



**UNIVERSITY of the
WESTERN CAPE**



FACULTY OF LAW

**CORPORATE CRIMINAL RESPONSIBILITY UNDER THE MALABO PROTOCOL: A STEP
FORWARD?**

BY

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DECLARATION

I, **FANNIE NYIRENDA** declare that **CORPORATE CRIMINAL RESPONSIBILITY UNDER THE MALABO PROTOCOL: A STEP FORWARD?**, is my work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources used, referred to or quoted have been duly acknowledged.

Fannie Nyirenda

Signed.....

Dated.....

Supervisor: Professor Gerhard Werle

Signed.....

Dated.....



KEY WORDS:

Africa

African Court

Corporate liability

Corporate policy

Corporate Criminal responsibility

Criminal responsibility

Domestic criminal law

International criminal law

Malabo Protocol

Statute of the African Court



ABBREVIATIONS

ATS	Alien Tort Statute
CCR	corporate criminal responsibility
ICC	International Criminal Court
ICL	international criminal law
ICTR	The International Criminal Tribunal for Rwanda
STL	the Special Tribunal for Lebanon
USA	United States of America



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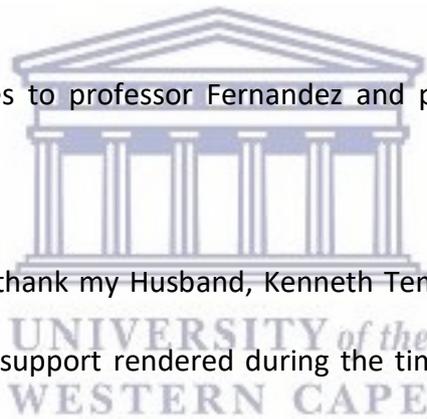


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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF RESEARCH

Traditionally, domestic criminal law was focused on individual guilt as can be seen from the principles of punishment, which are closely linked to blameworthiness and the infliction of loss or punishment to the offender¹. It most often requires the proof of the offender's mental state at the time of the committing the offence.

Due to the emergence of the concept of legal persona,² there has emerged a framework of imputing criminal liability on entities with legal personality. This concept has gained momentum in the domestic criminal law systems of many countries. The modern-day development of corporate criminal responsibility (CCR) emerged from the common law countries and has undergone a series of developments³. Various models of imputing liability on a corporation have been developed with the United Kingdom having recently passed laws for serious offences like corporate manslaughter.⁴

The concept has also developed (although with a restricted form of liability) in the civil law jurisdictions like France,⁵ Italy, Switzerland, Poland, etcetera. In Europe, the concept gained strides due to the risk posed by transnational crime in the wake of globalisation and the

1 Pieth M & Ivory R 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Pieth M & Ivory R (eds) *Corporate Criminal Liability Emergence, Convergence and Risk* (2010) 3-62.

2 Laufer L *Corporate Bodies and Guilty Minds. The failure of corporate Criminal Liability* (2006) 13

3 Pieth m & Ivory R (2010) 3-62.

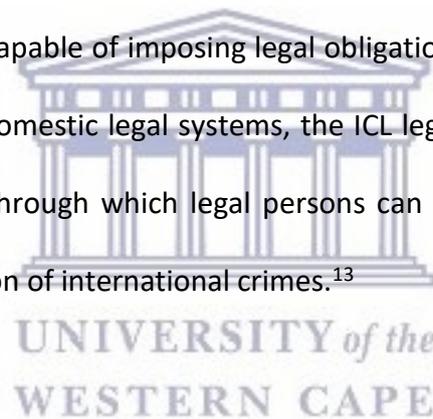
4 The United Kingdom Corporate Manslaughter and Corporate Homicide Act of 2007.

5 Slye R 'Corporations, Veils, and International Criminal Liability' (2008) 33 *BROOK. J. INT'L L.* 955. Where it was noted that corporate criminal liability was recognised in France in as early as 1670, but was repealed after the French Revolution, and only reintroduced towards the end of the 19th century with the coming of industrialisation.

collaboration brought about by the European Union.⁶ This resulted in signing of numerous international treaties against inter alia, organised crime, money laundering, corruption, finance terrorism, and bribery of foreign officials, some of which, required countries to pass domestic laws that are in conformity with the treaty and imposed corporate criminal liability for certain acts.⁷

The concept of CCR is also recognised in numerous African countries including South Africa,⁸ Kenya,⁹ Ethiopia,¹⁰ and Malawi,¹¹ all of which possess laws that recognise criminal liability for legal entities.

International criminal law (ICL), on the other hand, is founded on the understanding that international legal rules are capable of imposing legal obligations over individuals.¹² Despite the development of CCR in domestic legal systems, the ICL legal system has not succeeded in developing a framework through which legal persons can be held responsible for their involvement in the commission of international crimes.¹³



6 Pieth M & Ivory R (2010) 3-62.

7 Pieth M & Ivory R (2010) 3-62.

8 Section 332 of the South African Criminal Procedure Code Act No 51 of 1977 has a comprehensive provision which imposes liability on a corporate entity for crimes committed while furthering the organisation's interest.

9 The definition of a person under the Article 260 of the 2010 constitution of Kenya includes a corporation, associations or other body of persons whether incorporated or un incorporated. There are various Acts where the concept of corporate liability is manifested for example the penal Code Act Cap. 63 of the laws of Kenya, the Public Health Act Cap 242 of the laws of Kenya, the Forests Act N.o. 7 of 2005 etcetera.

10 Article 34 of the Ethiopian Criminal Code Proclamation No 414 of 2004 defines a corporation and stipulates that a corporation can be found criminally liable as a principal offender, instigator or accomplice.

11 Chapter 7:01, The Penal Code of Malawi makes provision for corporate criminal liability and the definition of person under the Act includes Corporations.

12 Cassese A et el (eds) *Cassese's International Criminal Law* 3ed (2013)1.

13 This can be appreciated from an interrogation of the statutes of the recent international law tribunals for example the ICTY, the ICTY the Lebanon tribunal, as well as the ICC statute have no provision for corporate liability. It should be noted however that the Lebanon tribunal in the New TV S.AL and Akhubar Beirut S.AL cases, although its statute does not specifically provide for corporate liability, it did find that it had jurisdiction over corporations for contempt of court. (see Bernaz N *Oxford Journal of International Criminal Justice* Vol 13 (2015). 313-330).

At the first international law tribunal, there was an inclusion of a form of organisational responsibility where organisations could be declared criminal for their involvement in the Nazi crimes. The issue of corporate liability was unsuccessfully considered during submissions leading to the formulation of the Rome Statute. The issue of CCR in the ICL arena, resurfaced with the enactment of the 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (hereinafter 'the Malabo Protocol')¹⁴ which is the focal point of this study.

1.2. PROBLEM STATEMENT

It is undeniable that organisations such as companies, non-governmental organisations, partnerships and an array of such other organisations play a key role in global economic, environmental, political and social activities.

Furthermore, African states rely greatly on foreign investments to grow and sustain their economies. Consequently, the continent has opened its doors to international companies and other legal entities by relaxing its investment policies in a bid to attract foreign investments.¹⁵ This economic pursuit has at times resulted in legal entities posing great harm to the continent in terms of involvement in the commission of crime, environmental hazard and unscrupulous exploitation of natural resources.¹⁶ Some legal entities has been sued for aiding and abetting the commission of crimes during apartheid,¹⁷ while others

14 The Malabo protocol amended the Protocol on the merger of the African Court of Justice and Human rights and extended the court's jurisdiction to include international criminal law jurisdiction.

15 Ongeso J *An Exploration Of Corporate Criminal Liability In International Law For Aiding And Abetting International Crimes In Africa* Unpublished Theses (2015) iii.

16 Pieth M & Ivory R (2010) 3-62.

17 In Re south African Apartheid Litigation 642F. Supp. 2nd 336 in which several litigants sued IBM for creating and maintaining the identity card that denationalised the blacks and Ford for supplying vehicles used for the oppression of the blacks during apartheid. <http://www.hrp.law.harvard.edu> (accessed on the 08/04/2017)

have been seen to be complicit to countries committing serious human rights violations.¹⁸ It must be noted that aside from those corporations engaged in economic activities, there are others such as non-governmental organisations, and non-profit organisations that could also cause serious harm in the international law context.

Despite this great economic, political and social role that legal entities play in today's world, the ICL framework has focused on individual criminal responsibility in dealing with international crimes even amidst certain indicators that point to the involvement of properly organised corporate criminality.¹⁹ ICL has concentrated on individual liability even when such persons may actually be cogs in a larger system that may be beyond the ambit of the responsibility of a natural person.²⁰

This is so even amidst the understanding that most often, international crimes do not result from the criminal actions of one person but constitutes a manifestation of collective criminality with crimes being perpetrated by groups of persons acting pursuant to a common criminal purpose.²¹ Furthermore, it has been argued by The Special Tribunal for Lebanon (STL) that the failure to develop the concept of corporate liability in international law has not been due to a supposed complex unfeasibility but due to complex compromises as in the case when drafting the Rome statute.²²

18 Kiobel v Royal Dutch Petroleum Co. (621 F3d 120 (2d.cr.2010)) (as cited in by Bernaz N oxford journal of international criminal justice Vol 13 (2015)313-330), the supreme court held that it did not have jurisdiction to hear the matter on the ground that that customary international law had rejected the concept of corporate liability for international criminal crimes.

19 Nollkaemper A. 'Introduction' in Nollaemper A & Wilt H (eds) *System Criminality in International Law* (2009) 1-25.

20 Nollkaemper A. (2009) 1-25.

21 Werle G & Jessberger F (2014) 193.

22 Bernaz N 'Corporate Criminal Liability under International Law: The New TV S.AL and Akhubar Bierut S.AL cases in the Special Tribunal for Lebanon' (2015) 13 (2) *Oxford Journal of International Criminal Justice* 316.

The African Union's member states adopted the Malabo Protocol in 2014. The Malabo Protocol²³ is an agreement which, when ratified by 15-member states, would grant criminal jurisdiction to the existing African Court of Human Rights, which is proposed to be merged with the African Court of Justice to create an African Court of Justice and Human Rights and Peoples' Rights (ACJHR).

Appended to the Malabo Protocol is the Statute of the African Court of Justice and Human and Peoples' Rights which has given the yet to be established African Court of Justice and Human and Peoples' Rights (hereinafter 'the African Court') criminal jurisdiction over corporate persons²⁴. Once the Malabo Protocol enters into force, the African Court will exercise criminal jurisdiction over legal entities which have perpetrated any of the crimes under the subject matter jurisdiction of the Court.

The Malabo Protocol gives the court jurisdiction over 14 international crimes, namely genocide, crimes against humanity war crimes, aggression, unconstitutional change of government, piracy, terrorism, mercenarism, trafficking in persons, drug trafficking, corruption, money laundering, trafficking in hazardous waste, illicit exploitation of natural resources.²⁵ It should be noted here that the scope of the international law crimes to be dealt with by the African Court has been broadened and the rationale is that the court will

23 Article 11 of the Malabo Protocol provides that the protocol shall enter into force 30 days after Ratification by 15-member states. It should be noted however that to date not even a single country has ratified the protocol but nine countries have so far appended their signatures. https://au.int/web/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_humanrights_19.pdf (accessed on the 17/04/2017).

24 Article 46C of the Statute of the African Court.

25 Article 28A of the Statute of the African Court.

deal with criminal matters that are peculiar to Africa and those that the international community does not consider as grave enough to recognise as international crimes.²⁶

Many of the crimes in the Statute undoubtedly have significant institutional and corporate elements to them, particularly corruption, trafficking in hazardous waste, illicit exploitation of natural resources and money laundering, trafficking in persons and drug trafficking. The hypothesis is that since legal persons possess certain liberties and obligations recognised in international law,²⁷ they should be subject to obligations under international criminal law as well. It has been argued by Slye that; 'it is not logical to give legal entities rights under international law, including international human rights law, while at the same time allowing them to circumvent responsibility for the most egregious abuses of that same body of law.'²⁸

According to Cassese, ICL possesses a unique characteristic of drawing its origins from international human rights law, international humanitarian law and national criminal law.²⁹ As such it is logical to argue that ICL can borrow from the models of CCR that have been developed in the domestic legal systems. However, it must be noted that, when considering the scope of corporate criminality, it is not clear what type, form or degree of crimes committed by a legal entity should be covered, what form of legal entity should be included, should there be systematic organisational criminality, or should it only encompass immediate corporate criminality in terms of illegal acts of legal persons.³⁰ All these

26 Abass A 'Historical and Political Background to the Malabo Protocol' in Werle G and Vormbaum M (eds) *The African Criminal Court A commentary on the Malabo Protocol* (2016) 11-30.

