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The Future of International Criminal Justice is Corporate

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ABSTRACT

The article explores the evolving recognition of corporate liability within international criminal law (ICL), traditionally centred on individual criminal responsibility. It underscores the involvement of multinational corporations in international crimes, human rights abuse and environmental harm. The article examines domestic and international legal frameworks, including the Malabo Protocol, which explicitly incorporates corporate liability for core international crimes and transnational crimes. It contrasts nominalist and organizational models of corporate liability and addresses conceptual challenges such as corporate intent and agency. The article advocates for integrating corporate liability into ICL responses to atrocity crimes, emphasizing its potential to bridge the Global North-South asymmetry in liability and provide equitable justice.

1. INTRODUCTION

In International Criminal Law (ICL), the focus has for a long time been on the individual. Increasingly, scholars, practitioners and human rights advocates call for looking beyond individual responsibility to hold legal entities, multinational corporations, accountable for core international crimes.¹ A focus on individual perpetrators may not tell the full story. Multinational corporations have a stake in conflict zones where rebels and government forces fight for control over precious natural resources. In the global pursuit of valuable minerals and raw materials, (Western) companies, rebel groups and corrupt government officials are strange bedfellows. It is no coincidence that three of the convictions (Lubanga, Katanga, Bemba) by the International Criminal Court (ICC) pertain to individuals commanding rebel groups in the mineral-rich region of Ituri. As the United Nations (UN) special rapporteur on human rights in the Democratic Republic of Congo (DRC) reported in 2003:

¹ J. Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project', 30 *Leiden Journal of International Law* (2017) 221–240; W. Huisman, *Business as Usual? The Involvement of Corporations with International Crimes* (Boom Legal Publishers, 2010); A. de Tommaso, *Corporate Liability and International Criminal Law* (Taylor & Francis, 2024).

‘despite the ethnic appearance of the conflict, its root causes are of an economic nature’. Another reason for turning to corporate liability is more pragmatic. Compensation for victims is likely to be easier when a corporation is found liable. It was exactly this reason that swayed states all those years ago to back a proposal for jurisdiction over legal persons in the draft statute for the ICC. This proposal never made it into the final text. There are reasons to reconsider this conservative position — the world has moved on since 1998.

For some time now, national jurisdictions have accepted that legal entities can commit offences and be held accountable under civil law, administrative law and/or criminal law.² At the international level, we have a system in place that provides for monitoring and supervision of corporations to ensure they respect human rights. Corporations can be taken to court for violating international law, in particular human rights.³ From there, it is only a small step to corporate criminal liability for — direct and indirect — involvement in core international crimes. In the current context of serious environmental harm (ecocide), the real prospect of dangerous artificial intelligence crime (automated weapons) and the dark business of arms trade fuelling an increasingly dangerous world, corporate liability keeps ICL in lockstep with current developments.

In recent years, domestic prosecutors have brought cases against economic actors for their involvement in core international crimes.⁴ The LaFarge⁵ and Lundin Oil⁶ cases are examples of domestic prosecutors shifting attention to new avenues of accountability. The Annual Universal Jurisdiction Overview 2023 published by Trial International speaks of a ‘trend’ in the rising number of judicial initiatives aiming to hold economic actors — companies and their executives — accountable for their responsibility in international crimes.⁷ Essential is the role of civil society. They push prosecutors to fill this gap in ICL and universal jurisdiction practice.

At the international level, corporate criminal responsibility is still a rare thing. In 2014, the Special Tribunal for Lebanon held that legal persons can be the subject of contempt proceedings.⁸ Three TV stations were held in contempt because of revealing names of witnesses that should have been kept concealed. Corporate liability was read into the Statute; the term ‘person’ was found to extend to natural and legal persons. In justifying this interpretation, the Tribunal referred to Lebanese law and ‘a general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers’.⁹

The most prominent attempt to establish a system of corporate liability at the international level is the one proposed by the African Court of Justice and Human Rights

² D. Roef, ‘Corporate Criminal Liability’, in J. Keiler and D. Roef (eds), *Comparative Concepts of Criminal Law* (Intersentia, 2019) 333–373. For an interesting piece on the ‘outlier’ Germany in not allowing corporate criminal liability, see S. Beck, ‘Meditating the Different Concepts of Corporate Criminal Liability in England and Germany’, 11 *German Law Journal* (2010) 1093–1114.

