitimacy of the order received and to abstain from carrying out the order when the act is prohibited by criminal law.

However, the subordinate who carries out an unlawful order when the law does not permit him to question the lawfulness of the order is not punishable. Even in a particularly strict

[116] Marinucci and Dolcini (n 18) 134 ff.

subordinate-superior relationship (such as in a military order, or state police), however, the duty to carry out orders has three limits:

- The order must not be formally illegitimate;
- The order, even if formally legitimate, cannot be manifestly criminal;[117]
- The subordinate cannot be personally aware of the criminal nature of the order.

The fulfilment of a so-called private order, emanated in a hierarchical relationship, does not provide an exception to liability. It is a general principle of the legal system that one who has undertaken criminal conduct under the instigation of another incurs liability along with the instigator or principal.Lastly, an actor who carries out an illegitimate order under the erroneous belief that he is carrying out a legitimate order is not liable for an intentional crime (art 59 1st para).

Concerning *coercion, state of necessity, or duress,* the Italian legal system recognizes that anyone who has committed an act in a state of necessity is not punishable (art 53, par. 1). In order for the exception to apply, an imminent danger that cannot be avoided other than through the criminal conduct must exist.[118] The criminal act must also be proportionate to the danger, in that there cannot be an excessive disparity between the legal interest that is safeguarded and the one that is sacrificed.[119]

The state of necessity can also be determined by a threat, which must be severe enough to limit the freedom and self-determination of the actor. In this case, the requirement of a motivational shift, such that the actor would not have undertaken the action if the danger had not been present, is necessary.

8 International Crimes and the Limits of Applicability of the Italian Criminal law

Finally, it is necessary to define the limits of applicability of the Italian criminal law for such international crimes. In particular, articles 3 and 6 of the Penal Code embrace the principle of territoriality, save for some exceptions provided for by articles 7-10.[120] As a general rule, anyone who commits even only part of a crime in the Italian territory is punished according to Italian law. This renders Italian law applicable, even when only one conduct, amongst those of the various co-participants, is also only partially committed in Italy. Consequently, even top-ranking corporate officials who failed to control a corporate activity which occurred abroad (for example, furnishing military equipment to a foreign government that the corporate managers knew would be used to commit war crimes) can be punished

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[117] Art 1349, Lgs D 15.3.2010 n 66, Codice dell'ordinamento militare; art 66 para 4, Law 1.4.1981 n 121, Nuovo ordinamento dell'Amministrazione della pubblica sicurezza.

[118] Cass pen, II, 30.1.1978 n 7344; Cass pen, I, 13.4.1978 n 870.

[119] On the matter, G V De Francesco, *La proporzione nello stato di necessità* (Jovene 1978).

[120] See Pagliaro (n 22) 143; Fiore and Fiore (n 17) 118; C Grosso and others, *Manuale di diritto penale,* PG (Giuffrè 2013) 147. Differently, M Gallo, *Corso di diritto penale, I La legge penale* (Cedam 1999) 169; Marinucci and Dolcini (n 18) 134; A Di Martino, *La frontiera e il diritto penale* (Giappichelli 2006) 42.

according to Italian criminal law (as long as the crimes actually committed are prohibited by Italian criminal law).

In this regard, it is important to note that when an Italian criminal norm identifies the crime, other criminal laws of different countries more favourable to the offender do not have a limiting effect on the liability of the potential perpetrator: The possible judgement already issued abroad can be repeated in Italy upon the request of the Minister of Justice.[121]

Finally, it does not seem that the extension of Italian criminal law to crimes committed abroad, according to the aforementioned articles 7-10, can be valid for a direct extension of the validity of Italian criminal laws in the case of the perpetration abroad of the international crimes specifically considered herein. The logic of the code is dominated by the defence of the state and from a state-centric vision of criminal protection; this is very different from the protection of human rights, which overlooks the nationality of the respective holders. The scope in which the request by the Minister of Justice is required as a condition of prosecution is proof of this (art 8, para. 1, art 9, para. 2, art 10. para. 1-2).

[121] See V Militello and A Mangiaracina, 'Country Report Italy' in M Boese and others (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union* (Nomos 2013) 259 ff.

This issue is the second milestone on the way to the 20th AIDP World Congress dedicated to 'Criminal Justice and Corporate Business'. It brings together the proceedings of the preparatory Colloquium on 'Individual Liability for Business Involvement in International Crimes', held at the University of Buenos Aires on March 20th-23rd, 2017.

This volume contains the resolutions adopted in Buenos Aires as well as the general report, two special reports, and ten national reports (Argentina, Brazil, Colombia, Croatia, Finland, Germany, Italy, Netherlands, Russia, United States). It offers a broad overview of the debate on and the main challenges raised by corporate involvement in international crimes. Through the analysis of both national and international case law and legislation, this issue provides insight into a variety of topics related to the liability of corporate officials and sheds light on the different doctrines of co-perpetration and complicity arising at the national and international level (eg: neutral acts, negligent complicity, complicity by omission, command responsibility; white collar crimes doctrine). Special attention is paid to the complex balance to be achieved between an effective prosecution of these conducts and the respect of the general principles of criminal responsibility.

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