27 Examples of human Rights Instruments giving obligations to organisations includes the preamble to the United Nations Universal Declaration of Human Rights, that provides; 'every individual and every organ of society' has an obligation to promote respect for the rights in the declaration'.

28 Slye R (2008) 959.

29 Cassese A et al (2013) 5.

30 Eser A & Rettenmaier F 'Criminality of Organisations: Lessons from Domestic Law- Comparative Perspective' in Nollaemper A (eds) & Wilt H *System Criminality in International Law* (2009) 222- 37.

questions must be considered to come up with a framework that will be more responsive in imputing CCR for international law crimes.

The research thus examines whether the concept of CCR has a place in ICL and more specifically in consideration of international crimes as envisaged in the Statute of the African Court. The main idea is to consider measures that would ensure criminal accountability of legal entities for the perpetration of international crimes, and an examination of the scope and practicability of the application of Article 46C of the Statute of the African Court.

1.3 OBJECTIVES OF THE STUDY

The general objective of the study is to assess whether CCR is a concept that can be utilised to counter the involvement of legal persons in international crimes and evaluate the practical applicability of the model of corporate liability as provided by the Statute of the African Court.

The specific objectives are:

1. To interrogate the place of CCR in ICL;
2. To review the existing domestic legal framework for CCR and consider the most appropriate model for attributing criminal liability on a legal person; and
3. To critically analyse whether the model of CCR under the Statute of the African Court evades the challenges that have in the past impeded the development of CCR in ICL.

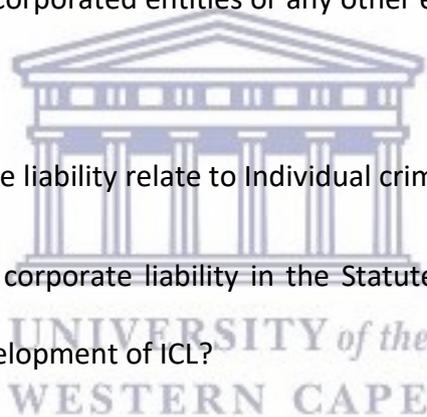
The research analyses whether it is possible to have corporate liability for all international crimes or a selection of them as is the case under some domestic frameworks; and

4. To assess whether the African Court model of CCR provides a way forward for corporate liability in ICL.

1.4 RESEARCH QUESTIONS

The research seeks to address the following questions:

1. What is the scope of corporate criminality that is envisaged in Article 46C of the Statute of the African Court and under what circumstances should the same arise?
2. What types of legal persons are envisaged in African Court model of CCR, does it envisage strictly incorporated entities or any other entities that are recognised as legal persons?
3. How does corporate liability relate to Individual criminal liability?
4. Is the inclusion of corporate liability in the Statute of the African Court a step forward in the development of ICL?



1.5 RESEARCH METHODOLOGY

The study has employed qualitative desktop research method involving a critical analysis of primary and secondary sources. The primary sources include cases, international treaties and instruments. The secondary sources to be reviewed include books, journal articles, reports and internet sources.

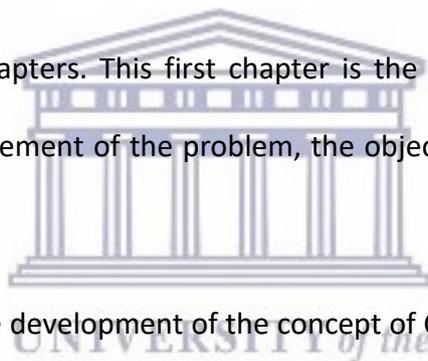
1.6 SIGNIFICANCE OF STUDY

Bearing in mind the novelty of CCR for international law crimes as provided for by the Statute of the African Court, this research is significant because it assesses and evaluates

whether it is rational to accept CCR in ICL. An evaluation of the principle of CCR as developed in various domestic legal systems and its possible transposition into ICL is conducted. Furthermore, the model of CCR as provided in the Statute of the African Court is evaluated in light of its applicability and whether it resolves some of the challenges that have impeded past development of a similar concept in ICL. The research thus contributes to the very limited research and almost non-existent research on the evaluation of corporate liability as envisaged in the Statute of the African Court in international criminal law.

1.7 CHAPTER OUTLINE

The study consists of five chapters. This first chapter is the introduction, setting out the background to the study, statement of the problem, the objective of the study and it gives an outline of the chapters.



The second chapter traces the development of the concept of CCR from the Nuremberg trial to the enactment of the Statute of the African Court. It further gives an account of the development of CCR at the domestic level, the chapter lastly discusses the models of CCR that have developed in the domestic legal arena.

The third chapter critically analyses article 46C of the Statute of African Court. The chapter discusses the model adopted by the provision, the manner in which it proposes to impute liability on legal persons and the weakness that the provision presents.

The fourth chapter looks at whether the model of CCR as adopted in the statute of the African court is progressive and a justifiable model for imputing CCR for international law crimes.

The fifth chapter gives the concluding remarks by highlighting the main findings of the research. It goes further to make recommendations in light of the findings.



CHAPETR 2

THE HISTORIC DEVELOPMENT OF CORPORATE CRIMINAL RESPONSIBILITY AND THE MODELS OF ATTRIBUTING LIABILITY ON A LEGAL PERSON

2.1 INTRODUCTION

This chapter discusses the development of CCR in the international arena from the Nuremberg trial to the adoption of the Malabo Protocol. Thereafter, it shall look at the concept of CCR by defining clearly what the concept entails and consider what types of organisations can be held criminally liable. Drawing from the domestic development of CCR, the chapter shall evaluate the various models of imputing criminal liability that have been developed to date. The possible challenges that may be encountered when utilising the models to prove corporate liability shall also be highlighted in the course of the discussion.

2.2 HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL RESPONSIBILITY

The development of CCR shall be traced from both the point of view of ICL proper and transnational criminal law. With regards to ICL, the history shall be considered from the Nuremberg Charter, the Nuremberg follow up trail, the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), the development of the Rome Statute and finally the Special Tribunal for Lebanon (STL). Thereafter developments at the transitional criminal law level shall be considered. Lastly mention shall be made about the growing convergence of CCR at the domestic levels of many countries.

2.2.1 The Nuremberg Charter

In ICL, the first attempt at organisational criminal liability came in the form of Articles 6, 9 and 10 of the Nuremberg Charter which provided for declaring certain Nazi organisations as criminal groups. The Charter only went so far as a declaration that an organisation is criminal but did not make provisions for sanctions against criminal organisations. The organisations charged were Nazi organisations and not necessarily legal persons. Subsequently, at the end of the Nuremberg trial, four organisations were declared as criminal and these were the Nazi party Leadership corps and their staff, the Secret State Police (Gestapo), Der Sicherheitsdienst (SD) and the die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS).¹ The declarations were to be subsequently used as a basis to prosecute members of the declared organisations for their involvement in the Nazi crimes as provided by the Law No. 10 of the Control Council.²

2.2.2 Nuremberg follow up Trials

Even though the Nuremberg Charter did not envisage liability of legal persons, the Nuremberg follow up trials acknowledged corporate involvement in the commission of the Nazi crimes.³ This can be seen from the prosecution of several business executive of entities such as the Flick Trust, the IG Farben Trust and the Krupp Trust for international law crimes including war crimes, mass murder, complicity in the crime of aggression and torture.⁴ Nerlich observes that even though the judgments in these cases indicated that the corporations were liable, the accused persons were all natural persons.⁵

1 Werle G & Jessberger F (2014) 8.

2 *The International Military Tribunal (Nuremberg) judgement of 1 October 1946* 468.

3 Kaleck W and Saage-MaaB M 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges' (2010) 8 *JICJ* 701.

4 Nerlich V 'Core Crimes and Transnational Business Corporations' (2010) *JICJ* 898.

5 Nerlich V (2010) 898.

2.2.3 Jurisprudence of the International Criminal Tribunal for Rwanda

Despite not having jurisdiction on legal persons, the jurisprudence of the ICTR shows some cases that arose as a result of corporate involvement in international law crimes and where senior members of the organisations were prosecuted. A case in point is the Media Case involving professional media personnel who were convicted due to their professional activities for conspiracy and direct incitement to commit genocide.⁶ Aside from the indirect traces of CCR in the above-mentioned cases, there was no significant growth of the concept during this period as the ICTR had jurisdiction only over natural persons.

2.2.4 The Rome Statute

The issue of CCR was unsuccessfully considered during negotiations leading to the adoption of the Rome Statute. It was proposed by the French representative that the Rome Statute should have a provision for corporate liability.⁷ The proposed article set out the manner in which CCR could be imputed on a legal person.⁸ This proposal was rejected on the ground that some states did not have the concept in their domestic laws as such would cause problems with regards to the complementarity principle.⁹ Others argued on the basis of challenges on how the concept would be applied in the ICL context.¹⁰

There was an attempt to reconsider the issue of CCR at the 2010 Rome Statute Kampala Review Conference, but the issue was overshadowed by the need for a definition of the crime of aggression.¹¹

6 *Judgement of Nahimana, Barayagwiza & Ngeze (ICTR-99-52-T)*.

7 Bassiouni M (2005) 72.

8 See Appendix 1.

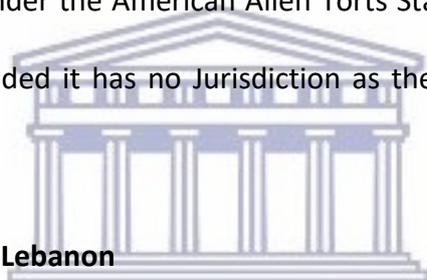
9 Schabas W *An Introduction to the International Criminal Court* (2007) 212.

10 Bassiouni M (2005) 72.

11 Van der Wilt H (2013) 45.

2.2.5 Enforcement through the Domestic Systems

After this failure to include CCR in the Rome Statute, human rights lawyers have unsuccessfully tried to pursue cases relating to corporate involvement in ICL crimes through the domestic courts. A key example is the Districts courts of the United States of America based on the Alien Torts Statutes (ATS).¹² It has also been argued that there is evidence for example in the case of *Kiobel v Royal Dutch Shell Petroleum Company*¹³ that points to the complicity by corporate entities in the commission of abuses of human rights and international crimes in African states by political and military leaders. It must be emphasised here that there has been an attempt by the African claimants to sue multinational companies in various cases under the American Alien Torts Statute, but the Supreme Court has on several occasions decided it has no Jurisdiction as there is no ATS cause of action against corporations.¹⁴



2.2.6 The Special Tribunal for Lebanon

A recent development of CCR in the international criminal law arena is the decision of the STL. The appeals panel of the STL in two separate cases decided that the tribunal has Jurisdiction over Corporations for the offence of contempt.¹⁵ This was the first time an international law tribunal asserted jurisdiction over legal persons.¹⁶ In making its decision, the STL took into consideration the fact that the rejection of corporate liability during the

12 Kaeb C 'The Shifting Sands of Corporate Liability Under International Criminal Law' (2016) 49 *The George Washington International Law Review* 365.

13 *No. 10-1491 US (2012)*.

14 It must be noted however that the Supreme Court of the United States of America in the case of *Jesner V. Arab Bank 16-499 2d cir*, has agreed to hear the case and resolve the issue whether the Alien Tort Statute, 28 U.S.C. §1350, categorically excludes corporate liability. Available at <http://opiniojuris.org/2017/04/03/unattractive-question-back-scotus-considers-corporate-liability-alien-tort-statute/> (accessed on 11 April 2017).

15 *New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1* and *Akhbar Beirut S.A.L. & Al Amin (STL- 14-06)*. In the *New TV S.A.L* case the corporate accused was subsequently acquitted and in the *Akhbar Beirut* case the corporation was convicted and fined 6,000 Euros.

