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Article 46C

Corporate Criminal Liability at the African Criminal Court

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1. INTRODUCTION

The proposed international criminal section of the African Court of Justice and Human and Peoples' Rights, or what will be referred to as the African Criminal Court (ACC),[1] involves a number of progressive features. Among them is the Court's proposed adjudicative authority over corporations. According to Article 46C of the ACC's Statute (the Statute), annexed to the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (the Malabo Protocol),[2] and entitled 'Corporate Criminal Liability', 'the Court shall have jurisdiction over legal persons, with the exception of States.'

Most international criminal courts[3] have to date had *jurisdiction personae* limited to natural persons only.[4] What Article 46C will involve (should it

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[1] Following the style adopted by others in this compendium, the use of the term 'African Criminal Court' or 'the ACC' is used to distinguish the African Court of Justice and Human and Peoples' Rights' criminal jurisdiction from its other competencies.

[2] (adopted 27 June 2014).

[3] The term 'international criminal court' is used in a broad sense to denote any court or tribunal, other than a purely domestic court, that exercises criminal jurisdiction over international and/or domestic crimes.

[4] See, e.g., Art. 25 of the *Rome Statute of the International Criminal Court* (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute); Art. 6 of the *Statute of the International Tribunal for the Former Yugoslavia*, UNSC Res 827 (25 May 1993) UN Doc S/RES/827; Art. 5 of the *Statute of the International Tribunal for Rwanda*, UNSC Res 995 (8 November 1994) UN Doc S/RES/955. While it is often said that all international criminal courts to date have been limited to prosecutions of natural persons, the instruments establishing the International Military Tribunal and the American Military Tribunal at

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come into operation) will therefore mean treading new ground. As a result, there are inevitably ambiguities surrounding how the provision will work. It may also elicit controversy, particularly given its potential to apply to corporations doing business in Africa but emanating from states that are not party to the ACC.[5] None of this need surprise, nor deter, practitioners, however it creates new challenges the Court will need to resolve, all the while creating new possibilities.

The inclusion of Article 46C in the ACC is not entirely unexpected. Globally there is an increasing convergence towards corporate criminal liability in domestic systems. This change improves the legal and political landscape upon which Article 46C will operate. Fewer states recognized corporate criminal liability when a similar provision was rejected at the Rome Conference of the International Criminal Court (the ICC). Traditionally, there was a divide between common and civil law jurisdictions, with the latter less likely to recognize corporate criminal responsibility. However, this has narrowed significantly in recent years with the uptake of corporate criminal liability schemes across a number of civil law countries.[6] In Africa, there are a number of a states that provide for corporate criminal responsibility.[7] Nonetheless,

Nuremberg can be interpreted to allow the prosecution of corporations, and at least one legal contemporary proposed doing so: J. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', 109 *Colum L Rev* (2009) 1094, at 1115, 1149–57, 1176–8, 1198–1200 and 1239 (on the proposal to indict corporations) and 7–1248 (reprinting, *Memorandum from A.L. Pomerantz, Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate Entities* (27 August 1946)). See also, N. Bernaz, 'Corporate Criminal Liability under International law: The *New TV S.A.L* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon', 13 *JICJ* (2015) 313, at 330 (on the implications of recent decisions of the Special Tribunal for Lebanon regarding its jurisdiction over corporations).

[5] According to Art. 46E*bis* of the ACC Statute, the ACC can exercise jurisdiction over nationals of a state that is not a party to the Court where the conduct is committed on the territory of a state party, where the victim is a national of a state party, or where the conduct in question threatens a vital interest of a state party.

[6] J. Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge', 56(3) *NILR* (2009) 333, at 336–348; M. Pieth and R. Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview', in M. Pieth and R. Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer, 2011) 3–60.

[7] These include and are not limited to: Botswana (Section 24 of the *Penal Code 1964*); Ethiopia (Art. 34 of the *Criminal Code 2004*); Ghana (Section 192 of the *Criminal Procedure Code 1960*); Kenya (Section 23 of the *Penal Code 1930*); Malawi (*Nyasaland Transport Company Limited v R* 1961–63 ALR Mal 328 and Section 24 of the *Penal Code*); Nigeria (Sections 65–6 of the *Companies and Allied Matters Act 1990*); South Africa (Section 332 of the *Criminal Procedure Act 1977*); Zambia (Section 26(3) of the *Penal Code Act 1950*); Zimbabwe (Section 277 of the *Criminal Law [Codification and Reform] Act 2004*). Some of these provisions do not establish corporate criminal responsibility but are premised upon its existence pursuant to other statutory or common law sources.

differences in national models for corporate criminal liability remain and some civil law states continue to reject the concept of corporate criminal capacity entirely, considering it antithetical to the individual-ethical concept of guilt that underpins their criminal law.[8] Further, the breadth of crimes over which the ACC will have jurisdiction straddles the traditionally discrete categories of international and transnational crimes.[9] The trajectories of collective state efforts to address these two broad crime categories, and the way these efforts interplay with the question of corporate liability, have traditionally been distinct. These factors may tend to complicate matters of legitimacy and enforcement as they relate to Article 46C.

In light of these probable sources of tension, the purpose of this chapter is to undertake a close reading of Article 46C, with a view to elucidating the scope of the Court's proposed jurisdiction over legal persons and the challenges the Court may face in exercising such jurisdiction. It seeks to highlight strengths, weaknesses and uncertainties given current drafting and the contemporary legal landscape. This includes considering the entities contemplated by Article 46C, the principles for attributing criminal liability to legal persons that it adopts, the breadth of corporate sanctions available, enforcement challenges that may arise, and the challenge of complementarity given the remaining differences in corporate criminal liability models in domestic legal systems. Throughout, the question of how the broader range of crimes over which the ACC will have jurisdiction might interplay with Article 46C is considered.

In the main, this chapter does not address the question of the *desirability* of corporate criminal liability at the ACC. Indeed, an implication of the African Union's adoption of Article 46C is that the hurdle of desirability has been overcome in the African context. This also reflects what appears to be a relatively solid consensus among African civil society groups on the need for

[8] In Egypt, for example, only natural persons can be criminally liable, on the basis that free will and awareness can only exist in human beings: M. Omara, *Criminal Liability of Companies – Egypt* (2008), available at www.lexmundi.com/Document.asp?DocID=1063. This position is sometimes reflected in the principle of *societas delinquere non potest* (a legal entity cannot be blameworthy). For an overview of this philosophical position, see T. Weigend, '*Societas delinquere non potest*? A German Perspective', 6 *JICJ* (2008) 927.

[9] The term 'international crimes' or 'atrocity crimes' is used to denote the crimes of genocide, crimes against humanity, war crimes and aggression that have been the traditional categories of crimes over which international criminal courts have had jurisdiction. The term 'transnational crimes' is used to denote other crimes with actual or potential trans-border effects: Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 5.

civil and criminal liability frameworks to address the impunity with which corporations continue to operate in many African jurisdictions.[10] Instead, the analysis in this chapter takes as its starting point that the development is, in theory, a welcome one. In 2005, Wells and Elias argued that the 'debate is perhaps no longer whether to have corporate liability but what form it should take.'[11] To be sure, there is ample literature on the 'why' of corporate liability elsewhere.[12] Instead, the focus here is upon the *form* of corporate criminal responsibility adopted by the Statute, in order to provide some guidance to stakeholders engaging with the ACC. However, before turning to Article 46C specifically, the first section of the chapter provides a snapshot of international legal efforts to address the role of legal persons involved in international and transnational crime to date. The purpose of Section 1 is to demonstrate not only the historical context within which Article 46C arises, but also how parallel legal developments have converged towards a legal environment increasingly receptive to an international criminal court with jurisdiction over corporations.

2. TOWARDS AN INTERNATIONAL CRIMINAL COURT WITH COMPETENCE OVER CORPORATIONS

The ACC is not the first time the idea of an international criminal court with competence over corporations has been seriously considered. From as early as the first UN Committee towards the establishment of a permanent international criminal court in 1951, members considered whether it should provide for corporate criminal liability given that corporate penal responsibility was known to some states.[13] This interest was unsurprising given that just a few years earlier the role of German business in Nazi atrocities of World War II had been of keen interest to Allied states when planning and executing their

[10] See, e.g., the 'Declaration of the African Coalition for Corporate Accountability (ACCA)' (November 2013), which has been endorsed by 89 organizations from 28 countries across the continent. Available at https://the-acca.org/declaration/.

[11] C. Wells and J. Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage', in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 141, 160.

[12] For an excellent review of the three major debates regarding corporate criminal liability (corporate criminal liability as a concept; criminal versus civil liability; and corporate versus individual liability of corporate officers) evaluated in the context of international crime, see James Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity', 16 (2) *New Crim L Rev.* (2013) 261.

[13] UNGA 'Report of the Committee on International Criminal Jurisdiction' (1952) UN Doc A/2136 [86]–[90].

post-war peace and justice programmes.[14] The issue of extended court competence was revisited during meetings of the second UN Committee of 1953, with Australia arguing that the 'criminal responsibility of corporations was not excluded either by doctrine or by jurisprudence.'[15] The principal concern pressing against the proposal was the lack of penal responsibility for corporations in some states (the comparative law challenge), together with the wisdom of a conservative approach and the benefit to brevity of decision making by setting the issue of corporate responsibility aside.[16] A similar comparative law challenge was again a key issue when the proposal was debated during the Rome Diplomatic Conference in 1998, particularly given the ICC's intended complementarity to domestic justice systems.[17] The concern at Rome was how the ICC would account for those states that do not provide for corporate criminal liability when determining the admissibility of a case against a corporate defendant involving such states, as well as how such states would enforce corporate criminal sanctions ordered by the ICC.[18] Despite this, and other, challenges, a Working Group developed sophisticated draft articles on juridical persons during the Rome meetings.[19] Due to a lack of time to resolve outstanding state concerns, the relevant articles were omitted.[20]

[14] K. Priemel, 'Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg', in K. Priemel and A. Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives and Historiography* (Berghahn Books 2012) 163–167. This was principally achieved through zonal military trials of individual industrialists that had headed notable German industrial concerns. For a discussion of those trials, see Bush (n 4); M. Lippman, 'War Crimes Trials of German Industrialists: The "Other Schindlers"', 9 *Temp Int'l & Comp L J* (1995) 173.

[15] UNGA 'Report of the 1953 Committee on International Criminal Jurisdiction' (1953) UN Doc A/2645 [85].

[16] UNGA 'Report of the Committee on International Criminal Jurisdiction' (1952) UN Doc A/2136 [85]; UNGA 'Report of the 1953 Committee on International Criminal Jurisdiction' (1953) UN Doc A/2645 [85].

[17] For an excellent summary of the debates at Rome regarding the legal persons' proposal, see A. Clapham, 'The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from the Rome Conference', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law 2000).

[18] For an analysis of this critique and possible responses to it, see: J. Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare', 19(1) *Crim LF* (2008) 115; Kyriakakis (n 6).

[19] 'Working Paper on Article 23, Paragraphs 5 and 6', UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (3 July 1998) UN Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2.

[20] 'Summary records of the meetings of the Committee of the Whole, 26th Meeting', UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (8 July 1998) U.N. Doc A/CONF.183/C.1/SR.26 [10]. See also, Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), *The*

The final iteration of the draft ICC corporate liability provision is attached as Appendix A, to assist in comparative analysis.

