FACULTY OF LAW

Lund University

Joseph Keogh

Corporate impunity and the 'accountability gap' in Sub-Saharan Africa: is the successful prosecution of corporate involvement in atrocity crimes within reach?

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Contents

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The motivation for this thesis stems from two books read in the last couple of years. Dictatorland by Paul Kenyon and Looting Machine by Tom Burgis do not make for light bedtime reading, but they have provided me with vital insights into how economic actors multiply the risk of atrocity crime precipitating in African countries endowed with high levels of natural resources.

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Definitions

Africa: for the purposes of this thesis, 'Sub-Saharan Africa' is shorthanded to 'Africa'. But as AU members, North African States are not forgotten entirely.

Accountability gap: describes the lack of enforcement mechanisms to hold corporations to account for their involvement in atrocity crimes.

Atrocity crime: refers to the 'core crimes' defined and governed by the Rome Statute with the exception of the crime of aggression. These are: genocide, crimes against humanity and war crimes. The main criterion for an atrocity crime is that it "shocks the conscience of humankind", thereby making them the most serious human rights violations.

Complementarity principle: the rule that an international criminal court may only intervene when the State on which the alleged atrocity crimes were perpetrated is either "unwilling or unable" to investigate and/or prosecute.

'De facto' complementarity principle: the proposition that an operational ACC would only intervene in a matter when the home State in question is either unwilling or unable to investigate and/or prosecute the foreign corporation alleged to have committed the extraterritorial crime over which the ACC exercises jurisdiction.

Global North: refers to affluent States predominantly located in the Northern hemisphere. Countries include the Anglophone States of the USA, UK, Canada & Australia and European countries such as France, Germany, Switzerland, the Benelux & Nordic States.

Hard law: legally binding sources of international law such as treaties.

Home State: the State in which a corporation is registered.

Host State: the State on which the TNC was alleged to have been involved in atrocity crimes.

Jurisdiction personae: the persons over which a court has jurisdiction. This may be restricted to natural persons or include legal persons as well.

Justice cascade: coined by Dr Kathryn Sikkink "to describe the spread of accountability systems throughout the globe".

Legal persons: non-human legal entities such as corporations.

Natural persons: individual human beings.

Natural resources: for the purposes of this thesis, natural resources refer to extractible raw products such as oil, gold, coltan, diamonds and other materials like timber, copper and rubber that contribute to the world economy. These natural resources are abundant in many resource-rich African States.

Resource curse: describes the paradox that in many instances the most wealthy States by measurement of natural resources are the most politically unstable.

Resource-rich States: those States that possess large deposits of natural resources such as oil, gold, coltan, diamonds and other materials like timber, copper and rubber.

Societas delinquere non potest: the principle that a legal person cannot be held criminally liable for wrongdoing.

Soft law: nonbinding sources of international law such as declarations.

Abbreviations

ACC: African Criminal Court

AU: African Union

ASAP: ‘African solutions to African problems’

BHR: business and human rights

CAH: crimes against humanity

CCL: corporate criminal liability

CSR: corporate social responsibility

DRC: Democratic Republic of Congo

EU: European Union

FDI: foreign direct investment

‘Guiding Principles’: United Nations Guiding Principles on Business and Human Rights

ICJ: International Court of Justice

ICC: International Criminal Court

ICL: international criminal law

ICCSt: Rome Statute

IHRL: international human rights law

ILC: International Law Commission

RDS: Royal Dutch Shell

SRSG: special representative of the Secretary-General on human rights and transnational corporations and other business enterprises

TNC: transnational corporation(s)

UK: United Kingdom

USA: United States of America

1 Introduction

1.1 Summary

Although transnational corporations (hereinafter TNCs) often far outmatch States in terms of resources and influence over the direction of the world economy, they are generally unaccounted for when operating outside the territories in which they are incorporated (hereinafter 'home States'). This thesis will look specifically at those TNCs that rely on natural resource extraction as their main source of profit. Such TNCs are drawn to States with high levels of natural resources and, perhaps counterintuitively, higher levels of political disorder. Because corporations continue to operate above the law across many resource-rich States, this thesis argues for the domestic use of CCL as the most appropriate mechanism for closing the accountability gap towards ending corporate impunity in Africa. In order for this to be achieved, there must be effective governance regimes based on international cooperation. Although a lofty ambition, it shall be argued that there are underlying frameworks at the international, regional and national levels indicating to the affirmative that closing the accountability gap may be within reach.

1.2 Introducing The Problem

Despite its broad acceptance in national legal systems, there is no unifying international source of 'hard law' that "explicitly regulate[s]" CCL for corporate involvement in atrocity crime.[1] By definition, TNCs operate across borders. And while punitive measures can be taken against an offending TNC in its home State, those CCL rules enabling the prosecution of a corporation 'lose their teeth' in the context of extraterritorial wrongdoing. In the words of the first SRSG for Business and Human Rights Professor Ruggie, corporate involvement in atrocity crime is expressed by a "negative symbiosis" between unregulated corporations and:

> …host countries that are characterized by a combination of low national income, current or recent conflict exposure, and weak or corrupt governance.[2]

[1] Finn Schreurs, 'Nestle & Cargill v Doe Series: Remedying the Corporate Accountability Gap at the ICC' (11th January 2021) *Just Security* > https://www.justsecurity.org/74035/nestle-cargill-v-doe-series-remedying-the-corporate-accountability-gap-at-the-icc/ <

[2] John Ruggie, 'Promotion and Protection of Human Rights' United Nations Commission on Human Rights (22nd February 2006) 62nd Session, at para 70

There is thus an 'accountability gap' that perpetuates corporate involvement in atrocity crime, a point that is attributable to (1) CCL governance systems in home States 'losing their teeth' extraterritorially, (2) host States with a weak rule of law failing to investigate corporate involvement in atrocity crime on their sovereign territory and (3) a lack of international law regulating corporate activities in politically turbulent countries. This problem is particularly pertinent to Africa, the continent with the greatest number of natural resources but arguably the highest frequency of atrocity crime.

Corporations involved in countries afflicted by political disorder are tied to the economic factors that help drive atrocity crime, a suggestion aptly demonstrated by the stark contrast between resource-rich African States and those States that boast fewer natural resources. The former group of States are demonstrably more susceptible to the precipitation of violence than are the latter States, clearly suggesting that there is a nexus between natural resource extraction and atrocity crime. If it is not possible to rely upon host States to provide criminal redress, the onus then falls on the home State to ensure preventative measures are taken to minimise the occurrence of atrocity crimes committed outside its borders. Although a large number of Global North States possess the doctrinal framework and have exhibited an underlying receptiveness to criminally prosecuting corporations for atrocity crimes, such prosecutions have been generally non-existent in practice. Global North States have thus been decidedly unresponsive to ensuring – at a minimum – domestic rules on CCL do not 'lose their teeth' when applied extraterritorially.

1.3 Research Questions

The overarching research question that permeates throughout this thesis reads as follows:

> Is it possible to assess the likelihood that future corporate involvement in atrocity crime in Africa will be redressed at the national level against the backdrop of international, regional and domestic developments?

A selection of interrelated research sub-questions were formulated to guide my discussion according to each chapter heading:

> **Chapter 2:** What is the accountability gap and how does it impact African States afflicted by the 'resource curse'?

Chapter 3: To what degree are the economic causes of atrocity crimes accounted for at the international level, the lack of CCL rules on the matter notwithstanding?

Chapters 4-5: How might an operational African Criminal Court interact with national legal systems in third party States (i.e. Global North home States)?

Chapter 6: What explanations can be gleaned from the ineffectiveness of domestic CCL rules when applied extraterritorially, despite there being generally supportive underlying doctrinal frameworks for such liability?

1.4 Research Methods and Materials

A hybrid research method was taken in preparation for this thesis. The majority of the discussion is informed by doctrinal research sourced from (1) international criminal law, (2) international human rights law, (3) African Union law and (4) national laws in Global North legal systems. Following the same numbering, particular reference to written law was made to (1) the Rome Statute, (2) international soft law such as the Guiding Principles on Business and Human Rights and other nonbinding sources that fall within the rubric of IHRL, (3) the Malabo Protocol, (4) national legislation that 'marries' internationally defined atrocity crimes with domestic rules on CCL. As well as written law, research into existing jurisprudence – or lack thereof – across the international and domestic levels was undertaken to help reveal trends that chime with the research questions outlined above. Because a sizeable part of the debate concerns future developments, much of the research undertaken for this thesis helps one to envision what a global governance regime on CCL for atrocity crime *might* look like. Particular mention must therefore be made to the ILC's work as well as those visionaries in the academic literature that have considered the prospects of a global CCL regime for atrocity crime in depth. Some of the doctrinal research undertaken did not yield the results initially expected. One notable example was the surprising scantiness of jurisprudence pertaining to CCL for atrocity crime despite there being a clear legislative mandate for such prosecutions across many jurisdictions in the Global North. But instead of prompting a re-evaluation in thesis topic choice, this research finding enriched my analysis and helped boost its originality by revealing major explanatory gaps in practice.

Another research objective of this thesis was to be able to make a broad comparative analysis of the international, regional and domestic legal systems and a narrower investigation of the approaches taken across different national systems. Indeed, this thesis is at no point wedded

to a particular nation State or source of law as to do so would undermine the purpose of the research questions. One of the principal objectives has therefore been to identify trends, themes and inconsistencies between Global North states, thereby necessitating comparative research. For this I relied heavily on comparative research papers published by NGOs like SOMO and Oxford Pro Bono Publico. These comparative research findings provided the material needed to make informed inferences about the probability of my predictions being achieved. Since a core part of my reasoning objects to the emergence of a patchwork of approaches vis-à-vis CCL for atrocity crime, making comparative analyses between proactive States like France versus less responsive States like the UK was critical to preventing premature or overly ambitious conclusions.

And finally, critical research was undertaken to provide a scholarly basis for my proposed pathways and predictions. Critical research in the context of this thesis refers to those scholarly contributions that identify lacunae in the law or express criticism towards existing sources of international law, national legislation or domestic/international jurisprudence. Much of the critique that borders scholarly activism is to be found in Chapter 2. As such, this thesis may initially read as 'activistic', to the extent that Chapter 2 provides a fairly scathing account of the corporate impunity that continues to thrive unabated in many resource-rich African States. This on-the-ground reality is explained by lacunae in assertive legal measures capable of imposing criminal liability on corporations for their involvement in atrocity crimes. The doctrinal research surveyed in subsequent chapters helps modulate this fairly acerbic viewpoint by providing rationales and explanations for the absurd reality that corporate impunity remains for the most part evergreen. The critical research cited in subsequent chapters points primarily to the inertia of political actors or offers proposals of how corporate crime might be redressed by CCL in the future. Through this literature review, it was possible to glean explanations that make sense of the accountability gap, thereby helping me reach the conclusion that a lack of political will – as opposed to doctrinal incompatibility – is the primary perpetuator of corporate impunity.

1.5 Limitations

The main limitation to this thesis is the striking lack of jurisprudence across Global North legal systems pertaining to CCL for atrocity crimes. But this, it is submitted, offers significant ground for discussion and analysis in its own right. Nevertheless, the scantiness of criminal jurisprudence means that I have had to rely more heavily on cases deriving from

civil lawsuits to help texture my analysis. Another obvious limitation is the lack of international law – binding or nonbinding – that engages the issues under discussion in this thesis. Rather, the majority of international texts under discussion are either proposals, in their embryonic stages of development or otherwise dormant. But despite being somewhat limitative, the abundance of treaty proposals and drafts has enabled me to assess my research questions from a predominantly normative angle. Because this thesis is geared towards offering policy perspectives, and is already of a fairly broad scope in itself, the following list enumerates the areas I will *not* be exploring in any significant detail: (1) victims and their role in criminal proceedings, (2) a comparative analysis investigating the specificities of CCL regimes within every Global North national legal system, (3) the notion of individual criminal responsibility as a preferable or more viable alternative to CCL, (4) hypotheticals about how corporations can help produce positive social and economic growth when subject to a robust CCL governance regime, (5) debates around the potential customary international law status of CCL and (6) corruption and neopatrimonialism as precipitating factors of atrocity crime. Although these topics are related to the main themes under discussion and of important academic value, they are ultimately peripheral to the main objectives of this thesis.