16 *New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1*

drafting of the Rome Statute was due to political negotiations. Further the STL concluded after a consideration of the Nuremberg trial and its follow up trials, that the concept of corporate liability was not out rightly rejected and neither was it expressly endorsed in ICL.¹⁷ It further considered that, the fact that no international tribunal has ever held a corporation liable is a result of policy choice and not genuine legal impossibility.¹⁸ The STL considered these and other factors before it could assert jurisdiction over corporate entities for contempt. These decisions although not necessarily relating to jurisdiction for ICL crimes makes a significant stride in developing CCR in international law.

2.2.7 Development through Transnational Crime Legal Instruments

Despite the scanty development of CCR for ICL crimes, there have been some development of CCR at the international level with regards to transnational crimes. States have addressed transnational non-atrocity crimes through instruments that have progressed and harmonised state responses within their own territories.¹⁹ Several international treaties have been passed that call for states parties to impose corporate liability at the national level to curb involvement of legal entities in certain crimes.²⁰ It must be noted at the outset that these instruments recommend criminal, civil or administrative liability for legal persons. These shall be looked it in terms of global and territorial instruments.

17 New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1.

18 New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1.

19 Kyriakakis J Article 46C: Corporate Criminal Liability at the African Criminal Court (2016) 8. Available at <https://ssrn.com/abstract=2970864> (accessed on 1 June 2017).

20 See generally Kyriakakis (2016), Pieth M and Ivory R (2010) and United Nations Special Representative of the Secretary General on Human Rights and Business (UNSRSG) Report on *Corporate Culture as a basis for the Criminal Liability of Corporations* (2008).

2.2.7.1 Global Treaties

At the global level, treaties or instruments on corruption,²¹ terrorism,²² human trafficking,²³ the Convention on Combating Bribery²⁴ etcetera, call upon the imposition of corporate liability on erring legal entities. This can either be criminal, civil or administrative corporate liability. Most recently, the 2017 International Law Commission adopted the draft Convention for Crimes Against Humanity which similarly calls upon states to establish some form of corporate responsibility for offences provided for in the draft convention.²⁵

2.2.7.2 European Treaties

Similarly, a significant factor motivating the recognition of CCR in European civil law systems has been the increase in international and regional instruments requiring such provisions. For example, the Council of Europe's Criminal Law Convention²⁶ and the European Union's Second Protocol to the European Union Convention on the Protection of the European Communities' Financial Interests²⁷ even prescribes a specific model of attributing corporate liability that member states can adopt.



2.2.7.3 African Treaties

Africa has also enacted regional instruments requiring the imposition of liability on corporations for their involvement in criminal activities. These include among others the

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- 21 United Nations Convention Against Corruption UN Doc. A/58/422 (2003)/ 2004 43 ILM 37.
 - 22 International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 / 39 ILM 270 (2000) / [2002] ATS 23 articles 5 and 7.
 - 23 United Nations Convention against Transnational Organized Crime 8 January 2001, A/RES/55/25 article 10.
 - 24 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (opened for signature 17 December 1997, entered into force 15 February 1999) 37 ILM 1, arts 2, 3(2) and (4).
 - 25 A/CN.4/L.895. Draft article 6(7) provides for either criminal, civil or administrative liability for legal persons. Available at <http://law.wustl.edu/harris/crimesagainsthumanity/> (accessed on 24 May 2017). This was propelled by the initiative of the Whitney R Harris World Law Institute to codify crimes against humanity into a convention.
 - 26 Council of Europe's Criminal Law Convention on Corruption 1999 article 18.
 - 27 European Union's Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests 1997 article 3.

Bamako Convention²⁸ and the Corruption Convention.²⁹ The challenges that the continent has faced with regards to corporate criminality have led to the adoption of the article giving the African Court jurisdiction over legal persons.³⁰ It should be noted further that during the drafting of the Rome Statute there was very little objection to the inclusion of the provision on corporate liability from African countries.³¹ Furthermore, CCR is accepted by many countries in Africa despite there being a few civil law countries like Egypt that do not recognise corporate liability.³² Several studies and cases, before the ICTR and those brought under the ATS, show how legal entities have played a role in the commission of atrocity crimes in Africa.³³ This coupled with the peculiar international law needs of the continent could explain the acceptance of the provision imposing CCR in the Statute of the African Court.³⁴

From the preceding discussion, it appears that the general approach has been to require states to introduce domestic laws that provide for liability of legal persons for engaging in certain criminal activities. To address the differences in legal cultures, these instruments give leeway for states to use criminal, civil or administrative sanctions, in respect of legal persons, provided sanctions are effective, proportionate and dissuasive so as to reflect the

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- 28 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) articles 1(16) and 9.
- 29 African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) article 11.
- 30 Seeking justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court (2016)13. Available at <http://kptj.africog.org/> (accessed on 11 June 2017).
- 31 See Bassiouni M (2005) 72-74, with countries such as Kenya, Tanzania, Tunisia among others supporting the French proposal.
- 32 Kyriakakis J (2016) 3.
- 33 Seeking justice or Shielding Suspects? (2016) 14.
- 34 Abass A (2016) 11-30. Unfortunately, the proceedings during the adoption of the protocol are not available in the public domain as such it is not possible to assess whether all countries were agreeable to the provision.

seriousness of the offences in question.³⁵ These instruments have played a crucial role in the growing convergence towards CCR especially among the civil law countries which were very opposed to the idea.³⁶ Due to the seriousness of the criminal activities in question, many countries have settled to introduce CCR as a result.³⁷ The adoption of Article 46C, giving the African Court jurisdiction over legal entities, is yet another reflection of the changing trend in recognising the desire to punish corporate criminality.

From the foregoing, the legal landscape has significantly changed since the failed negotiations for CCR at the Rome conference. International treaties and the jurisprudence of the STL show an overall increase in the recognition of CCR.³⁸ These developments show that the challenge of desirability and problems of complementarity, with regards to the implementation of CCR, is being overcome. Except for very few countries, the international community is more embracing of the concept of CCR. The challenge that still lingers on is finding an acceptable model of attributing corporate liability that will be effectively applicable to international crimes.³⁹ The provision of the African Court, as a regional court, is one such model of attribution which will be discussed in detail elsewhere. Its desirability and possible application beyond the African territory will also be considered.

The Appeals Panel of the STL considers that, given all the developments outlined above, CCR is on the verge of attaining the status of a general principle of law applicable under international law.⁴⁰

35 UNSRSG Report (2008) 8.

36 Peith M & Ivory R (2011) 3-62.

37 See generally Peith M & Ivory R (2011) 3-62 and UNSRSG Report (2008).

38 Kaeb C (2016) 397.

39 Kyriakakis J (2016) 3.

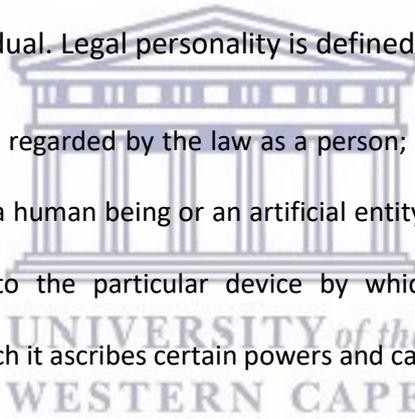
40 Jesberger F 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' (2016) 14 *JICJ* 338.

2.3 GENERAL DEFINITIONS IN UNDERSTANDING CORPORATE CRIMINAL RESPONSIBILITY.

Before proceeding to look at the various models of corporate liability that have been devised by different national jurisdictions, it is important to understand a few important concepts that are cardinal to grasp corporate liability. These are corporate personality, corporate responsibility and a corporation as a legal actor. These concepts shed light on why a legal entity should be held responsible for its criminal actions.

2.3.1 Corporate Personality

The basis for attributing corporate liability emanates from the understanding that a corporation is a separate legal entity, a legal person, with certain legal rights and duties different from a human individual. Legal personality is defined as:



‘The legal status of one regarded by the law as a person; the legal conception by which the law regards a human being or an artificial entity as a person.’ Or ‘Legal personality ... refers to the particular device by which the law creates or recognises units to which it ascribes certain powers and capacities.’⁴¹

Accordingly, a legal person can either be an incorporated or unincorporated entity. The Black’s Law Dictionary defines a corporation (incorporated entity) as,

‘an entity recognised under law to act as a single person separate from the stakeholders and established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists apart from them, and has the legal powers that its constitution gives it.’⁴²

41 Garner B (ed) *Black’s Law Dictionary* 8th edition (2004) 3623.

42 Garner B (2004) 1032.

Renowned corporate liability scholar, Wells, opines that the term corporation or what amounts to a corporation is responsible for the many obstacles and confusion that are faced when trying to impute liability on a legal entity.⁴³ It is the legal person or subject part of viewing a legal entity that is vital for imputing criminal liability on a legal person. The term 'legal person' is thus broader than what is generally understood to be a corporation and can include states, local authorities, incorporated entities, partnerships, trusts and other collective entities which enjoy a certain individuality from their members or organs and enjoy legally recognised rights and vested with duties.⁴⁴ It should also be borne in mind that the conception of a legal person differs from one domestic legal system to another and this usually depends on the definitions ascribed to it in the law. for purposes of this research corporate liability relates to liability of legal entities and is not only corporations in the strict sense of the word.

2.3.2 Corporate Responsibility

The notion of responsibility connotes accountability and answerability, it is a means of allocating obligations to persons or subjects of a legal order.⁴⁵ Wells proposes that responsibility can take four different perspectives, namely role, capacity, causal and liability and she explains them as follows:

Role responsibility recognises that individuals within an organisation have specific roles. Thus, the individuals and organisations themselves may bear responsibility for an activity within the organisation.⁴⁶ Capacity responsibility refers to the qualities of rationality and awareness for a subject of law to qualify as a responsible agent. This is at times seen as an

43 Wells C 'Containing Corporate Crime Civil or Criminal Controls?' in Gobert J & Pascal A (eds) *European Developments in Corporate Criminal Liability* (2011) 13-32.

44 Eser A & Rettenmaier F (2009) 222-237.

45 Wells C (2011)13-32.

46 Wells C (2011) 13-32.

obstacle to corporate liability especially when human cognition and will is attributed to a corporation.⁴⁷ Wells advances the idea that, for a legal entity to be liable, a form of capacity that is relevant to a legal person is required.⁴⁸

Causal responsibility is the link between the role responsibility and capacity responsibility to liability responsibility. Liability responsibility is the actualisation of the three forms of responsibility. It provides the '*raison d'être* for, and the purpose behind establishing role, capacity and causal responsibility.'⁴⁹ This signifies that in order to impute criminal liability on a corporate entity the role, capacity and link of causation attributable to the entity must be established.

2.3.3 Corporation as a Legal Actor

The third feature of imputing corporate liability is the recognition of an organisation as an independent actor, one that goes beyond specific individual action.⁵⁰ Despite this recognition, the concept of legal personality has created difficulties on how to hold these artificial legal personalities criminally liable. The problem hinges on how to apply human based concepts of *actus reus* and *mens rea* to a legal entity.⁵¹ Wells suggests four conditions for independent action of a corporation which can help in imputing liability. These are; 'an organisational rationality, an irrelevance of persons, a structure and capacity for autonomous action and a representative role.'⁵²

The organisation is seen as a rational entity capable of making its own decisions. This view advances the argument that a corporation is autonomous with its own identity and properly

47 Wells C (2011) 13- 32.

48 Wells C (2011) 13- 32.

49 Ochich G (2008-2010) 5.

50 Ochich G (2008-2010) 5.

51 Cavanagh N 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 *JCL* 414.

52 Wells C (2011) 13-32.

established structures and that human beings are only agents who can be replaced. Such that even though the actors are replaced the autonomy and the structures of the organisation, its capacities its goals and purpose for existing remain intact.

2.4 MODES OF ATTRIBUTING LIABILITY ON A LEGAL ENTITY.

Having established that a legal entity is an independent actor capable of being held liable due to its capacity as a legal person, we now look at the modes in which criminal liability may be imposed on such an entity.

