



Regulating the Exploitation of Natural Resources through the Doctrine of Corporate Criminal Liability in Contemporary Africa

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Abstract

This article is based on the growing change of trend on the doctrine of corporate criminal liability. The author has underlined the changes under the auspices of the African Union which have created a contemporary scope of corporate criminal liability by adhering to the non-derivative mode of corporate criminal liability. The article undertakes an analysis of how the inclusion of other crimes such as economic crimes and cross border crimes under the Malabo Protocol may contribute to widening the scope of crimes and corporate criminal liability at the international level. It also discusses the importance of bridging the impunity gap between natural and artificial legal persons given the fact that corporations may be the direct perpetrators of economic crimes, and that they might be involved in aiding and abetting human rights violations and other related crimes. The author has further analysed the fact that the African regional block has an opportunity to contribute towards the development of different doctrines that influence the development of international law through the Malabo Protocol. The article points out the importance for African countries to maintain the derivative mode of corporate criminal liability, by expanding the list of penalties that can be imposed on artificial legal persons.

Keywords: Corporate criminal liability; natural resources; Africa; crimes; punishment

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1 INTRODUCTION

Natural resources cover a wide range of resources both on land and sea which ought to be under the sovereign right of a particular state¹ or under the common heritage of mankind.² Private legal entities and states have major share in the exploration of natural resources with a clear vision of maximizing economic benefits. It has been noted that,

the impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons, thereby prolonging and intensifying the fighting and the suffering of civilians.³

Thus, corporations are not exempted from the commission in the form of complicity/participation of the core international crimes of genocide, war crimes and crimes against humanity. In order to regulate the manner in which natural resources are being exploited by bridging the gap between individual accountability and corporate accountability, regional law has come to embrace the doctrine of corporate criminal liability.⁴

Corporate criminal liability involves the criminal liability of corporations as legal entities or juridical persons as opposed to civil liability.⁵ Traditionally, international criminal law has confined itself to only four categories of international crimes namely war crimes, crimes against humanity, genocide and the crime of aggression. This trend is still the same to date at least, at the international level. In Africa, the state of affairs has significantly changed bringing about a shift in the understanding of international crimes within the African context. The AU has thus broadened the categories of crimes considered to be of regional concern akin to those considered to be the concern of the international community as a whole, as may be inferred from the Rome Statute.⁶ Thus, in the African context, the criminal liability has extended to cover more crimes for example Trafficking in Hazardous Wastes, and Illicit Exploitation of Natural Resources, just to mention a few.⁷ All these crimes can be committed by corporations in the course of exploitation of natural resources in Africa.⁸ For example, the problem of illegal exploitation of natural resources has been reported in countries such as the Democratic Republic of the Congo. The reports⁹ state that:

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- 1 General Assembly Resolution on Permanent Sovereignty over Natural Resources (UN General Assembly Resolution 1803 (XVII) (1962)), and the subsequent 1974 Charter of Economic Rights and Duties of States (UN General Assembly Resolution 3281 (XXIX) (1974). The unequal trading relations, foreign commercial control over natural resources or long-term resource compromise on unfavourable terms has resulted in the watering down of the permanent sovereignty over natural resources, the right which states ought to have had upon the end of colonial domination.
 - 2 Higgins *Problems and Process: International Law and How We Use It* (1994) 129.
 - 3 Report of the Secretary, General to the Security Council on the Protection of Civilians in Armed Conflict (30 March 2001) UN Doc. S/2001/331, 61; Bucy "Corporate Criminal Liability: When Does it Make Sense?" 2007 *American Criminal Law Review* 1437.
 - 4 Clapham "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups" 2008 *Journal of International Criminal Justice* 899–926. International criminal justice from the Nuremberg tribunal to the ICC has not concerned itself with the need of holding corporations accountable for playing part in the commission of international crimes.
 - 5 Stigen and Fauchald "Corporate Responsibility before International Institutions" 2009 *The George Washington International Law Review* 1025 1033. Corporations normally do not directly commit international crimes. They have increasingly played a role in financing the commission of international crimes a form of aiding and abetting governments or paramilitary groups.
 - 6 The Rome Statute under Article 5 provides the court with jurisdiction to only four core international crimes namely the crime of genocide; Crimes against humanity; War crimes; the crime of aggression.
 - 7 Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights Adopted by The Twenty-Third Ordinary Session of The Assembly, Held in Malabo, Equatorial Guinea 27 June 2014 (herein referred to as the Malabo Protocol).
 - 8 Graff "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo" <https://www.wcl.american.edu/hrbrief/11/2graff.pdf> (accessed 22-10-2018); Report of the ICJ expert legal panel on Corporate Complicity and Legal Accountability: Vol 2 Criminal Law and International Crimes 2008 <https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol2-publication-2009-eng.pdf> (accessed 22-10-2018).
 - 9 Security Council Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo 12 April 2001 <https://reliefweb.int/report/democratic-republic-congo/report-panel-experts-illegal-exploitation-natural-resources-and> (accessed 19-12-2018).

