



**Strathmore University**  

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**Law School**

**CORPORATE CRIMINAL LIABILITY IN AFRICA: THE DISCOMFITURE  
SURROUNDING THE PROTOCOL ON THE AMENDMENTS TO THE PROTOCOL  
ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore  
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## **DISSERTATION DECLARATION FORM**

I WANGUI EUNICE NJOKI do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date: 6 DECEMBER 2019

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

LILY MBURU

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## **ABSTRACT**

The corporate criminal liability doctrine has not always been met with open arms in international law. The main concern being the difficulties in assessing the *mens rea* of a legal entity as opposed to a natural person. The derivative models of attribution of liability helped to relieve some of these concerns by first finding an individual liable and as a consequence, a corporation would be found liable too. However, the era of globalisation has made it so that corporations have developed into more complex structures that make it difficult to identify specific individuals in whom liability should be placed. Consequently, corporations have continued to benefit from their crimes without having to pay the price.

It is for this reason that a new model, an organisational approach, has been developed. This model seeks to attribute liability directly to corporations. The proposed criminal division of the African Court of Justice and Human and Peoples Rights (ACtJHPR) seeks to adopt this model in attributing corporate criminal liability. The objective of this research paper is to discuss the viability of application of this model in the African context.

This research has mainly been qualitatively based as it has relied on primary and secondary sources. The primary sources have included legislations from different states and international legal instruments. The secondary sources have made the most contribution to this research.

## **LIST OF ABBREVIATIONS**

ACmHPR	African Commission on Human and Peoples Rights
ACtJHPR	African Court of Justice and Human and Peoples Rights
AU	African Union
CESR	Centre for Economic and Social Rights
ICC	International Criminal Court
ICJ	International Court of Justice
OECD	Organisation for Economic Cooperation and Development
SERAC	Social and Economic Rights Action Centre the
TWAIL	Third World Approaches to International Law
UN	United Nations
USA	United States of America

## **LIST OF LEGAL INSTRUMENTS**

### **National Legislation**

Chapter 7:01 of the Penal Code of Malawi

Company Act CAP 486 of the Laws of Kenya

Constitution of Kenya

Criminal Code Act, Australia

Penal Code Act of Kenya CAP 63 of the Laws of Kenya

South African Criminal Procedure Code Act No. 51 of 1977

### **International Law Instruments**

Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014

Statute of the International Tribunal for the Former Yugoslavia, UNSC Res 827, 25 May 1993, UN Doc

Agreement for the prosecution and punishment of the major war criminals of the European Axis (Nuremburg Charter), 8 August 1945, 251 UNTS

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 15 February 1999

Council of Europe Criminal Law Convention on Corruption, 1 September 2002

Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests, 19 May 2009

Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid UN Doc E/CN.4/1426, 9 January 1981

African Union Convention on Preventing and Combating Corruption, 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, 22 April 1998

Statute of the International Tribunal for Rwanda, UNSC Res 995, 8 November 1994, UN Doc S/RES/955

Charter of the United Nations, 24 October 1945

Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 90

## **LIST OF CASES**

*Akhbar Bierut S.A.L and Mr Al Amin STL-14-06* (2016), Special Tribunal for Lebanon

*Al Jadeed S.A.L and Ms Kyayat STL-14-05* (2016), Special Tribunal for Lebanon

*Anonymous (1701)* 88 Eng Rep 1518 (KB)

*Anonymous Case* [1701] 12 Mod 559

*Citizens' Life Insurance Co v Brown* (1906), The Privy Council of the United Kingdom

*Cornford v Carlton Bank* (1899), The Queen's Bench of the Court of England and Wales

*Director of Public Prosecutions v Kent and Sussex Contractors Ltd* (1945), The King's Bench of the Court of England and Wales

*Goodspeed v The East Haddam Bank* (1853), United States District Court

*HL Bolton (Engineering) Co. Ltd v T.J Graham and Sons Limited* (1957), The United Kingdom Queen's Bench

*New York Central & Hudson River Railroad Co. v United States* (1909), The Supreme Court of the United States

*Roper v Taylors Central Garage (Exeter) ltd* (1951) 2 TLR 284

*Salomon v A Salomon & Co Ltd* (1987), The United Kingdom House of Lords

*States v Parfait Powder* (1947), The Court of Appeals of the United States

*Stone v Christy Pontiac GMC Inc.* (1984), Supreme Court of Minnesota

*Tesco Supermarkets Ltd v Natrass* (1971), The United Kingdom House of Lords

*The Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* International Court of Justice, 2012

*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, ACmHPR Comm 155/96, Activity Report 2002

*The Trial of German Major War Criminals*, The International Military Tribunal (Nuremberg)  
judgement of 1 October 1946

*United States v Bank of New England* (1987), The Court of Appeals of the United States

*United States v Bi-Co Pavers, Inc.* (1984), The 5<sup>th</sup> Circuit of the United States Court of Appeal

*United States v Dunn* (1987), The Supreme Court of the United States

## **CHAPTER 1: INTRODUCTION**

### **1.1: Background to the study**

International law regards two principal actors as far as liability for violation of human rights is concerned, states and individuals.<sup>1</sup> States are the primary duty-holders for rights, as defined in treaties and conventions or in customary law.<sup>2</sup> In recent years, corporate bodies have become important players in international affairs. This is because of the economic power they hold so much so that markets become more significant than states<sup>3</sup> to the extent that they have become more powerful than some states, especially in developing countries.<sup>4</sup> Multinational corporations, for example, have more economic power and influence over the states where they invest in. In turn, this economic power extends to other spheres that at times lead to violation of rights. Such power has long acted as their shield when justice comes calling.

Individuals have, and continue to use corporations to achieve illegal ends. These have traditionally been illegal acts that only have an economic detriment such as fraud. However, the involvement of corporations in crimes has progressed to acts that violate human rights such as the right to life and the right to a clean and healthy environment. The question therefore remains, is there need to hold these corporate bodies responsible for their illegal conduct? One of such ways is by finding corporations criminally liable for their actions. This can be attributed to the concept of legal persona.<sup>5</sup> The personification of corporations was mainly developed to grant them autonomy.<sup>6</sup> However, the idea of corporate criminal responsibility is surrounded by debate and controversy.<sup>7</sup>

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<sup>1</sup> Ratner S, 'Corporations and Human Rights: A theory of Legal Responsibility', 113 *Yale Law Journal* 3, 2001,461.

<sup>2</sup> Ratner S, 'Corporations and Human Rights: A theory of Legal Responsibility', 461.

<sup>3</sup> Strange S, *The Retreat of the State: The diffusion of power in the world economy*, 1, Cambridge University Press, Cambridge, 1996, 16.

<sup>4</sup> Nciko A, 'The African Court and Corporate-related Human Rights Abuses in Africa: Making the Case for the African Union Law, 2018, 1 (unpublished article).

<sup>5</sup> Laufer L, *Corporate Bodies and Guilty Minds. The failure of corporate Criminal Liability*, University of Chicago Press, Chicago, 2006, 13.

<sup>6</sup> Mark G, 'The Personification of the Business Corporation in American Law' 54 *University of Chicago Law Review* 4, 1987, 1441.

<sup>7</sup> Khanna V.S, 'Corporate Mens Rea: A Legal Construct in Search of a Rationale' Harvard Law School, Discussion Paper No. 200 9/96, 1, - [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Khanna\\_200.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Khanna_200.pdf)- on 20 October 2019.

In the 16<sup>th</sup> and 17<sup>th</sup> centuries, the general belief was that it was impossible to subject corporations to criminal law and sanctions.<sup>8</sup> This was mainly due to the limited understanding of criminal law that was adopted by courts.<sup>9</sup> The principle of *societas delinquere non potest* (a legal entity cannot be blameworthy)<sup>10</sup> contributed to this understanding, more so in Europe. Holt CJ is quoted in an anonymous case stating that “A corporation is not indictable but the particular members of it are”.<sup>11</sup> More so, it also brings about philosophical questions about whether corporations can have *mens rea* to be held criminally liable.<sup>12</sup> Corporate *mens rea* can be defined as the imposition of liability on a corporation for engaging in a certain act with a state of mind, such as intent. This may be provided for in civil and criminal provisions.<sup>13</sup>

Corporate criminal liability, herein after referred to as “the doctrine”, was first imposed in cases involving nonfeasance of quasi-public corporations.<sup>14</sup> The development of the common law doctrine, *respondeat superior* further contributed to the expansion of the doctrine to other crimes.<sup>15</sup> For example, the Supreme Court in *New York Central & Hudson River Railroad Co. v United States* applied this principle to find that corporations could be held liable for crimes of intent.<sup>16</sup> Furthermore, in *Goodspeed v The East Haddam Bank*, it was held that corporations do possess *mens rea* for bringing forth a vexatious suit, which requires malice in tort law.<sup>17</sup> This represents the application of the doctrine in civil liability.

Nonetheless, the doctrine evolved so as to be applied in criminal contexts. This brought about the application of the *mens rea* standard on corporations. This can be argued to be motivated by two main reasons; deterrence and enforcement. As for deterrence, many crimes require *mens rea* as compared to crimes of negligence or strict liability.<sup>18</sup> Consequently, there was need to find ways of cabining corporations with *mens rea* offences. This would allow remedying of public harms

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<sup>8</sup> Mark G, ‘The Personification of the Business Corporation in American Law’ 1441.

<sup>9</sup> Godwin M, ‘The Case for Corporate Criminal Liability’ Research Gate, 2016, 1

<sup>10</sup> Diskant E, ‘Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure’ 118 *Yale Law Journal* 126, 2008, 129.

<sup>11</sup> *Anonymous* (1701) 88 Eng Rep 1518 (KB).

<sup>12</sup> Coleman B, ‘Is Corporate Criminal Liability Really Necessary’ 29 *Southwestern Law Journal* 4, 1975, 1.

<sup>13</sup> Khanna V.S, ‘Corporate Mens Rea: A Legal Construct in Search of a Rationale’, 1.

<sup>14</sup> Godwin M, ‘The Case for Corporate Criminal Liability’ 2.

<sup>15</sup> Colvin E, ‘Corporate Personality and Criminal Liability’ 6 *Criminal Law Forum* 1, 1995.

<sup>16</sup> *New York Central & Hudson River Railroad Co. v United States* (1909), The Supreme Court of the United States.

<sup>17</sup> *Goodspeed v The East Haddam Bank* (1853), United States District Court.