To be able to attribute criminal liability to a legal person, there is need to understand the models through which a legal person can be held liable. It has been observed that once liability is recognised, traditional criminal law concepts are inadequate to ensure successful prosecution of legal persons. The concepts of *actus reus*, *mens rea* and causation were established with natural persons in mind and are not easily applicable to legal persons. Thus, one must guard against unattainable conceptions of the understanding of a legal person.⁵³ Consequently, domestic legal systems have devised concepts which determine when an act can be attributed to a legal person and trigger criminal responsibility. There are two basic approaches used to determine when an act should be attributed to a legal person for the purposes of criminal liability. These are the derivative and organisational models. These will be looked at, considering how they have been developed and utilised in the domestic legal systems.

53 Gobert J (2011) 139-157.

2.4.1 The Derivative Model

Under this approach the criminal liability of an entity is derived from or located through the fault or responsibility of a natural person.⁵⁴ In other words the court must be satisfied that a natural person committed the offence and the responsibility of that natural person is imputed on the legal entity. There are two different variants of approaches under this model. These are the vicarious liability approach and the identification approach. The main difference between the two approaches lies in the range of persons from whom liability may be imputed on a legal entity.

2.4.1.1 The Vicarious Liability Approach

This is based on the traditional liability of a master for his servant's crimes if those crimes were committed in the course of employment. The vicarious liability approach is used in the USA as the doctrine of respondent superior and in South Africa as provided for by section 332 of the Criminal Procedure Act.⁵⁵ This approach emanates from the understanding that criminal violations require the presence of a mental element and a wrongful act. Since a legal entity may be considered as not possessing a mental state and only able to act through natural persons, the actions and the mental element of employees or agents of the legal entity can be imputed on it.⁵⁶ A legal entity would be held liable for the acts of a natural person if the circumstances are such that the individual employees or agents themselves would be found liable.

The court in the USA developed a system where it would impute the act and the intent of an individual on a legal entity if the individual was acting during the course of duty and for the

54 Ochich G 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008-2010) *Kenya Law Review* 6.

55 South African Criminal Procedure Act 51 of 1977.

56 Ochich G (2008) 7.

benefit of the legal entity.⁵⁷ Liability is imposed if the individual was acting within the scope of the authority of the legal entity and in line with the powers delegated to that specific individual.⁵⁸

In the South African legal system section 332(1) imposes criminal liability on a legal person for acts or omission committed with or without a particular intent by a director or a servant of the legal entity. This applies to both common law or any other offences. It also covers cases committed by the negligence of the employees as was the case in *S v Mtshum (Pvt) Ltd*.⁵⁹

This approach has a benefit of relative simplicity and is usually employed to render legislation enforceable where it would otherwise fail if personal liability were required and has thus been used for some strict liability or hybrid regulatory offences.⁶⁰

Under the USA system, a legal entity cannot rely on the defence that it has internally prohibited an act leading to liability.⁶¹ This obligates an organisation to ensure that its rules are enforced, and it also prevents a legal entity from evading liability when it forbids a certain activity on paper but allows it in practice.⁶² However, corporate liability is excluded for the acts that were not intended to benefit the legal entity.

As opposed to the strict vicarious liability developed in the USA, the United Kingdom has developed a qualified vicarious liability approach which is typically used for regulatory

57 Peith M & Ivory R (2011) 3-62.

58 Syle R (2008) 964.

59 (1971) 1 SA 33.

60 Sharma S *Corporate Crimes and Financial Frauds with Biggest Financial Frauds in the History of India* (2013) 14.

61 Peith M & Ivory R (2011) 3-62.

62 Syle R (2008) 964.

offenses.⁶³ The statutes deem a person guilty of an offence on principals of strict liability; however, typically accompanied by a due diligence defence which allows an entity to avoid liability if it can be shown that it acted with due diligence.⁶⁴

The vicarious liability approach has been criticised for being overly inclusive especially when applied beyond strict liability and regulatory crimes because it fails to reflect any fault on the part of the corporation which may have taken serious steps to avoid the wrong doing.⁶⁵ Since corporate fault flows automatically from the relationship of the corporation to the offending individual, there is no capacity for the corporation to point to organisational efforts to avoid such behaviour as a means of avoiding liability. As such there is no incentive for a company that adopts best practices or due diligence to avoid such harm. In the USA its application has been modified and the efforts by a corporation to avoid criminal conducts or due diligence is considered as a mitigatory factor at the sentencing stage.⁶⁶

2.4.1.2 The Identification Approach

This approach contemplates an identity between a legal entity and actions of certain senior officers or managers of the entity. The focus is on the wrongdoings of the "brains" of the entity.⁶⁷ Only acts committed by an individual with decision-making authority are assimilated to the legal entity and may trigger corporate liability.⁶⁸ Such individuals are considered the directing mind and will of the legal entity, the very ego and personification of the legal entity and their acts and state of mind are taken to be the acts and state of mind

63 Peith M & Ivory R (2011) 3-62.

64 Peith M & Ivory R (2011) 3-62.

65 Kyriakakis J (2016) 19.

66 Peith M & Ivory R (2011) 3-62.

67 Syle R (2008) 965.

68 Lehner A The Austrian Model of Attributing Criminal Responsibility to Legal Entities in Brodowski D et al (eds) *Regulating Corporate Criminal Liability* (2014) 79-86.

of the entity.⁶⁹ Thus, the legal entity is identified with the decision maker who illegally and culpably committed the offence.⁷⁰ The acts of junior employees-the 'hands' or 'labour' of the organisation are not attributable to the it.⁷¹ The advantage of this approach lies in the assimilation of the individual perpetrator and the legal entity, rather than the attribution of the individual's conduct on the legal entity as is the case in the previously discussed vicarious liability approach.⁷² Additionally through assimilation, the mental element is present in respect of the legal entity itself a factor favourable when dealing with *mens rea* offences.⁷³ This approach has been adopted in the United Kingdom and Australia, Kenya and other common law jurisdictions.

In addition to 'identification' as developed in the commonwealth countries, there is what could be described as the 'expanded identification' approach adopted by some European countries.⁷⁴ This approach retains the focus on the actions of senior officers and employees, but also incorporates a duty of supervision, although whether that duty is owed by the legal entity or its officers individually varies from country to country.⁷⁵

The Council of European Union Framework Decision on Combating Corruption in the Private Sector, proposes the adoption of a similar position, which imposes criminal liability on a legal entity for the acts of natural persons holding a leading position.⁷⁶ Additionally, the natural person must have had a power to represent the legal entity, or authority to take

69 Carrying co ltd v Asiatic petroleum co ltd (1915) AC 705.

70 Lehner A (2014) 79-86.

71 Syle R (2008) 965.

72 Verrydt L 'corporate Involvement in international crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons' in Brodowski D et al (eds) *Regulating Corporate Criminal Liability* (2014) 281-293.

73 Verrydt L (2014) 281-293.

74 UNSRSG Report (2008) 4.

75 UNSRSG Report (2008) 4.

76 Article 5.

decisions, or authority to exercise control or where there has been lack of supervision by the natural person.⁷⁷

This approach of distinguishing between the directing minds and the hands is of great value within the context of CCR, more certainly within the context of ICL.⁷⁸ This is in line with ICL which actually emphasises a preference for prosecuting those at the highest level of responsibility.

There are criticisms of the derivative model based on the requirement that the illegal act of an identifiable natural person must be attributed to the legal entity. This requirement can result in impunity in circumstances where it is not possible to pin point the wrong doer. Therefore, corporate liability always fails when an individual actor cannot be ascertained.⁷⁹

Additionally, the model is problematic when used in situations where liability requires proof of an intentional act, when in fact only negligence can be attributed to the individual.⁸⁰

It has also been observed that the derivative models fail to secure the conviction of legal entities with very complex structures. As a way of countering some of these challenges, some countries have developed the organisational model.

2.4.2 The Organisational or Direct Liability Model

This model was specifically developed for the imposition of criminal liability on a legal person and imitates the imposition of criminal liability on a natural person. This liability criteria imputes liability directly to the entity. Here, the responsibility is primarily based on the faulty organisation of the entity.

77 Article 5.

78 Syle R (2008) 967.

79 UNSRSG Report (2008) 67.

80 Kyriakakis J (2016) 21.

This model takes a more holistic approach to determine when an act should be attributed to a legal entity for purposes of criminal liability.⁸¹ It focuses on the acts or omissions of the legal person itself. Under this model, rather than the legal entity being liable for the acts of individual offenders, it is liable because its 'culture', 'policies', 'practices', 'management' or other characteristics encouraged or permitted the commission of the offence.⁸² According to Gobert, an organisation's culture in most cases is not tied to a particular individual but it may have developed over time and may be deeply rooted in the policies and practices.⁸³

The federal criminal system of Australia is a prime example of this 'organisational' liability model although only one of the states has actually adopted it.⁸⁴ The Federal Criminal Code Act provides for the application of the concept of corporate culture to the existing offences which require intention, knowledge or recklessness as a fulfilment.⁸⁵ A company's liability is based on corporate culture that directs, encourages, tolerates or leads to non-compliance with the law.⁸⁶

There are two variations of this approach. The first requires proof that the procedures and practices of the legal entity created the wrongful conduct. A causal connection between corporate policies and the wrongful activity must be proved.⁸⁷ The second approach requires proof that the organisational processes or policies did not and could not have prevented the wrongful act. This places a higher burden on the corporation thereby increasing the collective responsibility of the corporation for the individual acts of its

81 Syle R (2008) 967.

82 UNSRSG Report (2008) 4.

83 Gobert (2011) 140-157.

84 Gobert (2011) 140-157.

85 Australia Federal Criminal Code Act (1995) section 12(3)(2).

86 Australia Federal Criminal Code Act (1995) section 12(3)(3).

87 This is the approach adopted in the UK Corporate Manslaughter and Corporate Homicide Act, 2007, section 19 (1) (3) where the jury may consider a company's corporate culture though this can only be applied when death is attributable to a health and safety regulation.

officers.⁸⁸ Consequently, a legal entity is blameworthy when its procedures and practices fail to prevent corporate criminal violations or when its practices and procedures are inadequate to protect the public from corporate crime.

The Corporate Manslaughter and Corporate Homicide Act 2007, of the United Kingdom, has further developed the idea of corporate fault. A legal entity can be found liable if the manner in which it manages or organises its activities both causes a death and amounts to a gross breach of a relevant duty of care owed to the deceased by the legal entity.⁸⁹ Even though senior management must have played a substantial role in the gross breach, corporate liability in this case is not dependent on the commission of an offence by any person within the legal entity.⁹⁰ Liability merely requires the legal entity to fall below a required standard of due organisation and supervision that leads to the death of a person. Other countries that have adopted a variation of the organisational model include Switzerland Finland and Austria.⁹¹ The USA only considers the corporate organisation at sentencing as a way of mitigating sentence.

These newer approaches place much more emphasis on the corporate structure, recognising the influence of the corporate setting on employees and raise the expectation that a legal entity must provide for adequate measures to reduce the risk of lawbreaking. This requires legal entities to actively participate in the prevention of crime and, therefore, puts prevention much more at the centre of criminal and corporate regulation than ever before. If the legal entity fails, then it can be held liable for the offences. The organisational model of CCR is more suitable for the determination of the criminal liability of large

88 Syle R (2008) 968.

89 Engelhart M 'corporate criminal liability from a comparative perspective' in Brodowski D et al (eds) *Regulating Corporate Criminal Liability* (2014) 53-78.

90 Engelhart M (2014) 53-78.

91 See generally UNSRSG Report (2008) 34, 47 and Brodowski D et al (2014).

corporations. There is greater likelihood of success of convictions when this model is utilised. The model shows the growing recognition that legal entities are not mere legal fictions devoid of liability and are being viewed more as real actors that have to be accountable for their activities.⁹²

Eser opines that the huddles of imputing the mental element and the *actus reus* presented by the derivative model are somewhat overcome with the application of the organisational model where the conduct of an individual becomes somewhat irrelevant and focus is shifted to the corporate deficiencies resulting in management culpability.⁹³ She observes that the challenge, however, would be the loss of the ability to weigh deficiencies and their causes as one could not be able to distinguish between intentional and merely negligent conduct.