1.6 Outline

The first part of this discussion in Chapter 2 will provide a primer on CCL before exploring the accountability gap in closer detail. It will situate the accountability gap in the context of African States afflicted by the 'resource curse' to illustrate how corporate impunity multiplies the likelihood of the precipitation of violence in such environments. Chapter 3 aims to survey the existing international law (or lack thereof) on the matter of CCL for atrocity crimes. It will undertake an assessment of the emerging developments in the sphere of international law to begin to develop the argument that a CCL governance regime may be within reach. Chapter 4 provides an objective account of the Malabo Protocol and the proposed African Criminal Court. Chapter 5 builds on the previous chapter by examining the implications of an operational African Criminal Court with particular reference to a predicted 'de facto' or 'soft' complementarity principle emerging between the African regional system and third party States. Global North national legal systems are then discussed at length in Chapter 6. That chapter will elucidate some of the key arguments pertaining to supportive doctrinal frameworks and underlying receptiveness to prosecuting corporations under the doctrine of CCL. The final chapter synthesises the research findings identified in the preceding chapters,

and examines the probabilistic likelihood of the variables outlined coalescing to successfully end corporate impunity in Africa.

1.7 Purpose of the Thesis and its Contribution to the Existing Scholarship

In line with the wording of the titular question, this thesis will examine the likelihood of impactful CCL regimes – induced through the convergence of international, regional and domestic developments – emerging across Global North jurisdictions to end corporate impunity in Africa. I have purposely used the wording 'within reach' as it is nondefinitive and open-ended, since I am particularly mindful of the scale of the study and the patchwork of approaches taken across the various Global North jurisdictions. At this point it is helpful to elucidate upon what constitutes 'within reach', a phrase that could otherwise be interpreted as vague and open to interpretation. For the purposes of the topic under discussion, 'within reach' can be measured by identifying: (1) which States recognise the doctrine of CCL (2) whether any States have 'married' domestic CCL rules with internationally defined atrocity crimes,[3] (3) current sources of international law and the level of support they have amassed, (3) unratified sources of international law and the level of support they have amassed, (4) proposed treaties and the level of support they have amassed, (4) breadth of international jurisprudence, (5) breadth of domestic jurisprudence and (5) any possible jurisprudential trends across national jurisdictions. These indicators are largely consistent with the chapter headings, with the final chapter aiming to apply inductive reasoning to synthesise my findings pursuant to answering the titular question of whether closing the accountability gap in Africa is 'within reach'.

The purpose of this paper is threefold: (1) to illuminate the negative consequences associated with the accountability gap and the role TNCs play in atrocity crime on the continent of Africa, (2) to demonstrate *why* the accountability gap is solvable, (3) to forward pathways and predictions as to *how* the accountability gap can be narrowed looking to the future. It is hoped that the topics under discussion will contribute to the existing scholarship by drawing important links between developments at the international, regional and domestic levels pursuant to the idea of an ever-evolving 'justice cascade'. In the absence of concrete progress on the matter of CCL for atrocity crime, normative developments will form the focal point of this thesis. Discussion adds to the scholarship by assessing and identifying the normative

[3] This 'marriage' metaphor is defined at 6.1 and illustrated with specific examples between 6.5.1-6.5.2

indicators to justify the use of CCL for atrocity crime. I temper these observations by examining the extent to which normative developments have been actualised in practice, particularly by Global North home States. There are some gaps in the literature on these linkages, particularly with respect to the anticipated interplay between the proposed African Criminal Court and Global North home States.

2 Corporate Criminal Liability

2.1 Introduction

International law is mostly silent on the issue of CCL. Indeed, under international law the accountability of TNCs is entirely self-governing with the exception of voluntary soft law rules on corporate social responsibility (CSR). There are by the same token no sources of binding international law that place legal obligations on home States to prosecute corporations for involvement in atrocity crime (discussed further at 3.3). But under domestic law, CCL is not an aspirational legal doctrine. Despite CCL's status as an extant and fully enforceable legal tool in jurisdictions with a discernible rule of law, it has been suggested that TNCs are "about as likely to be held accountable as they are to be struck by lightning" when it comes to their involvement in atrocity crimes on the continent of Africa.[4] If such an observation is true then TNCs operate with impunity, owing to a gaping accountability gap that essentially makes them above the law in many – primarily resource-rich – countries across Africa. They are, by extension, excellent at deflecting blame for their involvement in atrocity crimes, made possible by a combination of indifference and inaction by home States.

The aim of this chapter is to demonstrate to the reader why CCL needs to be harnessed to its fullest potential if the accountability gap is ever realistically to be narrowed satisfactorily. It will then illuminate the role TNCs play in atrocity crimes, either directly as principal perpetrators or, more commonly, as complicit secondary perpetrators. The conclusions drawn from this chapter – that existing CCL is equipped to deal with TNC involvement in atrocity crimes but relies on the right combination of political and judicial will to realise its potential – will lay the groundwork for later chapters on future developments at the international, regional and domestic levels.

2.2 CCL as a Pragmatic But Underused Tool

2.2.1 Pragmatic underpinnings

CCL as a legal doctrine is not a new development, particularly in the common law traditions. It emerged in the early 20th century and was pivotal in dismantling the notion that only

[4] William A. Schabas, 'War Economics, Economic Actors and International Criminal Law' reprinted in his *War Crimes and Human Rights*, London: Cameron May 2008, 511, p.512

individual, natural persons could be held criminally liable for their wrongdoings. Indeed, CCL was spawned out of the need to close an accountability gap owing to the "absence of… viable forms of redress" capable of holding legal persons criminally responsible.[5] It follows that CCL is "highly pragmatic" since it pursues the "practical necessity" of preventing corporations from escaping criminal liability.[6] A quandary for supporters of CCL is that corporations are inanimate entities, meaning it cannot be easily argued that a corporation possesses the requisite guilty mind to invoke criminal liability. But by equal measure, a corporation enjoys the right to enter contracts, to sue and to own property. Corporations are therefore, like natural persons, rightsholders. The justification for CCL becomes persuasive when one accepts the pragmatic argument that "one legal fiction deserves another".[7] In other words, there must be concurrent duties appended to rights and privileges enjoyed by legal persons.

2.2.2 Extraterritorial underutilisation

Against the background described above, there probably ought to be some mechanism capable of holding corporations criminally liable for wrongdoing. To some proponents of CCL, the commission of corporate crime in Africa should "amount to an instantaneous death sentence" on the culpable TNC.[8] CCL would then be harnessed as a powerful deterrent on TNCs, especially those already subject to considerable international scrutiny as captains of the global economic order. This point is echoed by Stewart's assertion that:

> …corporations that sustain bloodshed are more exposed to foreign law enforcement, more prone to rational deliberation through their commitment to profit maximization, and likely to perceive conviction for [an atrocity] crime as nothing short of a commercial catastrophe.[9]

In this sense, the pragmatic underpinnings of CCL makes it anything but hollow as a legal doctrine within a domestic, Global North legal setting. CCL and its pragmatic origins might be viewed as fairly intuitive to criminal justice. It does not require any degree of interpretative finesse to comfortably integrate it into the wider rubric of criminal liability.

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[5] James G. Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16 *New Criminal Law Review* 261, p.262
[6] Stewart (2013) at p.262
[7] Stewart (2013) at p.271
[8] Stewart (2013) at p.280
[9] Stewart (2013) at p.273

CCL thus satisfies a normative quality; something one might *expect* to be a staple in many legal systems. It is therefore necessary to labour the point that the corporation is a rightsholder and, concurrently, a duty bearer as well. But CCL has only hitherto been a sharp tool within home States' territories. Given the pragmatic underpinnings of CCL, one might on the face of things proceed from the assumption that extraterritorial jurisdiction and parent company liability are used as uncontroversial tools in harnessing the doctrine to its fullest potential. Yet at the moment, generally speaking the opposite is true. It is thus arguable that a gaping accountability gap in Africa that enables corporations to act with impunity exists, notwithstanding the rules to which they are bound when operating within their home State. This is partly explained by the fact that international law has not yet developed to reflect the CCL standards enshrined within domestic jurisdictions (discussed further at 3.6). Instead, the 'marriage' between CCL rules and internationally defined atrocity crime has been endogenous to national legal systems (a point discussed at length throughout Chapter 6). And though international soft law pertaining to CSR does exist, there is no unifying source of binding legal norms that stop TNCs from foregoing their legal obligations when operating in African territories afflicted by a weak rule of law.

2.3 Types of Corporate Liability: Derivative Models

2.3.1 Vicarious liability

The earliest iteration of CCL proceeded on the argument that corporations are "nothing more than a collection of individuals".[10] This derivative model of CCL is categorised as such because CCL *derives* from the actions of individuals within the corporation. There are three main types of derivative CCL, the 'original' being vicarious liability. There is no requirement to "attribute any mental element" to the company under the doctrine of vicarious liability, thereby making it a form of strict liability applicable irrespective of the rank/status of the employee in question.[11] Vicarious liability is problematic because "wrongful acts are not treated as the company's own"; it is thus consigned to the possible untruth that corporations cannot be guilty in their own right.[12] Strict liability is also anathema to the mental elements associated with international atrocity crimes; at a minimum there must be knowledge of the

[10] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 *Journal of Criminal Law* 414, p.414
[11] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2013) OHCHR Report, p.35
[12] Zerk (2013) at p.35

commission of a serious human rights violation for alleged involvement to be prosecutable. Vicarious liability is, however, seldom used in the criminal justice system as its use depends on the wording of the criminal legislation (for example in the UK it is primarily found in statutes governing road traffic offences).[13] It is thus highly improbable that vicarious liability would be read into legislation criminalising corporate involvement in atrocity crime overseas.

2.3.2 The identification principle

A principal distinction between vicarious liability and the identification principle is that CCL for the latter is established through the mens rea and actus reus of those individuals that represent the "directing mind and will" of the corporation.[14] This tends to be restricted to executives and other figures with significant control over the company. The idea of "reputational rub-off" is an oft-cited rejoinder to the identification principle because such a norm may unfairly prejudice those at the top of a corporation.[15] While there is some merit to this claim, executives of a parent corporation are likely to exercise control over major business decisions such as entering into agreements/contracts with African collaborators and/or establishing subsidiary organisations through which atrocity crimes can be committed (either directly or through complicity).

2.3.3 The aggregation doctrine

This model for CCL combines the actions and mental states of a non-specific number of individuals irrespective of rank or status. These combined elements can then be *aggregated*, since every individual within a corporate organism purportedly forms part of a "collective unit".[16] This approach helps circumvent potential evidential issues (i.e. establishing intent and causation per individual). In other words, it is not necessary to prove any given agent's individual guilt, whereas this is the key criterion for the identification principle. However, the aggregation doctrine is potentially incongruent with international criminal law (ICL) because serious violations require a thorough investigation into the intent of the alleged perpetrators. It is not possible to simply forgo evidentiary investigation on the inference that the combined elements of an non-specific number of corporate agents would surely meet the requisite mens

[13] Crown Prosecution Service, 'Corporate Prosecutions: Legal Guidance' (12th August 2021) > https://www.cps.gov.uk/legal-guidance/corporate-prosecutions <
[14] Per Viscount Haldane LC in Lennard's *Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, at Para 713
[15] Stewart (2013) at p.280
[16] Cavanagh (2011) at p.427

rea and actus reus standards. If a normative body of ICL interpreted through the lens of domestic jurisdictions and their acceptance of CCL is to be furthered, then there should be a measure of consistency between international and national norms.