<sup>18</sup> Kadish S and Shulffhofer S, *Criminal Law and its Process: Cases and Materials*, 6 e.d, Wolters Kluwer, New York, 1995, 37.

committed by corporations by applying the *mens rea* standard on them. This in turn would deter other corporations from such offences.<sup>19</sup> To the second motive, it can be said that the doctrine developed to necessitate public enforcement and corporate liability.<sup>20</sup> Until quite recently, public enforcement was only possible through criminal proceedings.<sup>21</sup> Thus, it was imperative to impose criminal liability for corporations for enforcement purposes.<sup>22</sup>

Nefarious activities by corporations resulting in various offences have been on the rise making the discussion on corporate criminal liability a global one.<sup>23</sup> Most developing countries, as opposed to developed ones, are on the losing end of the spectrum. This is because they lack good corporate governance mechanisms which in turn lead them to lose out on the benefits of international investments.<sup>24</sup> This is the case for African states that rely on foreign investments to grow and sustain their economies. As a result, they relax their investment policies in an attempt to attract investments.<sup>25</sup> The role of corporations in instigating and fueling conflicts in Africa has been reported on in numerous ways. For example, the UN Security Council has tasked various groups of experts to report on the role of corporations in countries such as Angola, Liberia and the Democratic Republic of Congo. These reports demonstrate ways in which these corporations economically gained by fueling the conflicts.<sup>26</sup> In reaction to this state of affairs, the African Court of Justice and Human and Peoples Rights (ACtJHPR), has proposed a criminal division that shall have adjudicative authority over corporations.<sup>27</sup> This is by introduction of Article 46C, entitled

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<sup>19</sup> *Goodspeed v The East Haddam Bank* (1853), United States District Court, 536, 542.

<sup>20</sup> Khanna V.S, 'Corporate Criminal Liability: What Purpose Does It Serve?' 109 *Harvard Law Review* 7, 1996, 86.

<sup>21</sup> Hughes G, 'Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process' 47 *Vanderbilt Law Review* 37, 1994, 573.

<sup>22</sup> Khanna V.S, 'Corporate Criminal Liability: What Purpose Does It Serve?' 86.

<sup>23</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 9.

<sup>24</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 10.

<sup>25</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' Unpublished LLM Thesis, University of the Western Cape, 2017, 3.

<sup>26</sup> See for example, Final Report of the Monitoring Mechanism on Angola Sanctions' (21 December 2000) UN Doc S/2000/1225; 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.

<sup>27</sup> Kyriakakis J, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in Jalloh C, Clarke K and Nmehielle V, *The African Court of Justice and Human and Peoples Rights in Context: Developments and Challenges* e.d Cambridge University Press, Cambridge, 2019, 1.

Corporate Criminal Jurisdiction, which grants the ACtJHPR jurisdiction over legal persons (except States).<sup>28</sup>

The *jurisdiction personae* of criminal courts, whether national or regional, has been limited to the natural persons.<sup>29</sup> This thus constitutes new treading ground by the ACtJHPR, though not entirely unexpected. The model that the ACtJHPR is adopting is the organisational approach that focuses on the ‘corporate culture’ of the corporation.<sup>30</sup> As seen in Article 46C, this shall be through an inquiry into the policies of an organisation and the knowledge it had in the commission of an offence so as to establish liability. This approach is heavily modelled after the Australian federal criminal corporate laws as developed by Professor Eric Colvin in a 1995 paper.<sup>31</sup> This is a move away from the traditional approach, the derivative model, that has been previously employed in its various forms such as the vicarious liability (in the USA) and identification models (common law systems).<sup>32</sup> The derivative models seeks to establish liability by first pinning it on individuals in the corporation. This would thus require that first an individual be found criminally liable for the guilt of the corporation to be established. The organisational approach, on the other hand is a direct liability model. It seeks to establish liability directly from the corporation’s policy as opposed to trying peg its liability on individuals.

## 1.2: Problem Statement

The concern that surrounds the debate on corporate criminal responsibility is the criminal law principle of *mens rea*. This becomes a problem because corporations always perform acts through individuals as they are not natural persons. Consequently, it becomes difficult to establish a corporation’s *mens rea* making it possible for it to be free of any conviction that portrays a moral

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<sup>28</sup> Article 46C, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014.

<sup>29</sup> See, eg, Article 25 of the *Rome Statute of the International Criminal Court*, 1 July 2002 2187 UNTS 90; Article 6 of the *Statute of the International Tribunal for the Former Yugoslavia*, UNSC Res 827 (25 May 1993) UN Doc S/RES/827; Article 5 of the *Statute of the International Tribunal for Rwanda*, UNSC Res 995 (8 November 1994) UN Doc S/RES/955.

<sup>30</sup> Article 46C (2), Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>31</sup> Kyriakakis, Article 46C: Corporate Criminal Liability at the African Criminal Court, 22.

<sup>32</sup> Kanyuga C, ‘Move Towards a New Paradigm of Corporate Criminal Liability in Kenya’, 11.

condemnation for its actions since the liability incurred in one of a pecuniary form<sup>33</sup> or even facing no condemnation whatsoever at times.

A fitting example is the case affecting the Ogoni people of Nigeria lodged by the Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) at the African Commission on Human and Peoples Rights (ACmHPR).<sup>34</sup> The case involved allegations against the Nigerian government were that it condoned the actions of the Nigerian Petroleum Company, the majority shareholder consortium with Shell Petroleum Development Corporation that led to international environmental violations Ogoni land. These actions led to serious short and long-term health impacts which included respiratory ailments, increased risk of cancers and reproductive problems.<sup>35</sup> Despite the actions of the oil companies being in violation of international human rights standard, they could not be charged since the ACmHPR lacked jurisdiction over corporate bodies. As a result, the companies were never held accountable for their actions. This represents one of many instances where companies investing in Africa get away with their criminal conduct which explains why the ACtJHPR shall be first regional court to wield corporate jurisdiction.

In recent years there has been a new approach to this doctrine so as to hold corporations liable. This approach looks into the ‘corporate culture’ of the corporation instead of fixating on establishing its *mens rea*. This type of approach follows an organisational approach that attributes liability to corporations through their policies.<sup>36</sup> This is the model that has been adopted by the ACtJHPR in attaching liability to corporations.<sup>37</sup> Moreover, the doctrine, in the traditional derivative approach, has been applied in some African countries such as Kenya, South Africa and Malawi.<sup>38</sup> As Cassese argues, the international criminal sphere is unique in that it is able to borrow human rights law, humanitarian law and national criminal law.<sup>39</sup> A comparative study of the

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<sup>33</sup> Kanyuga C, ‘Move Towards a New Paradigm of Corporate Criminal Liability in Kenya’, 11.

<sup>34</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, ACmHPR Comm 155/96, Activity Report 2002.

<sup>35</sup> *SERAC and CESR v Nigeria*, ACmHPR, 2.

<sup>36</sup> Kanyuga C, ‘Move Towards a New Paradigm of Corporate Criminal Liability in Kenya’ 11.

<sup>37</sup> Article 46C (2), Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>38</sup> See for example, Article 260 of the Constitution of Kenya and the Penal Code Act of Kenya Cap. 63 of the Laws of Kenya; Section 322 of the South African Criminal Procedure Code Act No. 51 of 1977; Chapter 7:01 of the Penal Code of Malawi.

<sup>39</sup> Cassese A and Gaeta P, *International Criminal Law* 3 ed Oxford University Press, Oxford, 2013, 5.

Australian model will thus be imperative in informing how corporate liability shall be applied at the ACtJHPR. The question of enforcement of corporate liability remains one of the biggest concerns even before the court becomes operational. This research paper endeavors to navigate through this and other challenges that may be faced in the application of such liability.

### **1.3: Hypothesis**

This study is based on the presumption that:

- a) The doctrine is a sound mechanism for corporate liability as it seeks to establish direct liability for a corporation
- b) The application of the doctrine, in its organisational approach, to corporations in Africa will enhance accountability in its justice system

### **1.4: Statement of Objectives**

The objectives of this study shall include:

- a) To investigate the approaches that have been previously adopted in enforcing the doctrine and their feasibility.
- b) To examine the elements of the doctrine as adopted in the proposed Article 46C of the ACtJHPR while comparing them to other national jurisdictions.
- c) To explore the challenges in application of the doctrine by the ACtJHPR and how they can be overcome to ensure enforceability.

### **1.5: Research Questions**

This research work will seek to answer the following questions:

- a) What is the prevailing approach to the doctrine in various national jurisdictions?

- b) What elements of the organisational approach are adopted in the proposed Article 46C of the protocol to the amendments on the Malabo Protocol?
- c) What shall be the challenges faced in applying the doctrine to corporations in Africa, owing to the forward-looking approach of this study?
- d) How can the doctrine be properly enforced by the ACtJHPR?

## 1.6: Justification of the study

It is undeniable that corporations contribute a great deal to global economic development. However, for the longest time, it has been impossible to find corporations liable for their actions or inactions, at an international or regional level at the very least. Any attempt to develop a binding legal system that hold corporations accountable has been met with vehement opposition.<sup>40</sup> For example, the UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights were rejected due to their mandatory language in which they were framed.<sup>41</sup> This is because the international criminal system is focused on individual criminal responsibility.<sup>42</sup> Nonetheless, it is illogical for corporations to have rights under international law, yet have no obligations applying to them thus allowing them to escape liability for abuses of the said rights.<sup>43</sup> The lack of such binding mechanisms also deny courts jurisdiction to determine matters pertaining to violations by corporations.<sup>44</sup>

The doctrine therefore becomes an important tool in addressing this issue. Not only does its application under article 46C grant jurisdiction to the ACtJHPR, but it also creates parameters for its operation and application.

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<sup>40</sup> Simmons P, 'International law's invisible hand and the future of corporate accountability for violations of human rights' 3 *Journal of Human Rights and the Environment* 1, 2012, 6.

<sup>41</sup> Kinley D and Zerial N, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Rights Norms for Corporations' 25 *Companies and Securities Law Journal* 30, 2007, 34.

<sup>42</sup> Nollkaemper A. 'Introduction' in Nollaemper A and Wilt H (eds) *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, 1.

<sup>43</sup> Slye R 'Corporations, Veils and International Criminal Liability' 33 *Brooklyn Journal of International Law* 3, 2008, 959.

<sup>44</sup> Ezeudu M, Revisting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential of the International Criminal Court, 11 *African Human Rights Law Journal* 1, 2011, 24.

## **1.7: Research methodology**

The research design that will be adopted in the quest to conduct research on the applicability of the doctrine to corporate bodies shall be desk-based research. First, regard shall be taken to primary sources which shall focus on statutes and legislation that discuss the doctrine and its application. Secondly, the secondary sources to be relied on shall be literature by scholars that pertains to the research topic. This shall include books, journal articles, working papers and thesis.

## **1.8: Assumptions**

This study shall be guided by the following assumptions;

- a) The doctrine is an appropriate mechanism for corporate liability
- b) The doctrine has acquired an internationally acquired acceptance
- c) That the application of the doctrine in Africa is a step in the right direction in corporate liability enforcement

## **1.9 Limitations**

This study shall be limited since it is prospective in nature. This is because it contemplates the issues that may arise in the enforcement of a provision that is yet to be ratified by all member states of the African Union.