2.5 CHAPTER SUMMARY

The chapter has shown the progress that has taken place in relation to the recognition of corporate criminal liability from the Nuremberg Tribunal to the adoption of the Statute of the African Court. It has also shown how corporate liability has developed through international legal instruments as seen from the United Nations instruments, the regional instruments from Africa and Europe which call for accountability of legal persons for their corporate criminal activities.

The chapter has also set out an understanding of corporate liability and legal personality as a basis for holding legal persons liable for their criminal conduct. It has further set out the various forms of liability which make it possible to hold a legal entity accountable.

92 Ogenso J (2015) 76.

93 Eser A (2009) 222-237.

Finally, the chapter has looked at the different models of attributing criminal liability upon an entity. It is proposed that the most viable mode of attribution for international law crimes is the organisational model. This is because the model can work well for large legal entities with complex organisational structures and does not rely on the proof of intent of a particular natural person. Whereas under the identification approach a legal person is liable *per se* with regards to offences committed by decisions makers, the organisational model is utilised where the system enabled any other employee to commit an offence.



CHAPTER 3

ATTRIBUTION OF CORPORATE LIABILITY UNDER THE STATUTE OF THE AFRICAN COURT

3.1. INTRODUCTION

Having analysed the historical development of corporate liability and the models of attribution generally applied by the various domestic regimes, an in-depth analysis of Article 46C of the Statute of the African Court shall now be carried out to ascertain which model of imputing CCR is envisaged in the provision. In the course of the discussion the cardinal strengths and weakness of the model shall be highlighted. finally, the chapter looks the sanctions that the Statute provides with regards to corporate entities. In looking at the provision of the Statute, it must be noted that the Statute has no interpretive notes. As such its construction shall be done by comparing its provisions to other similar provisions of CCR. Research shows that Article 46C bears close similarity to Colvin's theory of the organisational model of corporate liability and the Australian federal penal code provision on corporate liability and these shall be called upon as we endeavour to construe the provision.

3.2 THE PROVISION ON CORPORATE CRIMINAL LIABILITY

Article 46C of the Statute of the African court gives the court jurisdiction over legal persons. The Statute also gives the Court subject matter Jurisdiction over 14 crimes. Under this part, consideration shall be made on whether a legal entity can be held liable for all the 14 crimes as established. Furthermore, the provision is analysed in detail to decipher the model of CCR that is envisaged the types of legal persons contemplated, and how the provision proposes to attribute the mental and physical element of an offence to a corporation. Thereafter, an

assessment of the relationship that must exist between the physical actor and the legal person in order to trigger liability is carried out.

Article 46C provides that:

1. 'For the purposes of this statute, the Court shall have jurisdiction over legal persons, with the exception of states.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.¹⁷

Before we proceed to look at the corporate liability provided for in details, it is cardinal to clarify which types of offences legal persons can be held liable for under the Statute of the African Court.

1 The statute of the African Court, annexed to the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights adopted during the ordinary session of the Assembly of the African Union, Doc EX.CL/846(XXV) of 2014.

3.2.1 Crimes for which Corporations can be Held Liable

The Statute stipulates that ‘for the purposes of the Statute a person includes a legal and natural person.’² The African Court has subject matter jurisdiction over 14 crimes.³ As regards, its personal jurisdiction, the Statute bluntly states that the Court has jurisdiction over both natural and legal persons.⁴ At this juncture, the point to ponder is whether the personal jurisdiction of the Court over legal persons applies to all the 14 crimes or only some of them. From Articles 28A to 28M, there is no crime which excludes a legal person as a possible violator. Article 46C itself does not contain an exclusion clause for offences that cannot be committed by a legal person. This lack of exclusion means that a legal person can be tried for the commission of any of the crimes provided for in article 28A. This is progressive as it shows that the Statute embraces fully the concept of CCR by adopting an all crimes approach in line with many African states where the criminal codes do not provide for specific offences or types of crimes that a legal person can commit.⁵ It reflects the view that legal persons are capable of committing any wrong as opposed to making them exempt from crimes that require the proof of *mens rea* and limiting their liability to typically economic and regulatory offences.⁶ This is a very progressive approach because throughout the development of ICL there have been cases exhibiting the involvement of legal entities and numerous cases where either executives or owners of the entities have been successfully prosecuted for international crimes.⁷

2 Article 1(2) of the Statute of the African Court.

3 Article 28A of the Statute of the African Court.

4 Articles 46B (1) and 46C (1).

5 A good example is Section 332(1) of the South African Criminal Procedure Act no. 51 of 1977, which stipulates that a corporation can be held liable for any crime provided for in the Statute.

6 Kyriakakis J (2016) 18.

7 Examples include cases from the very inception of the Nuremberg trial and the follow-up trials. See Kaleck W and Saage-Maab M (2010) 700.

3.2.2 Types of Organisations Envisaged in the Article

Article 46C (1) provides that the African Court ‘shall have jurisdiction over legal persons with the exception of states.’ The definition of person in Article 1 (3) stipulates that a person includes a natural or legal person. The Statute does not define what is meant by legal person. For the purposes of this discussion, we shall rely upon the understanding of a legal person as the defined in chapter 2 of this research.⁸

The question of how to define the organisations envisaged is one of the most difficult ones as the definition determines the scope of the jurisdiction of the Court. Domestic legal systems define the concept of legal personality differently. Depending on the jurisdiction in question, a legal person can include corporations, trusts, partnerships, non-governmental organisations, and trade unions. This broad inclusion of what can be termed a legal person is also evident in numerous domestic regimes of African states among them Kenya. The Council of the European Union’s Second Protocol, for example, does not define legal person and this has been interpreted broadly by member countries and thus not restricted to corporations in the sense of companies.⁹

The situation is different for an international criminal court because it is the court itself that must construe the language of the Statute. The lack of clear definition of legal person presents itself as a weakness of the Statute of the African Court. A clear definition like the one found in the proposed CCR provision of the Rome Statute would have been more progressive.¹⁰ It is proposed that the African Court should adopt a non-restrictive approach akin to the one adopted for the interpretation of the second protocol above. Such an

8 Part 2.3.1.

9 Engelhart M (2014) 53- 76.

10 Proposed article 23(5)(d) defined what juristic persons the court would have had jurisdiction over. See Appendix 1.

approach will cover as many organisational actors as possible. Once constituted, the African Court should thus clearly construe and set the parameters of what in the light of the offences and the Statute of the Court amounts to a legal person. It would have been more progressive had the Statute clearly stipulated the meaning of the term legal person to encourage certainty and predictability especially considering that this is a novel approach in ICL.

Despite the lack of definition of a legal person, as rightly pointed out by Kyriakakis, the rest of Article 46C refers to 'corporation' and this may perhaps help to shed light on the types of legal persons contemplated by the Statute. The term corporation is mostly used to refer to entities that have gone through some form of legal process of incorporation to come into existence and often relates to organisations carrying out an economic function.¹¹ Generally, the term corporation is synonymous to a company, and is usually engaged in economic activities. It can be argued that the consistent reference to corporation seems to narrow down the kinds of legal persons contemplated. Kyriakakis rightly opines that even though this is a possible interpretation, it would lead to an undue restriction of the court's jurisdiction.¹² This is because, such an interpretation would exclude a lot of entities that would be considered as legal persons in many jurisdictions but not necessarily qualifying to be called corporations in the strict sense of the word. Further, such a restrictive construction would go against the spirit of the entire Statute as the Statute envisages liability for all crimes that the African Court will have jurisdiction over and not merely economic crimes. Article 28A provides for various other crimes which are not economical in nature and can be committed by other forms of legal persons. As such the fact that the rest of Article 46C

11 Engelhart M (2014) 53-76.

12 Kyriakakis (2016) 14.

speaks about corporation, corporate intention and corporate knowledge should not be construed to limit the legal persons to legal persons carrying out economic activities. It should include the various other forms of legal persons generally accepted and recognised as such in the context of the various African legal systems such as partnerships, political parties, trusts, non-governmental organisations etcetera.

In looking at the types of entities envisaged, it should also be considered whether public entities are also included under Article 46C. The provision gives the Court 'jurisdiction over all natural and legal persons with the exception of states.' In various legal systems, the state is considered to possess legal personality. Furthermore, since states are precluded from the jurisdiction of the Court by Article 46C, the question that arises is whether public corporations as part of the state are also excluded. According to Kyriakakis, the Article can be interpreted in such a way that public entities carrying out state functions can be excluded from the jurisdiction of the court.¹³ However, public entities especially entities performing economic or private law functions can be included under the liability of legal persons.¹⁴ This kind of interpretation is akin to the interpretation of the Second Protocol referred to earlier which excludes states and public international organisations but includes public entities engaged in economic activities.¹⁵ It should be borne in mind however, that the Second Protocol relates to transnational corporate litigation relating to commercial or financial dealings and as such is distinguishable from the interests that the African Court seeks to protect in this case, but could still be used to understand the terminology of the Statute. Thus, Article 46C can be interpreted in such a way that public entities can be held responsible for corporate liability like private legal persons where they are acting in a

13 Kyriakakis (2010) 16.

14 Engelhart M (2014) 53-76.

15 Engelhart M (2014) 53-76.

comparably private capacity and not exercising functions of constitutional relevance.¹⁶ An interpretation that would extend the Court's jurisdiction over public entities performing a commercial and other non-constitutional law function is much more acceptable.

From the foregoing, it is imperative that once constituted, the African Court should take a broad interpretation of the meaning of legal persons to include both incorporated and unincorporated legal persons, public corporations as well as corporation soles taking part in fairly private activities.

3.2.3 The Model of Liability

As set out earlier, there are different models of attributing elements of a crime to a legal entity.¹⁷ Article 46C (2) to (4) provide for the mode of imputing corporate liability and will be considered in turn. The paragraphs stipulate how the mental element of intent and knowledge are to be attributed to a legal person.

Paragraph 2 provides that 'corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.'

Article 46C provides for an organisational model of attributing CCR. As such it does not rely upon the attribution of the conduct of an individual but rather fault lies in the corporate policies and corporate knowledge that enables the commission of the offence.¹⁸ The mental element of a crime or the *mens rea* or culpability lies directly within the decision-making processes of the corporation.

16 Kyriakakis (2010) 16.

17 See Chapter 2 part 4.

18 Kyriakakis (2016) 23.

3.2.3.1. The Element of Intention

It is a well-established principle in criminal law that for a person to be liable for the commission of an offence the prosecution must prove that the person intended to commit the act in question. According to paragraph 2, corporate intention to commit the offence can be proved by showing that it was the corporation's policy to do the act which constitutes the offence. This kind of corporate fault is similar to what is referred to as genuine corporate fault.¹⁹ Even though the Statute does not define what amounts to policy, in justifying genuine corporate fault, Laufer opines that the policy can be derived from the business codes of conduct, codes of ethics, compliance documents, practices, rules, procedures and general attributes of the corporate form.²⁰ Corporate policies maybe manifest in the formal directives or it may exist informally, in which case a policy would be attributed to a legal entity when it provides the most reasonable explanation for the conduct.²¹ Such policies may exist independent of individual employees and may continue to exist despite changes in the personnel.²²

Consequently, fault will be attributed to a legal entity where its practices and procedures enabled the commission of the offence or are inadequate to prevent the commission of the crime.²³ In other words, a corporation would be liable for failure to take reasonable efforts to implement policies and practices that prevent crime. Kyriakakis proposes that in determining corporate policies the Court must guard against adopting a limiting definition of

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- 19 Steward J 'Transcending the Alien Tort Statute' (2014) 47 *New York University Journal of International Law and Politics* 176.
20 Laufer W *Corporate Bodies and Guilty Minds the Failure of Corporate Criminal Liability* (2006) 57.
21 Colvin E 'Corporate Personality and Criminal Liability' (1995) 6 *criminal law reform* 38 and Article 46C (3) of the Statute of the African Court.
22 Sarre R 'Penalising corporate 'culture': the key to safer corporate activity?' in Gobert J and Pascal A (eds) *European Developments in Corporate Criminal Liability* (2011) 84-98.
23 Colvin E (1995) 35.

the term policy as a legal entity's formal policies may denote one thing while the corporate attitudes, unwritten rules or previous practice denote another.²⁴ Legal entities must not be permitted to hide behind the formal policies when in practice they encouraged the offending behaviour. This interpretation is supported by paragraph 3 which stipulates that a policy may be attributed to a corporation if it provides the most reasonable explanation of the conduct in question. This provides a wider range of evidence that can be called upon to prove or suggest the corporation's policies as a whole. In interpreting paragraph 3 with regards to a certain policy being the most reasonable explanation, Colvin opines that the court would be:

'entitled to infer that corporate members understood something to be 'an implied directive', and hence policy, of the corporation, where organisational practices and failures were so bad that they made more sense if viewed as embodying a determination to avoid the regulations, rather than as a product of inadvertent negligence or even recklessness.'²⁵

The provision of corporate liability under Article 36C is *sui generis* and it represents an adoption of a more efficient and progressive form of imputing corporate liability. The provision is to some extent comparable to the provision of the Australian Federal Criminal Code provision on corporate liability provided in section 12. Under that provision a corporate liability maybe imputed in two ways. On one hand, corporate fault is imputed by identifying the corporation with key personnel, officers and agents acting within the scope of their authority or employment. In the alternative a corporation may be found liable if it is proved that its corporate culture directed, encouraged, tolerated or led to non-compliance

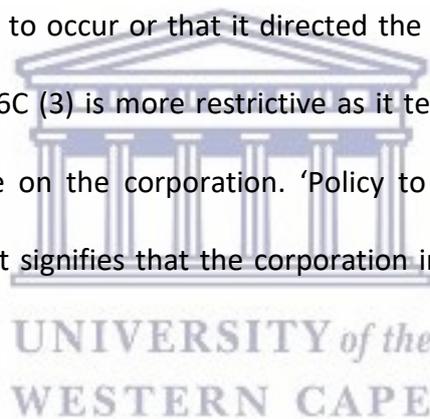
24 Kyriakakis (2016) 23.