2.4 Types of Corporate Liability: The Realist Approach

In contrast to derivative models of CCL, the realist approach aims to "break the link between corporate and individual liability" by treating the corporation itself as being at fault.[17] These 'organisational models' perceive corporations as being "free-standing entities, culpable for their own policies, procedures and systems".[18] The commonest expression of the realist approach is the corporate culture doctrine, where the CCL of the corporation derives from the "corporate practices that reflect the organisation's identity".[19] In the national setting, only the Australian legal system uses the corporate culture doctrine to assess CCL, with s.12.3(6) of the Australian Criminal Code defining 'corporate culture' as:

> …an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.[20]

While the organisational model is fairly watertight at the national level, it does not neatly fit into the highly individualistic models that characterise ICL. It is quite important that CCL for atrocity crimes is couched in language consonant with international criminal law models wherever possible, as to diverge from these standards would risk alienating ICL from national legal systems. As will be shown below, ICL provides a cohesive and normative framework on which domestic jurisdictions can rely for clarity and consistency. The organisational model, owing to its blurry and vague interpretations of guilt, as well as its general oversight for identifying individuals, makes it potentially incompatible with ICL despite its clear endorsement by the African Union and Australia (discussed in Chapter 5).

2.5 Evaluating the CCL Model Best Suited to Addressing Atrocity Crime

It is submitted that the definition of CCL under the identification principle might be better equipped than other models when assessing corporate impunity and atrocity crime. The fact

[17] Cavanagh (2011) at p.415
[18] Cavanagh (2011) at p.415
[19] Stewart (2013) at p.279
[20] Australian Commonwealth Criminal Code Act 1995, s.12.3(6)

that ICL does not presently recognise CCL is one persuasive reason for this argument. Put short, the identification principle is reconcilable with the wording of the Rome Statute because unlike the other models, the identification principle is essentially individualistic. Perhaps it could be modified somewhat to take account of particularly active lower-ranking corporate representatives, but for the most part the principle captures the reality that business executives possess control over the direction of a company. This presumptively includes greenlighting any major decisions that benefit the parent company over which they possess control. Moreover, the identification principle is analogous to the Nuremberg Charter (see 3.2), therefore situating CCL for atrocity crimes within existing – albeit defunct – ICL norms.

Conversely, organisational or aggregate models are less reconcilable with ICL. While they may be efficacious outside the scope of atrocity crime, it is risky to establish global CCL norms that might fly in the face of basic principles set out in the Rome Statute. When interpreting the Rome Statute within the meaning of domestic CCL, it is quite important to ensure that the criminal liability incurred is consonant with the guilty mind of the corporation. Corporate executives are the human embodiments of TNCs. They animate the TNC and dictate the direction of the corporation in their role as "lively social actors" as opposed to "automatons blindly responding to socio-political forces".[21] As 2.10 will demonstrate, the 'liveliness' of corporations is a central aspect that enables, contributes towards and perpetuates atrocity crimes in Africa.

There is no denial that the identification principle is analogous to individual criminal responsibility. The identification principle addresses the inescapable reality that executives are at the helm of the corporate vessel, in much the same way high ranking officials and military commanders are the so-called 'architects' of genocide and crimes against humanity. Moreover, there is a tradition in ICL proceedings for the defendant to claim indigence.[22] While those at the upper echelons of a corporate machine are themselves deep pursed, they still individually lack the wherewithal to pay reparations befitting of the injury suffered by the victims. With reference to the fact that corporations dominate the world economy, as a defendant the TNC itself has the resources to pay heavy punitive fines if a guilty verdict is returned.

[21] Christopher Mullins & Dawn Rothe, 'Gold, Diamonds and Blood: International State-Corporate Crime in the Democratic Republic of the Congo' (2008) 11 *Contemporary Justice Review* 81, p.88
[22] William A. Schabas, *'The International Criminal Court: A Commentary on the Rome Statute'*, Oxford: Oxford University Press 2010, p.810

2.6 CCL and Extraterritorial Jurisdiction

Criminal law is generally "local in operation", meaning that national courts possess territorial jurisdiction over the territory on which an alleged crime was committed.[23] But within the context of atrocity crime in Africa, Clough argues the application of extraterritorial jurisdiction is "clearly justified" if it is to be used as an instrument for successfully redressing corporate impunity.[24] In short, extraterritoriality allows a TNC to be prosecuted by a jurisdiction outside the territory on which the alleged crime was committed. The strand of extraterritoriality most pertinent to this discussion is the 'nationality principle', which enables a State to "extend the application of its criminal laws to its own nationals wherever they may be located".[25]

Extraterritoriality fits neatly into the corpus of CCL as it too is characterised by pragmatism. Put simply, extraterritorial jurisdiction *theoretically* ensures that the commission of criminal offences by TNCs in Africa "do not go unprosecuted".[26] Its future raison d'etre might therefore be to prevent impunity and to close the accountability gap, a trend that is already emerging in some Global North home States (discussed in Chapter 6). Furthermore, Global North countries do not "extradite their own nationals" and even if they did, TNCs "cannot be extradited" at any rate.[27] In this sense, it is a highly pragmatic tool theoretically capable of preventing corporate crime overseas. There is thus in the words of Clough "an underlying doctrinal framework that would allow for the prosecution of corporations" in their home State.[28] Yet in reality this submission in most cases could not be further from the truth. TNCs very seldom commit corporate crime in their home State. While home States have robust sets of norms, laws and regulations preventing the occurrence of corporate crimes, those same standards 'lose their teeth' overseas. This is thus a fairly clear expression of the disjuncture between theory and reality. So while the enforceable CCL governing wrongdoings committed on home territory is both pragmatic and efficacious in theory *and* reality, the same is not true for wrongdoings committed on a host State's territory where there is only the *theoretical* possibility of prosecution by the home State.

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[23] Jonathan Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' (2008) 33 *Brooklyn Journal of International Law* 899, p.920
[24] Clough (2008) at p.921
[25] Clough (2008) at p.921
[26] Clough (2008) at p.922
[27] Clough (2008) at p.924
[28] Clough (2008) at p.926

This is not helped by the fact that the UN Guiding Principles on Business and Human Rights[29] do not require States to "regulate the extraterritorial activities of businesses domiciled in their territory".[30] There is thus no real onus for nations to invoke extraterritorial jurisdiction against TNCs, with the enforcement of the nationality principle being left largely to the discretion of a home State. SOMO, in its effort to synthesise the cases heard before Global North courts for alleged atrocity crimes by corporations overseas, concluded that home States:

> …can simply turn a blind eye to indications suggesting the criminal origin of raw materials in order to avoid prosecution… [SOMO enumerates a number of unsuccessful cases, noting that] In all these instances the courts dismissed the case because of the extraterritorial nature of the abuses. As a result, to date there has been no accountability for these actions, neither in the home nor in the host states of multinational corporations.[31]

In light of the above, one cannot ignore the likely correlation between the underuse of extraterritorial jurisdiction and the evergreen impunity enjoyed by TNCs in Africa. Those African jurisdictions beleaguered by conflict, corruption and a weak rule of law simply cannot stop TNCs from engaging in atrocity crimes on their sovereign territories. The foregoing has shown that CCL is an important pragmatic mechanism for preventing corporate crime. I have also demonstrated that there is a clear point at which CCL 'loses its teeth', despite there being no obvious doctrinal reason for domestic CCL standards not applying overseas. It can thus be assumed, prima facie, that this lack of efficacy comes down primarily to a lack of political will on the part of home States to investigate and prosecute allegations of atrocity crimes committed in Africa.

[29] United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework 2011 (HR/PUB/11/04)
[30] Zerk (2013) at p.55
[31] SOMO, 'Multinational Corporations in Conflict-Affected Areas: Risks and Challenges Around Human Rights and Conflict' (2015) SOMO Paper, p.7

2.7 Why a Robust CCL Governance System is Needed in Africa

2.7.1 Leviathan TNCs must be subject to robust CCL standards

The largest TNCs are immensely powerful, with revenues often surpassing the individual GDPs of most States in the Global South.[32] To illustrate, Global Justice Now observes that sixty-nine out of the top one-hundred world economies are TNCs.[33] Indeed, Kyriakakis notes that there has been a proliferation of TNCs in recent decades, with the number rising from 7,000 in 1970 to 82,000 in 2008, therefore leading to enormous accountability gaps.[34] The prevalence of TNCs, compounded by their central role in a capitalist world economy, provides a natural inclination towards adopting CCL for atrocity crimes as a matter of regulatory necessity. Given the power disparities between major TNCs and Global South nations, it is unsurprising that between 2008 and 2010, Africa lost $63.4bn USD due to the illegal activities of TNCs.[35] And more perniciously, without an enforceable CCL regime corporations' economic and political clout potentially makes them a law unto themselves in African countries beleaguered by conflict and/or a weak rule of law.

2.7.2 Host States are unwilling or unable to prosecute foreign TNCs

One might speculate that host States' national legal systems can act as a first line of defence against corporate impunity. While this is true of stable jurisdictions, TNCs thrive in environments characterised by political turbulence and an extremely fragile or non-existent rule of law. As SOMO opines:

> …corporate actors are drawn to conflict-affected areas because weak rule of law and dependence on foreign investors for the national budget creates profitable business opportunities for them.[36]

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[32] Joanna Kyriakakis, 'Industry and Atrocity: The Business and Human Rights Context' in Joanna Kyriakakis, *'Corporations, Accountability and International Criminal Law: Industry and Atrocity'*, Edward Elgar Publishing 2021, p.11

[33] Global Justice Now, '10 Biggest Corporations Make More Money Than Most Countries in the World Combined' *Global Justice Now* (12th September 2016) > https://www.globaljustice.org.uk/news/10-biggest-corporations-make-more-money-most-countries-world-combined/ <

[34] Kyriakakis (2021) at p.11

[35] James Tsabora, 'Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones during Armed Conflict' (2014) 54 *Natural Resources Journal* 181, p.182

[36] SOMO (2015) at p.10

In keeping with the wording of the Rome Statute, such States are thus either "unwilling or unable" to prosecute foreign TNCs.[37] This is in large part because they are more often than not afflicted by the 'resource curse', the paradox that States with the greatest natural resource wealth are also the most unstable and conflict prone. According to Le Billion, some key economic constituents of the resource curse include: (1) high price fluctuation, (2) local currency overvaluation and (3) rent-seeking.[38] This is coupled by adverse political forces like: (1) patronage, (2) corruption/kleptocracy and (3) structural violence. The resource curse leads to the paradoxical conclusion that citizens of "the richest states, by measurement of natural resources" are the most acutely vulnerable to atrocity crimes.[39] Similarly, governments with control over resource-rich territories add to this sorrow by competing for foreign direct investment (FDI) through lowering taxes, restricting labour rights and relaxing environmental standards, thereby creating an environment highly susceptible to human rights violations and the precipitation of atrocity crime.[40]