## **1.10 Chapter Breakdown**

The outline of the dissertation shall be as follows:

- Chapter 2: Theoretical Framework

This chapter shall discuss the theoretical framework that informs this research study. This will help to identify what legal theories inform and possibly affect this study.

- Chapter 3: Analysis of the corporate criminal liability doctrine

The chapter shall begin by first looking into a brief history of corporate criminal liability. Thereafter, its development shall be traced by looking at the different modes of attribution, specifically derivative and organisational approaches.

- Chapter 4: The legal application of the corporate criminal liability doctrine

This chapter shall focus on the elements of Article 46C focusing on what models and approaches of the doctrine have been adopted. An investigation into the Australian model shall be conducted owing to its similarity to Article 46C. Furthermore, the challenges that may spring up due to the enforcement of the doctrine shall be discussed.

- Chapter 5: Findings, Recommendations and Conclusion

This chapter will contain a summary of the findings and recommendations suggested as a result of the study. It will also entail the conclusion.

## **1.11: Overall results and conclusions**

This research paper has justified the corporate criminal liability doctrine in international criminal law. This is by recognition that natural persons are not the only actors in criminal acts. Legal persons, especially corporations, have also been involved in criminal acts. In Africa the need for accountability for corporate crimes is more pertinent owing to the role that corporations play in economic development. The proposed criminal division of the ACtJHPR is thus a welcomed decision as a step to ending impunity for corporate crime.

## **CHAPTER 2: THEORETICAL FRAMEWORK**

### **2.1: Introduction**

The purpose of this chapter shall be to discuss legal theories that provide a lens into understanding the doctrine of corporate criminal liability.

### **2.2: Realist Theory**

The realist theory can be traced to Johannes Althusius, a German jurist. The theory propounds that a legal person is a real personality in an extra juridical and pre-judicial sense. The subjects of rights are thus not only human beings, but also every being that possesses a will and life of its own.

*“According to this theory, a legal person is a real personality in an extra juridical and pre-judicial sense of the word. The theory assumes that the subjects of rights are not limited to belong merely to human beings but to every being that possesses a will and life of its own. As such, being a juristic person and as ‘alive’ as the human being, a corporation is also subjected to rights. Under the realist theory, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. The realist jurists also contend that the law has no power to create an entity but merely having the right to recognize or not to recognise an entity”.*<sup>45</sup>

This theory views corporations as real entities as opposed to fictional ones; as social entities with a distinct personality.<sup>46</sup> This means that they comprise of institutionalised relationships amongst individuals as well as individuals themselves. Consequently, their identity cannot be reduced to just propositions about individuals.<sup>47</sup> Corporations can thus be deemed to be more than mere fictional entities. They are powerful and real actors that can cause harm to both the individual and

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<sup>45</sup> Sardana V, ‘Jurisprudence- Theories of Legal Personalities’ Law Notes by Vijay Sardana, 27 May 2017 <http://lawnotesforstudents.blogspot.com/2017/05/jurisprudence-theories-of-legal.html> on 10 April 2020.

<sup>46</sup> Clough J, 'Bridging the theoretical gap: The search for a realist model of corporate criminal liability' 18 *Criminal law forum* 3, 2007, 268.

<sup>47</sup> Otieno G, ‘The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons’ Kenya Law ,2008, 5.

the society.<sup>48</sup> It is for this reason that, as legal persons, they are holders of rights and duties.<sup>49</sup> Just as a human being uses his or her organs to perform an action, so does a corporation use human beings.<sup>50</sup> This however, does not take away its distinct legal personality that is separate from the individual as was held in *Salomon v Salomon*.<sup>51</sup>

### 2.3: Agency theory

The foundational premise of agency law is that the principal is responsible for the acts of the agent.<sup>52</sup> This is based on the moral and economic principle that one must bear the consequences of one's voluntary actions.<sup>53</sup> Paula Dalley refers to this as the cost-benefit internalisation theory. It stipulates that due to the principles of justice and efficiency, one cannot retain the benefits of an action without bearing its costs.<sup>54</sup> A principal should therefore not only enjoy the benefits derived from an agent, but also the costs of the agents actions. This is one of the justifications for the agency relationship; that a principal should not be able to profit from an action if such benefit is as a consequence of an injustice to the agent. This is due to the fact that corporations are at a better position to absorb huge losses as compared to an individual by for example acquiring insurance.<sup>55</sup> Agency law serves a policy purpose in ensuring that the legal consequences of an actor are not altered.<sup>56</sup>

Agency law has been applied in determining corporate criminal liability by adopting a nominalist perspective. That is, viewing them as a mere collection of individuals. The guilt of the corporation can thus be determined only by the derivative guilt of an individual.<sup>57</sup> This is what in common law is defined as vicarious liability, while in American jurisprudence it is the *respondeat superior*

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<sup>48</sup> Beale S, 'A response to the critics of corporate criminal liability' 46 *American Criminal Law Review*, 2009, 1482.

<sup>49</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 5.

<sup>50</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 20.

<sup>51</sup> *Salomon v A Salomon & Co Ltd* (1987), The United Kingdom House of Lords.

<sup>52</sup> Dalley P, 'A theory of agency law' 72 *University of Pittsburg Law Review*, 2011, 496.

<sup>53</sup> Dalley P, 'A theory of agency law' 498.

<sup>54</sup> Dalley P, 'A theory of agency law' 498.

<sup>55</sup> W Keeton, Dobbs D, Keeton R and Owen D, *Prosser and Keeton on Torts*, West Group Publishing Group, St Paul, 1984, 500.

<sup>56</sup> *United States v. Dunn* (1987), The Supreme Court of the United States.

<sup>57</sup> Bassi A, 'Corporate Criminal Liability: An analytical study with special reference to penal laws in India' Unpublished Ph.D Thesis, Rajiv Gandhi National University of Law, Punjab, 2016, 81.

doctrine. The agency theory is based on the premise that criminal violations are comprised of two elements; *actus reus* and *mens rea*. Corporations, being artificial entities, do not possess the mental element to establish a criminal violation. Agency law therefore comes to aid by attributing the mental state of the corporations' agents (employees) to the corporations.<sup>58</sup>

To attribute the mental element in corporate crimes, a three-part test, as developed in *Stone v Christy Pontiac*<sup>59</sup>, is employed. A corporation will be found liable if: 1) the employee was acting within the scope of his or her employment and with the authority to act for the corporation in the criminal action; 2) the action, was at least in part in furtherance of the corporation's business; and 3) the criminal acts were authorised, tolerated or ratified by the corporate management.<sup>60</sup> The courts have gone ahead to hold that the position of the employee in the corporation does not matter, meaning that even the lowest level employee can be said to be an agent of the corporation.<sup>61</sup> Furthermore, independent contractors may attach liability to corporations at times.<sup>62</sup> Consequently, as contrasted with vicarious liability, *respondeat superior* is a broader concept.

The authority to act may either be actual or apparent. Apparent authority may be defined as the authority to act in a certain position from a third party's perspective.<sup>63</sup> Actual authority is where the corporation knowingly and intentionally authorizes an action.<sup>64</sup> As to the benefit derived by the corporation, it need not be actual. This is because employees, nonetheless are primarily acting in their self-interest.<sup>65</sup>

Despite its application, the vicarious liability approach is criticised for the distortion it brings to the concept of fault. This is owing to the transfer of an individual's fault to the corporation without the need to prove its misfeasance or malfeasance.<sup>66</sup> Furthermore, the corporation's efforts to prevent illegal conduct may not be taken into consideration.<sup>67</sup> This would justify the position by

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<sup>58</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya', 26.

<sup>59</sup> *Stone v Christy Pontiac GMC Inc.* (1984), Supreme Court of Minnesota.

<sup>60</sup> *Stone v Christy Pontiac GMC Inc.* (1984), Supreme Court of Minnesota.

<sup>61</sup> American Law and Legal Information, *Corporate Criminal Responsibility: American standards of corporate criminal liability*, - <https://law.jrank.org/pages/744-> on 4 November 2019.

<sup>62</sup> *States v Parfait Powder* (1947), The Court of Appeals of the United States.

<sup>63</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 27.

<sup>64</sup> *New York Central & Hudson River Railroad Co. v United States* (1909), The Supreme Court of the United States.

<sup>65</sup> Hall J, 'Corporate Criminal Liability-Thirteenth Survey of White Collar Crime' 35 *American Criminal Law Review*, 1998.

<sup>66</sup> Bassi A, 'Corporate Criminal Liability: An analytical study with special reference to penal laws in India' 88.

<sup>67</sup> Department of Justice, Government of Canada, *Corporate Criminal Liability* 2002.

some scholars that corporations are contractual associations and consequently cannot suffer the moral stigma attached to criminal sanctions.<sup>68</sup>

## **2.4: Conclusion**

The aim of this chapter was to discuss legal theories that inform the study on corporate criminal liability. Two main theories have been discussed. The agency theory can be deemed to be the informing theory for the traditional derivative approaches to corporate criminal liability. This is by first establishing the liability of an agent, the employee, and consequently pinning such liability on a principal, the corporation. The realist theory informs the organisational model of attribution. It posits that corporations are real juridical entities in cognisance of their legal personality. As such they should be directly liable for any crimes they commit.

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<sup>68</sup> Fischel D and Sykes A, 'Corporate Crime' 25 *Journal of Legal Studies*, 1996, 319.

## CHAPTER 3: CONCEPTUALISATION OF THE CORPORATE CRIMINAL LIABILITY DOCTRINE

### **3.1: Historical development of corporate criminal liability**

The traditional view on criminal law more so, international criminal law, has been focused on individual criminal liability.<sup>69</sup> This led to the belief that corporations cannot thus be the subject of criminal law for reasons such as the lack of moral blameworthiness on the corporations for crimes of intent.<sup>70</sup> For example, in the English jurisdiction the chief justice declared that corporations cannot be charged with crimes.<sup>71</sup> This was perhaps due to the requirement that an accused person had to make a personal appearance in court. However, it is now possible for a corporation to have a representative appear on its behalf.<sup>72</sup> It is only after World War II that the idea of corporate criminal responsibility came to be recognised. This was through the recognition of the role played by corporations in the atrocities of the war. Tort law was quite instrumental to the development of corporate criminal liability as corporations were first prosecuted for failure to fulfil statutory obligations such as nuisance (non-feasance offences).<sup>73</sup> The scope of crimes extended to cover crimes of misfeasance such as malicious prosecution.<sup>74</sup>

In the United States, the imposition of liability for crimes of intention was first developed in *New York Central and Hudson River Railroad Co. v The United States*.<sup>75</sup> The court based its judgment on the *respondeat superior* doctrine which was developed through common law (same meaning as vicarious liability).<sup>76</sup> For common law, the first instance of corporate criminal liability can be seen in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd*.<sup>77</sup> The court held that a corporation is liable for giving of false information with an intent to deceive, which amounted to

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<sup>69</sup> Cassese A and Gaeta P, *Cassese's International Criminal Law*, 1.