³ Monitoring system OECD.

⁴ Project by Susanna Karstedt, Wim Huisman and Annika Van Baar, on file with author, presented at Onati International Institute for the Sociology of Law, 11–12 July 2024.

⁵ Asymmetrical Haircuts, ‘The Good and the Bad about LaFarge Case’, 24 January 2024, available online at www.justiceinfo.net/en/127682-good-bad-lafarge-case.html (visited 13 January 2025); N. Belhoste and B. Nivet, ‘The Organization of Short-Sightedness: The Implications of Remaining in Conflict Zones. The Case of Lafarge during Syria’s Civil War’, 60 *Business and Society* (2021) 1573–1605.

⁶ See O. Truc, *Lundin Oil: the Trial that “should never have taken place”*, 8 December 2023, available online at www.justiceinfo.net/en/125751-lundin-trial-should-never-have-taken-place.html (visited 13 January 2025); M. Klamburg, ‘Prosecuting Corporate Executives for War Crimes in Sudan’, 54 *New York University Journal of International Law and Politics* (2021–2022) 887–939. For an early publication on the harmful activity of Lundin: I. Schoultz and J. Flughed, ‘Doing Business for a “Higher Loyalty”? How Swedish Transnational Corporations Neutralise Allegations of Crime’, 66 *Crime, Law and Social Change* (2016) 183–198.

⁷ Trial International, *Universal Jurisdiction: Annual Review 2023*, available online at https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf (visited 13 January 2025), at 11.

⁸ STL, *New TVS A.L. Karma Mohamed Thasin Al Khayat* (STL-14-05), Appeals Chamber, 31 January 2014.

⁹ *Ibid.*, § 26 citing a report by Clifford Chance, *Corporate Liability in Europe*, January 2012.

(ACJHR) in the so-called Malabo Protocol. This Court — with few ratifications¹⁰ — explicitly provides for jurisdiction over legal persons alongside natural persons. As such, it changes ICL in a revolutionary way. In one simple sentence, in Article 46C, by extending jurisdiction over legal entities, the Protocol recognizes corporate criminal liability.¹¹ The provision gives us a good framework to discuss central issues of corporate liability for core international crimes and explore whether it is desirable and/or realistic to revisit the ICC discussion on corporate liability.

2. THE MALABO PROTOCOL

The Malabo Protocol grants the Court jurisdiction over 14 crimes: 4 core international crimes¹² and 10 transnational crimes¹³; crimes that have a cross-border effect and that require transnational inter-state cooperation to be effectively countered domestically.¹⁴ Transnational crimes capture the reality of business misconduct in Africa. Corporations in search of extractive resources and inexpensive labour operate in countries such as DRC, Angola, Guinea, Cote d'Ivoire, Nigeria, Central African Republic, Liberia and Zimbabwe. They are involved in the oil industry, mining business, diamond and timber trade, and dodgy land deals in the palm oil industry. Companies come from all over the world: UK, the Netherlands, USA, Lebanon and China. Some of these transnational crimes capture corporate misconduct as direct criminal responsibility, for example corruption, money laundering and illicit exploitation of natural resources.

The international crime definitions in the Malabo Protocol are drawn from the ICC. They are somewhat tweaked and added to. Rape and sexual violence are mentioned as a separate act of genocide and the chapeau element of crimes against humanity stipulates that crimes are committed as part of a 'widespread or systematic attack or enterprise against civilian population'. The definitions of transnational crimes are drawn from a number of international and regional conventions. Again, they are slightly tweaked, adding clauses on extending liability (via modes of liability) or applying the crime to specific situations ('in aid of or opposed to certain government'). Some of these Conventions already provide that the crimes can be committed by legal entities.¹⁵

The Malabo Protocol's broad scope of jurisdiction, extending over international and transnational crimes, comports with the increased recognition that the two categories of crime should not be kept separate since they are often committed in *tandem*. One offence is conspicuously lacking from the list: forced labour/slavery. In Nuremberg, it featured as one

¹⁰ On 14 June 2024, Angola became the first African Union Member State to ratify the statute of the Malabo Protocol. Fourteen other AU countries still need to ratify the statute before it enters into force.

¹¹ Art. 46C(1): For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

¹² Aggression (Art. 28A(1)(14)), genocide (Art. 28B), crimes against humanity (Art. 28C), war crimes (Art. 28D).