The foregoing points to a general unwillingness on the part of African States endowed with natural resources to regulate against corporate crime, since it is advantageous for ruling governments to 'get into bed' with TNCs. A vivid example of this is the role of oil in Nigeria, where political prestige is used by powerful Nigerian actors to "generate material benefits for themselves and their… kin".[41] States like Nigeria, which boast enormous crude oil deposits, become so dependent on rent that their entire economies are precariously built on one single resource. Indeed, in Nigeria the State allows oil giants like Royal Dutch Shell (hereinafter 'Shell' or 'RDS') to operate carte blanche. The State has "little interest in regulating and controlling" TNCs and instead allows corporations like Shell to use loopholes in the law to "evade legal liability" for the human rights violations they are directly involved in on the Niger Delta.[42] This reality is reminiscent of colonial-era resource plundering, except now

[37] Article 17 (1) (a) ICCSt
[38] Philippe Le Billion, 'Resource Wars Reframed' in Philippe Le Billon, *'Wars of Plunder: Conflicts, Profits and Politics'* Oxford: Oxford University Press 2014, p.15
[39] Tom Burgis, 'The Looting Machine: Warlords, Oligarchs, Corporations, Smugglers and the Theft of Africa's Wealth', Glasgow: William Collins 2015, p.4
[40] Raymond Gilpin, 'Economic Drivers of Mass Atrocities: Implications for Policy and Prevention' (1st August 2015) *The Stanley Foundation* Policy Brief > https://stanleycenter.org/publications/pab/GilpinPAB815.pdf < p.7
[41] Michael Lynch, Averi Fegadel & Michael Long, 'Green Criminology and State-Corporate Crime: The Ecocide-Genocide Nexus with Examples from Nigeria' (2021) 23 *Journal of Genocide Research* 236, p.248
[42] Lynch et al (2021) at p.248

TNCs arguably "deploy the repressive State apparatus to deal with domestic opposition".[43] Corporations engaged in nefarious business practices thus rely on the threat of "brute force" offered by their African collaborators – oftentimes "compliant dictators" or regional warlords – to achieve their economic goals.[44] But, despite this reciprocal relationship between TNCs and African States unwilling to prosecute, Ezeonu argues the "predatory events" that precipitate atrocity crime have "rarely been contextualised as criminal".[45]

Nigeria is the paradigmatic example of a State *unwilling* to stop corporate impunity. Many African States are simply *unable* to intervene because their rules of law are in a state of near-irreversible disrepair and/or they are stricken by the legacy of colonialism. It is particularly important not to overlook the colonial hangover many African States still have to contend with in the 21st Century. To elaborate, Kyriakakis describes investor-State contracts containing binding 'stabilisation clauses', running upwards of fifty years and enforceable through international trade law.[46] A stabilisation clause enjoins a State party from imposing subsequent legislation against a TNC (i.e. the other contracting party). This means that time stands still as far as the contract is concerned, as it retains the legal enforceability of outdated provisions whose terms – couched in language with colonial undertones – highly favour the TNC and may lead to a swelling of the accountability gap. And, while the world's major TNCs espouse a "rhetorical willingness" to accept legal duties to prevent human rights violations, they will not do so in practice until forceful CCL obligations are thrust upon them.[47] It follows that where an African State is either unable or unwilling to address corporate impunity, responsibility must fall on either a regional/international legal system or the home State. Otherwise, the following remarks from the UN Panel's report on the Democratic Republic of Congo (hereinafter 'DRC') might continue to ring true across Africa for the indefinite future:

[43] Ifeanyi Ezeonu, 'Market Criminology: A Critical Engagement with Primitive Accumulation in the Petroleum Extraction Industry in Africa' in Melissa Rorie, *'The Handbook of White-Collar Crime'*, Hoboken: Wiley Blackwell 2020, p.404
[44] Ezeonu in Rorie (2020) at p.404
[45] Ezeonu in Rorie (2020) at p.399
[46] Kyriakakis (2021) at pp.17-18
[47] Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *Journal of Human Rights & the Environment* 5, p.6

> …extracting the maximum commercial and material benefits [from natural resource extraction] has become the primary motive of the countries and armies involved [in war and conflict]… the role of the private sector… has been vital.[48]

2.7.3 Prosecuting the parent is imperative to the interests of justice

Parent companies conduct their activities in Africa through subsidiary corporations. For example, Shell operates in Nigeria through its subsidiary 'Shell Nigeria'. Illicit natural resource extraction conducted by a subsidiary ultimately benefits the parent. In keeping with the pragmatic justifications for CCL surveyed above, it is "logical and reasonable" to prosecute parent companies for the conduct of their subsidiaries.[49] While it may be pragmatically "logical and reasonable" to follow this approach, the civil law principle of separate corporate identity allows parent companies to hide behind the 'corporate veil'. In light of the dominant, civil lawsuit-based, approach to closing the accountability gap in the Global North this is a major hurdle since the principle of separate corporate identity asserts that a subsidiary enjoys a legal personality distinct from its parent. Thus, even when a parent company has total control over an offending subsidiary, it is not technically automatically liable for the commission of those wrongdoings, a reality that once again illuminates the tension between corporate law norms and human rights. It is conceptually nonsensical for a parent company to "reap the benefits of distinct corporate identity" and then "disown their subsidiaries" once accusations of involvement in human rights violations emerge.[50] A robust CCL regime is therefore needed to address this blind-spot as its effectiveness in practice does not rest upon 'piercing the corporate veil' by dismantling separate corporate identity. As a constituent of criminal law, an optimal CCL regime could supplant this factor and focus purely on the role of the parent corporation as a whole.

2.7.4 Possible overfocus on prosecuting African soldiers and political leaders

Human rights violations amounting to atrocity crimes cannot be attributed to one single origin. Instead they are caused by "multiple catalysts and forces".[51] One must thus make a holistic assessment of multiple factors to identify the less obvious enablers and determinants of serious human rights violations tantamount to atrocity crime. But as it stands the

[48] UN Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo (12th April 2001) S/2001/357, at para 215
[49] Clough (2008) at p.904
[50] Clough (2008) at p.930
[51] Mullins & Rothe (2008) at p.87

international community's treatment of serious human rights violations is calibrated towards allocating the entirety of the blame on African soldiers and political leaders. This distracts from the need to shift the focus on TNCs given their oftentimes important role as principal or secondary perpetrators of atrocity crimes in Africa. CCL must therefore be utilised as a tool pursuant to this aim, which is in close conversation with the 'practical necessity' argument that justifies CCL in the first place.

It is submitted that TNCs are a central component in the successful commission of human rights violations stemming from natural resource extraction. McGregor notes that "resource fuelled wars" – which represent a majority of conflicts in Africa – rely on TNCs to "extract, export and sell" natural resources.[52] As alluded to above, there is a clear correlation between natural resource wealth and propensity to armed conflict or political disorder. States not endowed with extensive natural resource wealth simply cannot rely on the likes of oil, gold and cobalt as sources of finance to fund protracted civil conflict. Exposing corporations that prefer to conduct business above public scrutiny is perhaps the most persuasive rationale for CCL.[53] Merely focussing on "soldiers and political leaders alone" cannot prevent the future commission of atrocity crimes "as the demand for… resources will remain".[54] However, with the powerful deterrent effect associated with CCL, it is unlikely TNCs would do business without conducting a thorough due diligence assessment before entering the territory of a politically turbulent host State.

2.8 Systemic Challenges to a Successful CCL Regime

2.8.1 Unwillingness of Global North States to cooperate

There is a general unwillingness on the part of Global North States to "impose stricter regulatory framework[s]" against TNCs to stem their involvement in human rights violations.[55] TNCs take advantage of these lacklustre responses from home States by continuing to operate on African soil with impunity. Instead of contributing to closing the accountability gap, a lack of political will to respond more forcefully against corporate crime in Africa and elsewhere is arguably CCL's main undoing. It is a mostly systemic problem

[52] Michael A. McGregor, 'Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources' (2009) 42 *Case Western Journal of International Law* 469, p.470
[53] McGregor (2009) at p.490
[54] McGregor (2009) at p.471
[55] Tsabora (2014) at p.193

that requires legislation and prosecutorial policy changes to overcome. Home States' unwillingness to be more responsive to corporate involvement in atrocity crime shall not be discussed further here as the matter is dealt with at length in Chapters 6.

2.8.2 Foreign direct investment

Foreign corporations are often perceived as providing a critical source of economic growth in Africa. Or as De Jonge observes, "governments everywhere recognise the role of TNCs in economic development".[56] Global FDI was estimated at $706bn in 2018, and has been dubbed by some scholars as the new foreign aid.[57] Forceful measures capable of ending corporate impunity for atrocity crimes might disincentivise TNCs to operate in Africa, which would in turn affect the level of FDI inflow to the continent. According to Abe and Ordor, African States "lack the political will" to investigate corporations for their involvement in atrocity crimes in part "due to fears of foreign direct investment flight".[58] Resource-rich African nations are instead engaged in a sort of 'race to the bottom', where States compete with one another to create optimal environments for TNCs whose primary objective is profit maximisation. Dependency upon TNCs as a source of economic income also leads to a 'don't bite the hand that feeds' relationship between State and corporation. The State is then arguably beholden to foreign TNCs, rendering citizens – especially marginalised ones – exceptionally vulnerable to corporate crime without any prospect of redress at the domestic level. Even African governments with good intentions are caught in the Catch 22 position of having to condone TNC infractions for fear of losing an important source of economic growth. It is thus not always reasonable to lament governments for choosing not to regulate foreign corporations when one considers the central role in national economies TNCs play.

2.8.3 Imperialism and inequality of arms

Sub-Saharan Africa has been a "theatre of resource plunder" for centuries, and many TNCs have deep colonial roots.[59] Modern corporate impunity in Africa is not a recent phenomenon, but rather a possible natural consequence of colonialism. The clear link between the modern TNC and imperialism in Africa can easily be demonstrated. For example, the oil giant Total

[56] Alice De Jonge, 'Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum' (2011) 7 *Critical Perspectives on International Business* 66, p.66
[57] Kyriakakis (2021) at p.13
[58] Oyeniyi Abe & Ada Ordor, 'Addressing Human Rights Concerns in the Extractive Resource Industry in Sub-Saharan Africa using the Lens of Article 46 (C) of the Malabo Protocol' (2018) 11 *Law and Development Review* 843, p.856
[59] Ezeonu in Rorie (2020) at p.398

Energies was formerly part of France's State energy company 'Elf', a quasi-TNC responsible for several human rights violations in Francophone Africa before it was privatised. Elf, a captain of the post-Empire *'Françafrique'* period, ostensibly aimed to maintain cooperation and friendship between France and its former colonial holdings. In practice, however, Elf propped up military dictators in Niger, Gabon and Central African Republic, all countries rich in natural resources.[60] Thanks in part to the colonial hangover, it is unsurprising that, as Burgis notes, Total "holds some of the best oil rights in Africa" alongside competitors like Shell and British Petroleum.[61] The DRC is another archetypal example of how the colonial hangover can have a devastating impact on African people. In the DRC, corporations continue to operate "with a brutal eye to the bottom line" as their imperialist predecessors had done before them.[62] In the colonial-era, Global North States with imperial designs "used colonial corporations to do their dirty work".[63] The colonial-era laid the foundations for a system of 'capitalist super-exploitation', and much like colonial corporations of old, certain modern TNCs lack the "moral compunction" to help dismantle the apparatuses that allow for "systemic violence" as a means of achieving "capital accumulation".[64] One cannot therefore deny there is a certain continuity between colonial-era and modern natural resource extraction.