<sup>70</sup> Godwin M, 'The Case for Corporate Criminal Liability' 1.

<sup>71</sup> *Anonymous Case* [1701] 12 Mod 559.

<sup>72</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 6.

<sup>73</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya', 24.

<sup>74</sup> *Cornford v Carlton Bank* (1899), The Queen's Bench of the Court of England and Wales.

<sup>75</sup> *New York Central & Hudson River Railroad Co. v United States* (1909), The Supreme Court of the United States.

<sup>76</sup> Khanna V.S, 'Coprorate Mens Rea: A Legal Construct in Search of a Rationale' Harvard Law School, Discussion Paper No. 200 9/96, 1 - [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Khanna\\_200.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Khanna_200.pdf)- on 20 October 2019.

<sup>77</sup> *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* (1945), The King's Bench of the Court of England and Wales.

malice. This same reasoning was applied by the court in *Goodspeed v East Haddam Bank*<sup>78</sup> where the court went further and stated that prohibiting lawsuits against a corporation for lack of actual mens rea would lead to enforcement hurdles even in tort law.<sup>79</sup>

### **3.2: Basis of corporate criminal liability**

It has been the contention by some scholars that the inherent characteristics of fault and blameworthiness presume personal responsibility.<sup>80</sup> Consequently, a corporation being a non-natural being cannot be the subject of criminal law as it lacks this personal responsibility. However, one might also consider that other branches of law, such as the law of contracts, do consider a corporation as capable of exercising its own will and thoughts.<sup>81</sup> It is this status that forms the basis of corporate criminal liability; the idea of legal personality.

Legal personality can be defined as a conception that regards a human being or an artificial entity as a legal person by ascribing certain powers and capacities.<sup>82</sup> A corporation is a legal person since it has a distinct legal personality from the natural persons who make it up. This was crystallised in the famous decision in *Salomon v Salomon*.<sup>83</sup> In this regard, the attribution of criminal liability should be dependent on this legal personality<sup>84</sup> and not whether a corporation is regarded as real or fictional entity. This is so because no matter what school of thought one approaches the subject from, nominalist or realist, the legal personality of corporations is undeniable.

It is due to this legal personality that one is able to attribute criminal responsibility on a corporation since responsibility is achieved through imposition of obligations to subjects in a legal order.<sup>85</sup> Responsibility, as Wells advances, may either be viewed from a role, capacity, casual and/or liability perspective.<sup>86</sup> Capacity responsibility is particularly important as it relates to the legal personality of the corporation, that is, the rationality and awareness of a subject. This ties in with

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<sup>78</sup> *Goodspeed v The East Haddam Bank* (1853), United States District Court.

<sup>79</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 25.

<sup>80</sup> Bassi A, 'Corporate Criminal Liability: An analytical study with special reference to penal laws in India' 5.

<sup>81</sup> Bassi A, 'Corporate Criminal Liability: An analytical study with special reference to penal laws in India' 5.

<sup>82</sup> Garner B (ed) *Black's Law Dictionary* 8th edition, 3623.

<sup>83</sup> *Salomon v A Salomon & Co Ltd* (1887), The United Kingdom House of Lords.

<sup>84</sup> Wells C 'Containing Corporate Crime Civil or Criminal Controls?' in Gobert J & Pascal A (eds), *European Developments in Corporate Criminal Liability*, Taylor and Francis Ltd., London, 2011, 13-32.

<sup>85</sup> Wells C 'Containing Corporate Crime Civil or Criminal Controls?' 13-32.

<sup>86</sup> Wells C 'Containing Corporate Crime Civil or Criminal Controls?' 13-32.

the liability perspective which is indeed the purpose of establishing responsibility.<sup>87</sup> The realist conception of a corporation as an independent and real actor makes it possible to attach liability to the corporation.

### **3.3: Modes of attribution criminal liability**

The development of the modes of attribution is primarily based on the two main conceptions of corporations; either as real or fictional entities. The adoption of a mode of attribution in any particular jurisdiction is heavily influenced by the history and politics of that jurisdiction.<sup>88</sup> The nominalist theories adopt a derivative approach of attributing criminal liability. This means that the liability is tied to finding an individual, a natural person, responsible for the crime.<sup>89</sup> This mode of attribution is the fuel that has led to the growth of corporate criminal liability. Under this approach, three models have been developed: the vicarious liability model, the identification model and the aggregation model. The organisational approach on the other hand, aims at holding the corporation directly liable for its crimes.<sup>90</sup> Its development seeks to remedy the problems posed by the derivative approach.

#### **3.3.1: Vicarious liability**

Vicarious liability (also known as *respondeat superior* in the USA) as a doctrine has its origins in tort law. Traditionally, it developed from medieval concepts of a master-servant relationship to protect third parties who viewed the master and servant as one.<sup>91</sup> Generally, vicarious liability was used in employment relationships in that a principal/employer becomes automatically liable for the acts of an agent/employee. Consequently, corporations will become automatically responsible

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<sup>87</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 5.

<sup>88</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 25.

<sup>89</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons', 6.

<sup>90</sup> Fisse B and Braithwaite J, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" 11 *The Sydney Law Review* 3, 1988.

<sup>91</sup> Ntsanyu C, 'Corporate criminal liability in South Africa: The need to look beyond vicarious liability, 55 *Journal of African Law* 1, 2011, 93.

for the illegal acts of its employees, just as a human employer would be.<sup>92</sup> This is an articulation of the agency theory. As Lord Lindley posited, it is difficult to see why the rules of agency law should not be applied to corporations since their legal personality does form relationships between itself and its employees.<sup>93</sup>

The applicable test in determining vicarious liability was developed in *State v Christy Pontiac GMC Inc.*<sup>94</sup> First, the employee must be acting within his or her actual or apparent authority for the act to be attributable to the corporation. The level of the employee in the corporation is not a consideration in attributing liability.<sup>95</sup> Secondly, the act should be in the benefit of the corporation and lastly that the corporation authorised or tolerated the action. Even where the corporation's policies are against the commission of the act, the actions of the employee will still bind the corporation.<sup>96</sup> This guards against instances where the corporation prohibits the action in principle but allows it in practice.<sup>97</sup>

The application of vicarious liability has been criticised for being too broad or inclusive. This is because it establishes the liability of the corporation automatically through the acts of an employee without going further to establish its own culpability<sup>98</sup> or to even take into account the steps taken by the corporation to avoid the illegal act.<sup>99</sup> Thus this model presents no incentive to corporations that are actually diligent in their obedience to the law.<sup>100</sup> To remedy this, the USA for example, provides for such efforts by a corporation to be considered as mitigating factors at the sentencing stage.<sup>101</sup>

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<sup>92</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 6.

<sup>93</sup> *Citizens' Life Insurance Co v Brown* (1906), The Privy Council of the United Kingdom.

<sup>94</sup> *Stone v Christy Pontiac GMC Inc.* (1984), Supreme Court of Minnesota.

<sup>95</sup> *United States v Bi-Co Pavers, Inc.* (1984), The 5<sup>th</sup> Circuit of the United States Court of Appeal.

<sup>96</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 27.

<sup>97</sup> Slye R, 'Corporations, Veils and International Criminal Liability' 964.

<sup>98</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 10.

<sup>99</sup> Kyriakakis J, 'Article 46C: Corporate Criminal Liability at the African Criminal Court, 19.

<sup>100</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' 25.

<sup>101</sup> Lehner A, 'The Austrian Model of Attributing Criminal Responsibility to Legal Entities' in Brodowski D et al (eds) *Regulating Corporate Criminal Liability*, Springer International Publishing, Cham, 2014, 79-86.

### 3.3.2: Identification model

This model goes beyond the vicarious liability approach by seeking to limit the scope of liability for corporations. It derived from the decision in *HL Bolton Co. Ltd v T.J Graham and Sons Limited*<sup>102</sup> that distinguished the ‘brains’ and ‘hands’ of a company/ corporation. The brain controls what the corporation does while the hands represents its agents or employees. Therefore, the directors and managers represent the will of the corporation. Their acts thus attach the liability of the corporation. In case of doubt as to the brains of the corporation, the memorandum and articles of association generally come to aid.<sup>103</sup> The purpose of this approach is to identify the guilty mind of the corporation hence establishing *mens rea*.<sup>104</sup> The identification approach is commonly referred to as the alter ego to vicarious liability.<sup>105</sup>

The identification model was discussed in *Tesco Supermarkets Ltd v Natrass* where the House of Lords held that the personnel at the centre of the corporation are the only ones whose conduct could be attributed to a corporation. In this specific case, the decision was that a branch manager of a bank did not attach liability to the bank as a whole because he was not part of the ‘directing mind’. What the decision seems to do is set a standard too high to attain especially for large corporations. As Glanville William puts it, it would have been more sensible for the standard to also include managers of local branches of a corporation.<sup>106</sup>

Despite the success of this model in locating the guilty mind of the corporation, there are still some criticisms attached to it. One of them is that it limits the scope of liability by not reflecting the reality of modern day corporations.<sup>107</sup> As a consequence, the model fails to attach criminal liability to corporations with complex structures.<sup>108</sup> Furthermore, since it is a derivative approach it is still flawed by its failure to finding the actual culpability of the corporation.

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<sup>102</sup> *HL Bolton (Engineering) Co. Ltd v T.J Graham and Sons Limited* (1957), The United Kingdom Queen’s Bench.

<sup>103</sup> For example, as seen in the Company Act, CAP 486 of the Laws of Kenya.

<sup>104</sup> Kanyuga C, ‘Move Towards a New Paradigm of Corporate Criminal Liability in Kenya’ 29.

<sup>105</sup> *Tesco Supermarkets Ltd v Natrass* (1971), The United Kingdom House of Lords.

<sup>106</sup> Williams G, *A textbook of criminal law*, Stevens and Sons, London, 1983, 973.

<sup>107</sup> Ormerod, D, *Smith & Hogan: Criminal Law*, Oxford University Press, Oxford, 2008, 239.

<sup>108</sup> Nyirenda F, ‘Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?’ 27.

### 3.3.3: Aggregation model

The aggregation model can be described as a go-between derivative models and the organisational approach. It is deemed to be a reflection of the liability of corporation through the conduct of one person being matched with the will of another.<sup>109</sup> The liability of a corporation is established through the consolidation of knowledge from different individuals. This means that the liability is not dependent on a single individual.<sup>110</sup> The theory was developed in response of the modern complexities of structures in today's corporation that make it almost impossible to identify a single individual so as to attach liability.<sup>111</sup> For example in *United States v Bank of New England*, the court accepted this model of liability by stating that if one employee was aware of the requirement to report transactions that exceeded the statutory limit but is in fact not the employee that knew of the particular transaction.<sup>112</sup> This represented the concept of collective knowledge.