There are other contexts, too, in which an international criminal court with competence over legal persons has been mooted. In 1981, an Ad Hoc Working Group of Experts on Southern Africa proposed an international penal tribunal for the suppression and punishment of the crime of apartheid with competence over legal entities.[21] The Draft Statute for the tribunal was intended to implement the Apartheid Convention, which anticipated such an institution.[22] The Apartheid Convention acknowledges (at Articles I and X) the capacity of organizations and institutions to commit the crime of apartheid, although it goes on to describe international criminal responsibility as that of the members of such organizations and institutions.[23] The view of the Group of Experts was that the proposed tribunal competence over corporations derived from the stipulation within the Apartheid Convention that apartheid is a crime under international law, together with established norms of criminal responsibility. They opined that while international criminal law contemplates individual criminal responsibility, such norms allow for the 'quasi-criminal responsibility' of corporate entities for which 'fines and punitive damages are appropriate remedies.'[24] Notably, the expectation of an international penal tribunal to address apartheid was one of the reasons that a court in the nature of the ACC did not proceed many years earlier, when something of its ilk was being considered in the 1970s.[25]

Likewise, in 1991, a group of experts submitted a draft statute for an international criminal court to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders with similar extended jurisdiction.[26]

International Criminal Court. The Making of the Rome Statute – Issues, Negotiations, Results (Kluwer Law International 1999) 199.

[21] 'Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid' (19 January 1981) UN Doc E/CN.4/1426, Draft Convention Art. 4–6.

[22] Art. V of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (opened for 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention).

[23] Art. I, X and III of the Apartheid Convention.

[24] 'Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid' (19 January 1981) UN Doc E/CN.4/1426 [58]–[60].

[25] A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24 (3) *EJIL* (2013) 933, at 936–7. Reflecting on the failure of such a court to materialize, Abass states: 'The impact of this "dupe", so to speak, had on Africans was significant, but it underscored the fact that not every crime committed in Africa would be of prosecutorial interest to the rest of humanity': 937.

[26] UNGA 'Draft Statute International Criminal Tribunal' (31 July 1990) UN Do. A/CONF.44/ NGO ISISC, Art. XIV, reprinted in (1991) 15 Nova L Rev 373.

Most recently, the Appeals Panel of the Special Tribunal for Lebanon (STL) found that legal persons (in those cases, TV and print news corporations) come within the Tribunal's jurisdiction for crimes against the administration of the Tribunal.[27] Importantly, this is in the nature of contempt jurisdiction, which is inherent in the authority of a criminal tribunal, and does not correspond to the same type of material jurisdiction as we see in the ACC. Nonetheless, and as Bernaz notes, given the effective silence (or ambivalence) discernible within international criminal law sources on the existence of corporate criminal responsibility under international law and given that the STL corporate contempt decisions are the first time an international tribunal has addressed the possibility of holding a corporation criminally liable, they are 'of utmost symbolic importance, even if [their] scope is rather narrow.'[28] This is not least given the kind of argumentation undertaken by the Appeals Panel to justify its finding of capacity over corporations, which included considering the status of corporate criminal liability as a general principle of international law and the need for competence over corporations in order to render the Tribunal's contempt powers effective.

There have been repeated calls since the Rome Conference that the idea of ICC competence over corporations be revisited. The reasons animating such calls vary but, much like the development of corporate criminal liability domestically, the drivers are often pragmatic rather than doctrinal, with an emphasis on the most efficacious ways of dealing with the reality of corporate crime.[29] Today, this pragmatism can focus upon gaps in governance, such as the dynamics of globalization that render transnational corporations peculiarly impervious to human rights accountability, particularly for harms related to business activities in the global South and in conflict zones. There is ample reporting on the role of corporations in a number of contemporary conflicts in Africa, which have in turn been linked to the need for international criminal courts to be directed towards the complicity of such (predominantly Northern) actors in otherwise apparently localized conflicts.[30] Various panels of experts established by the UN Security Council in relation to resource related

[27] *New TV S.A.L (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings)* (Case No STL-14–05/PT/AP/AR126.1, 2 Oct 2014); *Akhbar Beirut S.A.L. (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings)* (Case No STL-14–06/PT/AP/AR126.1, 23 Jan 2015).

[28] Bernaz (n 4) 321.

[29] Stewart (n 12) 261.

[30] See, e.g., M.J. Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court', 11 *AHRLJ* (2011) 23; I. Eberechi, 'Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC', 3 *Afr J Leg Stud.* (2009) 53; C. Jalloh, 'Special Court for Sierra Leone: Achieving Justice', 32(3) *MJIL* (2011) 395, at 424

conflicts such as those in Angola, Sierra Leone, Liberia and the Democratic Republic of the Congo have demonstrated the diverse ways in which transnational business practices have fuelled those conflicts while facilitating a flow of economic benefit to foreign actors, with effective impunity.[31] Involvement ranges from exploitation of natural resources controlled by rebel groups, smuggling natural resources, breaching UN arms embargoes, and purchasing conflict resources as part of consumer good supply chains.[32] Long before these modern examples, there are the gross violations that date back to King Leopold's search for resources in the Congo, famously catalogued as the first major atrocity crimes linked to the plunder of that state.[33] The impunity dynamics include accountability challenges associated with complex corporate structures that transcend national borders and the economic imperatives that undermine the governance capacities of individual states competing for foreign direct investment.[34] In cases involving atrocity, there are in fact overlapping sources of impunity, as there are also those that inhere to international crimes.[35] These dynamics negatively impact some parts of the world

(on the failure of the SCSL to prosecute foreign businessmen and profiteers who financed and benefited from the war).

[31] See, e.g., 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (16 October 2002) UN Doc S/2002/1146; 'Final Report of the Monitoring Mechanism on Angola Sanctions' (21 December 200) UN Doc S/2000/1225; 'Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone' (20 December 2000) UN Doc S/2000/1195.

[32] For an excellent overview of the dynamics of resource-related armed conflicts and the actors implicated in such wars, see Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2016) 1–30.

[33] For a powerful account of this history, see Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terrorism and Heroism in Colonial Africa* (Mariner Books 1998).

[34] UNGA, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' (7 April 2008) UN Doc A/HRC/8/5, in particular [11]–[16], [34]–[36], [47]–[49] (describing the dynamics of the current 'governance gap' in respect of corporate related human rights abuses). Another issue is the rise of private military companies and accountability therein.

[35] Atrocity crimes tend to be under-enforced within a wholly state based justice framework because many of the crimes can occur only with the participation of the state, resulting in unwillingness to prosecute. Other states also have reasons to refrain from intervening. Alternatively, the territorial state may be unable to act because its justice system is weak or even collapsed due to conflict: Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Cesare Romano and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004) 4–6. See also Ezeudu (n 30) 48–49 (noting that this is true whether the offender is a natural or legal person).

more than others and may help explain why a regional response has been more forthcoming than an international one.

The influence of critical scholarship attuned to the power relations underpinning international law and focused upon the lived experiences of peoples of the Third World, such as Third World Approaches to International Law (TWAIL), has also been felt. This literature challenges atrocity law to acknowledge the ways in which 'violence has been displaced in part from the first to the Third World' through an international economic order that favours the North.[36] While there are limits to how a criminal justice response can do this, TWAIL scholars suggest that one means is by broadening systems of accountability to inquire into the role of foreign economic actors in promoting and exacerbating local conflicts.[37] Similar ideas are becoming mainstreamed into international criminal law discourse. As international criminal lawyers adopt insights from political science on the ways in which many modern conflicts are rooted in competition over resources and in economic underdevelopment, calls for a new generation of international criminal law addressing economic actors and economic crimes are being made.[38] From this perspective, the degree to which international criminal practice has ignored property crimes, such as pillaging, and the role of corporate accomplices, is problematic.[39] It is thus unsurprising that it is at this moment and in the context of a regional court that will deal with crimes afflicting Africa that the idea of extended court jurisdiction to include corporate defendants (and a wider range of crimes) has been revived.

The trajectory of international action in respect of transnational and economic crimes has been, however, different to that related to atrocity crimes. Rather than move towards international adjudicative mechanisms, states have addressed non-atrocity crimes with cross border qualities principally through agreements that seek to progress, harmonize and coordinate state criminal justice responses within their own territories. These efforts have also not ignored the liability of entities. Particularly since the 1990's, a range of

[36] A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 78 *Chinese JIL* (2003) 77, at 89.

[37] *Ibid*, 90–2; C. Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland U L Rev* (2008) 81, at 98–9.

[38] See, e.g., L. van den Herik and D. Dam-De Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', 15 *Crim LF* (2011) 237; Eberechi (n 30).

[39] J. Kyriakakis, 'Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War', in L. May and A. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 113–20 (for a discussion on the way in which these issues are marginalized in international criminal law theory and practice).

regional and international instruments addressing crimes as diverse as bribery,[40] terrorism,[41] corruption,[42] the environment,[43] human trafficking,[44] and the sexual exploitation of children,[45] among others, (transnational crime agreements) address the liability of legal persons.[46] While specific models differ, the general approach is to require states to introduce laws domestically, and in some instances with extraterritorial effect, outlawing certain behaviours when undertaken by natural or legal persons. To address differences in legal cultures, these instruments give scope to states to use non-criminal measures, such as administrative sanctions, in respect of legal persons, provided sanctions are effective, proportionate and dissuasive so as to reflect the seriousness of the offences in question.

Transnational crime agreements have played a crucial role in the growing convergence towards corporate criminal liability across domestic legal systems. Prior to the 1990s, many states within the civil law tradition opposed the

[40] 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).

[41] International Convention for the Suppression of the Financing of Terrorism (opened for signature 9 December 1999, entered into force 10 April 2002) 39 ILM 270, arts 5 and 7; Council Framework Decision of 13 June 2002 on Combating Terrorism [2002] OJ L 164/3, arts 7, 8 and 9.

[42] United Nations Convention against Corruption (opened for signature 31 October 2003, entered into force 14 December 2005) arts 26 and 42; African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) art 11; Joint Action of 22 December 1998 adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Corruption in the Private Sector [1998] OJ L 358/2, arts 1, 5, 6 and 7; Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) CETS no 173, arts 1(d), 17, 18, and 19(2); Inter-American Convention against Corruption of 19 March 1996 (opened for signature 29 March 1996, entered into force 3 June 1997) art VIII.

[43] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (opened for signature 22 March 1989, entered into force 5 May 1992) 28 ILM 649, arts 2(14) and 9; 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) arts 1(16) and 9; Council Framework Decision of 27 January 2003 on Protection of the Environment through Criminal Law [2003] OJ L 29/55, arts 6, 7 and 8.

[44] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) art 10; Council Framework Decision of 19 July 2002 on Trafficking in Human Beings [2002] OJ L 203/1, arts 4, 5 and 6.

[45] Council Framework Decision of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography [2004] OJ L 13/44, arts 1(d), 6, 7 and 8.