25 Colvin E (1995) 38.

with the law. Under this law though permissible, it is not necessary to prove that an offence was committed by an agent of the organisation whose intention can thus be attributed to the corporation.²⁶

Article 46C's requirement of the fault element requires a finding that it was the corporate's policy 'to do the act which constituted the offence'. According to Kyriakakis the use of the words to 'do an act which constitutes an offence', appear to be more restrictive than the use of 'failure to maintain corporate culture of compliance' as in the Australian law.²⁷ The concept of failure to maintain corporate Culture can be interpreted to mean that the organisation acted reckless in its failure to maintain corporate culture, or that the culture positively lead to the offence to occur or that it directed the commission of the offence.²⁸

The language in the Article 46C (3) is more restrictive as it tends to exclude imputation of acts that are recklessly done on the corporation. 'Policy to do an act' tends to impute culpability on a legal entity. It signifies that the corporation intentionally and purposefully committed that offence.²⁹



To avoid a possibility of under criminalisation from narrow reading of 'policy to do the act', the Court ought to construe paragraph 2 in light of paragraph 3 which is more robust and tends to include actions which a corporation may not actively seek but 'permitted, acquiesced or tolerated'.³⁰ Corporate policy should include pervasive corporate ethos which tolerates the illegal action.³¹ The Court should thus guard against inadvertently encouraging official, but unwritten policies to be used to shield responsibility or to exclude abhorrently

26 Pieth M & Ivory R (2010) 3-62.
27 Kyriakakis J (2016) 24.
28 Colvin E (1995) 36.
29 Colvin E (1995) 38.
30 Kyriakakis (2016) 24.
31 Gorbett J (2011) 139-157.

poor compliance environments as insufficient to satisfy corporate intent. Therefore, the Court can take a more liberal approach going beyond the written policies and taking into account the day to day procedures and practices so that corporations do not escape liability when these informal policies support the commission of the offending act.³² Kyriakakis warns against adopting an overly literal interpretation of 'policy to do the act' which would fail to capture corporate environments where non-compliance with the relevant norm is tolerated and condoned, if not explicitly directed, thereby creating loopholes that corporations can use to avoid liability.³³

3.2.3.2. The Element of Knowledge.

Corporate knowledge is provided for in paragraphs (4) and (5). Paragraph 4 stipulates that an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation. The paragraph makes reference to both actual and constructive knowledge. Actual knowledge is that which can be inferred from the nature of the act done while constructive knowledge is that kind of knowledge which an accused had in effect means of knowing.³⁴ More precisely constructive or implied knowledge is that which the corporation ought to have known.

The provision for both degrees of knowledge can be said to reflect a stricter duty upon the corporation to be fully aware of the circumstances of what is happening in the organisation. Additionally, Kyriakakis argues that the reliance on constructive knowledge in terms of

32 Kaeb C (2016) 385.

33 Kyriakakis (2016) 25.

34 *Roper V Taylors Central Garage (Exeter) Ltd* (1951) 2 TLR 284.

international law crimes is important where the issue of complicity arises as such knowledge is sufficient to prove the mental element in complicity cases.³⁵

For the prosecution to prove that a legal entity committed an offense 'knowingly', it must be necessary to prove, not only that the corporate policies favoured the commission of the offense but also that the policies favoured its knowing commission.³⁶ In other words, the corporate policies coupled with the knowledge favoured the commission of the offence. The legal entity must possess the knowledge that the offense was being committed.

Paragraph 5 stipulates that 'knowledge may be possessed within a corporation even though the relevant information is divided between 'corporate personnel'. This signifies that knowledge does not have to be in the possession of one person. It is sufficient if pieces of knowledge are held by different persons in the organisation. This aggregation of knowledge is also expressed in paragraph 4 where the provision talks about 'knowledge within the corporation.' The aggregation of knowledge is a legitimate means of locating fault within an organisational model because it links knowledge to the broader theme of internal organisational structures and systems.³⁷ Aggregation of knowledge assumes that the organisation possesses knowledge even though no person in the organisations is fully aware of the facts, but that pieces of information were possessed by different individuals within the organisation.³⁸ This would in-turn encourage best information management practices and avert claims that the organisation was too big for the corporation to be deemed to possess the fragmented knowledge.

35 Kyriakakis (2016) 26.

36 Colvin E (1995) 39.

37 Kyriakakis (2016)25.

38 Colvin E (1995) 32.

3.2.6 Whose Acts can be Attributed to the Corporation?

Having shown how the subjective elements of intention and knowledge are to be imputed on a legal entity, the question still remains to be answered is how the Statute of the African Court proposes to impute the physical element of the offence on a legal entity.

It is generally accepted that a legal person acts through natural persons. A legal person may only act through a natural person, but it can omit by itself.³⁹ As such, where the offending act is an omission, then, the corporation can be the actor for that purpose.⁴⁰

However, where the act is not an omission, organisational models may require a physical offender who must be related in some way to the legal person in order for the legal person to be held liable.⁴¹ The requirement differs in the various organisational models that have developed in different domestic regimes. In the Australian model, the relationship is supplied by section 12.2 of the Criminal Code which applies to any 'employee, agent or officer' of the legal entity. The organisational liability models for Finland and Switzerland, on the other hand, provide for the possibility of corporate liability even when a natural actor cannot be identified.⁴²

The organisational model of the Statute of the African Court solely relies on the organisational fault to attribute liability to a legal person. A legal person is seen as a real entity, an autonomous actor whose actions transcends the actions of the individual contributors.⁴³ Article 46C is silent on how the physical element of the offence is to be attributed to a corporation. In this case, it appears there is no requirement to ascertain the

39 (UNSRSG) Report (2008) 72.

40 Article 102(2) of the Swiss penal code, where the failure of the corporation to take all reasonable and necessary steps to prevent the offending supplies the physical element of the offence. (see UNSRSG Report (2008) 72).

41 UNSRSG Report (2008) 72.

42 UNSRSG Report (2008) 72.

43 Wells C (2011) 14-32.

relationship between the actor and the legal entity. What must be shown is that the legal entity's criminogenic policies enabled the crime to be committed.⁴⁴ Colvin in supporting this type of organisational model opined that it is unnecessary in such a model to provide an additional provision in respect of the physical element of the offence.⁴⁵ As such liability could be imposed on the legal entity even in circumstances where a physical actor is not established for as long as it is proved that there is a causal connection between the commission of the offence and the policies of the legal entity.⁴⁶

This resolves the challenges faced by the derivative models where a legal entity would escape liability when a physical actor is not ascertainable.⁴⁷ It also casts a wider net of agents of a legal entity and can include employees, contractors, subsidiaries and other entities that may be viewed as independent entities but in actual sense are controlled or influenced by the organisation.⁴⁸ The wider the interpretation, the more viable it will be to support prosecution of legal persons especially in transnational settings where business is done through subsidiaries which are controlled by the parent company. Under Article 46C, the nature of the actors performing the various aspects of the physical element of the crime and their relationship to the legal entity is not very relevant to the legal entity's liability.⁴⁹ What is cardinal is the legal entity's relationship to the offence in terms of knowing and intending its commission and establishing a link between its policies and the commission of the offence. Such an organisational approach is more appropriate for modern legal entities

44 Colvin E (1995) 41.

45 Colvin E (1995) 41.

46 Akin to some aspects of Article 103 of the Swiss Penal code.

47 Kyriakakis J (2016) 28.

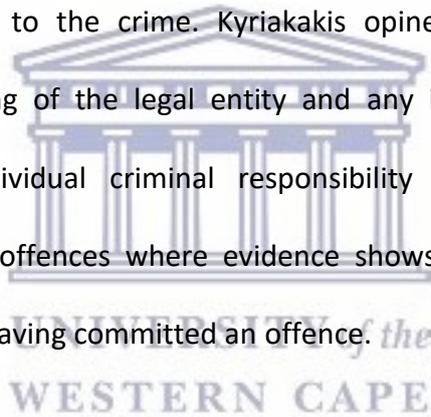
48 Kyriakakis J (2016) 28.

49 Kyriakakis J (2016) 28.

with complex structures because the scheme of liability is similar to liability of a natural person.⁵⁰

3.2.7. Corporate Liability not a Bar to Individual Liability

Paragraph 6 of Article 46C provides that liability of legal persons shall not exclude the criminal liability of natural persons who are perpetrators or accomplices in the same crime. This means that corporate liability is not dependant on finding a natural person guilty of the offence. This is an improvement upon the Rome Statute's draft model where corporate liability was premised on the liability of a natural person.⁵¹ Furthermore, the liability of a legal person shall not act as a bar to the liability of natural persons who may be co-perpetrators or accomplices to the crime. Kyriakakis opines that this development is important because the wrong of the legal entity and any individual offenders may be qualitatively different.⁵² Individual criminal responsibility will be pursued alongside corporate liability for those offences where evidence shows that a natural person also satisfies all the elements for having committed an offence.



3.3 SANCTIONS

The issue of the kind of criminal sanctions that can be imposed on legal persons has been a central point in the considerations and development of CCR. There are some criminal sanctions which by their nature cannot be imposed on a legal person. For example, imprisonment which is the most common form of criminal punishment, cannot be imposed on a legal person. As such alternative sanctions have been development that are suitable for

50 Laufer W (2006) 71.

51 See Appendix 1 and van der Wilt H (2013) 47.

52 Kyriakakis J (2016) 29.

a legal person. We shall now consider the sanctions that can be imposed upon an erring legal entity as envisaged in the Statute of the African Court.

Article 43A (2) gives the African Court power to impose a prison sentence or a pecuniary fine against a person convicted under the statute. Furthermore, Article 43A (5) provides additional penalties that the court may order such as forfeiture of any property, proceeds or any asset acquired as a result of the commission of a crime. The Court may order that forfeited proceeds be returned to their rightful owner or appropriate member states.