¹³ Crime of unconstitutional change of government (Art. 28E), piracy (Art. 28F), terrorism (Art. 28G), mercenarism (Art. 28H), corruption (Art. 28I), money laundering (Art. 28Ibis), trafficking in persons (Art. 28J), trafficking in drugs (Art. 28K), trafficking in hazardous wastes (Art. 28L), illicit exploitation of natural resources (Art. 28M).

¹⁴ The definitions of transnational crimes are drawn from a number of international and regional conventions: Convention for the Elimination of Mercenarism in Africa, adopted 3 July 1977, entered into force April 2002; OAU/AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1979, entered into force December 2002; AU Convention on Preventing and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; 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 and entered into force 22 April 1998.

¹⁵ Art. 1(16) Bamako Convention: person is natural and legal person. Art. 1(3) Convention on Elimination of Mercenarism in Africa provides that: any person, *natural or juridical* who commits the crime of mercenarism ... shall be punished as such.

of the offences the industrialists were charged with.¹⁶ It is criminalized in the Malabo Protocol as a war crime and as a crime against humanity but not as a stand-alone crime. It is puzzling that it was left out of the list of 14 crimes. A lot of the illegal trade comes with forced labour: for instance, in the diamond mines in Congo.

Before we consider ways in which we can enhance the possibility of corporate liability for core international crimes, we need to reflect on how corporate criminal liability is construed.

2. MODALITIES OF CORPORATE (CRIMINAL) LIABILITY

There are roughly two conceptual approaches or models of construing corporate liability: the nominalist model and the organizational model.¹⁷ The nominalist model is premised on the idea that the organization acts via its individual members. Liability of the corporation is derived from those individuals. A typical example of a nominalist, derivative approach to liability is the doctrine of vicarious liability. Its origins can be found in England and Wales, where it originally applied to regulatory offences, not demanding proof of fault (strict liability).¹⁸ Over the years, qualified forms of vicarious liability have been developed to overcome the doctrine's limitations, especially its non-applicability to *mens rea* offences. One way of doing so is by construing offences in a 'failure to act-format'.¹⁹

Another form of nominalist, derivative corporate liability is the identification doctrine, where the liability of the entity is established by identifying the actions and thought patterns of certain individuals within the corporation who act within the scope of their authority and on behalf of the corporate body. Their conduct is regarded as the conduct of the legal body itself.

The organizational model regards the organization as a social reality; it is capable of acting independently of its individual members. The corporation is criminally liable for its *own* conduct and knowledge. Conceptually, this is the most challenging approach. Thinking about the criminal responsibility of abstract legal entities without a body to kick and a soul to damn does not sit well with the concept of agency and personal fault. Elements that are used to construe this type of corporate liability are corporate culture and corporate attitude, often drawn from strategy reports and monitoring proceedings. Corporate fault can be established when flawed formal procedures or informal practices have been approved, encouraged or condoned at the management level.

The real problem with corporate liability and corporate complicity is *mens rea*. The enquiry into the organizational *mens rea*, will often rely on aggregation and assembling attitudes from several (individual) agents, often at the management level. Reasonableness, often using an objective test, plays a role in circumscribing liability. Central to a finding of guilt is the question: was the risk of crimes reasonably foreseeable?

Some domestic jurisdictions dispense with *mens rea* altogether. In Australia, the statutory provisions providing for organizational liability for federal offences rely on the concept of 'corporate ethos' and 'corporate culture'.²⁰ If intention, knowledge or recklessness is the fault

¹⁶ Count three in *The United States of America v. Carl Krauch et al. (IG Farben Trial)* charged the commission of war crimes and crimes against humanity through participation in enslavement and forced labour of the civilian population of countries and territories occupied or controlled by Germany, the enslavement of concentration-camp inmates within Germany, and the use of prisoners of war in operations and illegal labour. US Military Tribunal Nuremberg, judgment of 30 July 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. VIII, at 1081.

¹⁷ Roef, *supra* note 2, at 335–339.

¹⁸ J. Horder, *Ashworth's Principles of Criminal Law* (10th edn., Oxford University Press, 2022), 166–170.

¹⁹ Bribery Act 2010 in England and Wales. See C. Wells, 'Corporate Criminal Liability: A Ten Year Review', 12 *Criminal Law Review* (2014) 849–878.