Illegal exploitation of the mineral and forest resources of the Democratic Republic of the Congo are taking place at an alarming rate. Two phases can be distinguished: mass-scale looting and the systematic and systemic exploitation of natural resources. Mass-scale looting, during this first phase, stockpiles of minerals, coffee, wood, livestock and money that were available in territories conquered by the armies of Burundi, Rwanda and Uganda were taken, and either transferred to those countries or exported to international markets by their forces and nationals... The systematic exploitation flourished because of the pre-existing structures developed during the conquest of power of the Alliance of Democratic Forces for the Liberation of Congo-Zaire. These pre-existing structures were improved over time and new networks for channelling extracted resources were put in place. However, the systemic exploitation used the existing systems of control established by Rwanda and Uganda. In both cases, exploitation was often carried out in violation of the sovereignty of the Democratic Republic of the Congo, the national legislation and sometimes international law, and it led to illicit activities.¹⁰

Expanding the list of crimes is therefore an important step in capturing and ensuring corporate criminal liability in Africa. While traditionally, individuals are held criminally liable either at domestic or international level, there has been a growing trend in holding corporations liable at least at domestic level as shall be shown in later parts of this article. At international level, most legal instruments have limited their jurisdiction to natural persons thereby creating absolute impunity to corporations with the exception of the Special Tribunal for Lebanon (STL).¹¹ Therefore, in the era where regulation of exploitation of natural resources is centred on the respect of human rights, issues of accountability have become pertinent to comprehensively regulate all spheres of natural resources. The Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights hereafter referred to as the Malabo Protocol of 2014 has recognised the changing trends by providing for non-derivative corporate criminal liability as opposed to the derivative corporate criminal liability where directors are held criminally liable.¹² The Protocol has given jurisdiction to a regional court to hold corporations criminally liable for committing any of the crimes prohibited under the Protocol. In order to bridge a gap between individual criminal liability and corporate criminal liability and fulfil one of the core objectives of criminal law i.e. deterrence and punishment, the doctrine of corporate criminal liability is the key. As one can already see companies cannot be imprisoned, however, other forms of punishment can be imposed to provide a similar outcome to what imprisonment does to individuals. It must be remembered that, even though offences are committed by individuals; it is the company that carries the image of culpability to the general populace.

The aim of the article is to give an analysis of the doctrine of corporate criminal responsibility from an African perspective as a way of regulating the exploitation of natural resources and the respect of human rights. The article will analyse international instruments regulating transnational corporations and other business entities and thereafter provide an overview of the different forms of corporate criminal liability. The article makes an analysis of international, regional and domestic legal regimes governing corporate criminal liability which seems to have been forgotten in most of the legal systems, yet have been very important in promoting criminal justice and human rights in Africa.

1.1 Forms of Corporate Criminal Liability and Justification

Corporations in the course of exploitation of natural resources are under normal circumstances not the direct perpetrator of crimes relating to gross human rights violations prohibited by international instruments.¹³ They may, however, be direct perpetrators of economic related crimes such as corruption and illicit exploitation of natural resources.¹⁴ Thus, corporations

¹⁰ Security Council Report 2001 para 4–6.

¹¹ *Al-Jadeed S.A.L. & Al Khayat (The Al-Jadeed Case)*, STL-14-05/T/CJ, Judgment, Special Trib. for Lebanon Sept. 18, 2015.

¹² Malabo Protocol.

¹³ The Nuremberg tribunal affirmed that international crimes are committed by natural persons and not abstract entities. There is however other instances where corporations can be direct perpetrators of gross human-rights violations where they engage in a rampant killing to unjustifiably secure their businesses.