Simons outlines the approaches Global North States took against the "newly independent States [that] emerged from colonial rule".[65] They achieved this by:

> …using legal doctrines such as state succession, acquired rights, contracts and consent to protect the interests of their corporate nationals… and to resist the attempt by these new sovereign actors to establish a new international economic order which included their own sovereignty over their natural resources.[66]

It follows that international trade law instruments help confer on corporations 'quasi-sovereign' status when entering contracts with States. These deeply embedded rules create a clear inequality of arms between TNCs and formerly colonised nations. Indeed, international

[60] Burgis (2015) at pp.138-139
[61] Burgis (2015) at p.139
[62] Mullins & Rothe (2008) at p.89
[63] Ignasi Bernat & David Whyte, 'State-Corporate Crimes' in Melissa Rorie, 'The Handbook of White-Collar Crime' Wiley Blackwell 2020, p.130
[64] Bernat & Whyte in Rorie (2020) at p.130
[65] Simons (2012) at p.21
[66] Simons (2012) at p.21

arbitration decisions like the *Abu Dhabi*[67] and *Qatar*[68] cases demonstrate that trade agreements between States and TNCs are governed by an 'international law of contracts', with Anghie succinctly opining that:

> [w]hether a quasi-treaty between a sovereign and a quasi-sovereign entity, or a contract between two private parties, what is common to both characterizations is the real reduction of the powers of the sovereign Third-World state with respect to the Western corporation.[69]

It is thus exceptionally difficult for many African host States endowed with natural resources to liberate themselves from the colonial hangover that continues to typify international trade. The "unequal exchanges" that characterise contemporary trade agreements enable TNCs to make enormous profits while essentially crippling local economies through a combined exploitation of people and ecosystem, thereby leading to what Lynch et al describe as 'eco-genocide' within the context of natural resource extraction in Africa.[70] This factor, compounded by the other adverse forces surveyed above, enables corporations to conduct business with impunity. The fact that these are *systemic* causes of corporate impunity in Africa is pertinent, since by definition they are very difficult to surmount. The foregoing discussion then leads one to the unfortunate conclusion that the challenges associated with CCL may outnumber the potential strengths of the doctrine within the context of atrocity crime in Africa. A pattern is therefore emerging when one distils the information surveyed above: only home States or a regional/international court have the capacity to override the systemic challenges; left unaddressed, these forces continue to perpetuate corporate crime in Africa and make closing the accountability gap out of reach.

2.9 Doctrinal and Procedural Challenges

2.9.1 *Forum non conveniens* in civil lawsuits

Civil lawsuits have been the primary mode for imposing corporate liability on offending TNCs. Perhaps the greatest constraint to corporate liability in a civil lawsuit is the doctrine of *forum non conveniens*. Under this rule, judges have the discretionary power to refuse to

[67] *Petroleum Development Ltd v The Sheikh of Abu Dhabi* [1951] ILR 144
[68] *Qatar (Ruler of) v International Marine Oil Company* [1953] ILR 534
[69] Anthony Anghie, 'Imperialism, Sovereignty and the Making of International Law', Cambridge: Cambridge University Press 2005, p.235
[70] Lynch et al (2021) at p.255

accept jurisdiction on the basis that another court – i.e. one located within the host State – is better equipped to deal with the complaint than the home State. Put simply, the doctrine of *forum non conveniens* could be used as an expedient way for courts in the Global North to refuse to accept jurisdiction. Deferring to jurisdictions afflicted by a powerless judiciary should not be an option in the interests of providing victims access to a judicial remedy. As McGregor observes, *forum non conveniens* is "perhaps the most" prevalent legal barrier to tackling corporate impunity in civil law, particularly in common law legal systems where it is most frequently used.[71] He notes that in countries like the DRC, citizens' prospects of access to justice are non-existent, and when *forum non conveniens* can be so readily applied, the same is true when they attempt to litigate in corporations' home jurisdictions. To overcome this obstacle, there must be an impetus to engendering a culture for tackling corporate impunity as a matter of criminal law rather than civil law, where the court need only establish an actual basis for jurisdiction (discussed further in Chapter 6).

2.9.2 The tort law doctrine of separate corporate personality and 'piercing the corporate veil'

Much like a natural parent has some degree of control over the behaviour of their child, so too does the parent company have control over the actions of their subsidiaries. However, Bragato and Filho argue that the 'corporate veil' is the "leading legal barrier" to holding parent companies liable for human rights violations committed by their subsidiaries under the civil law.[72] Indeed, parent companies are not generally liable for the wrongdoings of their subsidiaries as per the doctrine of separate corporate personality. Successfully 'piercing the corporate veil' continues to be a perennial challenge to closing the accountability gap so long as tort lawsuits are the primary mode for imposing corporate liability since private claimants must establish a "legally recognised reason to 'pierce the corporate veil'".[73] This involves overcoming substantial evidentiary hurdles, especially where there is a "lack of transparency" vis-à-vis the nexus between the parent and their subsidiaries.[74] But fortunately the criminal justice system is not concerned with these issues. Instead, a domestic criminal court must simply establish a basis for jurisdiction. Circumventing this problem is one of the various aspects that make CCL a preferred option to closing the accountability gap to civil law.

[71] McGregor (2009) at p.493
[72] Fernanda Frizzo Bragato & Alex Sandro da Silveira Filho, 'The Colonial Limits of Transnational Corporations' Accountability for Human Rights Violations' (2021) 2 *TWAIL Review* 34, p.54
[73] Zerk (2013) at p.65
[74] Zerk (2013) at p.65

2.9.3 Evidentiary hurdles associated with prosecuting parent corporations

This factor affects the prospects of a successful case in both civil lawsuits and criminal trials. Here there are two types of evidentiary hurdle inimical to holding corporations to account: (1) building a link between a parent and its offending subsidiary to establish a basis for jurisdiction and; (2) gathering the requisite evidence to show that the parent company was either directly responsible for or complicit in a serious human rights violation tantamount to atrocity crime. As to the first point, a subsidiary "may be owned by a number of… foreign businesses, none of which [have] majority control".[75] A good example is Anvil Mining, a TNC with offices in multiple jurisdictions. Although there is often a clear nexus between parent and subsidiary, there are sometimes shell companies and other shadowy enterprises set up to make it harder to trace the subsidiary complained of back to the parent. While not a systemic challenge, it is difficult to relax evidentiary rules pertaining to meeting burden of proof standards without undermining corporations' right to due process and a fair trial. Equally, significant resources would have to be allocated to demonstrate the requisite causal link between the parent corporation and the subsidiary alleged to have perpetrated the atrocity crime. Similarly, gathering evidence in countries either unable or unwilling to impose CCL measures against TNCs is no small task. In war-torn countries it may be too unsafe to undertake factfinding missions, whilst in States ruled by corrupt governments factfinders may be met with outright hostility. Other challenges abound, especially pertaining to State sovereignty. To achieve CCL there would have to be close cooperation between the home and host State but at present, home jurisdictions quite understandably err on the side of caution when it comes to investigating parent companies for serious human rights violations in Africa. One way of circumventing legitimate State sovereignty concerns is the establishment of an operational African Criminal Court, where accusations of neocolonialism and State interference can be put to bed (discussed at length in Chapter 5).

2.10 The Nexus Between Corporate Impunity, Natural Resource Extraction and Atrocity Crime in Africa

2.10.1 Overview and rationale

One would be forgiven for assuming that the more natural resources a State's territory possesses the more affluent their people ought to be. But the opposite tends to be true in

[75] Zerk (2013) at p.65

Africa, where significant natural resource wealth usually correlates to a greater susceptibility for serious human rights violations. Natural resource wealth is therefore a blessing for the few and a curse for the majority in Africa.[76] But another paradox, or that at least seems counterintuitive on its face, is that TNCs thrive in environments afflicted by "war and chaos".[77] Because of the radical informalisation of economies affected by a weak rule of law, it is easier for TNCs to forgo due diligence considerations in favour of collaborating with demonstrable human rights violators. There is undoubtedly a connection between instability and "illegitimate commerce" in Africa, since opportunities to maximise profits abound when TNCs can be safe in the knowledge that no consequences will arrive upon them for their involvement in atrocity crimes and other human rights violations.[78] Tsabora illustrates this point by contrasting the behaviour of TNCs in States with "effective regulatory mechanisms" versus the behaviour of those same TNCs when operating in environments characterised by turmoil.[79] Whereas many TNCs would not hesitate to generate profits at the expense of human rights in Africa, there is no way they could escape accountability for comparable practices in their home State thanks to efficacious and enforceable CCL standards there. Natural resource extraction output is often unaffected by conflict. Oil can be "extracted from remote areas… and immediately shipped abroad for processing" while coltan or diamond mining operations steam ahead when the right deal is struck with the regional collaborator exercising control over the prized minefields.[80] This, Ross notes, contrasts sharply with the agricultural sector, which unlike natural resource extraction is profoundly affected by political turmoil.[81] Ross adds that unlike agricultural crops like cacao, natural resources need only be *extracted* in Africa; once shipped out of the conflict or turmoil affected territory, the crude product can be processed, refined and sold on the global market.[82] The abovementioned factors, which create an environment highly conducive to corruption, can therefore be attributed to this notion of a 'resource curse'.

[76] Burgis (2015) at
[77] Tsabora (2014) at p.184
[78] Tsabora (2014) at p.185
[79] Tsabora (2014) at p.193
[80] Michael L. Ross, 'Booty Futures' *unpublished working paper* (6th May 2005) available at UCLA Depository of Staff Papers > https://www.sscnet.ucla.edu/polisci/faculty/ross/papers/working/bootyfutures.pdf <, p.9
[81] Ross (2005) at p.9
[82] Ross (2005) at p.9

2.10.2 TNCs as complicit actors in atrocity crimes

Victims of serious human rights violations "do not typically allege that the corporation committed the abuses in its own right".[83] While TNCs are capable of directly perpetrating atrocity crimes, the commonest mode of participation relevant to corporations is complicity. Complicitly is enshrined in international criminal law as a mode of liability under Article 25 (3) ICCSt. There is nothing overtly complex about complicity. Its "essence" derives from an accomplice's "knowing involvement in the crime of another".[84] Corporations as legal persons can be prosecuted for complicity in an atrocity crime in most national legal systems that recognises the doctrine of CCL. Some jurisdictions, like Australia's, do not even require the principal perpetrator to have been identified for a corporation to be guilty of complicity in an offence. With the exception of notable examples like RDS in Nigeria, complicity as a mode of liability is salient to the current discussion precisely because there are few examples of TNCs as direct perpetrators. It is desirable for CCL norms to reflect the reality of corporate crime in Africa, which is to say that there is very seldom shared intent between principal and secondary offender.[85] Fortunately, with the notable exception of France, in most domestic systems shared intent is not a necessary ingredient to invoke CCL. This is helpful because corporations are profit-driven while principal offenders – such as warlords or repressive heads of state – will likely have radically different motivations for their conduct.[86]

There are many examples of suspected corporate complicity in atrocity crimes across Africa. One example is Talisman Energy and its alleged complicity in human rights abuses in Sudan.[87] Talisman, the largest energy company incorporated in Canada, had purportedly worked with the Sudanese government to ensure its oil fields were protected from the ongoing ethnic violence in southern Sudan. Talisman appeared indifferent to the fact that its collaborator, the Sudanese government, was perpetrating ethnic cleansing, mass murder and enslavement. As such, Talisman has been accused of assisting the Sudanese government with the objective of committing atrocity crimes.[88] Another notable example involves Anvil Mining after it became embroiled in controversy for its alleged involvement in the 2004 Kilwa massacre. Joseph Kabila, DRC's then president, ordered the Congolese military to

[83] Clough (2008) at p.905
[84] Clough (2008) at p.905
[85] Anita Ramasastry & Robert C. Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries' (2006) FAFO, p.18
[86] Ramasastry & Thompson (2006) at p.18
[87] *Presbyterian Church of Sudan v Talisman Energy Inc*. (S.D.N.Y. 2003) 244 F. Supp. 2d 289
[88] Ibid

intervene "in response to a small number of insurgents who allegedly threatened" the operations of a mine run but Anvil.[89] The principal offenders were assisted by Anvil through the provision of transport to and from the scene of the massacre. Anvil allowed the military to use its trucks and aeroplanes, which under a reading of the Rome Statute arguably amounts to complicity. As Lah and Collins opine, the Anvil case is another example of the quasi-neocolonial manner in which TNCs continue to benefit from "access to cheap mineral resources at the minor cost of supporting compliant political tyrants".[90]

2.10.3 Gilpin's study on the 'economic causes' of atrocity crime

With reference to the discussion at 2.7, it is becoming increasingly clear that economic factors can play a central role in the precipitation of atrocity crimes in resource-rich African States. Gilpin remarks that although:

> …the empirical evidence has not yet established a decisive causal link between natural resources and violent conflict, it is true that resource [rich] States have experienced more than their fair share of violent conflict.