²⁰ 'Corporate culture' is defined 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'; Criminal Code Act, 1995 § 12.3(6)

element of the underlying offence, it is attributed to the entity that expressly authorized or permitted the commission of the offence. Such authorization or permission is then established by proving that a corporate culture existed within the organization that directed, encouraged, tolerated or led to non-compliance with the law.²¹

Most civil law jurisdictions are fault-based and do not accept strict liability,²² which explains why traditionally the nominalist model is the preferred model in construing criminal liability of a corporation. Moreover, some form of intent needs to be proven. Negligence or gross negligence, accepted as the fault degree for corporate manslaughter in England and Wales, is insufficient as fault degree for serious crimes in these jurisdictions.

The provision on corporate liability in the Malabo Protocol is a combination of the nominalist and organizational approaches.

Article 46C Malabo Protocol:

...

- (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.

Article 46C(2) speaks of corporate intention by proof of a policy; this is an expression of the organizational approach. Paragraph 3 expands on that by stipulating how this may be established: a reasonable explanation of the conduct of that corporation. Paragraphs 4 and 5 further make clear that knowledge can be construed by deducing it from reports and/or monitoring procedures and by combining it from a collectivity of agents; assembling a corporate attitude by way of aggregation.

An alternative way of dealing with corporate wrongdoing is via administrative law. The German Penal Code does not recognize corporate criminal responsibility but does accept corporate liability under the *Ordnungswidrigkeitengesetz* (OWiG), which deals with administrative offences. While corporations cannot be held accountable under the Criminal Code, they may still be subject to fines for up to 10 million Euros (more under certain conditions) under the OWiG for intentionally committing an administrative offence.²³ For the European Court of Human Rights, the (national) label attached to a law is irrelevant for the application of Article 6 of the Convention on fair trial rights. The criminal nature of an administrative sanction can be deduced from the general character of the rule (deterrent) and the

²¹ E. Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity', 4 *Buffalo Criminal Law Review* (2000) 641–708, at 699–700.

²² See J.R. Spencer and A. Pedain, 'Approaches to Strict and Constructive Liability in Continental Criminal Law', in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford University Press, 2005), 237–283. Spencer and Pedain do, however, admit that the difference between common law and civil law jurisdictions should not be exaggerated. The fact that strict liability is accepted for misdemeanors in many civil law jurisdictions and the fact that there are less stringent evidentiary rules for proving fault nuances the distinction between common law and civil law jurisdictions.

²³ *Gesetz über Ordnungswidrigkeiten* 1968, s 30(2) sub 1.

purpose of the sanction (punitive).²⁴ This, to my mind, should prompt us to nuance the difference between criminal law and non-criminal law approaches to corporate liability. A ‘purist’ criminal law approach seems especially unwarranted in corporate liability cases where sentencing often comes down to economic sanctions, that is serious fines.

Tort law is another route to holding corporations liable. The Alien Tort Statute has allowed (foreign) plaintiffs to bring claims against multinational corporations for violating human rights. This possibility has been narrowed over time by the USSC (in particular in *Kiobel*²⁵), but some real victories have been heralded via the tort route. A jury in the Southern District of Florida held that Chiquita Brands International was liable for \$38 million in damages for the deaths of eight Colombian citizens.²⁶ The company was found liable for financing the United Self-Defense Forces of Colombia (AUC), a brutal paramilitary death squad.

In ICL, when we talk about corporate liability, we might want to adopt a broader approach and step back from insisting on corporate *criminal* liability.

3. CORPORATE LIABILITY AND THE ICC

The draft statute of the ICC contained a provision on legal persons in brackets, indicating that it was not accepted by consensus.²⁷ While several delegations stated that such liability ran counter to their domestic law, the point was made that the liability of a corporation could be important in the context of restitution. Moreover, a collective concept of liability had been applied in the Nuremberg judgment with the concept of criminal organizations.²⁸ The debate on corporate criminal liability, however, proved divisive. The non-recognition of corporate criminal liability in their own jurisdictions made some delegations look at the proposal with scepticism. Despite an attempt by the Coordinator of the Working Group to propose a provision on corporate criminal liability that was linked to the criminal liability of natural persons,²⁹ delegations eventually abandoned it.³⁰ Individual criminal responsibility is currently the only route to hold corporate actors criminally liable.

²⁴ *Oztürk v. Germany*, Appl. No. 8544/79, 21 February 1984.

²⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

²⁶ J.P. Hipp, A. Bernstein and A. Grainer, ‘The *Chiquita* Verdict Expands International Human Rights Liability for Corporate Conduct Abroad’, *Just Security*, 26 July 2024, available online at www.justsecurity.org/98093/chiquita-verdict-hu-man-rights (visited 13 January 2025).

²⁷ UN Report of the Preparatory Committee of the Establishment of an International Criminal Court, Vol. I, at 44, § 194, available online at <https://www.legal-tools.org/doc/e75432/pdf> (visited 13 January 2025).

²⁸ See N.H.B. Jorgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000).

²⁹ By proposing this provision:

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment 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);
- 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;
- 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.

Summary records of the plenary meetings and of the meetings of the Committee of the Whole in Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998, Vol. II, UN Doc A/Conf.183/C.1./L.3, 132, at 252.

³⁰ See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998, Vol. III (A/CONF.183/13), document A/CONF.183/2, Art. 23, § 6, fn. 71 (‘deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute’). See J. Kyriakakis, ‘Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge’, 56 *Netherlands International Law Review* (2009) 333, at 336–339; A. Clapham, ‘The Question of Jurisdiction under International

Prosecuting economic actors as natural persons is, however, difficult. For complicity/aiding and abetting, the ICC requires a purposive attitude on the part of the economic actor, CEO, or company director.³¹ Ad hoc tribunals applied a knowledge test, which is less onerous. The issue of which test is the appropriate one for complicity/aiding and abetting in ICL came up in the *Talisman Energy* case in the USA. The Court had relied on the ICC standard in finding in favour of the company and holding that '[p]laintiffs have not established Talisman's purposeful complicity in human rights abuses'.³² As *amici curiae* before the US Supreme Court, a group of international scholars argued convincingly that under customary international law, aiding and abetting liability requires that an accused *knowingly* provide substantial assistance to the perpetrator or tortfeasor.³³ This is also the test in the Malabo Protocol: corporate *knowledge* suffices (Article 46C(4)) for liability. The US Supreme Court never ruled on the issue; it announced it would not hear the appeal.

The question of corporate criminal liability under the 'Rome regime' pops up regularly. Bypassing the strict threshold of 'purpose' in Article 25(3)(c), Kotzamani proposes to prosecute corporate actors on the basis of indirect (co-)perpetration.³⁴ This would require the concept to be less rigid and the ICC to abandon its 'Roxin-inspired' concept of control, which is an essential element of indirect (co-)perpetration.³⁵ Tom Hamilton and Lydia de Leeuw, in separate publications, propose prosecuting corporations for contributing to a common criminal purpose, criminalized under Article 25(3)(ii).³⁶ Hamilton argues it would enhance the ICC's deterrent effect on the arms trade if there were prosecutions under this mode of liability.³⁷ However, he admits that his proposal only applies to small-scale brokers and sole-trading individuals.³⁸

In 2016, Scheffer writes that the situation has changed since the time of the drafting of the ICC Statute; there is broader acceptance of corporate liability in both domestic criminal law and ICL. He argues in favour of ICC jurisdiction over legal persons:

Today, the global landscape regarding corporate criminal liability in national jurisdictions has changed, including in many of the States Parties to the Rome Statute. Theoretically, the exercise of complementarity, while still problematic in some jurisdictions, will become more plausible in the event the Rome Statute is amended to embrace corporate liability and a significant number of States Parties transform their own national criminal codes to cover juridical persons in the commission of, or complicity in, atrocity crimes.³⁹

Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 139, at 142.

³¹ Art. 25(3)(c): *For the purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists (the commission of crimes) [italics, EvS].

³² *Presbyterian Church of Sudan v. Talisman Energy Inc.* (582 F.3d 244, 259), at 2.

³³ US Supreme Court, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc.* (No. 09-1262), Amicus Curiae of International Law Scholars, 30 April 2010, available online at <http://law.harvard.edu/programs/hrp/Talisman%20Amicus%20Final%20Filed%204.30.10.pdf> (visited 13 January 2025).

³⁴ P. Kotzamani, 'Corporate Criminality and Individual Criminal Responsibility in International Law: Removing the Hurdles from the International Criminal Court's Approach to Perpetration through Control of a Collective Entity', 20 *International Criminal Law Review* (2020) 1108–1137.