¹⁴ Kweka "Towards an International Criminal Law Regime for the Regulation of the Exploitation of Natural Resources: Africa as a Pioneer" in Van der Merwe and Kemp (eds) *International Criminal Justice in Africa, 2018* (2019) 1–19.

mostly commit crimes related to gross human rights violations by way of participation either through ordering, aiding and abetting, instigating, soliciting, inciting, joint criminal enterprise, planning, preparing, attempting and conspiracy.¹⁵ These modes of liability have been recognised by international instruments dealing with individual criminal liability.¹⁶ The doctrine of corporate criminal liability developed under domestic legal systems of both common-law and civil-law countries.¹⁷ These developments have witnessed a mushrooming of divided positions on which form corporate criminal liability should take.¹⁸ This has resulted in the development of two models/forms: the derivative liability model and the non-derivative liability model (organisational liability).¹⁹ The derivative liability model is the one which is centred on individuals who run the corporations and therefore the liability of the corporation is derived from the liability of the individuals who are considered the mind of the organisation or have committed crimes in the course of employment either through vicarious liability²⁰ or identification liability.²¹ On the other hand, the non-derivative model of corporate criminal liability infers the criminal liability of the organisation as a juridical person independently from the liability of the individuals.²² This model of liability has taken aboard the core principle of company law centred on the independence of the legal personality.²³

In order to address crimes committed by corporations in the course of exploitation of natural resources that may or may not be inherent business in nature, imposing criminal liability upon corporations emphasises the position of the community against such criminal conduct irrespective of whom has committed them. As a matter of tradition, corporations as legal entities would avoid any liability due to the existing individual criminal liability of persons working for such organisations.²⁴ In order to now bridge the impunity gap between natural and legal persons and deter corporations from engaging in criminal conduct, the imposition of corporate criminal liability becomes of paramount importance.²⁵ Joanna Kyriakakis points out that

Prosecutions of transnational corporations in appropriate cases may be said to speak particularly tangibly both to international and local audiences. Prosecution of transnational corporate involvement in atrocity begins the difficult task of demarcating where otherwise apparently legitimate global business transactions become criminal, thus delivering normative messages to relevant actors with the capacity to operate within that sphere. The local audience is also a recipient of norm promulgation, given that proceedings relate to local victims and harms. Where the nature of the conflict demonstrates crucial links between certain local and foreign commercial networks, addressing this may better align an institution's work with victim

15 ICJ Report on Corporate Complicity and Legal Accountability 2008, 2.

16 Article 2 and 6 of the Statute of the International Criminal Tribunal for Rwanda 1994; Art 4 and 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1993; Art 25 of the Rome Statute of the International Criminal Court United Nations 1998.

17 Clough and Mulhern *The Prosecution of Corporations*(2002) 2; Pinto and Evans *Corporate Criminal Liability* 2ed (2008) 19; Stephens "The Amoral of Profit: Transnational Corporations and Human Rights" 2002 *Berkeley Journal of International Law* 45 64.

18 Wells "International Trade and Models of Corporate Liability" <https://orca.cf.ac.uk/67409/1/cacorp toolkitCW0203.pdf> (accessed 5-12-2018).

19 Chella *The Complicity of Multinational Corporations In International Crimes: An Examination Of Principles* (PhD-thesis, Bond University, 2012) 49.

20 Beale and Safwat "What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability" 2004 *Buffalo Criminal Law Review* 155–158. Under vicarious liability the position is that the employee must perform the conduct in whole or in part for the benefit of the corporation and must have obvious power to act on behalf of the corporation. This mode of liability has been criticised for being too wide in covering criminal conduct of employees of different levels.

21 Chella *Complicity of Multinational Corporations* 172–177. The liability is established from those who are considered to be the mind of the organisation (board of directors and senior managing staff or persons to whom the authority has been delegated to) whose conduct is said to be the conduct of the corporation.

22 Gobert and Punch *Rethinking Corporate Crime* (2003) 38.

23 Lederman "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity" 2000 *BCLR* 681–682.

24 Wells and Elias "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed) *Non-State Actors and Human Rights* (2005) 143 158.

25 The deterrence referred to here can either be specific to that corporation or generally to other corporations within the society.

community expectations for post-conflict justice efforts.²⁶

Flowing from the above reasoning, corporate criminal liability gives states an opportunity to impose sanctions against corporate assets upon being found criminally liable. Additionally, holding corporations criminally liable generates the moral guilt that should normally be attached to corporations which are culpable of committing crimes punishable under the doctrine. This would normally not be the case where the derivative mode of corporate criminal liability is employed. Further, as a matter of general deterrence, other corporations would not want to be labelled criminal in fear of losing their good public image. It is envisioned that, this will create an environment which nurtures adherence to the rules and principles governing the conduct of business. It is therefore the view of the current author that, the preferred mode for corporate criminal liability be the non-derivative model.