Gilpin's study is helpful for elucidating the potential economic causes of atrocity crime – since natural resource extraction attaches to monetary value – but there is very little mention of either the role of TNCs or their home States in contributing towards or preventing atrocity crime, respectively. Because resource-rich States are oftentimes unable or unwilling to address corporate involvement in atrocity crime, the regulatory frameworks promoted by Gilpin can presumptively extend to Global North States in the form of CCL governance systems with extraterritorial application. It follows that:

> If economic factors are central to understanding and driving mass atrocities, they must feature more prominently in efforts at resolution.[91]

2.11 An Overview of CCL for Corporate Crime in Africa Within Home States

Given that African national legal systems are either unable or unwilling to impose CCL on TNCs, there could be an attendant legal duty for Global North States to address corporate impunity enjoyed over crimes committed in Africa. Of the world's largest economies in the

[89] Kim Lah & Anthony Collins 'The Kilwa Massacre: Critical Analysis for a Southern Criminology' (2020) 9 International Journal for Crime, *Justice and Social Democracy* 135, p.136
[90] Lah & Collins (2020) at p.144
[91] Gilpin (2015) at p.3

Global North, only Germany follows the principle of *societas delinquere non potest*. And because "justice and accountability are often difficult to obtain" in African States afflicted by a weak rule of law, African nationals often attempt to file civil lawsuits in the offending corporation's home States.[92] Domestic courts thus have jurisdiction over public and private law cases where an alleged atrocity crime has been committed. Thus, while TNCs "are not prosecutable" at the Hague, domestic jurisdictions are equipped to fill the gaps left by that absence of CCL in the Rome Statute.[93]

2.12 Conclusion

The main aim of this chapter was to provide an overview of CCL in domestic legal settings and to show the reader how the CCL norms that regulate corporations lose their teeth across borders. This reality becomes especially troubling in African States with a weak rule of law, where corporations have evaded CCL for decades, a point partly explained by the colonial hangover described at 2.7. This chapter has also provided a primer on corporate crime in Africa. Explaining the origins, explanations and persistent challenges linked to the topic under discussion has painted a generally negative account of how corporate impunity continues to persist unabated. Even where efforts are made to close the accountability gap – which mostly originate in the tort law tradition – there are myriad systemic and procedural obstacles that hamstring the extent to which a corporate liability regime can take hold. Although this chapter has approached the topic of corporate crime in Africa with a somewhat defeatist attitude, the next chapters promise more positive perspectives to indicate that the narrowing of the accountability gap may be within reach. Perhaps the reason for this more negative tone is that the current chapter has primarily discussed the *existing* dominant realities that clearly do not bode well. The next chapters, take a more positive tone because they describe either emerging or yet to be fully advanced ideas/developments that can close the accountability gap and disprove the dire state of affairs outlined in this chapter.

[92] SOMO (2015) at p.7
[93] Tsabora (2014) at p.197

3 International Law and Corporate Criminal Liability

3.1 Introduction

As mentioned from the outset of Chapter 2, international law is quiet on the issue of CCL. The last chapter attempted to show that CCL can only become a fully-fledged legal doctrine if it does not 'lose its teeth' when applied in Africa. Perhaps the main driving force capable of propelling CCL would be its unambiguous recognition at the international level. Although there is a fairly large body of international soft law regulating corporate practices, neither international criminal law nor international law more generally recognise CCL for atrocity crime as a legal doctrine. Either the admission of CCL at the international level or the imposition of indirect CCL rules via State treaty obligations could provide the nucleus for ending corporate impunity. And though this may sound ambitious or aspirational, there are some strong indications that a source of international law recognising CCL "might be within reach".[94]

This chapter will survey existing norms and standards at the international level, before undertaking an examination of possible future developments. It will then show how the ICC is unable to keep pace with growing trends towards CCL, and will opt instead for promoting the use of international law – intended to confer a high level of discretion on State signatories – as a better equipped alternative. Although the ICC is largely rejected for the purpose of the topics under discussion in this thesis – owing to the wording of the Rome Statute and the monumental level of political will required to extend the Court's *jurisdiction personae* – the Rome Statute as a legal text is presented as vital to achieving the goal of 'marrying' internationally defined atrocity crimes with domestic CCL rules. The ICC is furthermore promoted as a contributor to identifying the economic causes of atrocity crime. A key aim of the present chapter is to start building a picture of the potential for a future CCL governance system that integrates the international, regional and domestic legal regimes pursuant to tackling corporate impunity in Africa.

[94] Leila N. Sadat & Madaline George, 'An Analysis of State Reactions to the ILC's Work on Crimes Against Humanity: A Pattern of Growing Support' (2020) 6 *African Journal of International Criminal Justice* 162, p.163

3.2 Historical Overview

In the aftermath of World War II (WWII), the Allied Powers established the Charter of the International Military Tribunal ('the Nuremberg Charter') to prosecute key figures of the Nazi Party and the German war machine. The Nuremberg Charter provided theoretical space for the International Military Tribunal (IMT) to prosecute leading industrialists during the Third Reich. Moreover, the Nuremberg Charter conferred jurisdiction on the IMT to punish persons "whether as individuals or members of organisations".[95] While the IMT distanced itself from the collective criminal liability made possible under Article 6 of the Nuremberg Charter, it still provides precedent for a model of liability that resembles CCL. Nevertheless, it is important to mention that the 'single criminal enterprise' principle was used exclusively against groups within the Nazi State (e.g. the Nazi High Command, SS & Gestapo) and did not extend to profit-driven corporations (whose leaders were instead tried under the doctrine of individual criminal responsibility during the Nuremberg Military Tribunals).

Neither leading industrialists under the doctrine of individual criminal responsibility nor the corporations themselves under CCL were tried by the IMT. It thus fell on the subsequent Nuremberg Military Tribunals (NMTs), conducted by the Allied occupying powers under their respective national laws, to prosecute leading industrialists.[96] The most prolific Allied power to investigate the economic causes of the Nazi war machine was the USA, which heard a total of three cases involving leading German industrialists. Those cases are the *Krupp*[97], *Flick*[98] and *IG Farben*[99] trials. Prosecutors were motivated by the need to treat economic actors as potentially vital contributors to the commission of atrocity crimes, a rationale that closely resonates with the main theme of this paper. Yet none of the cases heard involved indictments against the corporations themselves. In other words, neither the IMT nor the NMTs "addressed the responsibilities of corporations qua corporations", making CCL's heritage in international law somewhat ambiguous.[100] A close examination of the NMT's jurisprudence is beyond the purview of this chapter, save to say that the prosecution of industrialists proved mostly unsuccessful. Kyriakakis observes that this limited success may

[95] Article 6 of the Charter of the International Military Tribunal
[96] Allied powers were given charter to do so under Article III of Control Council Law no.10 (popularly known as the 'London Agreement')
[97] *The United States of America v Alfried Krupp et al* (17th November 1947-30th June 1948) Military Tribunal III
[98] *The United States of America v Friedrich Flick et al* (3rd March 1947-22nd December 1947) Military Tribunal IV
[99] *The United States of America v Carl Krauch et al* (17th August 1947-29th July 1948) Military Tribunal VI
[100] Kyriakakis (2021) at p.78

be attributed to the NMT's fear of fomenting anti-capitalist sentiment in postwar Germany, which would potentially lead Germans to 'fall into the arms' of communism. Though of a different nature to corporate crime in Africa, the systemic colonial and capitalist forces that arguably underpin the current failure to prosecute TNCs, discussed at 2.7 and 2.10, does bear resemblance to Kyriakakis's argument. There is thus merit to the suggestion that the NMT had to address "some of the same challenges we grapple with today". But all things being equal, the industrialist trials under the Nuremberg Charter are not widely considered a central part of its legacy.[101]

In the 1990s, following a long hiatus caused by the Cold War, the ad hoc tribunals for the former Yugoslavia and Rwanda were established to address the atrocity crimes committed in the Yugoslav Wars and Rwandan genocide, respectively.[102] Neither Statute giving effect to the Tribunals made provision for CCL. Jurisdiction was thus restricted to natural persons, although corporate media executives were indicted by the ICTR and stood trial for their contribution to inciting the Rwandan genocide.[103] CCL was discussed during Rome Statute negotiations, with France particularly keen to add it to the ICC's jurisdiction. However, the drafters were "unable to come to a consensus" on the matter, owing in large part to the obvious complementarity issues that would flow from its admission to the final draft.[104] When the Rome Statute was drafted many countries did not accept CCL, and some powerful countries – like Russia and Japan – remained "strongly opposed" to the idea.[105] Beyond the issue of CCL, a large majority of African states ratified the Rome Statute as many of them "considered the [ICC] a… solution to the continent's injustices".[106] However, this sentiment has soured after the Rome Statute came into effect, with some African countries disenchanted by the ICC for its supposed overemphasis on atrocity crimes in Africa and the Prosecutor's continued predilection for investigating alleged serious human rights violations as per the *propo motu* principle (discussed further at 4.2.2).

[101] Kyriakakis (2021) at p.103
[102] Statute of the International Criminal Tribunal for the Former Yugoslavia and Statute of the International Criminal Tribunal for Rwanda
[103] *The Prosecutor v Ferdinand Nahimana et al* [2003] ICTR-99-52-T (the 'Media Case')
[104] McGregor (2009) at p.492
[105] McGregor (2009) at p.492
[106] Pauline Martini, 'The International Criminal Court versus the African Criminal Court' (2021) 18 *Journal of International Criminal Justice* 1185, p.1186

3.3 Current CCL Norms and Standards

3.3.1 The ICC and the economic causes of atrocity crime

Corporations have traditionally existed in a "legal vacuum" because neither the Rome Statute nor any other source of international law imposes direct legal obligations on them.[107] Arguably one of the greatest impediments to redressing corporate crime in Africa is the Rome Statute's silence on CCL. De Jonge notes that this absence is unacceptable when one appreciates the:

> …disparity between the huge global influence and reach of transnational corporations, on the one hand, and the lack of international legal infrastructure for regulating TNC activity, on the other.[108]

This disparity is being mended by growing trends, particularly in domestic jurisdictions, towards imposing CCL to combat corporations' involvement in atrocity crime. While the absence of CCL from the gamut of Rome Statute norms and standards has been traditionally excused because of the complementarity-based objections by States incorporating the *societas delinquere non potest* principle into their domestic regimes, it is becoming an increasingly untenable justification since CCL as a legal doctrine has swollen in popularity around the world in recent years.