³⁵ The 'control theory' requires control over an entity with a tight hierarchical structure and exercise of effective control over subordinates and over a specific geographical area. See Kotzamani, *ibid.*, at 1112–1113.

³⁶ T. Hamilton, 'Arms Transfer Complicity Under the Rome Statute', in N.H.B. Jorgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, 2020) 148–186; L. de Leeuw, 'Corporate Agents and Individual Criminal Liability under the Rome Statute', 5 *State Crime Journal* (2016) 242–267.

³⁷ Hamilton, *supra* note 36, at 184.

³⁸ Because of the knowledge requirement regarding usage of weapons and the causal connection to the commission or attempted commission of the crime; see Hamilton, *supra* note 36, 150, 182.

³⁹ D. Scheffer, 'Corporate Liability under the Rome Statute', 57 *Harvard International Law Journal Online Symposium* (2016) 35, at 38.

In 2019, Maisie Biggs makes a similar point when she points to post-Rome developments, in particular the Draft Articles on the Prevention and Punishment of Crimes Against Humanity.⁴⁰ The latter comes with a provision on the responsibility of legal persons in Article 6(8):

Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.⁴¹

A more recent initiative that recognizes corporate liability for core international crimes is the Ljubljana–The Hague Treaty. This treaty aims to strengthen cooperation in investigations and prosecution of core international crimes and provides for the liability of legal persons in Article 15:

- (1) Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for their participation in the crimes to which that State Party applies this Convention.
- (2) Subject to the legal principles of a State Party, the liability of legal persons may be criminal, civil or administrative.
- (3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the crimes.
- (4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The provision is broader than the Malabo Protocol because, like the Draft Articles on the Crimes against Humanity Treaty, it provides for non-criminal law enforcement ('criminal, civil or administrative'). Moreover, the treaty is broad enough to allow for attribution via individual agents. Liability can be attributed to the entity by way of the vicarious liability of a company's agent; this nominalist approach fits well with the majority of (civil law) jurisdictions that provide for corporate criminal liability.

These provisions in the Draft Articles on the Prevention and Punishment of Crimes against Humanity and the Ljubljana–The Hague Treaty are part of so-called suppression treaties; they have as their main purpose domestic enforcement via the improvement of inter-state cooperation in legal matters suppressing specific (transnational) criminality. They do not come with an international criminal justice system like the ICC. The emphasis in the above provisions is on setting a duty to legislate, on an end result. It does not stipulate how to get there. This does not make them irrelevant in arguing for corporate liability in the ICC Statute. Both the ICC and transnational criminal law/suppression treaties are about the enforcement of international law via domestic law. This comparison is even more compelling

⁴⁰ M. Biggs, 'International Criminal Law and Corporate Actors—Part 2: The Rome Statute and its Aftermath', available online at <https://www.asser.nl/DoingBusinessRight/Blog/post/international-criminal-law-and-corporate-actors-part-2-the-rome-statute-and-its-aftermath-by-maisie-biggs> (visited 13 January 2025).

⁴¹ *Draft articles on Prevention and Punishment of Crimes Against Humanity Adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10)*, available online at https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf (visited 13 January 2025).

when we consider the ICC's new approach to complementarity, which is more deferential to domestic law.⁴²

The EU law on corporate liability occupies a middle position between suppression treaties and a detailed criminal statute like the Rome Statute. It provides for a more detailed provision on corporate liability than the suppression treaties whilst setting a duty for Member States to legislate.⁴³ The EU has emerged as a formidable front against corporate crimes, mostly on the front of corruption, which harms the EU's own interests. Article 6 of the EU Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law — a provision that can be found in similar terms in other EU instruments protecting the EU's financial interests⁴⁴ — stipulates:⁴⁵

- (1) Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person; or
 - (c) an authority to exercise control within the legal person.
- (2) Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Article 3, 4 or 5 for the benefit of that legal person.
- (3) Liability of legal persons under paragraphs 1 and 2 of this Article shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 3 and 4 or who are criminally liable under Article 5.