Many have argued against the non-derivative model on the basis of it being unfair to shareholders. The question is, would it really be unfair to shareholders if corporations are criminally liable? Despite the minimal role that may be played by shareholders in the management of the corporations, shareholders are the direct beneficiaries of profit accruing from business conducted by such corporations. As such, it is expected that they should bear both the positives and negatives that may emerge from corporations that they hold shares in. Is it right for these shareholders to benefit from otherwise criminally conducted business? The answer is by and large, no. No one should benefit from criminal conduct no matter the circumstances. Imposing criminal liability will make shareholders more cautious about the manner in which business is conducted and thereby creating accountability of directors and respect for general rules regulating the conduct of business. However, enforcing criminal liability on corporations is really not easy to achieve in most of the developing countries of which most are from the African continent.²⁷ This is because these poverty-stricken countries cannot manage their natural resource independently. The dependence is in the main on technology and finances, which have been heavily supported by the developed countries or international organisations.²⁸

2 LEGAL REGIME FOR CORPORATE CRIMINAL LIABILITY: INTERNATIONAL LAW, AFRICAN REGIONAL LAW AND DOMESTIC LAW

Accountability for the commissioning of crimes can be secured through the international tribunals or courts, regional courts or domestic courts depending on the nature of the cases and circumstances surrounding issues of jurisdiction and admissibility. With international crimes (the crime of genocide, war crimes and crimes against humanity) prosecution of individuals have successfully been done at international tribunals and courts coupled with domestic prosecutions. The current part will provide the legal regime that provides for corporate criminal liability at all of the mentioned forums.

2.1 International Regime on Corporate Criminal Liability

The development of international criminal justice focused on individual criminal liability. But the International Military Tribunal was the first notable development towards recognition of criminal liability of legal entities under Article 9 and 10 of the establishing statute.²⁹ The tribunal took a step further and declared the leadership Corps of the Nazi Party, the Gestapo, the *Sicherheitsdienst* and the *Schutzstaffel* to be criminal groups and individual business persons who had supported the Nazi and Japanese governments, to be criminally liable.³⁰ However,

²⁶ Kyriakakis "International Criminal Courts and Tribunals: Corporations before International Criminal Courts: Implications for the International Criminal Justice Project" 2017 *Leiden Journal of International Law* 221-232.

²⁷ See a article by World Bank "Natural Resource Management and Land Policy in Developing Countries: Lessons Learned and New Challenges for the World Bank" 2001 <https://web.worldbank.org/archive/website> (accessed 12-11-2019).

²⁸ *Ibid.*

²⁹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.C. 280, 8 August 1945; Charter of the International Military Tribunal 1945.

³⁰ Chella *Complicity of Multinational Corporations* 200-201.

the instruments establishing the 1993 and 1994 *ad hoc* tribunals,³¹ special courts³² and even the International Criminal Court (ICC) have endowed these courts with personal jurisdiction over individuals/natural persons with a notable omission on the criminal liability of legal persons.³³ During the negotiations for the establishment of the ICC there were proposals to give the court jurisdiction over legal persons but these were rejected due to a number of reasons, including the lack of state practice on the doctrine of corporate criminal liability.³⁴ This state of affairs has however changed since the Rome Statute was adopted in 1998.³⁵

It is important to make mention of the developments in the Special Tribunal for Lebanon in the contempt case of *Al-Jadeed S.A.L. & Al Khayat* in which the court has affirmed its jurisdiction over legal persons.³⁶ Although the case was dealing with offences against the administration of justice, it was the first case before an international tribunal where a corporation was accused of committing a crime. The court interpreted rule 60*bis* "the power to hold in contempt any person" to include both natural and legal persons.³⁷

Despite the lack of jurisdiction on legal persons in other tribunals and courts, the derivative mode of corporate liability has been utilised through the principle of aiding and abetting (organisational complicity doctrine) to hold those responsible in the decision-making of corporations. Hence, accountability has focused more on individuals than corporations in instances where there has been assistance, encouragement, or moral support for the commission of a crime. The standard employed in proving *mens rea* has been the knowledge test³⁸ as opposed to the specific intent test.³⁹ The knowledge standard is the "realistic *mens rea* standard for how corporations facilitate the commission of atrocity crimes and serious human rights abuses in the pursuit of their own profits."⁴⁰ Other cases such as the *Media* case before the ICTR have witnessed the holding accountable of executives of two media corporations through superior responsibility.⁴¹

2.2 The Malabo Protocol and Corporate Criminal Liability

In June 2014 the African Union (AU) adopted the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights (herein referred to as Malabo Protocol) which gives criminal jurisdiction to the African Court of Justice and Human Rights (ACJHR).⁴² Although the adoption of the Malabo Protocol followed a series of tension between the AU and the ICC, it has therefore been widely criticised. However, generally the Malabo Protocol has made notable additions to the understanding of the doctrine of corporate criminal liability. As stated in the introductory part of this article, the Malabo Protocol has expanded the list of crimes within the jurisdiction of the ACJHR to include not only those related to gross human rights violations but also those considered to be economic crimes such as corruption, money laundering, trafficking in hazardous waste and illicit exploitation of natural resources.