[46] For further examples see, Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 54–5.

concept of corporate criminal capacity. The picture has since changed dramatically, with even formerly 'restrictive' systems introducing laws that enable corporate prosecutions.[47] For example, as at 2013, only Greece, Germany and Latvia remain without some kind of corporate criminal liability in Europe.[48] In Germany, there exists a system of administrative penalties, elements of which have been compared to corporate criminal liability[49] and there is an open debate as to whether a true criminal sanction against companies is needed.[50] This phenomenon of convergence has altered the legal and political landscape since the Rome debates, which is now more amendable to a development like Article 46C than ever before. It does not, however, eradicate the challenges of a diverse comparative law landscape for an international court cutting across such diversity. There remain differences across national corporate criminal liability models, which can include the entities and crimes contemplated by domestic schemes, the principles for attributing the physical and mental elements of crimes to a legal entity, and the sanctions available. How this plurality may interact with Article 46C is considered further in Sections 3 and 4.

There is a genuine question as to whether the historically distinct approaches to the criminalization of international and transnational crimes respectively (where one tends towards international adjudicative mechanisms and the other towards harmonized state responses) is grounded in qualitative differences between the wrongs in question or whether it is a symptom of historical-political realities. In terms of corporate liability, it is likely that different types of crimes may implicate different kinds of organizational structures and behaviours, and thus invite different criminal justice responses, though such differences are not necessarily split across the two broader crime categories. Further, it is not self-evident that it is only in respect of atrocity crimes that the capacity and willingness of the territorial state to act may be compromised and the international community share an interest in the direct enforcement of repressive measures. This seems to be reflected in points of interplay between the two legal movements that belie a neat divide between appropriate responses.

For example, in 1989, when movement towards a permanent international criminal court had stalled for decades, it was the efforts of Trinidad and Tobago at the General Assembly regarding the possibility of an international

[47] *Ibid* at 56–7.
[48] *Ibid* at 57.
[49] Kyriakakis, (n 18) 343–4.
[50] Engelhart (n 46) 57.

criminal court with jurisdiction over drug trafficking offences that revived the initiative.[51] At the Rome Conference years later, Thailand indicated that the question of ICC competence over drug offences would influence its position on the question of the liabilities of organizations.[52] The 1991 draft statute for a permanent international criminal court, noted earlier, envisaged a court dealing with over 22 categories of crimes spanning both international and transnational crime categories, on the basis that these are crimes over which states have an inability 'unilaterally to control and suppress'.[53] In its 2005 Final Report, the Truth and Reconciliation Commission of Liberia recommended an 'Extraordinary Criminal Court for Liberia' with jurisdiction over legal entities and over economic crimes in light of the crucial role of economic actors and economic activities in the Liberian armed conflict.[54] The Commission defined economic crimes to include contributions by business entities to human rights and humanitarian abuses for profit, as well as economic crimes such as money laundering, bribery, tax evasion, environmental harms, and illegal natural resource extraction, to name a few.[55]

Demonstrating cross-pollination in the opposite direction is the recent 'Crimes against Humanity Initiative' where legal experts produced a draft convention on the prevention and punishment of crimes against humanity hoped to encourage state action.[56] The text proposes that states provide for the liability of legal persons within domestic law but allows scope as to the form of corporate liability in terms modelled on the transnational crime agreements.[57] The matter has now been taken up by the International Law Commission, which is considering the issue of the criminal responsibility of legal persons in any convention directed towards improving state performance on crimes

[51] M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', 10 *Harv Hum Rts J* (1997) 11, at 55–56.

[52] 'Committee of the Whole, Summary Record of the First Meeting' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (20 November 1998) UN Doc A.CONF.183/C.1/SR.1 [49].

[53] 'Draft Statute International Criminal Tribunal' (n 26) 380.

[54] Truth and Reconciliation Commission of Liberia, 'Volume 2: Consolidated Final Report' (30 June 2009) 426–59 (Annex 2: Draft Statute: Extraordinary Criminal Court, 426–59, Art. 14 (11) and 15(2)). For the Commission's findings on economic crimes in general see, Truth and Reconciliation Commission of Liberia, 'Volume 3, Title III: Economic Crimes and the Conflict, Exploitation and Abuse' (2009).

[55] Truth and Reconciliation Commission of Liberia, 'Volume 3, Title III: Economic Crimes and the Conflict, Exploitation and Abuse' (2009) 2–6.

[56] 'Crimes against Humanity Initiative' (*Whitney R Harris World Law Institute*, 2015) http://law.wustl.edu/harris/crimesagainsthumanity/.

[57] Crimes Against Humanity Initiative, 'Proposed International Convention on the Prevention and Punishment of Crimes against Humanity' (August 2010), art 8(6).

against humanity.[58] In general it can be said that international criminal justice is moving towards a de-centralized approach, where complementarity is intended to activate and complement domestic efforts.

The combinations of these discrete but interconnected threads of legal developments demonstrate how routinely the liability of legal persons has arisen as a matter of importance in international dialogues related to serious crimes in recent years. Furthermore, they demonstrate the growing convergence and cross-pollination of efforts directed at international and transnational crimes. Article 46C, as well as the wider substantive jurisdiction of the ACC, does not appear unannounced. An international criminal court with jurisdiction over legal persons may well be an idea whose time has come.[59] The challenge of an overburdened institution does, however, loom large. While timely, can the ACC manage the breadth of crimes and of actors with which it will be tasked? A preliminary response to this question is that the Court will need to develop policies to guide and justify situation and case selections. A similar challenge is faced by the ICC that, while tasked with core international crimes by natural persons only, must also practice radical selectivity in terms of what is pursued.[60] The challenge to be faced by the ACC may well be different in scale, but it will not be unique in kind. The benefits of corporate prosecutions, including in financial terms such as the potential for meaningful reparations, may well outweigh the costs of the added burden to the Court.

3. ARTICLE 46C: CORPORATE CRIMINAL LIABILITY AT THE ACC

With this context in mind, this section turns to the substance of Article 46C, discussing the legal entities over which the ACC would enjoy jurisdiction, the

[58] Sean Murphy, Special Rapporteur for Crimes against Humanity, 'Second Report on Crimes against Humanity' (21 January 2016) UN Doc A/CN.4/690 [41]–[44]; ILC, 'Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma' 68th Session (9 June 2016) 16 (on the intent of the Drafting Committee to consider shortly the three options proposed by the Special Rapporteur on how the Convention may address that issue).

[59] See, e.g., K. Tiedemann, 'Corporate Criminal Liability as a Third Track', in D. Brodowski and Others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 18 (quoting Victor Hugo's words: 'Nothing else has the force of an idea the time of which has come', in reflecting on the idea of corporate criminal liability as a common 'third track' of national criminal justice systems).

[60] See, e.g., M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Mich J Intl L* (2012) 265 (advocating expressivism as the best basis for determining selectivity issues at an international criminal court).

principles of attribution adopted, sanctions that may be applied against legal persons, and how complementarity might operate.

The general part of criminal statutes that provide for the liability of legal persons serve to translate substantive crimes and modes of liability provisions, generally defined in terms reflective of the human person, into terms enabling attribution of the wrong to the legal person. Serious crimes and the modes by which they can be committed generally involve a combination of physical actions and subjective mental states such as intent, recklessness or knowledge. The principal function of Article 46C is to set out how those kinds of human qualities can be attributed to legal persons; otherwise referred to as the principles of attribution. It states:

Article 46C

Corporate Criminal Liability

1. For the purpose 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 natural persons who are perpetrators or accomplices in the same crimes.

A. *The Entities and Crimes Contemplated*

A first question that arises is which entities are contemplated by Article 46C. Article 46C (1) provides that 'the Court shall have jurisdiction over legal persons, with the exception of States'. In addition, Article 1 states that the term 'person' as it appears in the Statute 'means a natural or legal person'. The term 'legal person' is not defined. Despite this broad language, it is argued below that Article 46C grants the ACC jurisdiction over a limited range of legal entities, namely those incorporated under domestic law. However, no further limitation is evident on a plain reading of the text.

Generally speaking, the term legal person is understood to denote organizations with some formal legal status, in terms of enjoying some of the rights and responsibilities of legal personality.[61] A dominant form of legal person is the corporation; limited liability companies given a legal status distinct to shareholders through incorporation. However, there are other entities that may also have distinct legal personality under national laws including unincorporated associations, trusts, trade unions, sporting clubs, partnerships and non-governmental or religious organizations. The legal status of particular entities varies from state to state.[62] From the international perspective, legal persons can also denote not only states but also some international organizations and belligerent groups.[63]

The way the issue of entities was addressed in the ICC draft articles was to define the preferred term 'juridical persons' narrowly as '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 organization registered, and acting under the national law of the State as a non-profit organization.'[64] By way of contrast, transnational crime agreements tend to leave terms such as legal person or legal entity un-defined. The difference in these two approaches might be explained on a few grounds. First, there is the state interest in controlling an international court's jurisdiction, which would otherwise be left to judicial interpretation. Clapham notes that a crucial concern at Rome was to ensure states would be excluded, both collectively, individually and in their composite parts, as well as the concern to protect the humanitarian efforts of non-profit organizations from 'unscrupulous States'.[65] Second, the nature of the crimes may also play a role. The transnational crime agreements that address the liability of legal persons deal with crimes such as bribery, corruption, the transport of hazardous waste, terrorism, and organized crime. The goals of criminalization in these areas may be frustrated if a narrow definition were adopted, given the variety of entities that can be vehicles for such crimes.

[61] UNODC 'Liability of Legal Persons, article 10 of the United Nations Convention against Transnational Organized Crime, Background Paper by the Secretariat' (6 June 2014) UN Doc CTOC/COP/WG.2/2014/3, [15]. It should be noted, however, that the term is not universally understood in this kind of restrictive fashion: Engelhart (n 46) 59.

[62] UNODC 'Liability of Legal Persons, article 10 of the United Nations Convention against Transnational Organized Crime, Background Paper by the Secretariat' (6 June 2014) UN Doc CTOC/COP/WG.2/2014/3, [16]-[17].

[63] J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 115–21.

[64] See Appendix A.

[65] Clapham (n 17) 156.

Turning to the ACC, apart from sub-section (1), the title and remaining provisions of Article 46C refer repeatedly to the corporation ('corporation', 'corporate intention', 'corporate knowledge'). This suggests that the concept of legal person in the Statute is, in fact, limited to incorporated entities; artificial entities that are granted a legal existence separate from that of the individual members through some domestic process of incorporation.[66] The question of incorporation would be a matter of fact based upon the national laws where incorporation is said to have occurred. There are implications that flow from this interpretation. First, if correct, this would preclude ACC jurisdiction over belligerent groups or criminal organizations *per se*, such as terrorist groups, as it is unlikely they would be registered under any national law. However, as Clapham has argued in the ICC context, it is likely such entities would operate through registered legal persons and in any event, it is not clear how one could indict organizations that do not exist in law.[67] Second, it might be argued that to 'speak of corporations . . . would limit the scope to incorporated organizations in the *economic field*.'[68] However, in many countries the term 'corporate' is not necessarily so limited. For example, in Australia, 'incorporation' includes incorporated associations, trade unions, and building societies.[69] Without qualifying terms related to the purposes of the entity, it is submitted that a narrow interpretation limited to incorporated *businesses*, is unduly limiting.

There is also the question as to whether the African Criminal Court will have competence over state owned and controlled corporations. This is a considerable issue given that in many countries, government owned corporations play a crucial role in various sectors, such as utilities, infrastructure, natural resources, postal services, telecommunications, transport, and financial services. Furthermore, there is today a significant degree of foreign

[66] According to Art. 31(1) of the Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 17 January 1980) 1155 UNTS 331: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. There is also the principle of interpreting criminal statutes, that in cases of ambiguity the matter should be resolved in favor of the defendant.