The idea of collective knowledge best serves its purpose when dealing with crimes of negligence but not so much so for crimes of fault.<sup>113</sup> However, the aggregation model is criticised for its distortion of criminal liability as a whole. This is because it is illogical to attribute the state of mind of one individual to the conduct of another individual, at least without a causal link.<sup>114</sup> Moreover, the aggregation theory is still based on finding individuals liable either through their actions or the knowledge they possess.

### 3.3.4: Organisational approach

This approach advocates for the imposition of direct liability on a corporation. It derives its validity from the realist theories that assert that corporations are real entities capable of acting on their own

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<sup>109</sup> Mays R, 'Towards corporate fault as the basis of criminal liability of corporations' 2 *Mountbatten Journal of Legal Studies* 2, 1998, 53.

<sup>110</sup> Wells C, *Corporations and Criminal Responsibility*, 2nd ed. Oxford, Oxford University Press, 2001, 156.

<sup>111</sup> Wilkinson M, 'Corporate criminal liability-the move towards recognising genuine corporate fault', *Canterbury Law Review* 5, 2003, - <http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.html>- accessed on 19 November 2019.

<sup>112</sup> *United States v Bank of New England* (1987), The Court of Appeals of the United States.

<sup>113</sup> Ormerod, D, *Smith & Hogan: Criminal Law*, Oxford University Press, 2005, 239.

<sup>114</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 22.

independent will.<sup>115</sup> The model was developed so as to impose criminal liability on a legal person in the same way it is imposed on a natural person.<sup>116</sup> The approach looks at the acts of commission or omission by the corporation, what it knew or ought to have known about its actions and what preventive actions it took or should have taken to prevent harm from its actions.<sup>117</sup> The notable thing is that direct models of liability for corporations have been proposed since 1944<sup>118</sup>, despite the thinking of many that this is a fairly new mode of attribution.

The mode of attribution of the organizational approach is based on corporate culture which represents a more holistic approach to attribution of liability. Culture is in itself not visible but is only expressed through its members.<sup>119</sup> The culture of a corporation is at most times developed through its policies and practices and not tied to a particular employee.<sup>120</sup> It is these policies, practices and/ or other characteristics that encourage or allow for the commission of a crime. So what constitutes the corporate culture of a corporation? Edgar Schein proposes a theory that helps to navigate its dynamics. He posits that corporate culture exists in three main levels.<sup>121</sup>

The first and most visible form of corporate culture is typical behaviour. It is considered to be at the heart of corporate culture. This type of culture as Edgar espouses can be referred to as the observable artefacts of a corporation.<sup>122</sup> For example, the dress code at Strathmore University is a proper manifestation of its culture. The dress code requires students to dress in appropriate and modest attire that in turn befits their stature as mature young adults and promotes professionalism; to help students discover their inner dignity that goes beyond their academic or financial status.<sup>123</sup> From this dress code it can be deduced that it is aimed at promoting a culture of professionalism. In a corporate context, this typical behaviour would include things such the benefits provided to

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<sup>115</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 22.

<sup>116</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' 27.

<sup>117</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 23.

<sup>118</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 23.

<sup>119</sup> Dewey J, 'The Historic Background of Corporate Legal Personality' 35 *The Yale Law Journal* 6, 1926, 664.

<sup>120</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' 28.

<sup>121</sup> Schein E, 'Organizational Culture', 45 *American Psychological Association* 2, 1990, 111.

<sup>122</sup> Schein E, 'Organizational Culture' 111.

<sup>123</sup> Strathmore University, *Strathmore university student handbook* - <https://www.strathmore.edu/about-strathmore/policies-downloads/> accessed on 20 November 2019.

executives or the level of technology used in the corporation.<sup>124</sup> For example where a corporation awards bonuses for performance of certain tasks, it may be the case that such bonuses are used as incentives for one to follow directives even if the said directives would constitute commission of a crime. The second level that forms the basis of corporate culture is the stated values of a corporation. They limit individual behaviour of employees by affecting their decision making. They may either be formal or operational. Formal values are the requirements or expectations that are associated with a corporation pursuing its goals. They can best be described using the mission and vision statement of a corporation. Operational values are the unwritten rules of practice that are quickly picked up by a new employee. For example, a corporation breaks for lunch at 12:30 p.m. as compared to another that breaks at 1:30 p.m., is a representation of the corporation's operational values. Thus operational values are habitual acts that have been developed overtime in a corporation. The third level is the fundamental beliefs and assumptions of a corporation. These are subjective in nature and may even be unknown to some of the corporation's members.<sup>125</sup> However, they are vital in explaining the underlying perceptions and thought processes of a corporation making it easier to decipher the implicit conduct of persons within the corporation.<sup>126</sup>

Criminal liability may be attributed to a corporation based on corporate culture in two possible ways. The first way requires proof of a causal connection between corporate culture, in any of its forms, to an illegal action.<sup>127</sup> For example, this approach has been adopted in the Corporate Manslaughter Act and Corporate Homicide Act of the United Kingdom where such death is caused by the safety and health regulations of the corporation.<sup>128</sup> Thus, if one can connect the death of an employee or any individual for that matter to the safety and health regulations or lack thereof, the corporation shall be deemed liable of manslaughter or homicide as the case may be. The second requires proof that the corporate culture failed to prevent or is inadequate in preventing the illegal act. This standard places a higher burden on a corporations since it increases their collective responsibility for the individual acts of its employees.<sup>129</sup>

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<sup>124</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 32.

<sup>125</sup> Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' 32.

<sup>126</sup> Schein E, 'Organizational Culture' 112.

<sup>127</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' 28.

<sup>128</sup> Corporate Manslaughter and Corporate Homicide Act (2007), United Kingdom.

<sup>129</sup> Slye R, 'Corporations, Veils and International Criminal Liability' 968.

The organisational approach is highly praised for its capacity to solve some of the deficiencies of derivative models. The most notable being that it is able to attribute criminal liability to a corporation without the need to pin it on an individual.<sup>130</sup> This is not to mean that individuals cannot be prosecuted for their own criminal acts as can be seen for example in Article 46C (6).<sup>131</sup> This approach also serves a public interest aim by the awareness it brings to the public of the wrongful acts of a corporation seeing that it is the corporation itself that is found criminally liable as opposed to its high ranking officials or any other employee.<sup>132</sup> Nonetheless, the approach can face challenges in differentiating which acts are intentional, thus constituting *mens rea*, and which are purely negligent. This blurs the line between criminal and tortious acts.

### **3.4: Conclusion**

This chapter has discussed the conceptualization of corporate criminal liability by first tracing its historical development. It has discussed why at the onset, corporations could not be found to be criminally liable and why and how this view changed. The reasons for this change, form the basis for imposing corporate criminal liability have also been discussed.

The chapter has then gone ahead to discuss the modes of attributing corporate criminal liability. These are two-fold, derivate approaches and the organisational approach. The derivative approaches attribute liability based on the conduct of individuals in a corporation. They are the vicarious liability, identification and aggregation models. The organisational approach, on the other hand, aims at finding a corporation directly liable by looking at its corporate culture.

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<sup>130</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 23.

<sup>131</sup> Article 46C (6), Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>132</sup> Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 23.

## **CHAPTER 4: CORPORATE CRIMINAL LIABILITY AS ENVISIONED IN THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**

### **4.1: Legal development of corporate criminal liability**

The Nuremburg Charter provides the first peek into organisational liability in international criminal law through Articles 6, 9 and 10.<sup>133</sup> However, these declarations only went as far as stating the criminal nature of the organisations without providing any means of sanctioning.<sup>134</sup> Despite the lack of a legal personality, the declarations were significant in that they led to the prosecution of its members for their involvement in Nazi crimes.<sup>135</sup> The follow up trials after Nuremburg also acknowledged the contributions of corporations in perpetration of war crimes by prosecuting some executives, so much so that the judgements passed revealed that the corporations were liable.<sup>136</sup>

The idea of establishing corporate criminal liability for corporations was also brought up in the drafting of the Rome Statute. Australia was at the forefront in this bid as it advocated for corporate criminal liability on the basis that there was no jurisprudence limiting its application.<sup>137</sup> However, due to the lack of corporate criminal liability in some jurisdictions, it would be difficult to implement the principle of complementarity, which was to be the core of the operation of the international court.<sup>138</sup>

Transnational legal mechanisms have also been instrumental in the development of corporate criminal liability, particularly in the civil law traditions. These legal instruments have mandated states to establish provisions for corporate criminal liability. The OECD Convention on Combating

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<sup>133</sup> Articles 6, 9 and 10, *Agreement for the prosecution and punishment of the major war criminals of the European Axis (Nuremburg Charter)*, 8 August 1945, 251 UNTS.

<sup>134</sup> Nyirenda F, 'Corporate Criminal Responsibility under the Malabo Protocol: A Step Forward?' 12.

<sup>135</sup> *The Trial of German Major War Criminals*, The International Military Tribunal (Nuremburg) judgement of 1 October 1946, 468.

<sup>136</sup> Nerlich V 'Core Crimes and Transnational Business Corporations' 8 *Journal of International Criminal Justice* 3, 2010, 898.

<sup>137</sup> UNGA, *Report of the 1953 Committee on International Criminal Jurisdiction*, UN Doc A/2645 (27 July- 20 August 1953).

<sup>138</sup> Schabas W, *An Introduction to the International Criminal Court*, 3 e.d, Cambridge University Press, Cambridge, 2007, 212.

Bribery of Foreign Public Officials in International Business Transactions is one of such instruments.<sup>139</sup> Some go further to proscribe a specific mode of attribution.<sup>140</sup> These transnational instruments have led to a somewhat trend in favour corporate criminal liability.<sup>141</sup> In order to accommodate different legal cultures, some scope is allowed for states to use some non-criminal measures provided that the sanctions rendered are proportionate to the crime.<sup>142</sup>

In the African context, South Africa provides the earliest glimpse into corporate accountability. This was through the proposition of an ad hoc Working Group of the Experts on Southern Africa to have an international criminal tribunal to punish and suppress apartheid. This was to be implemented through the Apartheid Convention that contemplated the participation of corporations in apartheid. The idea was to establish quasi-judicial responsibility of corporations since only individual criminal responsibility is contemplated in international criminal law.<sup>143</sup> Despite the nonrealization of such a tribunal, there are several treaties that have been adopted in Africa that impose criminal liability on corporations. These include the Corruption<sup>144</sup> and Bamako<sup>145</sup> Conventions. Article 11 of the Corruption Convention mandates states to prevent and combat corruption by private entities and its agents while Article 9 of the Bamako Convention requires states to put in place mechanisms for liability for all persons (including legal persons) involved in illegal imports.