The inclusion of the doctrine of corporate liability was inspired by the desire to hold corporations accountable for the sake of world economy and some related offences of which have formed part of the subject-matter jurisdiction of the amended ACJHR. Hence, Article

31 Statute of the International Criminal Tribunal for Rwanda, 1994; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1993.

32 Statute of the Special Court for Sierra Leone 2000.

33 Article 25 the Rome Statute of the International Criminal Court United Nations 1998.

34 Chella *Complicity of Multinational Corporations* 209; Kyriakakis *LJIL* 223–224; Kaeb "The Shifting Sands of Corporate Liability under International Criminal Law" 2016 *The George Washington International Law Review* 377–379. It is notable that the US has a robust jurisprudence in corporate criminal liability. See the case of *Kiobel v Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013); *Abdullahi v Pfizer, Inc.*, 562 F.3d 163, 193 (2d Cir. 2009); *Khulumani v Barclay Nat'l Bank Ltd*, 504 F.3d 254, 326 (2d Cir. 2007).

35 Kaeb *GWILR* 379–381.

36 *Al-Jadeed S.A.L. & Al Khayat (The Al-Jadeed Case)* STL-14-05/T/CJ, Judgment, Special Trib. for Lebanon Sept. 18, 2015.

37 *Al-Jadeed S.A.L. & Al Khayat (The Al-Jadeed Case)* 27–28.

38 *Ibid.*

39 Kaeb *GWILR* 372.

40 *Ibid.*

41 *Prosecutor v Nahimana*, Case No. ICTR-99-52-A, Nov. 28, 2007 Appeals Judgment 1113–1114.

42 Adopted by the Twenty-Third Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea 27 June 2014.

46 B and C, which provide for personal jurisdiction of the ACJHR, have maintained individual criminal responsibility thereby maintaining the elements of organisational complicity. In respect of the *jurisdiction personae* the protocol provides *inter alia* that:

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.⁴³

From the above provision, it is evident that the Malabo Protocol provides for liability of legal persons either public or private. This gives room for private business enterprises and government institutions to be brought before the ACJHR in the event that they have perpetrated crimes stated in the Malabo Protocol: either international crimes, economic crimes or other cross border crimes. The liability of these corporations does not dissolve the liability of individuals either as direct perpetrators or accomplices.⁴⁴

The *actus reus* and *mens rea* for corporate criminal liability is inferred from conduct attributed to the corporation. The need for attribution is based on the juridical nature of corporations as legal persons whose activities are executed by individuals acting on its behalf.⁴⁵ The criminal conduct of directors and high-level managers can be attributed to the corporation.⁴⁶ The establishment of the *actus reus* is subject to the presence of the required *mens rea*. This then makes it possible to draw a line between personal criminal conduct and corporate criminal conduct. There is however, significant improvement under the Malabo Protocol.

Corporate *mens rea* and *actus reus* in establishing corporate criminal liability has been adequately dealt with by the Malabo Protocol. The Protocol provides for two requirements; that of intention and knowledge. In order to prove corporate intention to commit an offence, one needs to establish that there was a corporate policy to commit a criminal offence.⁴⁷ A policy can be attributed to the corporation where it provides the most reasonable explanation of the conduct of that corporation.⁴⁸ Moreover, corporate knowledge of the commission of an offence can be established by proving that actual or constructive knowledge of the relevant information was possessed within the corporation.⁴⁹ As the Malabo Protocol rightly provides, knowledge of the commission of the offence need not be possessed by all corporate personnel. Such knowledge can be divided between corporate personnel.⁵⁰ This is a very big step in corporate liability, improving greatly on domestic legal regime which has required the establishment of *mens rea* from individuals through the establishment of a causal link between individuals and corporations.⁵¹ As Kaeb opines,

[a] major downside of this approach is that corporations could avoid liability by dividing up duties and compartmentalizing information within the corporate structure in bad faith. For that reason, courts have often established corporate guilt on the basis of the "collective knowledge" doctrine that imputes to the corporation the totality of the knowledge of all employees, as acquired within the scope of their employment.⁵²

43 Article 46 B and C of the Malabo Protocol.

44 Article 46(C)(6) Malabo Protocol.

45 Kaeb GWILR 383.

46 Kaeb GWILR 384.

47 Article 46 (c) (2) Malabo Protocol.

48 Article 46 (c) (3) Malabo Protocol.

49 Article 46 (c) (4) Malabo Protocol.

50 Article 46 (c) (5) Malabo Protocol.

51 Kaeb GWILR 384.

52 Kaeb GWILR 385.

The above downside has therefore been countered by the Malabo Protocol, which requires proving the intention and knowledge attributable to the corporation and not employers of the corporation. If it is proved that such intention and knowledge is not attributable to the corporation then it will be substituted and attributed between employees.⁵³