[67] Clapham (n 17) 156–7. Having said this, the notion of criminal organizations that is adopted in some criminal justice contexts demonstrates how such an approach can operate: see, e.g., Shane Darcy, *Collective Responsibility and Accountability under International Law* (Transnational Publishers 2007) ch V.

[68] Engelhart (n 46) 59 (emphasis added).

[69] See, e.g., in the Australian context: Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press 2002) 65–7.

investment by state owned transnational corporations.[70] The ACC Statute expressly excludes states from the jurisdiction of the Court but it is silent as to the status of public entities.

From a comparative perspective, the question of whether public entities are responsible within domestic corporate criminal liability schemes differs across national legal systems. In some states, governments, their organs and agencies may enjoy a limited degree of immunity from prosecution, which may extend to non-state actors that are 'highly integrated into national or international political processes'.[71] Engelhart notes that, comparatively speaking, in the main a mixed approach to this issue is adopted, meaning that public entities can be held criminally responsible only in so much as they are not exercising state authority[72] (or 'functions of constitutional relevance' as is the determinant in some states).[73] In other words, they are treated comparably to other legal persons where they are acting in a comparably private capacity, such as participating in the marketplace. This offers one possible interpretation of Article 46C, that the Court is limited to corporations engaging in commercial activity. However, this approach involves reading into the Statute a limitation that is not present on a plain reading of the text. On its plain terms, Art 46C grants the ACC jurisdiction over legal entities incorporated in domestic law whether they are public or private in nature and irrespective of the degree of state control over the corporation's activities. This conclusion is reached on a few grounds.

First, and by way of direct contrast to the draft ICC provision on legal persons, Article 46C excludes only states. States are, as a general rule, treated as legally distinct from corporations, on the basis that international law recognizes the doctrine of corporate separation with the exception of lifting the veil in cases of fraud and evasion.[74]

Second, it is true that in transnational corporate litigation contexts, there are a number of distinct, but related, legal doctrines that serve to limit either the jurisdiction or the willingness of foreign courts to adjudicating matters that implicate the official actions of foreign states. These doctrines can have

[70] See, e.g., United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014, Investing in the SDGs: An Action Plan* (United Nations 2014) 20.

[71] Pieth and Ivory (n 6) 17. See generally 14–17.

[72] Engelhart (n 46) 59.

[73] See, e.g., C. de Maglie, '*Soceitas Delinquere Potest?* The Italian Solution' in M. Pieth and R. Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 255, 261 (on the Italian and French approach to this issue).

[74] *Barcelona Traction, Light and Power Co Ltd Case (Belgium* v. *Spain)* [1970] ICJ Rep 3, [39]–[49] and [56]–[58].

implications for cases involving state majority-owned corporations or against corporations concerning abuses committed by government partners on joint venture developments.[75] One of these is the doctrine of sovereign immunity, which provides a jurisdictional immunity to sovereigns deriving from international law, including conduct undertaken through majority-owned separate legal entities, but with the exception of activity characterized as commercial in kind.[76] The second is foreign court deference to acts of state, where foreign courts abstain from hearing claims relating to a foreign sovereign's official acts within its own territory. This deference is animated by domestic concerns as to comity, separation of powers, and foreign relations.[77]

However, neither of these doctrines should be taken to limit the jurisdiction of the ACC. Taking sovereign immunity, in the context of international courts, states can agree to relinquish their immunities through ratification.[78] The ACC Statute contemplates immunities only for heads of state and senior state officials during terms of office (Art 46A*bis*), which by their nature seem to preclude application to corporations. If this is incorrect and Article 46A*bis* immunities could feasibly apply to corporate entities, Article 46C should not be interpreted in a way that expands immunities in the case of corporate defendants beyond those envisaged for natural persons. What is open to adjudication when responsibility is atomized to the individual level should not become protected when undertaken through the guise of incorporation. Act of state doctrines can also be set aside as they do not have purchase in the context of an international court given they are animated by concerns peculiar to the reach of foreign *domestic* courts. Furthermore, even in such contexts, common law courts have found the act of state doctrine is less likely to apply when a state is accused of behaviour that is widely condemned under

[75] See, e.g., S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004) 40–4, 121; M. Bühler, 'The Emperor's New Clothes: Defabricating the Myth of "Act of State" in Anglo-Canadian Law' in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 343–71.

[76] R. Wai, 'The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism' in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 213–45. See also, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur' (10 June 2010) UN Doc A/CN.4/631 [71]–[77] (on the relationship between act of state doctrines and principles of sovereign immunity).

[77] S. Zia-Zarifi, 'Suing Multinational Corporations in the U.S. for Violating International Law', 4 *UCLA J. Intl L & For. Aff.* (1999) 81, at 128–40 (on the US context).

[78] Cryer et al (n 9) 557–9 (discussed in the context of the ICC).

international law (such as those the subject of ACC jurisdiction) on the basis that such conduct cannot be characterized as official state acts.[79]

Finally, international rules of state responsibility for internationally wrongful acts (with the exception of what is taken to constitute the state itself) set out in the International Law Commission's *2001 Articles on Responsibilities of States for Internationally Wrongful Acts*,[80] do not preclude the concurrent criminal responsibility that might also exist at the level of the individual (or the corporate person), the function of each site of responsibility being distinct.[81] In short, Article 46C can be said to grant the ACC jurisdiction over legal entities incorporated in domestic law whether they are public or private in nature and irrespective of the degree of state control over the corporation's activities.

Before moving to the model of attribution set out under Article 46C, also important is the range of crimes that the Statute contemplates can be attributed to a corporation under Article 46C. In short, the absence of an exclusion clause means that there is no limit as to the crimes within the ACC Statute that will apply to corporations. This approach is common in states that fully embrace corporate criminal capacity; to provide a uniform provision on corporate criminal responsibility applicable to all crimes within their penal codes, notwithstanding the diversity of conduct such crimes engage.[82] It reflects the progressive view that corporations are, in theory, capable of committing any wrong, rather than precluding *mens rea* offences or limiting liability to crimes 'typically associated with the economic, environmental, or social impact of the modern (multinational) corporation'.[83] This is true even of crimes of specific intent, such as genocide, with historical examples that demonstrate the potential for corporations to knowingly participate in genocidal programmes. For example, in the 1946 *Trial of Bruno Tesch and Two Others* before the British Military Court, two co-accused were convicted and executed for their business of supplying the poison gas, Zyklon B, to the SS for

[79] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (SCt 1964) 428; *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995) 250 (from the US context).

[80] 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of Its Fifty-Third Session* (3 August 2001) UN Doc A/56/10.

[81] See, e.g., A. Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court', in P. Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003) 30, at 31–50.

[82] This is known as the 'all crimes' approach: Pieth and Ivory (n 6) 20.

[83] *Ibid* 18 and generally 17–21.

use in concentration camps with knowledge that the gas was being used to exterminate human beings.[84] Having said this, the ACC may identify certain ACC crimes that cannot be committed by corporations and in particular the leadership clause of the crime of aggression may render corporate prosecutions incongruous.[85]

B. *Attribution Principles: How the Corporation Acts and Attracts Blame*

As mentioned, attribution principles serve to translate how the elements of substantive crimes and of particular modes of participation in crimes can be attributed to a legal person. Such principles are necessary given that corporations can only act through human beings and that primary criminal law principles are generally defined in terms reflective of a human actor. To understand the attribution model adopted in the ACC Statute, it is useful to first review the main models that currently exist.

1. Models of Attribution

Generally speaking, models for the attribution of criminal liability to legal persons are either 'derivative' or 'organizational'. Derivative models base the liability of the entity entirely upon the liability of a specific individual or individuals, rather than identifying the fault located within the organization itself. Vicarious liability is an example of derivative liability, where the legal person is automatically criminally responsible for the wrongful conduct of any employee, officer or agent, if that conduct was committed within the scope of their employment.[86] Scope of employment is not precluded due to the act being criminal,[87] though some states do require the act to be at least in part

[84] United Nations War Crimes Commission (UNWCC), 1 *Law Reports of Trials of War Criminals* (1947), 93. While the case dealt with individual criminal responsibility, the findings of the Tribunal could likewise support corporate criminal responsibility. For further examples of possible scenarios of corporate involvement in genocide, see Michael J Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016) ch 4.

[85] ACC Statute, Art. 28M of the Statute (crime of aggression).

[86] For an outline of the principles of vicarious liability in the common law tradition, see Clough and Mulhern (n 69) 79–88. It should be noted that vicarious liability is also a principle of attribution for civil liability, however it is used here to refer to its contours in the criminal law.

[87] *Ibid* 86–7; C. Ntsanyu Nana, 'Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability', 55(1) *J Afr L* (2011) 86, at 99 (noting that vicarious liability is often rationalized on the basis that it is necessary where a 'statute would be rendered nugatory if liability was not imposed on the company').

intended to benefit the entity.[88] In other words, vicarious liability involves the determination that a specific individual or individuals committed the crime, liability for which is then transposed to the sufficiently related entity.

Vicarious liability has the benefit of relative simplicity and is often employed to render legislation enforceable where it otherwise would tend to fail if personal liability were required.[89] However, it has been criticized for its over-inclusivity, particularly when applied beyond strict liability and regulatory crimes, on the basis that it does not necessarily reflect any fault on the part of the organization, which may well have taken steps to avoid wrongdoing by corporate officers.[90] An effective means of avoiding corporate harms and encouraging best practice is through recognizing due diligence in corporate responsibility schemes. Due diligence is, in essence, the opposite of negligence. It allows an organization to avoid responsibility by showing that it took all reasonable steps to ensure compliance with the relevant law. This might be through adequate corporate management, control, and supervision, or through adequate systems for conveying relevant information to relevant persons. As corporate fault flows automatically from the relationship of the entity to the offending individual in vicarious liability models, there is no capacity for the corporation to point to organizational efforts to avoid such behaviours as a means of avoiding liability. This may undermine the normative messaging of a verdict of corporate fault and can de-incentivize due diligence efforts, as they may have little bearing on responsibility.[91] The United States, which adopts the vicarious liability model of corporate criminal liability even for serious crimes, mitigates the problem of over-inclusivity through prosecutorial discretion and detailed sentencing guidelines that bring into focus compliance efforts on the part of the organization.[92]

Another form of derivative liability is the identification model. A restricted form of vicarious liability, this approach likewise links the liability of the

[88] This is the approach, for example, of federal US criminal law: see, e.g., Allens Arthur Robinson, '"Corporate Culture" as a Basis for the Criminal Liability of Corporations', (February 2008) 29–30; and in South African law: see, e.g., Nana (n 87) 93–8.

[89] Clough and Mulhern (n 69) 80.

[90] See, e.g., Nana (n 87) 98–103 (criticizing the use of vicarious liability for corporate criminal liability in South African on this basis); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001) 152–4 (summarizing the debate over vicarious liability and noting that similar critiques can be extended to the identification model).

[91] Though it should be noted that due diligence does have some bearing on vicarious liability schemes even if not explicitly provided for, as the diligent organization minimizes risks of harms flowing from corporate activity in the first instance and thus in theory reduces situations in which it might be strictly liable for harm.