Within this framework, an attribution mechanism is developed for corporate criminal liability, which is premised on the principle of vicarious liability and hierarchical identification of the offender (the 'controlling director'). Furthermore, the provision permits cumulative liability: both the natural person and the legal person can be prosecuted at the same time without necessarily linking corporate liability to individual liability (which was the case in the ICC draft provision). The provision contains different criteria for attribution. First, a natural person must commit the offence for the corporation's benefit, entailing vicarious liability. As presented in paragraph one, the identification principle requires perpetrators to occupy a specific hierarchical position based on their decision-making, representative or managerial authority. Furthermore, the corporation can be held responsible for lack of supervision or control by the above-mentioned leading individual. This is easily transposable to the ICC Statute, where a failure to supervise is currently captured in the provision on superior responsibility (Article 28). It could feature as a third section in that provision.

⁴² ICC OTP, *Policy on Complementarity and Cooperation*, April 2024, available online at www.icc-cpi.int/sites/default/files/2023-10/DRAFT-Complementarity-and-Cooperation-Policy-Paper_September-2023%20%281%29.pdf. See Symposium by Just Security on this new policy, available online at www.justsecurity.org/tag/icc-policy-on-complementarity (both websites visited 13 January 2025).

⁴³ Keiler and Roef, *supra* note 2, at 337.

⁴⁴ It can be traced back to Art. 3 of the Second Protocol to the 1995 European Convention on the Protection of the European Communities Financial Interests ('PIF-Convention') (1997).

⁴⁵ E.g. Art. 8 of Regulation 2014/57/EU on criminal sanctions for market abuse, No. 596/2014, 16 April 2014, L173/179.

The approach taken by the EU shows the compromise made to satisfy all Member States. If we ever want the ICC to have a provision on corporate liability, this might be a good model.⁴⁶ Since it represents the vicarious/nominalist model, it is less conceptually controversial than the organizational model of corporate liability that is prominent in the Malabo provision.

4. CONCLUDING THOUGHTS

Nicole de Silva and Mary Amadi recently commented on the Malabo Protocol's tenth anniversary. They conclude that the prospects for an African Court with criminal jurisdiction remain uncertain.⁴⁷ The Protocol is ambitious with 10 additional crimes, beyond the 4 core international crimes. Ratifying it will lead to an implementation overload for states. Moreover, vesting the ACJHR with criminal jurisdiction alongside its human rights mandate has caused ACJHR judges to raise concerns.⁴⁸ Despite all that, the Malabo Protocol is important for its symbolic value. It holds the promise of a 'fuller account' of liability.

Corporate liability in ICL can be game changer. It can upend the Global North-South asymmetry in terms of liability. In its most recent annual report on universal jurisdiction cases, Trial International notes that 13 jurisdictions are actively prosecuting international crimes.⁴⁹ Of these 13 countries, 10 are European. By indicating where the crimes are committed, the report reveals that crimes perpetrated in the Global South (Africa, the Middle East and Asia) are all — apart from Argentina — prosecuted and tried in the Global North (Europe). This points to a 'balance of guilt' that obscures the reality of foreign (Western) interests in atrocity crimes.

The future of international criminal justice is corporate, and national jurisdictions are leading the way. Civil society organizations (CSOs) have played a leading role in getting cases to court. Prosecutorial entities should do the same, to harness their efforts in bringing cases, to see where the gaps are and to test the limits of corporate liability for core international crimes. On top of that, we should, like David Scheffer, continue to argue the case for *international* corporate liability and address the current gap in the ICC Statute. After 30 years of experience in international criminal justice, we see the limits of focusing on the individual. The criminal liability of legal persons allows for a fairer distribution of justice. Given current geopolitical developments, where the ICC is facing increased pushback from powerful states, it might be opportune to focus on corporate actors fuelling conflict rather than going after high-ranking state officials.

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⁴⁶ F.A.L. Jung, 'Incorporating Corporate Criminal Responsibility into the Rome Statute: A Push-Forward by National and Regional Legal Systems?' (2023), thesis available online at www.duo.uio.no/handle/10852/109347 (visited 13 January 2025).

⁴⁷ N. de Silva and M. Amadi, 'The Malabo Protocol's 10th Anniversary Revives Advocacy for an African Criminal Court', *EJIL: Talk! Blog of the European Journal of International Law*, 25 December 2024, available online at <https://www.ejiltalk.org/the-malabo-protocols-10th-anniversary-revives-advocacy-for-an-african-criminal-court/> (visited 13 January 2025).

⁴⁸ De Silva and Amadi, *ibid.*

⁴⁹ Trial International, *Universal Jurisdiction Annual Review 2024*, available online at https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (visited 13 January 2025), at 11–12