Another important aspect in corporate liability is the issue of penalty. In realising the limits placed on the nature of sentences imposed on individuals i.e. penal sanctions, the Malabo Protocol has given the ACJHR power to impose penalties such as pecuniary fines and forfeiture of "property, proceeds or any assets acquired unlawfully or by criminal conduct" upon conviction.⁵⁴ These kinds of sentences will be relevant and practical when dealing with corporate criminal liability. However, such sentences are not enough. The Protocol has fallen short on the range of penalties it can issue upon finding corporations guilty of a crime. It can be suggested that fines and attachments of assets are by no means a total expression of the core objective of criminal law. The kind of penalties that should be imposed must reflect the core objectives of criminal law which aims at punishment and deterrence among others. Can there be more innovative forms of punishments to mimic imprisonment and even the death penalty that is issued under individual criminal liability? The answer is yes. There are forms of punishment that can be imposed and have been developed under domestic legal regime. To leave the penalties as they are gives a suggestion that there is no difference between criminal and civil liability and such does not even justify the conducting of criminal proceedings independent from civil liability. Penalties such as temporal prohibition to conduct business, permanent closure of business, and probation by placing the corporation under a monitoring period to confirm compliance are some of penalties that can be added to the Protocol.

2.3 Domestic Regime: The Case of Rwanda

Legal framework on corporate liability and international crimes in Rwanda is traced back to the Organic Law No. 08 of 1996 which is the principle legislation on international crimes in the country.⁵⁵ The law is supplemented by the law on Repressing the Crime of Genocide, Crimes against Humanity and War Crimes of 6 September 2003.⁵⁶ These laws have limited liability to that of individuals something that was in consonant with the practice before international courts and tribunals. However in 2012, to go with the trend in including crimes other than the four core international crimes, Rwanda enacted Organic Law No.01/2012 of 2 May 2012, instituting the Penal Code.⁵⁷ This law has expanded the definition of an international crime to include any crime characterised as such by International Conventions while a cross-border crime means a crime for which one of its constituent elements is accomplished outside Rwanda's borders.⁵⁸ The crimes include: terrorism; hostage-taking; apparent piracy; drug trafficking; illicit manufacturing and trafficking in arms; money laundering; cross-border theft of vehicles with the intent of selling them abroad; information and communication technology related offences; trafficking in human beings especially children; slavery and torture; cruel, inhuman or degrading treatment; genocide, crimes against humanity and war crimes; genocide denial or revisionism.⁵⁹ When compared to the provisions of the Malabo Protocol, the list under this law is modelled to the Protocol with slight departure for crimes such as corruption and illicit exploitation of natural resources. Needless to say that these crimes can still be committed by corporations in the course of the exploitation of natural resources.

The most important provisions under this law are those that establish corporate criminal liability.⁶⁰ The law provides for criminal liability of state institutions, public or private companies, enterprises, associations or organisations with legal personality, public or private

53 Stigen and Fauchald *GWILR* 1025 1033. Corporations normally do not directly commit international crimes. They have increasingly played a role in financing the commission of international crimes as a form of aiding and abetting governments or paramilitary groups.

54 Article 43A (2) and (5) Malabo Protocol.

55 Organic Law No. 08 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

56 Organic Law No. 33 on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes of 6 September 2003.

57 Official Gazette of the Republic of Rwanda, 14 June 2012.

58 Article 15 Organic Law No. 01/2012.

59 Article 16 Organic Law No. 01/2012.

60 Article 33 Organic Law No. 01/2012.

companies, and enterprises.⁶¹ The provision therefore includes both private and state organs and institutions. The liability of legal persons under this law is limited to derivative liability by requiring the guilty of the legal entity to be derived from representatives or those who hold leadership positions while they are acting for the benefit of these legal persons.⁶² The attributability of conduct rests on the power of representation; power to take decisions and power of supervision.⁶³ This model, as stated earlier, poses challenges in proving collective knowledge. Similar to the Malabo Protocol, the liability of legal entities does not dissolve the individual liability of such representatives or their accomplices.⁶⁴