[92] Allens Arthur Robinson (n 88) 30–3.

organization to a specific individual's wrongful conduct, however only persons of sufficient standing within the organization are considered to represent it and to thus be capable of fixing it with criminal responsibility. While precise national approaches vary, this model of corporate criminal responsibility is the most commonly adopted in respect of *mens rea* crimes.[93] Similarly, while many transnational crime agreements requiring corporate liability do not suggest a specific method of attribution, those that do tend towards the identification model. For example, the *International Convention for the Suppression of the Financing of Terrorism* (1999) provides that state parties 'shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity', committed Convention offences.[94] Likewise, a number of European instruments adopt a model where corporate liability emerges via offences by persons with a leading position within the legal person, or through offences made possible by such persons' failure to supervise or control others.[95] This latterly feature, basing corporate liability on a lack of adequate supervision or control by persons in leading positions in the company, has been described as a form of 'expanded identification' that incorporates an element of organizational due diligence.[96] The draft ICC articles adopted a particularly restrictive 'identification' approach, requiring that the individual offender not only be 'in a position of control' of the juridical entity, but also acting on behalf of the legal person and with its explicit consent.[97]

A difficulty with the identification approach is determining the point at which an individual can be said to constitute the 'directing mind and will' of the company. States take different approaches to the issue. Further, it can encourage organizations to be structured so as to insulate senior management, hence 'the company', from liability 'by delegating the management of criminogenic activities to lower level managers'.[98] It has also been widely critiqued as inadequate in the context of large complex corporate structures where

[93] *Ibid* 64.

[94] International Convention for the Suppression of the Financing of Terrorism (opened for signature 9 December 1999, entered into force 10 April 2002) 39 ILM 270, Art. 5.

[95] See, e.g., Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) CETS no 173, Art. 18; Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests (adopted 19 July 1997) OJ C 221 of 19.7.1997, Art. 3.

[96] Allens Arthur Robinson (n 88) 4, 7–8, 65–6.

[97] See Appendix A. For a discussion on how these requirements may be broader than they appear at first glance, see Clapham (n 17) 153–5.

[98] Nana (n 87) 100.

decision making and action is diffuse. As a result, it fails to secure convictions in such circumstances, even where corporate fault seems to be strongly suggested.[99] It also suffers the same paradoxical problems of both over-inclusivity and under-inclusivity that plague any vicarious liability model. Over-inclusivity is described above. Under-inclusivity flows from the fact that the entity's liability still depends upon the wrongdoing of a single individual.[100] Notably, the impetus for many modern corporate criminal liability schemes is dealing with the problem of being unable to identify physical persons responsible for an offence.[101]

Modern corporate criminal liability statutes now adopt variants of the conceptually distinct 'organizational' approach to corporate criminal responsibility. This approach has emerged in direct response to the problems associated with derivative models of attribution and to reflect the growing influence of realist schools of thought regarding the ontology of corporate behaviour. Such schools posit that the fault of an organization is distinct from the acts of any particular individuals therein and is instead something that 'inheres in the organization itself'.[102] In such a model, the fault of the corporation does not lie in the decisions of a single organ or individual within the corporation, but within the 'policies, standing orders, regulations and institutionalized practices of corporations … [that are] … authoritative, not because any individual devised them, but because they have emerged from the decision making process recognized as authoritative within the corporation'.[103] The organizational model has yet to be subject to significant criticisms apart from its possible conceptual complexity, albeit that this may be due to being, as yet, largely untested.[104]

2. Article 46C: An Organizational Model

With this overview in mind, the approach adopted in the ACC Statute can be better understood. Before examining Article 46C in detail, a few preliminary

[99] E. Colvin, 'Corporate Personality and Criminal Liability', 6(1) *Crim LF* (1995) 1, at 15–18. For critiques of the identification model see J. Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey', in A. Eser, G. Heine and B. Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Freiburg im Breisgau 1999) 16–18; Nico Jorg and Stewart Field, 'Corporate Manslaughter and Liability: Should we be going Dutch?' (1991) Crim LR 158–62.

[100] *Ibid*.

[101] See, e.g., Allens Arthur Robinson (n 88) 34 (on the impetus for the Swiss corporate criminal liability laws).

[102] Colvin (n 99) 22. See generally 23–5 on the basic elements of the realist view.

[103] Jorg and Field (n 99) 159.

[104] Allens Arthur Robinson (n 88) 69.

comments. Article 46C appears to be derived from, or at least influenced by, an approach developed by Professor Eric Colvin in a law article from 1995, as the drafting is strikingly similar.[105] As a result, reference is made to that 1995 article to aid interpretation of Article 46C. Colvin's recommendations were developed after a critical review of the Australian federal corporate criminal liability laws,[106] which are often held up as a well-devised and progressive example of the organizational approach. Colvin's proposal does not correspond to any specific state's model. It is thus unique and also elegantly simple, but there is some uncertainty as to its scope. There is no reason why the ACC model of corporate criminal liability needn't be *sui generis*. It might necessarily be so given the uniqueness of the project. Certainly, the proposed ICC model was peculiar to it. Simplicity also has its advantages as it may both maximize scope for the Court to develop jurisprudence best suited to the cases it confronts and to accommodate domestic variants operating concurrently. On the other hand, the less specificity of the provision, the more it is open to the criticism of unpredictability. Lack of specificity and the resulting unpredictability of application are of greater concern in the criminal law context. The reason is the added significance of due process rights for criminal defendants flowing from the unique stigmatic implications of a finding of criminal guilt and the nature of criminal punishment, all of which is reflected in the fundamental criminal law principle *nullum crimen sine lege* (no crime without law). It is also noteworthy that Colvin's drafting was not adopted in its entirety in the original draft of Article 46C and was also modified, presumably following consultations and negotiations over the earlier draft. The result is that Article 46C may no longer fully reflect the rationales that justified the drafting recommended in the first instance.

Article 46C adopts an organizational model for corporate responsibility. This is because it does not rely upon the attribution of the conduct and state of mind of specific individuals to the corporation but rather it situates corporate culpability within the corporate policies and corporate knowledge that enabled the offence. It does so by specifying how the distinct mental states of intent and knowledge can be attributed to the legal person without deriving those from the mindset or knowledge of specific individuals within the

[105] Colvin (n 99) 40–1. This is suggested by the fact that Art. 46C doesn't appear to reflect a particular state's approach, as well as that, in its original draft form it closely mirrors Colvin's recommended model. The earlier drafting of Art. 46C can be found in: AU, '*Draft* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (15 May 2012) AU Doc Exp/Min/IV/Rev.7.

[106] Criminal Code Act (Cth) (Aus), Part 2.5, sections 12.1–12.4. Colvin also considered similar laws in Canada.

company. Instead, such fault lies within the decision-making *processes* of the entity itself.

Beginning with the attribution of intent; paragraph (2) provides that the corporation is taken to have intended an offence where 'it was the policy of the corporation to do the act which constitutes the offence'. A first question is what is meant by policy and in particular what kind of evidence the Court would be entitled to consider in determining such policies. On its own, some may interpret paragraph 2 as limiting the evidence to which the Court can have recourse in determining intent to the corporation's *formal* policies. If this were the case it would be problematic, as formal corporate policies may denote one position while corporate attitudes, unwritten rules, or previous practice and courses of conduct, *de facto* authorize something quite different. To protect against this kind of criminogenic risk, for example, Australian federal corporate criminal liability provisions define 'corporate culture' as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.[107] Limiting corporate intent to formal policies is insufficient.

Given its basis in the Colvin model, paragraph (3) of Article 46C is arguably intended to extend what can be considered by the ACC in determining a corporation's policy to include a wider range of evidence strongly suggestive of the company's internal culture. As Colvin describes it, 'intent is the rationale that presents the best explanation of the corporation's policies, rules, and practices considered as a whole.'[108] This is expressed in paragraph (3) as the power of the Court to attribute a policy to a corporation 'where it provides the most reasonable explanation of the conduct of that corporation.' It is intended to convey that a Court is entitled to infer that corporate members understood something to be 'an implied directive', and hence policy, of the corporation, where 'organizational 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.'[109] The challenge is that this reading is not self-evident from the drafting of paragraph (3). A risk is that it might instead be read to reduce the burden of proof regarding corporate intent to the balance of probabilities, which is not the intent behind the original design.

It is also here worth noting a difference between Article 46C and Colvin's drafting in respect of attributing intent, which may or may not be significant.

[107] Criminal Code Act (Cth) (Aus), subsection 12.3 (6).
[108] Colvin (n 99) 33–4.
[109] *Ibid* 38–9.

Article 46C requires a finding that the corporate policy was 'to do the act which constituted the offence.' By contrast, the Colvin model speaks to a policy of non-compliance with the relevant provision. This change of language may make proof of corporate intent more difficult, particularly if the term 'act' is interpreted narrowly to refer to the specific actions of a specific individual perpetrator, rather than to a broader lack of compliance directive. However, reading the provision this restrictively would tend to re-train corporate liability upon that of an individual which is contrary to the underlying philosophy of the organizational approach, and so it is likely the changes in language were not intended to be so limiting. Again, on this issue and by way of contrast, the Australian corporate crime provisions allow a finding of responsibility where the crime was enabled through a corporation's culture that directed, encouraged, tolerated or led to non-compliance or, alternatively, where the corporation failed to maintain a culture of compliance.[110] A narrow reading of 'policy to do the act' may lead to under-criminalization where an organization cannot be shown to have actively sought the specific underlying act constituting the wrong but permitted, acquiesced, or tolerated, precisely that kind of wrongdoing. When interpreting these provisions, the ACC should therefore take care not to inadvertently encourage official but unrepresentative policies to be used to shield responsibility, nor to exclude egregiously poor compliance environments as sufficient to satisfy corporate intent.

In summary, the ACC might consider taking a more liberal rather than formal approach to policy, as paragraph 3 appears to allow, by going beyond corporate written policies, in order to better account for the informal day to day policies of the corporation as manifested in the conduct of its officers. Furthermore, it should not adopt an overly literal reading of 'policy *to do* the act' and thus fail to capture corporate environments where non-compliance with the relevant norm is tolerated and condoned, if not explicitly directed. To do otherwise might create loopholes that companies could strategically exploit in order to avoid criminal responsibility.

Corporate knowledge is then addressed in paragraphs (4) and (5). They provide that where knowledge is an element of an offence, such knowledge can be attributed to the corporation 'by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.' This in turn can be satisfied through the aggregation of such knowledge across corporate personnel. Aggregation of knowledge can be a legitimate means of locating fault within an organizational model of culpability, as it links to the

[110] Criminal Code Act (Cth) (Aus), subsections 12.3 (1), (2)(c) and (2)(d).

broader theme of internal structures and systems that will ensure compliance. Aggregated knowledge models operate on the basis that an organization may 'know' a fact or situation even where no single individual embodies completely such knowledge and that organizations have the capacity to establish information sharing systems that will ensure compliance with law. In other words, the principle that the knowledge of personnel will be aggregated and attributed to the corporation can encourage best information management practices that are valuable in ensuring good corporate citizenship. As Kelly has argued, claims that a company was too big to have shared in knowledge held by individuals diffusely across the corporate structure so as to undercut any entity responsibility are disingenuous 'in the modern age, when technology can ensure that large multinational corporations know very well what's going on within their structures.'[111] Like concepts of corporate culture, aggregated knowledge is another example of how due diligence principles are often embedded in organizational models.