Quite recently, the Special Tribunal for Lebanon (STL) made a significant contribution to the jurisprudence of corporate criminal liability. This was through its decision in the *New TV S.A.L*<sup>146</sup> and *Akhbar Bierut S.A.L*<sup>147</sup> cases. The cases involved the offence of contempt whereby broadcasting and publishing of names of alleged confidential witnesses in the Tribunal's

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<sup>139</sup> Article 2 (1), OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 15 February 1999.

<sup>140</sup> Article 18, Council of Europe Criminal Law Convention on Corruption, 1 September 2002; Article 3, Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests, 19 May 2009.

<sup>141</sup> Mark Pieth, 'Article 2 – The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary*, 2006, 21.

<sup>142</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 9.

<sup>143</sup> Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid' UN Doc E/CN.4/1426 (19 January 1981), 58– 60.

<sup>144</sup> Article 11, African Union Convention on Preventing and Combating Corruption, 5 August 2006.

<sup>145</sup> Articles 1(16) 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, 22 April 1998.

<sup>146</sup> *Al Jadeed S.A.L and Ms Kyayat STL-14-05* (2016), Special Tribunal for Lebanon.

<sup>147</sup> *Akhbar Bierut S.A.L and Mr Al Amin STL-14-06* (2016), Special Tribunal for Lebanon.

proceedings in television programmes and a newspaper respectively.<sup>148</sup> This was a special moment as it was the first time that an international tribunal declared its jurisdiction over legal persons.<sup>149</sup> Indeed this is a massive step forward in the prosecution of corporations as legal persons because currently, the International Criminal Court (ICC) only has jurisdiction over natural persons.<sup>150</sup> The STL went ahead to find the corporation in the *Akhbar Beirut* case liable and fined it 6,000 euros.<sup>151</sup> This decision represents an acceptability of corporate criminal liability that may lead to attainment of the status of a general principle in international law.<sup>152</sup>

## 4.2: The background to the creation of a regional criminal court

The role of corporations in promoting economic growth and even the well-being of societies is undeniable in this phase of globalisation, more so in Africa. This is evidenced by regulations such as corporate social responsibility that goes beyond the profit-making aims of the corporation but require such a corporation to take into account social and environmental concerns.<sup>153</sup> On the other side of the spectrum, some of these corporations have also contributed and fueled the conflicts that have been experienced in the region. These actions date back to Congo during King Leopold's reign in the search for resources.<sup>154</sup> Third World Approaches to International Law (TWAAIL) proponents are of the opinion that such atrocities have continued to happen because of the economic order that favours western and foreign states.<sup>155</sup> They thus propose that the spectrum of accountability for the role of foreign actors in local conflicts should be broadened.<sup>156</sup>

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<sup>148</sup> Bernaz N, '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 *Journal of International Criminal Justice*, 2015, 314.

<sup>149</sup> *Al Jadeed S.A.L and Ms Kyayat STL-14-05* (2016), Special Tribunal for Lebanon; *Akhbar Bierut S.A.L and Mr Al Amin STL-14-06* (2016), Special Tribunal for Lebanon.

<sup>150</sup> Article 25, Rome statute of the International Criminal Court.

<sup>151</sup> *Akhbar Bierut S.A.L and Mr Al Amin STL-14-06* (2016), Special Tribunal for Lebanon.

<sup>152</sup> Jesberger F 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' 14 *Journal of International Criminal Justice*, 2016, 338.

<sup>153</sup> International Institute for Sustainable Development, Corporate Social Responsibility - <https://www.iisd.org/business/issues/sr.aspx> - accessed on 26 November 2019.

<sup>154</sup> See generally, Hochschild A, *King Leopold's Ghost: A Story of Greed, Terrorism and Heroism in Colonial Africa*, Paperback, Mariner Books, London, 1998.

<sup>155</sup> Anghie A and Chimni B, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' 2:1 *Chinese Journal of International Law* 77, 2003, 89.

<sup>156</sup> Nielsen C, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law' 14 *Auckland University Law Review* 81, 2008, 98-99.

There are various drivers that have led to the decision to have a regional African court with criminal jurisdiction. One is the *Hissene Habre case*. Hissene Habre was the former president of Chad accused of gross human rights violations. Belgium, in a bid to exercise its universal jurisdiction against Senegal invoked a decision by the International Court of Justice (ICJ) to have Senegal try Hissene or extradite him to Belgium.<sup>157</sup> Senegal was the case in point because of its granting of political asylum to Hissene.

The African Union (AU) consequently set up a committee to consider the aspects of Hissene's case and what would be necessary to put in to trial. This was the Committee of Eminent Jurists.<sup>158</sup> The committee, while developing a strategy for Hissene's trial was to take a couple of factors into account, of importance to this study is the priority for an African mechanism to try him and to make "concrete recommendations on ways and means of dealing with issues of similar nature in the future".<sup>159</sup> Thus, one of the recommendations made in the committee's report was the need for an African mechanism and more so granting jurisdiction to an independent criminal court.<sup>160</sup> However, the AU did not implement this recommendation back in 2008 when the protocol to the ACtHPR was merged by that of the ACJHPR. Probably the AU reasoned that this would be an isolated incident and that the ICC could still continue to exercise its jurisdiction over individuals.

This brings us to the second trigger, the political indifferences between the AU and the ICC. The primary concern by the AU being that the ICC is abusing the principle of universal jurisdiction to specifically target African leaders.<sup>161</sup> The issuance of arrest warrants against some Rwandese officials for related crimes to the 1994 genocide pushed the AU to take a stand by a decision on the principle of universal jurisdiction.<sup>162</sup> This was in July 2008. The AU specifically called upon the European Union members to impose a moratorium on the arrest warrants<sup>163</sup>, to which there was no compliance. This led to another call by the AU assembly in 2009 calling for the exploration

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<sup>157</sup> *The Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* International Court of Justice, 2012.

<sup>158</sup> Decision on the Hissene Habre Case and the African Union (Assembly/AU/Dec.103).

<sup>159</sup> Decision on the Hissene Habre Case and the African Union (Assembly/AU/Dec.103, para 3-5).

<sup>160</sup> Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, para 34-42.

<sup>161</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient? 18.

<sup>162</sup> Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Doc. Assembly/AU/14 (XI).

<sup>163</sup> The AU-EU Expert Report on the Principle of Universal Jurisdiction (DOC. 8672/1/09 REV1).

of the idea of conferring the ACtHPR with criminal jurisdiction.<sup>164</sup> The arrest warrants against Al Bashir escalated the tension between the AU and the ICC so much so that the AU called upon states to not cooperate with the ICC in relation to Al Bashir's arrest.<sup>165</sup> The AU in reiterating the need to protect and defend Africa in the international criminal sphere tasked the African Commission on Human and Peoples Rights (ACmHPR) with implementing the decision to try international criminal crimes committed in African soil in Africa.<sup>166</sup>

The novel thing about the proposed court is the introduction of new crimes that have previously not been part of the scope of international criminal justice. These are piracy, terrorism, corruption, trafficking in persons, trafficking in drugs, trafficking in hazardous waste, mercenarism and the crime of unconstitutional change of government.<sup>167</sup> Furthermore, and specific to this study, is the extension of jurisdiction of the court to legal persons, specifically corporations.<sup>168</sup> The link between these crimes is their specificity to the African context.<sup>169</sup> Multinational corporations are predominantly controlled by the West and consequently have largely influenced the negotiations of accountability mechanisms in the international sphere. Consequently, they have been shielded from culpability.<sup>170</sup> The decision for such jurisdiction can be deemed to be a brave stand that Africa is taking in response to the roles that corporations play in the violation of human rights while advocating for their own selfish economic needs.

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<sup>164</sup> Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec. 213(XII)), para 9.

<sup>165</sup> Decision on the Meeting of African States Parties to the Rome Statute) (Assembly/AU/13(XIII), adopted at its 13<sup>th</sup> Ordinary Session at Sirte, Libya, 1–3 July 2009, para 10.

<sup>166</sup> Decision on the Implementation of the Assembly Decisions on the International Criminal Court, (Assembly/AU/Dec.366 (XVII)), para 8.

<sup>167</sup> Article 14, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>168</sup> Article 46C, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>169</sup> Manirakiza P, 'The Case for an African Criminal Court to prosecute international criminal crimes committed in Africa' in Nmeheille V (ed), *Africa and the the ICC: Perceptions of justice*, Cambridge University Press, Cambridge, 2016, 19.

<sup>170</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' 32.

### 4.3: The substance of Article 46C

Article 46C is the operative provision for the enforcement of corporate criminal liability. However, there are no interpretative notes to help in the navigation of the provision, hence similar provisions shall help in understanding how the provision shall or may be applied.<sup>171</sup> The provision has a striking similarity to the provision in the Australian penal code as developed by Colvin.<sup>172</sup> Part 2.5 of the Australian Code provides for the operation of an organizational model for the attribution of corporate criminal liability. The attribution is based on the corporate culture of a corporation on the justification that “.... the policies, standing orders, regulations and institutionalised practices of corporations of corporate aims, intentions and knowledge of individuals within a corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation”.<sup>173</sup>

Article 46C provides as follows:

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.

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<sup>171</sup> Nyirenda F, ‘Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward? 32.

<sup>172</sup> Colvin E, ‘Corporate Personality and Criminal Liability’ 15-18.

<sup>173</sup> Field S and Jorg N, ‘Corporate Manslaughter and Liability: Should we be Going Dutch?’ *Criminal Law Review*, 1991, 156.

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.

The first question arises as to whether all legal persons shall be under the jurisdiction of the proposed court, with the exception of States. It can be argued that this includes all incorporated entities in the domestic law of African states<sup>174</sup> This is further supported by the continuous reference to the term ‘corporate’ in denoting intention and knowledge throughout Article 46C. Perhaps the more pressing question with regards to the African context is whether state-owned corporations shall be under the purview of the court. This is in consideration that such corporations contribute greatly to various sectors of states and to foreign investments in Africa.<sup>175</sup> The effective way to deal with state corporations, keeping in mind that in some jurisdictions they enjoy some immunity, is to consider their actions while they are of a private capacity. This would mean that when not exercising state authority, they may be held criminally liable.

Secondly, the mode of attribution envisaged in Article 46C. The corporation’s knowledge and policies are to be the basis of its culpability pursuant to Article 46 (2) and 46 (4). The element of intention is one that has been well established in criminal law for the necessary culpability of a crime. As described by Colvin, intention is the rationale for a corporation’s culture as a whole.<sup>176</sup> Such intention shall be proved by the corporation’s policies, which may also be implicit pursuant to Article 46 (3). Consequently, not only shall the formal policies be considered, but also those that exist informally. This can be inferred from Article 46 (3) in that it is only through such policies that a reasonable explanation for certain conduct may be determined.