When it comes to penalties for legal entities, the 2012 law has contemporary provisions. The penalties which the court can give as it deems appropriate⁶⁵ include:

dissolution;⁶⁶ fine;⁶⁷ temporary prohibition or for a long time from carrying out one or several professional or social activities; temporary prohibition or for a long time from carrying out one or several activities in a specific zone; permanent closure of the enterprises in which criminal acts were committed or which were used to commit such acts; exclusion from public procurement, on a permanent basis or for a period not exceeding five (5) years; prohibition to issue a cheque, a credit card or a negotiable instrument; confiscation of the object which was used in or intended for use in committing the offence or was the product of the offence; placement under judicial supervision;⁶⁸ Publication of the decision by any media.⁶⁹

All these penalties are applicable to private legal entities with a selection for state organs and institutions in the event that state organs or an institution have been held criminally liable. The only penalties that can be imposed are: fine; temporary prohibition or for a long time from carrying out one or several activities in a specific zone, confiscation of the object which was used in or intended for use in committing the offence or was the product of the offence and publication of the decision by the media can be imposed on state organs and institutions.⁷⁰ This differentiation is necessary and has taken aboard the need for continuity of state organs and institutions which are responsible in offering services to people for the realisation of their basic human rights.

The list of penalties in Rwanda⁷¹ is longer and more sync to reality than those provided for under the Malabo Protocol. The drafters of the law looked beyond monetary punishment which is accustomed when dealing with legal persons. The imposition of other penalties beyond monetary penalties enables the efforts of bringing about deterrence to corporate commission of crimes, either human rights violations or purely economic crimes.

61 Article 16 Organic Law No. 01/2012.

62 Article 113 Organic Law No. 01/2012.

63 Article 16 Organic Law No. 01/2012.

64 Article 16 Organic Law No. 01/2012.

65 Article 34 Organic Law No. 01/2012.

66 Article 36 Organic Law No. 01/2012: "[t]he decision of dissolution of a private company, enterprise, association or organization with legal personality shall be transmitted to the competent authority to proceed with the liquidation."

67 Article 35 Organic Law No. 01/2012: "The fine applicable to State institutions, public or private companies, enterprises, associations or organizations with legal personality shall be twice (2) the amount of fine imposed on natural persons."

68 Article 37 Organic Law No. 01/2012: "The Court decision of placing a private company, enterprise, association or organization with legal personality under judicial supervision shall include the appointment, at their expense, of a representative whose duties are specified by the court. Such duties shall only cover activities which were conducted or which gave rise to the commission of the offence. Every six (6) months, the representative shall submit to the judge who made the decision a report on the situation. On receipt of this report, the judge may impose a new sentence or decide to lift the decision which had been made upon request by the Public Prosecution."

69 Article 32 Organic Law No. 01/2012.

70 *Ibid.*

71 Refer Organic Law No.01/2012 of 2 May 2012 (note 57).

This will enable the observance of laws and participation in the promotion and protection of human rights by corporations during the exploitation of natural resources. It will also ensure that the presence of corporations which have invested in the exploitation of natural resources is not to the detriment of the country in question by harbouring immunity of these legal entities in the event they have committed crimes stipulated under the laws. The only emphasis should be to encourage and adhere to fair and just procedures in the course of enforcing those laws so as not to discourage corporations to invest in projects vital for the economic development of the country.

2.4 Soft Laws Regulating Transnational Corporations, other Business Entities and the Respect of Human Rights

Human rights are indivisible, interdependent and interrelated. There is a general obligation placed upon states and individuals to ensure that they are promoted and protected. This obligation is derived from both treaty regime and rules of customary international law.⁷² It is important to note that, there have been no adopted treaties that have specifically and directly imposed similar obligations on corporations with particular emphasis on multinational corporations. However, the wording of the Universal Declaration of Human Rights, instruments dealing with corruption⁷³ and those adopted under the auspices of the International Labour Organisation (ILO), embraces other non-state actors' obligation to promote and protect human rights.⁷⁴

For the past decade, the international community has awoken to the need to regulate business entities following the mushrooming of human-rights violations committed, aided or abetted by such entities.⁷⁵ This has led to the development and adoption of regulatory frameworks to regulate affairs of corporations such as the United Nations Global Compact, 2000; the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, 2003; the Equator Principles, 2006; and the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises, adopted in 1976 and revised in 2011. The 2003 UN Norms are instrumental to the regulation of business enterprises covering issues such as the right to equal opportunity and non-discriminatory treatment, the right to security of persons, respect for national sovereignty and human rights, to mention just a few. The norms therefore obliges

transnational corporations and other business enterprises not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.⁷⁶

In addition, transnational corporations and other business enterprises are under obligation not to

Offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further

⁷² Universal Declaration of Human Rights UN General Assembly Resolution 1948; International Covenant on Civil and Political Rights, UN General Assembly Resolution 1966; African Charter on Human and People's Rights 1986; American Convention on Human Rights 1978; American Declaration of the Rights and Duties of Man 1948 and European Convention for the Protection of Human Rights and Fundamental Freedoms 1953.