Having said this, the way the principle of aggregating knowledge is adopted in Article 46C might be criticized on a few bases. It is worth here reflecting on the original drafting proposed by Colvin in respect of the attribution of knowledge. It was as follows:

> 3. (a) If knowledge is a required fault element of an offense, that fault element may be established by proof that the relevant knowledge was possessed by a corporation.
>
> (b) Knowledge may be attributed to a corporation where it was possessed within the corporation and the culture of the corporation caused or encouraged knowing noncompliance with the relevant provision.[112]

Colvin explains the rationale behind this drafting as follows:

> What justifies invoking the idea of collective knowledge is that not only is the knowledge possessed but also the corporate culture positively favored the commission of the offense with that knowledge.[113]

This foundational rationale seems to be undermined by the current drafting of Article 46C which dilutes corporate culpability in two ways. First, the Statute allows an aggregation of not only actual but also constructive knowledge. The choice to widen the kind of knowledge that can be attributed to a corporation might be defended in that it tends to further incentivize good corporate

[111] Kelly (n 84) 80–1.

[112] Colvin (n 99) 41. It's worth noting that the original draft Art. 46C, while different, showed greater fidelity to Colvin's recommended wording.

[113] *Ibid* 39.

management by making the corporation responsible for failures among personnel to inquire where they ought. Moreover, it may reflect an expectation that corporate liability is more likely to be in the form of complicity, for which constructive knowledge is sufficient under customary international law.[114] Notwithstanding, it sets up a uniformly different standard for corporate, relative to individual, fault in terms of the degree of knowledge needed generally to satisfy guilt. The level of knowledge required for international criminal law offences and modes of liability in most cases is actual knowledge, with a few instances where knowledge would be expected. A uniform lower standard of knowledge in the case of corporate responsibility relative to individual responsibility, rather than one determined by the substantive crime and its mode of commission, may undermine the normative force of a finding of corporate criminal responsibility.

Second, Article 46C removes the requirement that the corporation must also be shown to have caused or encouraged non-compliance, in light of such knowledge, although this might be remedied by the requirements for attributing corporate intent. In general, there is a risk that paragraphs (4) and (5) may criminalize a company that is not aware of wrongdoing at a level relevant to avoiding the kind of harm suffered, irrespective of reasonable oversight systems. Risks of over-criminalization could be mitigated through the Court separately considering due diligence issues at the sentencing stage. This might be permitted by the concept of 'circumstances of the convicted person' under Article 43A, although the explicit power to consider this issue may be preferable. Furthermore, the exercise of prosecutorial discretion could weed out inappropriately tenuous corporate prosecutions.

It is also worth noting that Article 46C is silent as to the principles by which the physical elements and the specific fault element of recklessness can be attributed to the corporation. In respect of recklessness, the omission of principles for attributing this mental state to a corporation might reflect the view that international crimes require actual or deemed intent and not recklessness.[115] If this is true across the substantive crimes and modes of

[114] For a discussion of the elements of complicity under international criminal law and how these are likely to interact with corporate culpability see, International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability*, vol. 2 (ICJ 2008) 21–4.

[115] This seems to be broadly correct, although command responsibility, for example, can be based in recklessness. Under the Rome Statute, most, if not all, offences require actual or deemed intent. For a discussion of the concept of *mens rea* in international criminal law see, J. Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law', 12 *U Miami Int'l & Comp L Rev* (2004) 57.

liability contemplated under the ACC Statute, the mental elements relevant to international crimes are fully addressed in Article 46C.

The situation in terms of attributing physical elements is a bit more complex. In general, organizational models tend to articulate how a physical offender must be related to the defendant corporation in order for their conduct to bear on the determination of the criminal responsibility of the corporation itself.[116] In the Australian model, for example, the physical element is attributed to the corporation where it was committed by an employee, agent or officer acting in the actual or apparent scope of their employment.[117] In other words, a vicarious liability model is adopted for the physical element only. Having said this, a common exception is where the liability of the legal person is established through a failure to take reasonable care (negligence crimes) that is causatively linked to the harm, in which case the lack of care *is* what constitutes the corporation's 'act'.[118] Swiss and Finnish models go further and allow for corporate responsibility where anonymous guilt constitutes the corporate wrong. This is where the way in which the corporation is organized precludes identification of the offender.[119] Colvin has argued that attribution of the physical element of an offence is not required in his model on the basis that the fact that the corporation's criminogenic culture has made a positive contribution to the offence supplies the requisite link to relevant conduct.[120] This causative link is not explicit in Article 46C, however arguably it is supplied through the requirements that the corporate policy was to do the act (intent) and that the corporation possessed all of the relevant knowledge via its 'corporate personnel' (knowledge).

An open question is whether the concept of 'corporate personnel' (as mentioned in paragraph (5) and referring to how corporate knowledge is ascertained) is limited to employees or whether it includes agents, contractors or even corporate subsidiaries. If the corporation's culpability lies in its criminogenic culture, then in theory any crime enabled through that culture would be sufficiently tied to the corporation to render it culpable regardless of the physical actors also implicated. Indeed, the point of this model appears to be that the nature of the actors undertaking the various aspects of the physical commission of the crime and the legal quality of their relationship to the corporation is less relevant to the corporation's liability than the corporation's

[116] Allens Arthur Robinson (n 88) 72–3.
[117] Criminal Code Act (Cth) (Aus), section 12.2.
[118] Allens Arthur Robinson (n 88) 72.
[119] Art. 102(1) of the Swiss Penal Code; Chapter 9, Section 1 of the Penal Code of Finland (relevant translated extracts available in Allens Arthur Robinson (n 88) Appendices 5 and 6).
[120] Colvin (n 99) 41.

relationship to the crime per se in the form of knowing and intending its commission. Whether a person related to the corporation is an agent, contractor or employee is a matter of legal form tending to reflect a more or less temporary or task related relationship with the corporation, which may have little to do with the specific activities they are engaged in on behalf of the corporation, how closely those tasks relate to the corporation's core business, and the degree of control exercised by the corporation over how such activities are undertaken. Likewise, while corporate subsidiaries are legally distinct from their parent, this may say little about the real degree of parent control over the subsidiaries' activities. The wider the net is cast, the more amenable the model will be to corporate prosecutions, particularly in transnational settings where business is often transacted through local subsidiaries and contract chains and where parent company control can be and is often exercised. But at the same time, and particularly given the permissive grounds for attributing knowledge to the corporation, the wider the net the further determinations may move from genuine situations of corporate misfeasance. To address this problem, if it is seen as such, prosecutorial discretion may again have a role to play. For example, a guiding consideration may be that the actor in question should be authorized (for example, contractually) by the corporation to perform a function that benefits or advances its interests.

Finally, it is important to note that corporate criminal liability in the ACC Statute is not predicated upon the liability or conviction of a natural person. The ACC Statute is thus consistent with most models of corporate criminal responsibility in this regard, derivative and organizational.[121] It is also an improvement upon the ICC draft model that appended corporate liability to that of an individual person. This development is crucially important; as wrongs that occur in corporate settings can mean that no individual can or necessarily should be liable for the same wrong, even where such person can be identified.[122] Moreover, the wrong of the corporation and any individual offenders therein may be qualitatively different. But likewise, and importantly, paragraph (6) clarifies that corporate responsibility is in no sense a shield, should individual responsibility also be appropriate. With crimes as serious as those with which the ACC will be concerned and given the goals of international criminal justice, should evidence disclose that a particular individual or individuals within the corporation fully embodies an offence; such person(s) should be individually called to account. As a starting point, where

[121] Allens Arthur Robinson (n 88) 73.
[122] B. Fisse and J. Braithwaite, 'The Allocation of Responsibility for International Crime: Individualism, Collectivism, and Accountability', 11 *Syd LR* (1988) 468.

individuals in positions of senior management in a corporation or those at a middle management level responsible for corporate policy direction are implicated in ACC crimes, it is reasonable to anticipate that individual criminal responsibility would be pursued alongside any corporate criminal responsibility. This recognizes the distinct purposes and effects of individual and corporate criminal liability. As a subsidiary question, it should be a matter for the Prosecutor and the Court as to if, and how, any corporate and individual prosecutions relating to the same conduct should be joined, determined on a case by case basis. The ACC may wish to develop Rules of Procedure that provide some direction in that regard, recognizing that the interests of an individual defendant may conflict with those of a corporation being prosecuted for related conduct.

The choice to adopt a progressive organizational model for the ACC is understandable and defensible. It makes sense for a modern corporate criminal responsibility scheme to reflect the recent lessons and experiences gained through past efforts around national corporate prosecutions for intent crimes. It has been argued, in the context of proposals for the ICC, that the identification model may be more palatable to a wider range of states given it is reflected in some transnational crime agreements, is the more common national model, and can be accommodated more readily even in states that adopt a vicarious liability approach, given it is simply a limited derivative liability model.[123] This may well be true, although it is important not to overstate similarities across national schemes even when apparently in keeping with the same broad approach. But it can likewise be seen as a backward step for a Court that is likely to influence national legislative progress to adopt an approach increasingly criticized as outdated, particularly in the context of large and complex corporate settings. Any model should be capable of successful application where evidence of corporate blameworthiness is justifiable. It should aim to neither over- nor under-criminalize the behaviour of legal persons, considering how the resources available to corporations empowers them to take serious measures to curb criminogenic tendencies but also bearing in mind the need to uphold the normative sway of criminal law. The challenge for the ACC will be to balance these two imperatives. To an extent, the amenability of the current model to that balancing act can only be tested through the doing.

[123] L. Verrydt, 'Corporate Involvement in International Crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons', in D. Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 286–92.

C. *Corporate Sanctions*

According to Article 43A, available sanctions against a convicted legal person will be limited to pecuniary fines and the forfeiture of 'any property, proceeds or any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'. In addition, Article 45 provides that convicted persons can be ordered to make reparations to victims, in terms of restitution, compensation and rehabilitation. Finally, Article 46M provides that the ACC can order money and property collected through fines and confiscation to be transferred to a Trust Fund for legal aid and assistance to the benefit of victims. These measures reflect the most common forms of sanctions recognized across domestic legal systems that provide for corporate criminal liability. By keeping sanctions limited in this way, the Statute may simplify the mutual assistance situation for the ACC, as seeking inter-state cooperation to enforce such measures is less controversial than if the Statute allowed a wider range of options.