Essentially from the provision of Article 43A, the only available sanctions against a legal entity are fines and forfeiture of the proceeds of a crime. Article 45 provides that a convicted person may be ordered to pay reparations to the victims of the offence in the form of restitution, compensation and rehabilitation. The sanctions provided for by the Statute constitute some of the simple sanctions that are generally accepted as applicable to legal persons in many domestic jurisdictions. Although some African countries provide for more complex and elaborate corporate sanctions including winding up and dissolution, the adoption of simple and generally accepted sanctions is advantageous as it is more likely to ensure co-operation of the member countries and indeed other countries beyond Africa, to offer legal assistance to enforce the sanctions of the Court. Severe and radical sanctions such as dissolution although desirable bearing in mind the seriousness of the offences in question, may pose problems in enforcement.⁵³ By keeping the sanctions simple, the statute may encourage mutual legal assistance in cases where the proceeds may have been transferred to a different region.⁵⁴

53 Kaeb C (2016) 390.

54 Kyriakakis J (2016) 30.

Effective implementation of article 45 will alleviate the problem faced with the practical application of Article 75 of the Rome Statute. Individuals that are held liable by the ICC have often claimed indigence and as such not able to pay reparations to the victims.⁵⁵ The absence of CCR for international crimes signifies that the legal entities that gain from such criminal conduct are not called upon to account and thus are at liberty to enjoy the proceeds of their criminal activity. The sanctions envisaged in the Statute of the African Court will even be more meaningful in the African sense because the continent has for a long time lamented over corporate involvement in international crimes. Examples include pillaging by legal entities for example in Congo,⁵⁶ the supply of ammunition, and instances where the African continent has been stripped of its assets through the activities of multinational companies⁵⁷.



3.4. CHAPTER SUMMARY

The organisational model of attributing corporate criminal liability adopted under Article 46C is *sui generis*. It provides a type of attribution that domestic regimes have been moving towards including the Australian Federal Code, some aspects of the corporate liability models for Finland and Switzerland, the English Corporate Manslaughter Act and has been used for purposes of sentencing in the USA. The model has got support from many renowned corporate criminal liability scholars.

The chapter has shown that Article 46C attributes the fault element through reliance on the policy of the corporation which traces fault to the organisation's conduct. The 'policy to do the act', though not defined must be interpreted robustly to encompass abhorrent failure to

55 Kyriakakis J (2016) 31.

56 See generally McGregor M 'Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources' (2009) 42 *Case Western Reserve Journal of International Law* 471.

57 See generally The African Union *Report of the High-Level Panel on Illicit Financial Flows from Africa* (2015).

maintain a good corporate policy. Additionally, the provision clearly stipulates the manner in which the mental element of intent and knowledge are to be attributed to a legal person. Furthermore, there is no requirement under this model to attribute the physical element to any individual.

Despite being progressive the provision itself has weakness and among those highlighted pertain to lack of cardinal definitions. The model of the African court raises concerns about its practical application and how best the model will render itself applicable to international crimes since it developed from the domestic jurisdictions.

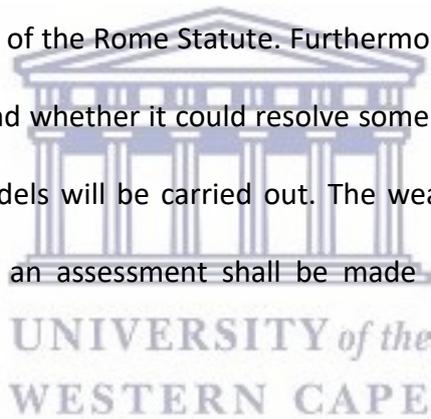


CHAPTER 4

ASSESSMENT OF THE PROGRESSIVENESS AND VIABILITY OF ARTICLE 46C IN RELATION TO INTERNATIONAL CRIMES

4.1. INTRODUCTION

Having comprehensively considered the model of CCR provided for in Article 46C of the Statute of the African Court, further analysis must be made on whether such a concept can be used in ICL. This chapter analyses whether the model of criminal liability provided in the Statute of the African Court is a step forward in terms of ensuring criminal liability of corporations that engage in criminal conduct. The assessment will be made by taking into consideration the draft article of the Rome Statute. Furthermore, an assessment of how the model can work in practice and whether it could resolve some of the conceptual challenges faced with the derivative models will be carried out. The weakness and challenges of the model will be explored, and an assessment shall be made on whether the provision is progressive.



4.2. THE ROME STATUTE'S DRAFT ARTICLE

In order to ascertain whether or not Article 46C is a progressive provision in terms of ICL, it must be assessed in light of the ICL standards. There being no equivalent, the chapter shall proceed by looking at what was proposed at the drafting of the Rome Statute and weigh whether there are improvements in terms of the concept of the model envisaged in Article 46C.

The proposed draft article on CCR of the Rome Statute had adopted the identification model of attributing criminal fault on a legal entity.¹ The provision sought to impose liability on a legal entity for acts of a natural person holding a position of control in the entity. For the legal person to be liable, the crimes must have been committed while the natural person was acting on behalf of and with the explicit consent of the legal entity.² The model required a conviction of a natural person before a conviction can be sustained for a legal entity.³

Although this provision adopted one of the commonly accepted models of imputing criminal liability on a legal person, the model has faced a lot of criticism. This type of model was seen as desirable because it sought to trace corporate fault in the personnel that exercises some form of control in the entity or the directing minds of the legal entity.⁴ However, a weakness lies in its reliance on the identification of a natural person who must embody the intention and *actus reas* to commit the offence. Additionally, the person must have been explicitly authorised to act on behalf of the legal entity. In the same vein with regards to liability of a parent company, where crimes are perpetrated by local actors or subsidiaries, there was a requirement that proof must be shown that an agent of the controlling company was also exercising control or was present in the subsidiary.⁵ Article 46C resolves these handles as it only requires the proof of a causal link between the policies of the parent company and the commission of the offence by the subsidiary.

From domestic experience, it has been observed that this model can create some inequalities between legal entities. The model can be used to successfully impute liability on a small organisation but is very weak when it comes to ensuring successful prosecution of

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- 1 Kyriakakis J Article 46C: Corporate Criminal Liability at the African Criminal Court (2016) 21.
 - 2 See Appendix 1.
 - 3 See Appendix 1 and van der Wilt H (2013) 45.
 - 4 Van der Wilt H (2013) 48.
 - 5 Kaleck W and Saage-Maab M (2010) 722.

large organisations as observed in the *Tesco supermarkets vs Natress*⁶ and the *R vs P&O European ferries Ltd*⁷ cases. Furthermore, it bears some weaknesses of uncertainty and evidential challenges when applied to a legal entity with a complex structure or with decentralised power structures.⁸ It also presents challenges when the actual perpetrators of the offence are not ascertainable, but fault is seen in a legal entity as a collective.⁹ As such this model is open to manipulation by legal entities such that they would be able to tactfully create deficiencies so as to avoid liability leading to under criminalisation of corporate liability.¹⁰

4.3 IS THE MODEL ADOPTED BY THE STATUTE OF THE AFRICAN COURT PROGRESSIVE?

Nowadays, legal entities have taken up sophisticated structures through which they claim their reality as separate beings from their members. Their aims, intentions and knowledge can be assessed based on their policies such as the standing orders, codes of ethics and organisational practices.¹¹ Thus, it is fair and practical to hold legal entities criminally liable for the policies and practices adopted as their method of operation.¹² Essentially, the idea adopted in the Statute of the African Court is to treat legal persons as if they were natural persons and to recognise that fault can lie with the legal entity itself rather than with specific individuals who act for the entity.¹³ The model adopted by the Statute of the African Court is progressive because it is a more realistic model of attributing corporate fault, it overcomes evidential challenges, is independent from individual fault and is more suitable for international crimes as will now be shown.

6 AC (1972) 153.
7 Cr App (1991) 93.
8 Cavanagh N (2011) 417.
9 Cavanagh N (2011) 418.
10 Kyriakakis (2016) 21.
11 UNSRSG Report (2008) 12.
12 UNSRSG Report (2008) 63.
13 Sarre R (2011) 84-98.

4.3.1. Realistic Model of Attribution

The model of attribution adopted in Article 46C provides a more reasonable and realistic way of attributing criminal liability than the other models of corporate liability. The reliance on the corporation's policies is realistic because these authoritative policies are not decided by an individual, but they emerge from the decision-making process recognised as authoritative within the legal entity.¹⁴

4.3.2. Alleviates the Evidential Challenges Posed by Other Models

Cavanagh opines that there is a need to embrace a model of corporate liability that ensures that a legal person only incurs liability when truly at fault.¹⁵ The organisational model depicted in the Statute of the African Court is capable of determining whether a legal entity is truly at fault by processing and evaluating the policies and decision-making processes. The concept of 'corporate policy' casts a much more realistic net of responsibility over corporations than derivative models of vicarious liability and identification approaches.¹⁶

Attaching liability to the legal entity, as opposed to only holding the individual directors or officers involved, can be considered a more accurate reflection of the nature of corporate criminality, more so, at the scale of international crimes.¹⁷ This argument is further supported by the fact that due to their size, complexity, and control of vast resources, legal entities especially multinational corporations have the ability to engage in misconduct that is far more devastating than what could be accomplished by individuals.¹⁸

14 Gobert J (2011) 139-157.

15 Cavanagh N (2011) 432.

16 UNSGRSG Report (2008) 61.

17 Kaeb C Law' (2016) 367.

18 Kaeb C (2016) 367.

In applying the strict identification model, the contempt Judge of the STL pointed out that the reliance of the model on the proof of criminal responsibility of a specific person creates significant challenge to holding, legal entities with complex structures, liable for their criminal conduct.¹⁹ This is because in many instances, the elements of the crime are distributed between different functions and natural persons. This hurdle is overcome by the provision of Article 46C which relies on corporate fault from the legal entity's policies and knowledge, both direct and constructive, that can be possessed at different levels of the organisation. Such an approach can ensure more accountability for corporate fault and certainty in the prosecution of corporate crimes.²⁰ The corporate policy and the aggregation of knowledge adopted can effectively ensure more success in prosecuting a complex legal entity.

4.3.3 Independence from Individual Fault

This model overcomes the shortfall posed by the derivative models which relied on identifying liability within an identifiable individual. Under Article 46C, corporate criminal liability is founded on the legal person's own wrongdoing.²¹ It also ensures fairness because a legal person can only be held liable for the actions for which it is at fault unlike the situation created by some variations of the vicarious liability approach where a legal person could be held liable even when culpability of the actor is not provable.²²

It has been argued that the organisational approach has a significant impact on the scope of corporate liability in that it is easier to implement because it represents a greater possibility

19 New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1.

20 Cavanagh N (2011) 334.

21 Cavanagh N (2011) 431.

22 See section 332 South African Criminal Procedure Act 51 of 1977.

of holding corporate entities criminally liable.²³ Article 46C fully embraces the realist theory of viewing an organisation as being more than an aggregate of its members but rather as a social reality with an independent existence.²⁴

4.3.4 Suitable for International Crimes

The model adopted in Article 46C renders itself applicable and capable of proving corporate guilt against a legal entity both for its actions as a principle offender and as an aider or abettor. Take for example the Lundin Holdings and Freeport-Mcmoven Holdings' involvement in the Democratic Republic of Congo's Tenke-Funguruma concessions.²⁵ Where the facts are quite clear that the companies actively took part in the bribing of government officials concealing certain information from the government during the negotiations to gain and maintain control over the concessions and leading to the government to lose about 25% of its interest through the misinformation.²⁶ In such circumstances where an entity's actions show a certain pattern of a criminogenic policy, it is possible to prosecute the entity as principle perpetrator under Article 46C. Reliance must be placed on the evidence which must reveal facts, circumstances, conduct, and intentionality of an organisation to do the act in question thereby prompting a fair or reasonable attribution of liability. Due to its reliance on the criminogenic policies of a legal entity, the organisational model presents a better chance of ensuring successful prosecution of legal entities with complex structures.

The model adopted in Article 46C also makes it possible to convict a parent company for the criminal conduct of a subsidiary.²⁷ Whereas in the identification model one would require

23 UNSRSG Report A (2008) 13.

24 Henning J & Hauman M 'Corporate Criminal Responsibility: A South African Perspective' in Rider B (ed) *Research Handbook on International Financial Crime* (2015) 191- 205.