Interpreting Article 46 (3) in a wider context will make up for the differences in the provision from the Australian approach. First, the organisational model by Colvin is a policy of non-compliance while that in Article 46 requires a finding that a policy was directed to doing the act that constituted the offence.<sup>177</sup> Secondly, the model allows for attribution of culpability where corporate culture tolerated the actions or failed to put a compliance mechanism in place.<sup>178</sup> Seeing that these

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<sup>174</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 13.

<sup>175</sup> United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014, Investing in the SDGs: An Action Plan* (2014) 20.

<sup>176</sup> Colvin E, ‘Corporate Personality and Criminal Liability’ 33-34.

<sup>177</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 24.

<sup>178</sup> Criminal Code Act, Australia, subsections 12.3 (1), (2)(c) and (2)(d).

provisions are lacking in Article 46 may mean that there may be under-criminalisation of a corporation's actions where the culture did not 'actively' lead to the commission of the offence.<sup>179</sup> A wider interpretation of Article 46(3) will thus support the spirit of the organisational model in finding corporations directly culpable for acts and omissions.

Knowledge is another element that shall establish a corporation's intentions as seen in Articles 46 (4) and 46 (5). The knowledge may either be actual or constructive. Actual knowledge is inferred from the nature of the action while constructive knowledge is that which is ought to be known or there exists means for it to be known.<sup>180</sup> Furthermore, this knowledge need not rest in one employee, but may be aggregated across other employees. This represents the aggregation model of attribution of liability as discussed in Chapter 3. Thus due diligence is instilled in corporations by encouraging best information management practices.<sup>181</sup> Moreover, it is quite absurd in this day of modern technology for a corporation to argue that it is too big to have been aware of the knowledge possessed by its employees.<sup>182</sup> These provisions on aggregation of knowledge and constructive knowledge shall prove useful in crimes of complicity. Nonetheless, this introduces a new standard for fault in criminal law in that for individuals such fault may only be established through actual knowledge.<sup>183</sup>

The last provision of Article 46 relates to individual criminal responsibility. Individuals are not shielded from their personal liability in the commission or omission or crimes in a corporate structure, even when the corporation is being prosecuted. Hence, the two may be tried concurrently making it easier for the prosecution to make its case especially in instances where knowledge is aggregated. However, the individual need not be convicted for the corporation to be found liable and even where the individual is identified, he or she may necessarily not be held liable for the corporation's wrongdoing.<sup>184</sup>

Furthermore, this answers an important question as to the *actus reus* involved. Through the acknowledgement of individual responsibility, the provision appreciates that legal actors still act

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<sup>179</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 24.

<sup>180</sup> *Roper v Taylors Central Garage (Exeter) Ltd* (1951) 2 TLR 284.

<sup>181</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 25.

<sup>182</sup> Michael J, *Prosecuting Corporations for Genocide*, Oxford University Press, 2016, 80.

<sup>183</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 26.

<sup>184</sup> Fisse B and Braithwaite J, 'The Allocation of Responsibility for International Crime: Individualism, Collectivism, and Accountability' 468.

through natural persons. This is regardless of the lack of a provision that speaks to the physical element of the crimes, which differs from the Australian model. In Section 12.2 of the Australian Criminal Code Act, a vicarious liability model is adopted in attributing the *actus reus* of crimes. Nonetheless, Colvin argues that for an organisational model, it is not necessary to have a provision that establishes the physical actor in a corporate crime.<sup>185</sup> This goes to remedy the defect in derivative models that require for a natural person to be liable so as to establish the responsibility of a corporation. It also allows for a corporation to be liable for all actions that are under its control, and not only those of its employees, such as the acts of a subsidiary.<sup>186</sup> What is important is to establish a relationship between the corporation's policies and knowledge to the commission of a criminal act.<sup>187</sup>

#### **4.4: Conclusion**

The chapter began by explaining the legal development of corporate criminal liability as can be deduced from provisions in statutes and treaties. Tracing such history goes to prove that the idea of holding corporations criminally liable is not as alien as some may pose it to be. Perhaps what is new is that corporate criminal liability has progressed from just being imposed by transnational treaties, to a regional court being conferred jurisdiction over corporate crimes. The factors that have led to this being a first for the African continent have also been discussed. This legitimises the decision by the AU based on its concerns of protecting the integrity of its people. Lastly, the substance of the relevant provision on corporate criminal liability has been discussed. This has helped in discovering what has or has not been catered for by the provision by contrasting it to the Australian model.

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<sup>185</sup> Colvin E, 'Corporate Personality and Criminal Liability' 41.

<sup>186</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 28.

<sup>187</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward? 45.

## **CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION**

### **5.1: Findings and Recommendations**

#### **5.1.1: What is the prevailing approach to the doctrine in various national jurisdictions?**

This research question has been discussed in Chapters 3 and 4. The research concludes that in most national jurisdictions across the world the prevailing approach is the derivative mode of corporate criminal liability, specifically the vicarious liability and identification models. These are most prevalent in the USA and across European national jurisdictions respectively. In Africa the models can be seen to be in place in countries such as South Africa, Kenya and Malawi.

#### **5.1.2: What elements of the organisational approach are adopted in the proposed Article 46C of the protocol to the amendments on the Malabo Protocol?**

Chapter 4 of this research addresses this research question. The elements that have been adopted in employing the organisational approach are those of intent and knowledge. These two elements can be ascertained by looking into the corporate culture of the organisation. Intention shall be determined by looking at the formal and informal policies of the corporation whereas knowledge shall either be actual or constructive.

#### **5.1.3: What shall be the challenges faced in applying the doctrine to corporations in Africa, owing to the forward-looking approach of this study and how can it be properly enforced?**

Having established that there is a legal basis for corporate criminal jurisdiction, I now turn to the challenges the court shall face if it becomes operative. The first is the concern by civil society organisations that the endowing of international criminal jurisdiction is in a bid to diminish the capacity of the Human Rights Court to protect human rights before it has even proved itself capable.<sup>188</sup> The concerns reiterate that there shall be diversion of resources from the court which

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<sup>188</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' 28.

some argue are not quite sufficient for the human rights division in the first place.<sup>189</sup> This shall then lead to the overburdening of the court. These views may have merit in that the compliance of human rights in Africa has not been exactly impressive, to say the least. The AU has taken actions that can be said to impede such compliance by for example objecting to the arrest of Al Bashir. So the real question to be answered is whether the real reason for extending jurisdiction is to protect African leaders from international criminal accountability.<sup>190</sup>

Nmeheille argues that such thinking implies a homogenous type of thinking in addressing impunity in Africa, that the AU may manipulate the court process to ensure that African leaders are not brought to justice.<sup>191</sup> This ignores other relevant actors who are to be involved in the proper governance of the court. The judges, prosecutors and other court officials are one of such actors. Their integrity will create a shield against anyone that may want to escape justice. Moreover, the draft statute also grants *proio motu* powers to the prosecutor to initiate a case.<sup>192</sup> The civil society has also been quite instrumental in the relative success of the human rights system in Africa.<sup>193</sup> Their contributions shall thus also be needed in safeguarding the integrity of the criminal justice system.

Another challenge is the complementarity of the mode of attributing corporate criminal liability that the Court shall adopt to the different existing modes of attribution in domestic states. This is pursuant to Article 46H that stipulates that the jurisdiction of the Court shall be complementary to that of national courts. First, there is the question of tension that may arise from states that do not recognise corporate criminal liability. Even though this position is not currently held by as many states.<sup>194</sup> As Joanna suggests, a way to remedy such situations is to allow the Court to resort to non-criminal efforts if certain conditions are satisfied or where a state does not recognise corporate criminal liability.<sup>195</sup> This would be a derivation from the measures adopted in transnational crime

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<sup>189</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' 28.

<sup>190</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' 33.

<sup>191</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' African 33.

<sup>192</sup> Article 46G (1), Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>193</sup> Nmeheille V, 'Saddling' the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive or expedient?' 34.

<sup>194</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 34.

<sup>195</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 35.

agreements, which as discussed in Chapter 3 have significantly contributed to the acceptance of corporate criminal liability in numerous jurisdictions. Secondly, tension may arise where a state has adopted measures that enforce corporate liability in a different way as envisioned by the Court. For example, where the position is to adopt non-criminal measures towards corporations. This is significant because the Court does not require states to modify their criminal laws to reflect those of the Court.<sup>196</sup> The court can in turn respond by being more accommodating in its interpretations to maintain the spirit of complementarity.

Enforcement is perhaps the biggest challenge that the Court is yet to face. This is the case because the Court is to have jurisdiction over transnational crimes which require the collaborative efforts of multiple states. For matters such as access of witnesses and evidence, enforcing orders or accessing corporate property may be less problematic in African states as the draft statute already contemplates them.<sup>197</sup> For non-African states, this is indeed a pressing problem. This is with the knowledge that most corporations in Africa operate as subsidiary companies and consequently that the resources plundered in Africa end up in foreign states.<sup>198</sup> Cooperation may be achieved through entering into agreements as contemplated in Article 46L (3) of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

The question also arises as to the liability of a parent company whose subsidiary commits offences in Africa. The key consideration being that these corporations are distinct legal persons from each other. So then can a corporation be held responsible for the crimes of another corporation?<sup>199</sup> This question is of importance especially where a subsidiary corporation may be held liable for actions that should properly be grounded in the parent corporation. One way is to charge the parent corporation as an accessory to the offences of the subsidiary.<sup>200</sup> Another way would be to establish the sole responsibility of the parent corporation through a demonstration that it is because of the policies it has in place that the offence was committed by the subsidiary.<sup>201</sup>

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<sup>196</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 34.

<sup>197</sup> Articles 46J and 46K, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>198</sup> Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' 58.

<sup>199</sup> Clough J, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' 33 *Brooklyn Journal of International Law* 3, 2008, 899.

<sup>200</sup> Article 28N, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>201</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 38.

A related question is to the non-physicality of corporations that makes it impossible to extradite them. Article 46A provides for the right of an accused person to be present during the trial. This may be taken to mean both natural and legal persons given by the intent to consistently treat both persons.<sup>202</sup> For corporations, they may choose to have their case tried in the presence of a chosen representative. To ensure that this course of action is effective there needs to be in place rules as to the appointment of such a representative and actions to incentivise corporations to comply.<sup>203</sup>

Lastly, I shall look into the challenge with the sanctions as proposed. The propositions of the sanctions to be rendered are quite conservative as they are limited to pecuniary sanctions. Perhaps this is an effort to ease the process of mutual assistance.<sup>204</sup> However, it has been argued that pecuniary sanctions are insufficient in deterring corporate crime<sup>205</sup> or even to demonstrate the moral condemnation of such crimes. It is for this reason that the Council of Europe has suggested sanctions such as prohibition from conducting business with public officials, winding up of the corporation, publication of the decision to impose sanctions among others.<sup>206</sup> The proposals made for the ICC were also in this line. For example, the closing down of the premises used for the commission of the crime and dissolution.<sup>207</sup> Joanna argues that perhaps the reason for such conservatory sanctions is because non-pecuniary measures are the only incentives offered by poorer environments to corporations.<sup>208</sup> As to the concerns that shareholders as innocent parties may have to bear the cross for the crimes of a corporation, Colvin argues that the use of an organisational model makes such concerns less compelling because it is through the policies of the corporation that liability is located. Furthermore, it is unreasonable for shareholders to reap the benefits and not share in bearing some liability.<sup>209</sup>

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<sup>202</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 39.