But the Statute is otherwise quite conservative in regard to corporate sanctions. Effective and appropriate sanctions in respect of legal persons can differ depending on the circumstances of the crime and of the entity. Pluralizing sanction options can provide a court with discretion to adopt measures best directed to the circumstances at hand. The Council of Europe (COE), for example, in its Recommendation No. R (88) on the Liability of Enterprises for Offences, took the view that a wide range of corporate criminal sanctions should be introduced by states, on the basis that 'it is doubtful ... whether pecuniary sanctions – be they criminal or quasi-criminal – are sufficiently effective to produce the desired deterrent effect.'[124] Sanctions alternative or additional to financial penalties and forfeiture can serve to demonstrate the moral condemnation attendant on a finding of entity guilt for serious crimes. It can also provide a court with the capacity to intervene directly with the operation of the corporation in ways likely to engendered behavioural changes or to meaningfully punish, though secondary effects for related third parties need to be managed. Proposals for the ICC were more ambitious in that regard and included dissolution (a form of corporate death penalty); prohibitions for a period of time or in respect of certain activities; and closure of

[124] Council of Europe, *Liability of enterprises for offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (COE 1990) [28].

corporate premises used in the commission of a crime.[125] The COE, in its list of suggested sanctions added prohibition from doing business with public authorities, exclusion from fiscal advantages and subsidies, prohibition upon advertising goods or services, annulment of licenses, removal of managers, appointment of provisional caretaker management, closure or winding up, and publication of the decision to impose a sanction or measure.[126] While this broader range of sanctions appear to be explicitly precluded by Article 43,[127] it is also possible that some of these non-pecuniary measures may have in any event been more difficult to sell as they are often the only attraction offered to corporates in risky environments that tend to be in poorer parts of the world, including some contexts in Africa.

Despite the limited nature of corporate sanctions within the ACC Statute, those that do exist may add significant value to the work of the ACC in terms of the recovery of monies and assets for the purpose of reparation, both specific and general. Schabas notes that '[m]ost defendants before international criminal tribunals have claimed indigence'.[128] The risk of indigence is, through common sense, lower in respect of corporate defendants. McGregor argues, in his work on pillaging in the Democratic Republic of the Congo, that even if international courts exercise jurisdiction over corporate directors and officers, the 'international community is allowing corporations to walk away with billions of dollars in profits' obtained from the pillaging of natural resources.[129] However, the potential of asset recovery through corporate sanctions will depend significantly upon prosecutorial strategy and the cooperation of states. States parties are obliged to comply with any requests or orders of the Court in identifying, tracing, freezing, and seizing proceeds, property and assets for the purpose of eventual forfeiture,[130] as well as with the execution of any final

[125] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, Art. 76.

[126] Council of Europe, *Liability of enterprises for offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (COE 1990) arts 6 and 7.

[127] Specifically, Art. 43A(2) of the ACC Statute states: 'For the avoidance of doubt, the penalties imposed by the Court **shall be limited to** prison sentences and/ or pecuniary fines' (emphasis added).

[128] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 810.

[129] M. McGregor, 'Ending Corporate Impunity: How to *Really* Curb the Pillaging of Natural Resources', 42 *Case W Res J Int'l L* (2009) 469, at 490. He goes on to explain how there are few alternative means for victims of pillaging to recover lost resources: at 492–3.

[130] ACC Statute, Art. 46L (Co-operation and Judicial Assistance).

judgment.[131] Mindful use of interim powers and state party cooperation is crucial given the risks of corporate movement of assets. For example, there is the risk that local 'shell' subsidiaries in the place of an offence may have limited assets or be folded with their assets removed to another jurisdiction. The benefit of an international court in this respect is the ability to follow such assets across territorial borders and seek the assistance of states parties to access corporate assets wherever they are located across their collective territories.[132] However, the experience of the ICC to date in securing cooperation and assistance from states constitutes a cautionary tale. The challenge, of course, becomes greater where the assets are moved, or the corporate defendant itself is domiciled, in a third-party state. This may certainly arise in the work of the Court, given that the majority of transnational corporations continue to emanate from the global North.[133] In such situations, third states will need to be prevailed upon to cooperate and establishing agreements to have judgments of the ACC recognized will be needed.

Finally, it is worth noting that the enforcement of fines and forfeiture measures must be undertaken 'without prejudice to the rights of bona fide third parties'.[134] It is sometimes suggested, as a critique of corporate criminal responsibility, that sanctions against corporations harm innocent third parties, such as shareholders and employees. To be fair, if this were a legitimate critique, it would preclude all forms of corporate penalty, criminal or otherwise. While the Court should always be mindful of the secondary effects of any judgment, shareholders (to take one example) should not be considered 'bona fide third parties' nor are they necessary innocent ones. As Colvin notes, shareholders reap the benefit of corporate operations and it is 'therefore not unreasonable to make them bear some of the social costs' of corporate misfeasance.[135] He also goes on to note that the argument of shareholder innocence is even less compelling where an organizational model of liability is adopted, as it is a lack of compliance efforts within the corporation that

[131] ACC Statute, Art. 46*Jbis* (Enforcement of fines and forfeiture measures).

[132] Making a similar point in defense of ICC competence over corporations, see: Jordan Sundell, 'Ill-Gotten Gains: The Case for International Corporate Criminal Liability' 20:2 *Minnesota J Int'l L* (2011) 648, 673.

[133] There is a notable geographical distribution of corporate headquarter states. They are predominantly developed states, many being Western European, though this is beginning to change: B. Roach, 'A Primer on Multinational Corporations', in A. D. Chandler Jr and B. Mazlish (eds), *Leviathans: Multinational Corporations and the New Global History* (Cambridge University Press 2005) 24–8.

[134] ACC Statute, Art. 46*Jbis* (Enforcement of fines and forfeiture measures) and 46L (Co-operation and Judicial Assistance).

[135] Colvin (n 99) 29.

grounds its culpability. Concerned shareholders are not entirely disempowered in that regard, and can press for protective action to be taken or can sell shares if they are dissatisfied with corporate behaviour.[136] Likewise, any rises in prices resulting from corporate penalties[137] are arguably the transmission of the real cost of the goods or services in question to consumers. Moreover, the problem of innocent party impacts is a reality of any punishment, corporate or individual. One need only consider the material and emotional costs to the families, friends and dependents of an incarcerated person to see that this is so. On the other hand, the potential impact on workers is a more complicated issue, given the potential for many to be innocent of the corporation's misconduct. There is, for example, the risk that a corporate fine may be 'socialized' by the corporation in the form of laying off workers or reducing employment conditions[138] or that a fine is so heavy that it affects the corporation's ability to comply with contractual terms agreed with other actors that are innocent bystanders and have nothing to do with its bad (criminal) conduct. These interests most likely cannot be fully accommodated under any corporate punishment scheme. However, the Court could and should think seriously about who can and should be accommodated as 'bona fide third parties' when deciding corporate penalties, using its discretion to avoid situations that will cause severe and sufficiently direct costs on identifiable bona fide third-party interests.

D. *The Challenge of Complementarity*

As mentioned earlier, a challenge for states in deciding whether to adopt corporate criminal liability at the ICC was how the Court could operate in a manner genuinely complementary to domestic systems, given the plurality of national approaches to the issue of corporate crime. According to Article 46H, the ACC is intended to act in a similarly complementary fashion to national justice systems (and presumably to the ICC). The same challenge as to how the ACC will address national desire to deal with a corporate offender they are also contemplating is thus likewise raised. Corporate liability provides a source of tension, both legal and philosophical, between states that do not recognize corporate criminal capacity and the ACC though, as noted earlier, fewer states

[136] *Ibid.*

[137] G. Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', 4(1) *London Rev Int'l L* (2016) 127, at 152 (noting this is one of a number of ways in which corporations can externalize financial penalties).

[138] *Ibid.*

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than ever maintain this absolute position. While the philosophical tension is removed, a question also arises regarding prosecutorial efforts by states where the model of corporate criminal responsibility differs from that of the Court. In short, is the ACC precluded from deferring to national measures in respect of corporate defendants (and hence operating complementarily thereto) if such measures are non-criminal in nature or if the national model of attribution narrows the implications for corporate responsibility?

Before considering this question, it is important to bear in mind that the ACC Statute (like the ICC Statute) does not oblige states to modify their substantive criminal law to reflect its elements of crimes and of criminal responsibility. States may choose to do so, to maximize capacity to take carriage of a given case. In this sense, no doubt the ACC Statute (like the ICC Statute before it) may well catalyze domestic legislating, which is part of its very goal to further the creation of a robust legal environment in Africa. Despite this, the way the complementarity challenge is sometimes discussed in the literature as it pertains to the corporation's proposal seems to presume that substantive criminal law uniformity across states is both a precondition and a requirement of a functioning complementary international criminal institution. That this is not correct is demonstrated plainly by the fact that the ICC Statute came into operation despite the divergence of national systems on numerous principles of criminal law.[139] The control of crime theories that are currently applied at the ICC to determine individual criminal responsibility, which are known to very few domestic legal systems,[140] and even the joint criminal enterprise principles that came before them, likewise put paid to the suggestion that criminal law principles at an international court are only legitimate and functional where they reflect majority global practice. Indeed, the unique modes of liability that have developed in international criminal law have done so not only on the basis of national practices, but also to deal with the unique qualities of blameworthy participation in atrocity. Having said this, the question of how international criminal law deals with the plurality of

[139] For a discussion of the challenges that arose during drafting negotiations at Rome due to differences between states on substantive principles of criminal law, see Saland (n 20).

[140] For detailed analysis of this form of liability and its origins and application at the ICC, see the selection of papers in the 'Special Symposium', 9 *JICJ* (2011) 85–226; N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12(1) *Chicago J Int'l L* (2011) 159–200; F. Jessberger and J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir', 6(5) *JICJ* (2008) 853; H. Olasolo, *The Criminal Responsibility of Political and Military Leaders as Principles to International Crimes* (Hart 2009) 116–34 and 302–30; H.G. van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7(2) *JICJ* (2009) 307; J. David Ohlin, E. Van Sliedregt and T. Weigend, 'Assessing the Control Theory', 26 *LJIL* (2013) 725.

national approaches to criminalization is a real one, and perhaps it is more pronounced in respect of corporate prosecutions than otherwise (though, from a legal rather than political perspective, of this I am not convinced).

As it stands, and without modifying the ACC Statute, it is likely that Article 46H precludes the ACC from deferring to national measures in respect of a corporate actor that fall short of a criminal process. This is strongly suggested by the use of the terms 'prosecution' and 'tried' therein. This means that states that do not have corporate criminal liability schemes in whatever form would be precluded from taking carriage of a case involving a legal person and this may have implications for willingness to engage with the Court. A way to modify this situation, and potentially increase the political palatability of the ACC to some states, might be to adopt a derivative of the transnational crime agreements and explicitly allow the ACC to defer to non-criminal national efforts if certain conditions are met. To be defensible, this option would need to predicate deference upon local non-criminal proceedings meeting certain conditions, such as sufficiently individuated processes and exposure to sufficiently severe penalties, so that they are an effective and proportionate response given the nature of the wrong.[141] The Statute might go even further, as does the OECD Bribery Convention, and allow such deference to national non-criminal schemes only where the jurisdiction in question does not recognize the principle of corporate criminal liability. This option could be actioned through relatively straightforward modifications to the ACC Statute, and in particular to Article 46H.

There are various policy factors that alternatively push towards or away from this reform option. First, there is the potential that recognition of non-criminal processes may minimize the message of wrongdoing and blameworthiness that is delivered via the non-criminal trial and punishment of the corporate defendant. Having said this, it has been argued that social messaging related to legal practices are particular to a relevant legal community rather than universal, in which case it is the local legal culture that is significant and ought to determine responsibility practices.[142] Second, while recognizing non-criminal local mechanisms tends against the trend towards a primary

[141] Indeed, Larissa van den Herik has noted that, provided certain conditions are met, the question of whether a process constitutes a 'criminal charge' is not always determined in international law solely according to the domestic qualification: 'Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counter Arguments and Consequences', in C. Stahn and L. van den Herik, *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 362.