25 See generally McGregor M (2009)

26 McGregor M (2015) between pages 472-475.

27 Kyriakakis (2016) 28.

proof of presence of some directing personnel from the parent company in the offences committed by a subsidiary, the organisational model only requires evidence that the formal or informal corporate policies of the parent company supported or lead to the commission of the offence. It must be proved that the parent company through its policies substantially contributed to the commissions of the offence. This must be combined with ‘an intent through its policies or knowing commission’, to facilitate the commission of the crime. Such a concept would be easier to discharge in terms of international law crimes. This approach was attempted in the Swiss Courts in the case of Nestle but the matter did not proceed to trial because the action was statute barred by the statute of limitations.²⁸

With regards to aiding and abetting, the model’s use of both actual and constructive knowledge increases chances of successful prosecution of legal entities. It is well established in customary ICL that the proof for the mental element for aiding and abetting is the mere knowledge that one’s actions assisted the commission of the offence.²⁹ As such it would be easy to discharge the burden of proof for aiding and abetting or complicity where the mental element is proof of the legal entity’s knowledge about the offender’s criminal purpose. The provision on the aggregation of knowledge presents an advantage for the prosecution where by the embodiment of knowledge is not required to be in one person but that it was available in the organisation. This approach significantly lowers the evidential burden for the prosecution.³⁰ It also averts the evidential challenge in circumstances where a legal entity deliberately compartmentalises knowledge so as to avoid liability. To elaborate this point, an illustration from the example of the Lundin company dealings with the Kabila’s

28 Available at https://www.ecchr.eu/en/our_work/business-and-human-rights/nestle.html (accessed on 23/10/2017).

29 *Prosecutor v. Furundlija, IT-95-17/1-T*, (1998). Reaffirmed in *Prosecutor v. Vujadin Popovice IT-05-88-A* (2015).

30 Kaeb C (2016) 396.

army is on point. Barely weeks after Kabila took over power in the Democratic Republic of Congo, Lundin Holdings bribed off Kabila and paid huge sums of money into Kabila's company. This was despite reports in the public domain that the company was used to fund and procure weapons for Kabila's army thereby sustaining the war.³¹ As such, it is plausible in this case to argue that the company had constructive knowledge that payment of bribes into the company that was being used to fund the war and Kabila's armed group would lead to commission of further atrocities that the armed group was already engaged in.

The preceding discussion shows that Article 46C if properly applied, presents a very progressive effort to hold legal persons for their involvement in international crimes. It provides a very viable answer to the question of how a legal entity can be held liable for international crimes. However, despite its progressive nature, the concept has some challenges that shall now be dealt with.

4.4 CHALLENGES

The conceptual challenges such as the lack of clarity in the provisions as to what kind of legal persons are envisaged and lack of clear stipulation for ascertaining the 'corporate policy' or what amounts to 'policy to do the act' have already been pointed out in chapter three of this paper.³² Furthermore, the use of constructive knowledge and aggregation of knowledge broadens the scope of knowledge which can be attributed to prove knowing commission of an offence. As already shown, the level of evidential burden to prove constructive knowledge is significantly lower than that required to prove actual knowledge.³³ With constructive knowledge the prosecution only needs to prove that in the

31 McGregor (2009) 475.

32 See discussion under part 3 of chapter 3.

33 See chapter 3 part 2.3.2.

circumstances of a case the legal entity ought to have known the existence of a particular fact. This evidential burden is lowered further by the aggregation of knowledge of different individuals in the legal entity. In as much as this seems to ease the prosecution's burden of proof, it may be said to be unfair because it waters down the burden of proof.³⁴ Despite such proof being acceptable for complicity crimes it may not be acceptable for conviction as a principle perpetrator for international crimes which in most cases require actual knowledge.³⁵

Apart from the conceptual challenges, the other foreseen challenges are with regards to enforcement. The transnationality of most legal entities operating in Africa is at the core of this challenge. The Court would have to rely on co-operation and mutual legal assistance in accessing witnesses, documentary evidence and enforcing orders across states.³⁶ Co-operation for the court to access corporate documents, personnel and property maybe fairly less problematic with regards to member states.³⁷ However, this may pose a challenge for the jurisdictions outside Africa. Enforcement challenges especially with regards to the fact that most corporations doing business in Africa have their controlling companies in the western world. Further, most of the resources plundered from the continent eventually find themselves in the developed worlds. There will be a need to promote more international collaboration in order to ensure that judgments and sanctions are meaningful. This difficulty in ensuring co-operation may be worse with respect to countries that do not have provisions of CCR in their laws. There may be need for agreements to be made between the

34 Kaeb C (2016) 396 and Kyriakakis J (2016) 396.

35 Kyriakakis (2016) 26.

36 Kyriakakis (2016)38.

37 Article 46J bis.

African Union and third-party states and territorial bodies to enable the Court to carry out investigations and enforcement in those states when need arises.

Further the Statute is silent on how to procedurally deal with the issue of presence of a legal person at trial. It should be noted that there is a general provision relating to an accused being present during trial, but this provision does not specifically address the requirements of how to ensure a legal entity is represented.³⁸ Although such rules may be best stipulated in the law of the country where the legal entity is registered, it necessary for the court to stipulate general and clear rules stipulating the category of persons that can represent a legal entity and methods of ensuring the presence of such representatives before court.³⁹ This would ensure certainty of procedure especially for those states that may not have CCR in their laws.

4.5 CHAPTER SUMMARY

It has been shown in this chapter that the model of CCR in the Statute of the African Court, which requires reliance on corporate policies when establishing corporate guilt and intent, has its own conceptual problems. Despite those inherent conceptual challenges that will need to be addressed, this alternative presents advantages that are not available in the other models of attributing CCR. The STL tribunal recognised that a more nuanced model of attributing liability on large corporate entities in international criminal law ought to punish a corporation for its corporate fault and not merely criminalising conduct of its superior officers.⁴⁰ Article 46C of the Statute of the African Court seeks to do just that. Corporate liability stemming from the corporate policies themselves presents a better opportunity of

38 See Article 46A of the Statute of the African Court

39 Kyriakakis (2016) 38

40 New TV S.A.L. and Al Khayat, STL- 14-05/PT/AP/ARI26.1.

proving the organisational guilt. This approach is progressive because it tackles some of the challenges that have been experienced in the past when trying to impute corporate liability on corporations. It is also more open to be used for dealing with international criminal law crimes.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUDING REMARKS

This research has looked at the development of CCR at the level of ICL from the Nuremberg Tribunal to the enactment of the Statute of the African Court. Though there is no international law court with jurisdiction to hold legal persons liable for international crimes, several cases adjudicated at the ICL level have shown a serious connection of corporate involvement in their commission. The research has also shown that the domestic and human rights efforts to hold legal persons liable for breaches of international criminal law have been inadequate and in most cases yielded negative results.

The research shows further that the world has responded to corporate criminality for non-atrocity crimes through various legal instruments that have either called for criminal, civil or administrative liability on legal persons for their involvement in transnational crimes. Most jurisdictions have responded by imposing criminal liability and thus numerous countries now have CCR provisions in their penal statutes.

The issue of corporate liability arises from the acceptance of a legal person as a holder of rights and obligations. The research has shown that the derivative and organisational models have been developed to impute liability on a legal person. The derivative model is more common despite receiving a lot of criticism in the recent past. The research has shown that, the recently developed organisational model is a more viable mode of imputing CCR.

This is because with this model, fault lies in the organisation's policies as opposed to relying on the fault of an agent of the organisation.

The organisational model resolves the challenges that were faced when dealing with legal entities with complex organisational structures that make it impossible to identify the individual whose conduct and mental state can be imputed to the legal entity. The model is more likely to ensure that large entities do not use their complex structures to avoid criminal liability.

The research has shown that the organisational model of attributing corporate criminal liability adopted under article 46C is sui generis. It provides a type of attribution that domestic regimes have been moving towards in the recent past. The research has shown that the model attributes the fault element through reliance on the policy of the corporation which traces fault to the organisation's policies. The model requires that the organisation must have intended to do the act through its policies either formal or informal, and that the policies allowed for the legal entity's knowing commission of the offence. Furthermore, there is no requirement under this model to attribute the physical element to any individual person.

Despite its advantages, the model adopted in the Statute of the African Court has some conceptual challenges. These include the lack of clear definitions of the legal persons envisaged and what constitutes a 'policy to do the act' or 'policy'. Due to its novelty, the model of the African Court raises concerns about its possible practical application. Despite the challenges, this alternative presents advantages that are not available in the other models of attributing CCR. Corporate liability stemming from the corporate policies themselves presents a better opportunity of proving the organisational guilt. This approach

is progressive because it tackles some of the challenges that have been experienced with the derivative model. It is also more open to be used for dealing with international criminal law crimes.

As shown by this study, recent developments in state practice and judicial development, the question no longer seems to be whether legal persons are liable under international law but rather how such liability would be implemented. Recent developments show that the issue now hinges on what the material elements of imputing liability on a legal person ought to be and what the form of sufficient punishment ought to look like. The Statute of the African Court, has given a comprehensive answer on how this can be done. Scholars, the African Court and the international community can work together towards developing the model further so that it can have universal applicability.

5.2 RECOMMENDATIONS

5.2.1 Recommendation on the Conceptual Challenges

Based on the finding that Article 46C is not very clear with regards to the types of legal persons that the Court has jurisdictions over, it is recommended that the Court once established ought to give a purposive interpretation so that the appropriate legal entities must be included in the meaning of legal persons and the Court should exercise jurisdiction over them if they commit any crime under the Statute of the Court. The term legal person must not be restricted to only those carrying out corporate or economic activities.

Secondly the issue of corporate policy to do the act must be interpreted in a robust manner to guard against the exclusion of certain behaviour that may not be in the formal rules of the legal entity but nevertheless was part of the implied policies of the entity. It is recommended that the Court should clearly draw the parameters of what kind of evidence

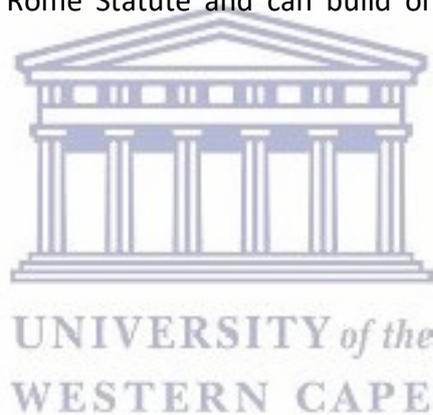
is necessary to establish a policy to do the act. The interpretation must be such that it should capture genuine fault and not lead to under criminalisation where legal entities would avoid liability even when their policies show that they were at fault. On the other hand, the interpretation should not lead to over criminalisation of actions where legal entities are held liable even when their policies do not support the commission of the offence.

5.2.2 Recommendation on Enforcement

The research has shown that it has been very difficult to ensure that corporate entities are held liable for their conduct or involvement in international law crimes. The mere inclusion of personal jurisdiction over corporate entities does not solve the issue. The Court will have to establish comprehensive rules of procedure to ensure that such legal entities are properly arraigned before Court. Rules of procedure ought to include rules on determining who would represent a corporate entity in Court. The Court must also formulate rules on how to ensure that necessary documentary evidence and witnesses related to legal persons are brought before Court. As indicated most of the legal entities that operate in Africa have the main offices outside the continent. The Court or the African Union must thus collaborate to ensure that mutual legal assistance is offered when documents or witnesses in jurisdictions outside Africa are required before the Court. In the same vein mutual legal assistance shall be required for enforcement of the judgments that may be passed by the Court. The African Union must broker agreements for assistance in the enforcement the Court's judgments in jurisdictions outside the continent. Co-operation at that level is foreseeable as many countries now recognise CCR.

5.2.3 Recommendation for the Adoption of Corporate Criminal Responsibility for the International Criminal Court.

Bearing in mind that the International Criminal Court is a global court with 124 Member states, it is recommended that the Rome Statute ought to be amended to extend the Court's jurisdiction to legal persons. It is further recommended that an organisational model similar to the one adopted by the Statute of the African Court would be more appropriate. Such a move would assist with the enforcement challenges that the African Court may face. Further the model of the African Court is versatile and would present a better option of CCR for atrocity crimes. Further, legal analysis can assist in rethinking the reform process for corporate liability under the Rome Statute and can build on the model adopted by the African Court.



Word Count: 18204

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APPENDIX 1.

WORKING PAPER ON ARTICLE 23, PARAGRAPHS 5 AND 6 A/Conf.183/C.1/WGGP/L.5/Rev.2 3
July 1998 (footnotes omitted)

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

- (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
- (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
- (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
- (d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, “juridical person” means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organisation registered, and acting under the national law of the State as a non-profit organisation.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file

charges against the natural and juridical person jointly or separately. The natural person and the juridical person may be jointly tried.

If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.



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