Even with the lack of provisions enabling the prosecution of corporations, the ICC has been accused of failing to address the economic causes of atrocity crime despite there being precedent for doing so at Nuremberg.[109] And while the ICC is entitled to investigate and prosecute corporate executives under the doctrine of individual criminal responsibility, its timidness and inaction makes it seem as if it is precluded from doing so in practice. But rather than examining the economic actors involved in atrocity crime, the ICC has focussed almost entirely on African soldiers and politicians. This alleged overfocus on African soldiers and politicians has alienated some African countries, particularly when one proceeds from the view that soldiers' and politicians' wrongdoings are not necessarily the root cause of atrocity crime. Rather, one of the heavily overlooked possible root causes of atrocity crime in Africa lies in the alleged failure, at the domestic and international levels, to minimise corporate

[107] De Jonge (2011) at p.67
[108] De Jonge (2011) at p.66
[109] Kyriakakis (2021) at p.180

impunity. So while the ICC does not have jurisdiction over the TNCs as legal persons themselves, it has had numerous opportunities to investigate corporate executives and to assess the aforesaid economic causes of atrocity crime in its jurisprudence. It is fair to question whether it is even appropriate for the ICC (or ICL in general) to address these possible economic causes of atrocity crimes. But because 2.10.3 suggested that economic factors are possible determinants of atrocity crime, it is argued here that the ICC could make more effort to assessing economic causes of atrocity crime in resource-rich States, not least because of its international platform and influence over shaping domestic jurisprudence.

3.3.2 Existing norms and standards in the wider sphere of international law

Public international law – with the exception of ICL – is characteristically State-centric. Any treaty imposing direct obligations on corporations would thus go against the grain of conventional public international law. But this is not inimical to the goals of the current study, since a binding treaty could bring home States into the fold by requiring them to place CCL measures on corporations to ensure compliance with their international obligations. At present, existing norms and standards within international law more generally are largely nonbinding and/or declaratory in nature. For example, Annex II (1) (a) of the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy contains a regional reporting provision aimed at ensuring the Declaration's provisions are met, but lacks any enforcement mechanism to achieve this goal. Similarly, the UN's Global Pact[110] initiative – although laudable for being the first of its kind in addressing 'corporate sustainability' and directly applying to TNCs – is fundamentally a "voluntary initiative" that must rely entirely on the good faith of its private signatories.[111] OECD Guidelines for Multinational Enterprises are likewise "politically symbolic" but ultimately nonbinding and largely ineffectual.[112] Moreover, none of these existing sources of international soft law are specifically aimed at addressing TNCs and atrocity crime; they focus on general corporate social *responsibility* as opposed to criminal *liability*.

The first major attempt by the international community to develop a treaty on CCL was the UN's Draft Norms on Responsibilities of Transnational Corporations. Unlike the

[110] United Nations Global Compact 2000
[111] Kamil Omoteso & Hakeem Yusuf, 'Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism' (2017) 13 *Critical Perspectives on International Business* 54, p.58
[112] Mullins & Rother (2008) at p.87

aforementioned soft law mechanisms, the Draft Norms – owing to their being anchored in customary international law – would probably have been binding on its State signatories, thus solving the hitherto "glaring absence of provisions at international law applicable to TNCs".[113] So in this instance, the generally State-centric nature of international law would make the home State dutybound to ensure corporations comply with the treaty's provisions. This is a motif across other sources of international law to be discussed below (particularly the CAH Draft Articles) whereby internationally defined CCL rules do not place a direct obligation on TNCs themselves owing to the State-centric nature of public international law.

Negotiations as regards the Draft Norms became "mired in a political stalemate" and the proposed norms never came to fruition.[114] Moreover, the inaugural SRSG on Business and Human Rights, Professor John Ruggie, strongly opposed the Norms for supposedly rendering TNCs directly subject to an international treaty. According to Ruggie, the Draft Norms would have had the effect of subject TNCs to the same duties owed by States and by extension, "undermine [their] corporate autonomy, risk-taking and entrepreneurship".[115] Ruggie's rationale for refusing to endorse the Draft Norms is questionable, insofar as he inverts the justifications for imposing CCL standards on TNCs as a reason *not* to do so. Of course a binding treaty obliging States to impose legally enforceable measures against TNCs for corporate wrongdoing would curtail the extent to which they can operate untrammelled by regulatory checks. Corporate autonomy is desirable, but the absence of strong regulatory measures might simply beget impunity. But as 2.2.1 explained, the autonomy conferred on TNCs must be coupled with concurrent duties, a goal the Draft Norms set out to achieve. Corporate risk-taking is synonymous with high stakes and potentially reckless business operations, such as brokering deals with war lords for concessions to minefields. The Draft Norms do not hamper the spirit of entrepreneurship either, and instead call for more sensible and commercially responsible entrepreneurial endeavours that aim to chip away at the profit-above-all mentality that often typifies the corporate machine.

It is therefore submitted that Ruggie missed a critical opportunity to jumpstart CCL at the international level. Yet the Draft Norms are still helpful to the current discussion insofar as they reveal an underlying receptiveness in the international community for creating a treaty that places a duty on States to impose CCL on corporations for human rights infringements.

[113] De Jonge (2011) at p.74
[114] Kyriakakis (2021) at p.28
[115] John G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *The American Journal of International Law* 819, p.826

SRSG Ruggie shifted attention away from the Draft Norms and instead spearheaded the current UN Guiding Principles on Business and Human Rights with its 'protect, respect and remedy' framework. The Guiding Principles are the most robust source of international soft law to-date and perform an important function for reaffirming the pre-existing norms and standards that impose *duties* on States to protect human rights by keeping those TNCs liable to commit violations from doing so through "…effective policies, legislation, regulations and adjudication".[116] Moreover, the text uses assertive language more typical of a binding treaty. For example, States "must" implement domestic measures that will bring about compliance with the Guiding Principles. Despite the forceful language, the Guiding Principles have "received wide recognition and support" within the international community.[117] Indeed, as well as State responsibility to protect human rights by adequately regulating corporations, TNCs are themselves subject to a moral duty to *respect* human rights as per the second prong of the framework. There is thus a heavier moral onus for TNCs to minimise their negative footprint through meeting meaningful corporate social responsibility standards. Nevertheless, the Guiding Principles are only a guide; they are therefore characteristically non-binding and follow the same pattern as preceding international soft law that expects only a moral commitment from States and TNCs to tackle human rights violations caused by corporate wrongdoing. It follows that victims cannot rely on the Guiding Principles to "obtain redress [either] at the domestic level [or] through the international law" because they do not impose *legal* obligations on corporations or State signatories.[118]

The foregoing discussion leads one to the conclusion that the current international standards are largely inadequate and ineffectual, therefore casting doubt on the titular proposition that closing the accountability gap may be within reach. As De Jonge points out, current international law instruments are hobbled by a lack of (1) "mandatory and verifiable reporting systems", (2) "mechanisms for monitoring corporate activity and compliance" and, (3) "enforcement mechanisms which are effective beyond national boundaries".[119] Furthermore, the existing soft law instruments express moral duties on TNCs to adopt and implement CSR standards that are ultimately self-regulating. This allows TNCs to exercise discretion over which responsibilities to adopt, thus risking an undesirable "cacophony" of

[116] United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework 2011 (HR/PUB/11/04)
[117] Zerk (2013) at p.54
[118] Omoteso & Yusuf (2017) at p.59
[119] De Jonge (2011) at p.72

standards.[120] Conversely, a binding source of international law has the effect of unifying State obligations towards ensuring the consequences of corporate failure to respect CSR standards will result in the invocation of CCL. But nevertheless, the existing international law does "represent a consensus of the international community", with texts like the Guiding Principles being "instrumental in clarifying" the duty of states to protect – and the responsibility of businesses to respect – human rights.[121]

3.4 Emerging and Potential Future Developments

3.4.1 The Special Court for Sierra Leone

It is suggested that captains of the international diamond trade were pivotal to the Revolutionary United Front's (RUF) war effort during the decade long civil war in Sierra Leone. Supported by Liberian president Charles Taylor, the RUF committed a shopping list of atrocity crimes over the course of the conflict. Taylor's support for the RUF stemmed from his interest in "gain[ing] access to Sierra Leone's diamond fields".[122] The relationship was symbiotic, to the extent that the RUF were dependent on the revenues produced by mining 'blood diamonds'. Even with the RUF's control over these prized diamond fields, the extracted raw product was practically worthless without the help of international traders and refiners. But those TNCs engaged in diamond mining and trading fell beneath the international community's radar. Taylor was prosecuted for his complicity in the commission of the RUF's crimes, but the Special Court for Sierra Leone (SCSL) may have missed an opportunity to closely assess the role of TNCs in atrocity crime.

Unsurpisingly, the SCSL was "criticised for omitting to charge any of the foreign businessmen" responsible for their potentially vital role in financing the protracted war and who in turn profited from the conflict.[123] This criticism may be valid when one looks to the wording of the Statute giving effect to the SCSL: that the court exercises "the power to prosecute persons who bear the greatest responsibility" for the atrocities committed during the civil war.[124] And perhaps, had the proposed African Criminal Court discussed in the next chapter been operational at the time, the corporations involved in the atrocity crimes would

[120] Kyriakakis (2021) at p.27
[121] SOMO (2015) at p.8
[122] *The Prosecutor v Charles Ghankay Taylor* [2013] SCSL-03-01-A
[123] Kyriakakis (2021) at p.148
[124] Article 1 of the Statute of the Special Court for Sierra Leone

have been successfully prosecuted under the doctrine of CCL. Nevertheless, in its ruling the Court discussed the trading of diamonds for arms throughout, and drew a clear nexus between precious minerals and the commission of international crimes. As such, SCSL proceedings against Charles Taylor marks an important development in international jurisprudence for its close examination of the economic causes of atrocity crime with respect to Taylor's financial motivations for involving himself in the Sierra Leone conflict.

3.4.2 Special Tribunal for Lebanon

Hybrid courts such as the Special Tribunal for Lebanon (STL) allows some cross-fertilisation of domestic legal doctrines and international criminal law.[125] Lebanese law, quite unlike the Rome Statute, recognises the doctrine of CCL. The STL was the first of its kind to hold corporations criminally liable before a hybrid court. Although the liability invoked against the two news corporations in question was based on a procedural technicality (contempt of court) rather than an atrocity crime, it is still pathbreaking for its explicit announcement of CCL in relation to tackling corporate impunity. In contrast to the ICC's silence on the matter in its jurisprudence, the STL Appeals Panel observed that CCL was:

> …on the verge of attaining… the status of a general principle of law applicable under international law.[126]

The STL made other important observations that bring into sharp focus the misalignment between existing ICL and CCL as a pragmatic necessity. Here, the STL highlighted the "oddity" of a legal person being subject to CCL under domestic law but not so for precisely the same misconduct under ICL.[127] Similar to the discussion on pragmatism at 2.2.1, the STL emphasised the need to deliver an "effective" interpretation of the STL Statute.[128] For a tribunal of international character to have explicitly made these remarks – as opposed to shying away from them – is significant and marks a promising step towards ensuring international law gradually grows more responsive to corporate involvement in atrocity crime. And, even if the Rome Statute is never amended to include CCL, at least there is precedent for a hybrid court to invoke CCL. This in turn may have the dual effect of (1) engendering changes within the ICC towards examining the economic causes of atrocity crime as a matter of priority and, (2) encouraging future hybrid tribunals and national courts

[125] Article 1 of the Statute of the Special Tribunal for Lebanon
[126] *New TV S.A.L* [2014] STL-14-05/PT/AP/ARI26.1 at Para 67
[127] *Akhbar Beirut S.A.L* [2015] STL-14-06/PT/AP/AR126.1 at Para 59
[128] *Akhbar Beirut S.A.L* [2015] at Para 31

to integrate domestic CCL norms as an uncontroversial tool for reflecting the role of corporations in the atrocity crimes over which they have jurisdiction.