[142] The challenge, in turn, with this proposition is the question of who is the intended audience for the purpose of social messaging in cases involving international and transnational crimes.

requirement of corporate criminal liability emerging under public international law,[143] it may have the pragmatic benefit of moving us collectively closer to a legal environment of corporate accountability across the globe, however locally characterized.[144] Third, there may be some potential implications of this kind of reform for individual prosecutions: whether similar deference to non-criminal measures in admissibility decisions related to individual defendants (for example, recognizing credible truth commissions) would be demanded by a principled approach. However, there may be a solid rationale for differentiating the treatment of natural and legal persons on this issue.

What about national variant models for corporate criminal responsibility? As it stands, Article 46H seems to empower the ACC to defer to national criminal justice efforts irrespective of the national model of attribution adopted. At the ICC, the pertinent issue in deciding the adequacy of domestic efforts involves the interpretation of a number of concepts, such as what constitutes action in respect of the same 'case', and interpretations surrounding the content and breadth of the unwillingness and inability provisions. These ideas are undergoing evolution. The ACC would need to develop its interpretations of these concepts, and apply them in logically consistent ways to cases involving both legal and natural persons, ideally synergistically with the ICC. Having said this, it seems prudent for the ACC to do so in a way that enables the widest possible deference to differences in national approaches to corporate criminal responsibility in order to ensure the spirit of complementarity is maintained.

A final question that may arise is whether there is any necessary relationship between admissibility determinations regarding related corporate and individual prosecutions. In other words, could the ACC refuse to admit a case against an individual defendant on the basis that an interested state was taking sufficient action with regard to that person, while simultaneously admitting a corporate prosecution for related conduct for want of sufficient state action, or vice versa? The correct answer in my view would be yes, with the question of admissibility for each defendant being considered individually, irrespective that their charges may relate to the same underlying conduct. At the ICC, case admissibility determinations rest upon the question of whether the relevant state is acting with regard to the same person and the same conduct.[145] If the

[143] See, e.g., the comments of Mark Pieth in the context of review of the OECD Convention on Bribery, quoted in Allens Arthur Robinson (n 88) 8.

[144] For others advocating a similar solution for similar reasons, see Ezeudu (n 30) 52–3; van den Herik (n 141) 361–2.

[145] See *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Admissibility of the Case), ICC Pre-Trial Chamber I, 31 May 2003.

same interpretation of complementarity is adopted at the ACC, this would mean that admissibility determinations for each separate defendant, corporate and individual, would be a distinct question for the court. This, too, would again reflect that corporate and individual prosecutions for related conduct are distinct inquiries, involving distinct processes, questions and concerns.

4. ENFORCEMENT CHALLENGES

This section of the chapter provides some final, brief, thoughts regarding issues of enforcement. As with any criminal justice system, without appropriate investigative and procedural powers, any model of liability will be ineffective. There are challenges involved in prosecuting serious crimes of an international or transnational kind that will require mutual legal assistance involving one or more states. While corporate prosecutions can be more complex, the difficulties likely to be faced are in many respects the same as for those faced generally by any international criminal court. Having said this, there are some challenges that are peculiar to the effort to bring corporations to account or that can be more pronounced due to the corporate character of the defendant. For example, specific procedural arrangements will be needed to enable corporate prosecutions. These include provision as to who must be served to qualify for proper service, and who is entitled to represent the legal person in proceedings. These are matters properly addressed in the Court's Rules.[146]

As discussed above in the context of enforcing sanctions, corporations implicated in Statute offences may be transnational in character and this creates specific complexities. In many cases, a legal person may be incorporated in one jurisdiction and act through subsidiaries or other related entities incorporated in another jurisdiction. It may therefore be necessary to consider whether and when one corporation can be liable for its role in the offence of another corporation.[147] This can be particularly important where a local subsidiary directly implicated in an offence has limited assets or where it may be made a scapegoat for an offence that is more properly located in the culture and behaviours of the parent corporation. The Statute does not address this question directly however a few options are available when prosecutors are

[146] ACC Statute, Art. 19*bis* (4).

[147] For a discussion of considerations when deciding which entity to prosecute when dealing with a transnational corporate group and the practical and legal issues that can arise, see J. Gobert and M. Punch, *Rethinking Corporate Crime* (Butterworths Lexis Nexis 2003) ch 5; J. Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses', 33(3) *Brook J Int'l L* (2008) 899.

deciding the prosecutorial strategy in any given case. For example, it may be possible to pursue a parent company as an accessory to the offence of a subsidiary or for conspiring to commit the offence in accordance with Article 28N. This might be difficult to prove. An alternative is to argue the responsibility of a parent company where it can be shown that it exercised a requisite level of control over an offending subsidiary company such that the fault lies with it. This may be possible to argue under Article 46C in that the policy of the parent company as to the wrongful act of a subsidiary or related entity under its control may be sufficient to satisfy that provision. In other words, to demonstrate that the parent corporation's policies and actions were sufficiently connected to the crime to warrant its direct responsibility.

The transnationality of corporations and corporate groups also raises challenges of mutual legal assistance in accessing witnesses and documentary evidence, compelling attendance or document disclosure, and enforcing orders across states. As mentioned above, the Statute requires cooperation by states parties. This gives the Court a legal basis to access corporate documents, personnel, property, and assets that are located within the collective territories of those states. More difficult is where assistance is required from states that are not parties to the Court. It may be necessary for the ACC to enter into agreements with third-party states to enable investigation and enforcement in corporate prosecutions, as with any of its work. Article 46L(3) provides explicitly for this, stating that the Court 'shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.'

A complexity that might be encountered in such efforts is with jurisdictions that do not recognize corporate criminal responsibility or where models of corporate criminal responsibility are markedly different and more limited than that provided for under Article 46C. It is difficult to see how this can be avoided, aside from focusing on the corporation's presence in jurisdiction. Perhaps, the limited corporate sanctions available to the ACC may soften the challenges in reaching mutual agreements regarding enforcement of orders. Furthermore, adopting an approach to corporate admissibility determinations that provides as great a deference to domestic alternatives for dealing with the same corporate defendant as is defensible may also serve to maximize good relations between the ACC and states. Separately, third-party states that consider the ACC's corporate responsibility scheme an impermissible legal over-reach into global or external economic affairs, may dispute the legitimacy of efforts to enforce the Statute against corporate nationals. That being said, a number of factors press against the weight of such political critiques. These include the codified and

consent-based nature of the ACC's corporate criminal liability scheme, the limitation of the Court's jurisdiction to territorial, nationality, or protective grounds, and the serious nature of the crimes in question.

A related challenge is the problem that a corporation cannot be extradited (though business executives can be when individually prosecuted).[148] According to Article 46A an accused has the right to be tried in his or her presence. This should be read to include corporate accused, given the intent of the Statute seems to be the consistent treatment of natural and legal persons to the degree that is logical, the serious nature of the crimes in question, and the lack of any specific, defendant rights provisions directed to legal persons. This is despite the presence of gendered language in Article 46A. In the case of a corporate prosecution, this equates to the entitlement for the corporation to have hearings conducting in the presence of a chosen representative. As noted, such representative cannot be compelled through extradition processes to appear and speak on behalf of the company. However, there are ways in which to ensure, so far as possible, such representatives are duly appointed and appear in ACC processes.

First, Rules of Procedure and Evidence will need to clarify how a corporation may appoint a representative and the kind of documentation that will function as proof of such appointment. Such Rules may also stipulate penalties where a corporation fails to duly appoint a representative or to appear when indicted, constituting as that would an act of contempt, so as to further incentivizing corporate defence participation. Notably, such contempt penalties would give rise to the need to ensure enforcement cooperation by states, against corporate assets located in their jurisdictions. Second, it should be noted that it is entirely feasible that corporations, local or foreign, may simply submit to ACC proceedings. As Clough has noted, it may well be in the interests of corporations to submit to foreign proceedings where there are significant business interests that might be jeopardized by failing to do so, a factor that seems to have influenced corporate cooperation with US Foreign Corrupt Practices Act proceedings.[149] For example, a company may well be concerned to protect its reputation against allegations of serious violations against international law. Short of access to the corporation within a state party territory or willing submission, a couple of other suggestions have been mooted. The first is that leading individuals within the foreign corporation sufficiently implicated in the offence might be indicted alongside the company. Through their personal extradition and proceedings, the Court may gain

[148] Gobert and Punch (n 147) 157; Clough (n 147) 922.
[149] Clough (n 147) 923.

access to documents pertinent to corporate proceedings and a representative to appear as the company.[150] The problem, however, is that despite being personally charged, this would not compel such persons to appear as the company in respect of the corporate charges.[151] The ICC model to some extent avoids this problem by appending corporate prosecutions to those of the individual, though the pay-off noted above is the substantially reduced utility of a corporate responsibility scheme limited in this way. An alternative is to allow a trial to proceed in absentia, should the corporation fail to produce a representative.[152] Proceeding against an accused in absentia, even for serious crimes, is allowed in some jurisdiction in such circumstances, although the challenge of enforcing the verdict against the person and their assets beyond the territory of states parties remains.[153] To further protect defence rights, protections may be built into any such trial in absentia scheme, for example allowing for retrial should a corporate representative be subsequently appointed.

This brief survey of the procedural challenges of corporate prosecutions, as well as the earlier discussion of conceptual challenges in substantive law, gives a sense of the complexity that faces the Court in pursuing the goal of corporate accountability. This should not deter it, as the rewards of a stronger compliance environment for corporate conduct in Africa could be significant. It does demonstrate that, ideally, the ACC would be sufficiently resourced such that it might create specialized corporate crime branches within its various organs that can focus energies on the particularities of corporate prosecutions and forge links with national and international institutions that operate in this space.[154]

5. CONCLUSION

Article 46C on the criminal liability of corporations is a significant step in the direction of justice. Corporations can facilitate the crimes of natural persons as well as commit offences in their own right. The criminal liability of corporations for transnational and international crimes is an emerging general principle of public international law. Enabling corporate prosecutions at the ACC reflects empirical evidence of corporate involvement in serious crimes

[150] Gobert and Punch (n 147) 157.
[151] Clough (n 147) 922.
[152] *Ibid* 922–3
[153] *Ibid* 923.
[154] One example would be the Nigerian Corporate Affairs Commission: Chijioke Okoli, 'Criminal Liability of Corporations in Nigeria: A Current Perspective' [1994] 38(1) *JAL* 35, 39–40 (describing the functions of this body).

affecting the African continent and the growing appreciation of the distinctive nature of corporate criminality relative to that of individuals therein. This development may well strengthen the prospects of meaningful reparative and restitutive sanctions that can be used to repair victim communities. It also addresses the moral outrage that exists where corporations benefit financially from involvement in serious crime. The political neutrality of the ACC as an independent international institution also speaks in its favour.[155] As Deya notes, Africa has long pioneered in the international law arena, with 'the rest of the international community "catching up" later'.[156] The prospect of an international criminal court with jurisdiction over legal persons, long debated and much deferred, may well come to fruition under African leadership.

[155] Sundell (n 132) 660–1 and 672–3; Ezeudu (n 30) 51.
[156] D. Deya, 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes', *OpenSpace on Int'l Crim Justice* (2012) 22, at 26.

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APPENDIX A

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 organization registered, and acting under the national law of the State as a non-profit organization.

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.