<sup>203</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 39.

<sup>204</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, Joanna 30

<sup>205</sup> 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*, 1990, 28.

<sup>206</sup> Article 7, 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*, 1990.

<sup>207</sup> Article 76, 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

<sup>208</sup> Kyriakakis J, Article 46C: Corporate Criminal Liability at the African Criminal Court, 31.

<sup>209</sup> Colvin E, 'Corporate Personality and Criminal Liability' 29.

## 5.2: Conclusion

Africa has been a pioneer in the international law arena with the rest of the international community “catching up” later.<sup>210</sup> The proposition of a regional court with corporate criminal jurisdiction evidences this view seeing that it shall be the first court to wield such jurisdiction. This is no surprise given the contributions of corporations in Africa, both positive and negative. Developments in the field of corporate criminal liability have moved away from asking the ‘why’ to responding to the ‘how’. It is in this response that the organisational mode of attributing liability has been developed and applied first in Australia, and now Africa. This is a progressive step in allocating liability as it seeks to remedy the defects of derivative models. Despite the challenges that may be faced in its application, it is undeniable that this move shall lead to more accountability for crimes committed by corporations in Africa

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<sup>210</sup> Deya D, ‘Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes’ *OpenSpace on International Criminal Justice* 22, 2012, 26.

## **BIBLIOGRAPHY**

### **Books**

Cassese A and Gaeta P, *International Criminal Law* 3 ed Oxford University Press, Oxford, 2013

Garner B (ed) *Black's Law Dictionary* 8th edition

Hochschild A, *King Leopold's Ghost: A Story of Greed, Terrorism and Heroism in Colonial Africa*, Paperback, Mariner Books, London, 1998

Kadish S and Shulhofer S, *Criminal Law and its Process: Cases and Materials*, 6 e.d, Wolters Kluwer, New York, 1995

Laufer L, *Corporate Bodies and Guilty Minds. The failure of corporate Criminal Liability*, University of Chicago Press, Chicago, 2006

Michael J, *Prosecuting Corporations for Genocide*, Oxford University Press, 2016

Schabas W, *An Introduction to the International Criminal Court*, 3 e.d, Cambridge University Press, Cambridge, 2007

Wells C, *Corporations and Criminal Responsibility*, 2nd ed. Oxford, Oxford University Press, 2001

Williams G, *A textbook of criminal law*, Stevens and Sons, London, 1983

### **Chapter in Book**

Kyriakakis J, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in Jalloh C, Clarke K and Nmehielle V *The African Court of Justice and Human and Peoples Rights in Context: Developments and Challenges* e.d Cambridge University Press, Cambridge, 2019

Lehner A, 'The Austrian Model of Attributing Criminal Responsibility to Legal Entities' in Brodowski D et al (eds) *Regulating Corporate Criminal Liability*, Springer International Publishing, Cham, 2014

Manirakiza P, 'The Case for an African Criminal Court to prosecute international criminal crimes committed in Africa' in Nmeheille V (ed), *Africa and the the ICC: Perceptions of justice*, Cambridge University Press, Cambridge, 2016

Mark Pieth, 'Article 2 – The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary*, 2006

Nollkaemper A. 'Introduction' in Nollaemper A and Wilt H (eds) *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009

Wells C 'Containing Corporate Crime Civil or Criminal Controls?' in Gobert J & Pascal A (eds), *European Developments in Corporate Criminal Liability*, Taylor and Francis Ltd., London, 2011

### **Journal articles**

Anghie A and Chimni B, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' 2:1 *Chinese Journal of International Law* 77, 2003

Beale S, 'A response to the critics of corporate criminal liability' 46 *American Criminal Law Review*, 2009

Bernaz N, '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 *Journal of International Criminal Justice*, 2015, 314.

Clough J, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' 33 *Brooklyn Journal of International Law* 3, 2008

Clough J, 'Bridging the theoretical gap: The search for a realist model of corporate criminal liability' 18 *Criminal law forum* 3, 2007

Coleman B, 'Is Corporate Criminal Liability Really Necessary' 29 *Southwestern Law Journal* 4, 1975

Collectivism and Accountability" 11 *The Sydney Law Review* 3, 1988

Colvin E, 'Corporate Personality and Criminal Liability' 6 *Criminal Law Forum* 1, 1995

Dalley P, 'A theory of agency law' 72 *University of Pittsburg Law Review*, 2011

Dewey J, 'The Historic Background of Corporate Legal Personality' 35 *The Yale Law Journal* 6, 1926

Deya D, 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes' *OpenSpace on International Criminal Justice* 22, 2012

Diskant E, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure' 118 *Yale Law Journal* 126, 2008

Ezeudu M, 'Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential of the International Criminal Court', 11 *African Human Rights Law Journal* 1, 2011

Field S and Jorg N, 'Corporate Manslaughter and Liability: Should we be Going Dutch?' *Criminal Law Review*, 1991

Fischel D and Sykes A, 'Corporate Crime' 25 *Journal of Legal Studies*, 1996

Fisse B and Braithwaite J, "The Allocation of Responsibility for Corporate Crime: Individualism,

Hall J, 'Corporate Criminal Liability-Thirteenth Survey of White Collar Crime' 35 *American Criminal Law Review*, 1998

Hughes G, 'Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process' 47 *Vanderbilt Law Review* 37, 1994

Jesberger F 'Corporate Involvement in Slavery and Criminal Responsibility under International Law' 14 *Journal of International Criminal Justice*, 2016

Khanna V.S, 'Corporate Criminal Liability: What Purpose Does It Serve?' 109 *Harvard Law Review* 7, 1996

Kinley D and Zerial N, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Rights Norms for Corporations' 25 *Companies and Securities Law Journal* 30, 2007

Mark G, 'The Personification of the Business Corporation in American Law' 54 *University of Chicago Law Review* 4, 1987

Mays R, 'Towards corporate fault as the basis of criminal liability of corporations' 2 *Mountbatten Journal of Legal Studies* 2, 1998

Nerlich V 'Core Crimes and Transnational Business Corporations' 8 *Journal of International Criminal Justice* 3, 2010

Nielsen C, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law' 14 *Auckland University Law Review* 81, 2008

Ntsanyu C, 'Corporate criminal liability in South Africa: The need to look beyond vicarious liability, 55 *Journal of African Law* 1, 2011

Ratner S, 'Corporations and Human Rights: A theory of Legal Responsibility', 113 *Yale Law Journal* 3, 2001

Schein E, 'Organizational Culture', 45 *American Psychological Association* 2, 1990

Simmons P, 'International law's invisible hand and the future of corporate accountability for violations of human rights' 3 *Journal of Human Rights and the Environment* 1, 2012

Slye R 'Corporations, Veils and International Criminal Liability' 33 *Brooklyn Journal of International Law* 3, 2008

Strange S, *The Retreat of the State: The diffusion of power in the world economy*,1, Cambridge University Press, Cambridge,1996

Wilkinson M, 'Corporate criminal liability-the move towards recognising genuine corporate fault', *Canterbury Law Review* 5, 2003

### **Self-published articles**

Godwin M, 'The Case for Corporate Criminal Liability' Research Gate, 2016

Otieno G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' *Kenya Law*, 2008

### **Unpublished articles**

Nciko A, 'The African Court and Corporate-related Human Rights Abuses in Africa: Making the Case for the African Union Law, 2018

### **Discussion papers**

Khanna V.S, 'Corporate Mens Rea: A Legal Construct in Search of a Rationale' Harvard Law School, Discussion Paper No. 200 9/96

### **Dissertations**

Bassi A, 'Corporate Criminal Liability: An analytical study with special reference to penal laws in India' Unpublished Ph.D Thesis, Rajiv Gandhi National University of Law, Punjab, 2016

Kanyuga C, 'Move Towards a New Paradigm of Corporate Criminal Liability in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014

Nyirenda F, 'Corporate Criminal Responsibility Under the Malabo Protocol: A Step Forward?' Unpublished LLM Thesis, University of the Western Cape, 2017

### **Legislation**

Chapter 7:01 of the Penal Code of Malawi

Company Act CAP 486 of the Laws of Kenya

Constitution of Kenya

Criminal Code Act, Australia

Penal Code Act of Kenya CAP 63 of the Laws of Kenya

South African Criminal Procedure Code Act No. 51 of 1977

## **International Law Instruments**

Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014

Statute of the International Tribunal for the Former Yugoslavia, UNSC Res 827, 25 May 1993, UN Doc

Agreement for the prosecution and punishment of the major war criminals of the European Axis (Nuremburg Charter), 8 August 1945, 251 UNTS

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 15 February 1999

Council of Europe Criminal Law Convention on Corruption, 1 September 2002

Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests, 19 May 2009

Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid UN Doc E/CN.4/1426, 9 January 1981

African Union Convention on Preventing and Combating Corruption, 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, 22 April 1998

Statute of the International Tribunal for Rwanda, UNSC Res 995, 8 November 1994, UN Doc S/RES/955

Charter of the United Nations, 24 October 1945

Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 90

## **UN Documents**

Final Report of the Monitoring Mechanism on Angola Sanctions' (21 December 2000) UN Doc S/2000/1225

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

UNGA, *Report of the 1953 Committee on International Criminal Jurisdiction*, UN Doc A/2645 (27 July- 20 August 1953)

## **AU Documents**

Decision on the Hissene Habre Case and the African Union (Assembly/AU/Dec.103

Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec. 213(XII))

Decision on the Implementation of the Assembly Decisions on the International Criminal Court, (Assembly/AU/Dec. 366(XVII))

Decision on the Meeting of African States Parties to the Rome Statute) (Assembly/AU/13(XIII)

Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Doc. Assembly/AU/14 (XI)

The AU-EU Expert Report on the Principle of Universal Jurisdiction (DOC. 8672/1/09 REV1)

## **Reports**

Report of the Committee of Eminent African Jurists on the Case of Hissene Habre

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

United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014, Investing in the SDGs: An Action Plan*, 2014

### **Institutional authors**

American Law and Legal Information, *Corporate Criminal Responsibility: American standards of corporate criminal liability*

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*, 1990

Department of Justice, Government of Canada, *Corporate Criminal Liability*, 2002

### **Internet Sources**

Sardana V, 'Jurisprudence- Theories of Legal Personalities' Law Notes by Vijay Sardana, 27 May 2017

<http://lawnotesforstudents.blogspot.com/2017/05/jurisprudence-theories-of-legal.html> on 10 April 2020