⁷³ The United Nations Convention Against Corruption 2003.

⁷⁴ The preamble of the UDHR makes mention of "group", which can be interpreted to cover other non-state actors.

⁷⁵ Amnesty International "Corporate Accountability" <https://www.amnesty.org/en/what-we-do/corporate-accountability/> (accessed 11-11-2018): "Companies operating across borders are often involved in severe abuses, such as forced labour or forcibly relocating communities from their lands. Unsurprisingly, abuses are particularly stark in the extractive sector, with companies racing against each other to mine scarce and valuable resources." Panda "Multinational Corporations and Human Rights Violations: Call for Rebuilding the Laws of Twenty-first Century" 2013 *Journal of Financial Crime* 422-432 <https://doi.org/10.1108/JFC-02-2013-0006>.

⁷⁶ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), rule C3.

seek to ensure that the goods and services they provide will not be used to abuse human rights.⁷⁷

Therefore, in the event that these transnational corporations and other business enterprises conduct themselves contrary to already established rules of international law, the question of accountability comes into play. It is important to note that, since 2016, the African Union has been working on a draft policy framework on business and human rights. The policy caters for three distinct areas including the duty of state to protect human rights, the responsibility of business entities to respect human rights, and access to remedies. The policy is yet to be adopted but has already been tabled before the AU Specialized Technical Committee (STC) on Justice and Legal Affairs.

3 Concluding Remarks

There is a growing change of trend on the doctrine of corporate criminal liability. While initially developed at domestic level, the changes witnessed under the African Union have created a contemporary scope of corporate criminal liability by adhering to a non-derivative mode of corporate criminal liability. Initially the focus at international level was not in holding corporations criminally liable for the commission of flagrant human-rights violations amounting to international crimes. However, the inclusion of other crimes such as economic crimes and cross-border crimes under the Malabo Protocol has widened the scope of crimes which will entail corporate criminal liability. Most of these corporations may be the direct perpetrators of economic crimes, where as human-rights violations and other related crimes have been committed under their aiding or abetting. This is a step forward in bridging the impunity gap between natural and legal persons. The African regional block is at a critical time in history to contribute towards the development of different doctrines that influence the development of international law. It is an opportunity to be creator of international law rather than what it has been accustomed to as recipient of already developed rules from other parts of the globe.

It is also of great significance that the laws have reaffirmed the independence of individual and corporate criminal liability, that is, one does not dissolve the other. The Malabo Protocol has however limited the kind of punishment that can be imposed on corporations. While at domestic level in Rwanda, the law has maintained the derivative mode of corporate criminal liability, the law has expanded on the list of punishment that can be imposed on legal persons in the event they are found guilty of committing crimes enumerated under the laws. If the Malabo Protocol should mirror the developments in Rwanda, implementation of the Protocol will have to be of paramount importance among member states. As noted, other penalties which are not monetary will require states to play a major role in their enforcement. States will therefore, be under obligation to provide for legal framework to enable the execution of judgments to be rendered by the court and also to make complementarity regime effective. It is however important to point out that, since its adoption in 2014, the Malabo Protocol has thus far received nine (9) signatures and zero (0) ratifications, a fact which threatens its enforceability. This should however not be a point of discouragement. African states can adopt corporate criminal liability in their domestic laws thereby contributing positively to the possible crystallisation of the doctrine as a norm of customary international law in the future.

The Malabo Protocol needs a boost of punishment that the court can impose. Currently, the list of punishment made available is inadequate to truly develop the doctrine of corporate criminal liability. It is recommended that penalties such as temporal prohibition to conduct business, permanent closure of business, and probation by placing the corporation under a monitoring period to confirm compliance are some of the penalties to be added to the Protocol. Some warn against the closing of viable businesses that is providing employment to a specified section of the community. Thus, this penalty is to be limited to the most egregious crime that cannot be remedied by any other penalty.

Further, one cannot ignore the complexities that can emerge in the course of holding transnational business entities criminally liable. The Rules of Procedure and Evidence that will be adopted, should the Protocol come into force, must take into account the complex organisational structure of transnational corporations and the fact that the corporations are

⁷⁷ *Ibid.*

not grounded in one territorial state. Existing rules under the doctrine of state responsibility can be borrowed to ensure liability of both principal and subsidiary corporations. For example, tests such as the level of control the principal company exerts on the subsidiary (overall control test) and whether the principal company received benefits/profits from the operations of the subsidiary company will be handy to curb expected difficulties. This will enable the court to provide rules that will ensure it gathers evidence to warrant conviction. Otherwise such trials will be difficult to conduct.