3.4.3 Crimes Against Humanity Draft Articles

Unlike genocide and war crimes, there is not yet a standalone treaty for crimes against humanity (CAH) in international law. However, the International Law Commission's recent and timely Draft Articles on Crimes Against Humanity could mark a turning point in the international community's endorsement of CCL. In conversation with the brief discussion on the distinction between ICL and public international law more generally at 3.3.2, Article 6(8) of the Draft Articles calls on States to:

> …establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.[129]

Because the Draft Articles make the admission of CCL conditional on States' acceptance of the doctrine in their national legal systems, the ILC overcomes the complementarity hurdle that proved the undoing of CCL's enshrinement into the Rome Statute. Although the Draft Articles are exclusive to CAH (i.e. not applicable to the other three core crimes), its ratification would still propel CCL to new heights. As Sadat and George remark, the Draft Articles have garnered significant support within the international community with only a few States – including China and India – voicing any serious opposition to the proposed treaty.[130] Moreover, the ILC was heavily informed by "already widely accepted" norms and rules in domestic and international legal fora.[131] Because Article 6(8) has 'made the cut' to the ILC's current working draft, this commitment to making a treaty that reflects already widely accepted principles would presumptively extend to CCL as well.

If ratified, the Draft Articles would become the first source of international law to impose (qualified) legal obligations on States to impose CCL measures against corporations. One cannot downplay the significance of this proposed treaty if it is to withstand scrutiny at the negotiating table. However, the Draft Articles do not make any mention of extraterritorial jurisdiction or the broader duty of home States to use CCL against TNCs operating

[129] Draft Articles on Prevention and Punishment of Crimes Against Humanity 2019, Article 6(8)
[130] Sadat & George (2020) at 163
[131] Sadat & George (2020) at p.189

overseas.[132] The Draft Articles might then be heavily undermined by host States "with notoriously weak governance mechanisms" that cannot fulfil their treaty obligations.[133] And while Omoteso and Yusuf are accurate in asserting that States with a weak rule of law need to be subject to an "enforceable international mechanism for achieving [TNC] accountability", the same is true of Global North home States that have historically been successful in avoiding responsibility for prosecuting TNCs incorporated within their territories.[134] Moreover, because the Draft Articles are restricted to CAH, CCL as a recognised legal doctrine in international (criminal) law would only complete one part of the jigsaw. For a complete regime, the same recognition of CCL would have to apply to the other core crimes. The existing standalone treaties on genocide and war crimes are silent on the issue, and no standalone treaty exists for the fourth core crime of aggression. Despite these drawbacks, the Draft Articles call for quiet optimism. There is always the risk that the international community will change its mind and drop Article 6(8), leading the Draft Articles to a similar fate as the Draft Norms discussed above. However, because significant discretion is conferred on States and no enforcement mechanism is attached to the proposed treaty, States that already adopt CCL within their national legal systems might be receptive to the Draft Articles' future ratification.

3.5 The Future Role of the ICC

Article 121(1) ICCSt allows for amendment to the Rome Statute. Proposed amendments require a two-thirds majority vote, with seven-eighths of States parties needed to agree to those amendments through ratification. It is thus theoretically possible for the Rome Statute to be amended to recognise CCL and extend the *jurisdiction personae* of the ICC to include TNCs. Here, McGregor envisions an amended Article 25(1) ICCSt to read as follows:

> The Court shall have jurisdiction over natural *and legal persons* pursuant to this Statute.[135]

[132] Similarly, Article 7 (1) only places an obligation on States to establish national jurisdiction over natural persons. While this can be seen as a limitation to the Draft Articles, Article 7(3) allows States to exercise jurisdiction "in accordance with its national law". This means that States with pre-existing rules on CCL would be able to establish jurisdiction beyond the wording of Article 7 (1) to include legal persons.
[133] Omoteso & Yusuf (2017) at p.56
[134] Omoteso & Yusuf (2017) at p.66
[135] McGregor (2009) at p.496

While the sentiment is to be applauded, it is still highly unlikely that such an amendment would come to pass. Although the abovementioned CAH Draft Articles testify to the growing support for CCL at the international level, its ratification would meet significantly fewer challenges than a major amendment to the Rome Statute. For one, CCL under the Rome Statute would likely apply to all four core crimes. It would also provide an international enforcement mechanism (in the form of the ICC) which many States might be reluctant to accept. Moreover, an amendment to Article 25(1) ICCSt would probably require a unifying definition of CCL, therefore sparking tension between States with conflicting approaches to CCL in their domestic systems. The Draft Articles on the other hand apply solely to CAH, making it a much more digestible prospect for States to accept. Further, the Draft Articles do not give rise to an international enforcement mechanism, and they confer a high level of discretion on future States parties in their implementation of Article 6(8). Linking to this point, it is unlikely any complementarity issues would arise from the Draft Articles as there is no mention of a specific definition of CCL; States with contrasting rules on CCL can therefore implement their treaty obligations without sparking diplomatic tension. States that do not recognise CCL could simply 'opt-out' of Article 6(8), whereas any amendment to the Rome Statute in this regard might undermine the principle of complementarity. The political challenges associated with an amendment to the Rome Statute therefore clearly outnumber the ones that may arise through the CAH Draft Articles.

On another note, the ICC already has its work cut out dealing with individual criminal responsibility; to add CCL to the Rome Statute would surely place even more strain on the Court's workload without significant additional funding and resources. Adding CCL similarly "complicate[s] an already challenging process" vis-à-vis investigating and prosecuting defendants.[136] With many States already disenchanted with the Rome Statute, it would require a monumental level of political will to implement an amended Article 25(1) ICCSt. Some African countries are particularly disgruntled due to the ICC's alleged bias towards focussing on prosecuting and investigating African nationals. The Malabo Protocol, which will be discussed in Chapter 4, is perhaps the most palpable expression of this resentment. Against this background, the chances of a two-thirds majority of States willing to support an amendment to the Rome Statute is vanishingly slim. At present, therefore, the ICC is unlikely to play any significant role in the future of CCL at the international level. Nevertheless, the Rome Statute has purchase as the principal source of international criminal

[136] Kyriakakis (2021) at p.119

law defining and governing atrocity crimes. This will be an important point of discussion in Chapter 6 on the way in which domestic legal systems transpose the Rome Statute into national legislation and potentially 'marry' internationally defined atrocity crimes, whose parameters are laid out by the Rome Statute, with domestic rules on CCL.

3.6 Conclusion: A New Generation of International Law on the Horizon?

Public international law is viewed as a legitimator of norms, with Kolieb supporting the postulation that treaty compliance is grounded in the "perceived legitimacy" of an internationally defined set of rules.[137] If its function is to legitimate pre-existing standards and norms that reflect "universal values", then public international law also facilitates the harmonisation of national jurisdictions' domestic rules.[138] A streamlined body of international norms relating to CCL for atrocity crimes may thus be within reach, especially considering the popular support for the CAH Draft Articles. If ratified, the CAH Draft Articles could "mark an important development" as the first legally binding endorsement of CCL for atrocity crimes at the international level.[139] Here, as per the traditional State-centric nature of public international law, States parties would be responsible for imposing CCL measures against corporations. At the centre of this development is State practice. In this sense, any future developments at the international level should align as closely as possible with the converging and evolving landscapes of the domestic legal systems. This is a point echoed by Cassese et al's postulation that international (criminal) law is a:

> …hybrid branch… impregnated with notions, principles, and legal constructs derived from national criminal law, human rights law and customary laws.[140]

As such, the ILC's approach to Article 6(8) of the CAH Draft Articles is probably the most effective way to start bringing CCL for atrocity crimes into the fold at the international level. In close conversation with Cassese's remarks, the ILC placed a premium on State practice and emerging trends at the domestic level before finalising its Draft Articles. Moreover, there

[137] Jonathan Kolieb, 'Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally Binding Corporate Human Rights Obligations' (2019) 50 *Georgetown Journal of International Law* 789, p.799
[138] Kolieb (2019) at p.802
[139] Alhagi B.M. Marong, 'The ILC Draft Articles on Crimes Against Humanity: An African Perspective' (2020) 6 *African Journal of International Criminal Justice* 93, p.109
[140] Antonio Cassese, Paola Gaeta & John R.W.D Jones, *'The Rome Statute of the International Criminal Court: A Commentary'*, Oxford: Oxford University Press 2002, p.19

is precedent for this approach in the international law governing non-atrocity crimes like bribery and corruption.[141] Under these treaties, Kyriakakis notes that States are required:

> …to introduce laws domestically… [outlawing] certain behaviours when undertaken by legal persons.[142]

When one appreciates the level of power TNCs exercise over the world economy, and the attendant rights they are able to claim under international trade law, it is not unreasonable for TNCs to be "reined in by [similar] mechanisms designed to constrain… States".[143] This existing 'personification' of TNCs, coupled with the growing support for CCL at the domestic level, means that a "paradigm shift" in the sphere of international law is indeed becoming a real possibility.[144]

Conferring a high degree of discretion on States to deliver their treaty obligations is important to inducing changes at the international level, and if the Draft Articles are ratified then potential amendment protocols to the Geneva Conventions (for war crimes) and Genocide Convention (for the crime of genocide) could be on the horizon. Similarly, the sources of soft law attempting to address corporate impunity are by no means redundant. The General Principles are of particular normative value, and provide detailed guidelines – couched in assertive language – that might complement future treaties such as the CAH Draft Articles. Moreover, although nonbinding the Guidelines "provide… a standard… against which progress at the domestic level can be judged", a point discussed further at 5.3.2[145]

It is evident that the foregoing discussion shows a correlation between State-centrism and the likelihood that CCL will become an established norm at the international level. This is doubly advantageous when zooming into Africa. Marong argues that the benefits of the CAH Draft Articles are twofold: (1) CCL "bears particular resonance in Africa", meaning its admission to international law would be welcomed and (2) consonant with the topic under discussion, the Draft Articles are consistent with African nations' "desire to regain some of the prestige and dignity perceived to have been lost" via the ICC's supposedly "overzealous assertion of jurisdiction" pertaining to crimes committed in Africa by citizens of African nations.[146] This

[141] See for example Article 2 of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, which requires States parties to take necessary measures to impose liability on legal persons for bribing public officials.
[142] Kyriakakis (2021) at p.130
[143] Omoteso & Yusuf (2017) at p.61
[144] McGregor (2009) at p.493
[145] Zerk (2013) at p.63
[146] Marong (2020) at p.106

is because interpretation of the treaty is left to the discretion of States parties, meaning that allegations of encroachments upon State sovereignty will not be an issue if the Draft Articles are ratified. Yet this factor of the Draft Articles may also be its undoing. As Marong notes, there is a risk that some States will lack the will to "hold accountable powerful military and political elites", a point that – in light of the close ties between many corrupt governments and major foreign businesses – could extend to TNCs as well.[147] With no international enforcement mechanism, States have absolute discretion over the extent to which they interpret the proposed treaty without any fear of intervention from an international court. This could lead to a patchwork of approaches, inimical to the goal of closing the accountability gap since some corporations will continue to enjoy impunity if the host State on which the crimes were committed fails to investigate and prosecute them.

Although it might have been preferable for the ICC to take centre stage on the matter of CCL for atrocity crimes, the discussion at 3.5.1 showed that such a prospect is higly unlikely. But this may prove an advantage given the developments at the African-regional level to be discussed in Chapter 4, as well as the normative power of the Rome Statute to build a link between atrocity crime and nationally enforceable rules on CCL. International and regional law are not mutually exclusive but interdependent, meaning that advancements towards an African Criminal Court benefits from the current and future international law described above. The foregoing discussion has indicated that a new generation of international law might indeed be on the horizon. This chapter has attempted to lay the groundwork for how a streamlined body of rules on CCL across the international, regional and domestic levels might successfully end corporate impunity for atrocity crimes in Africa. The international developments discussed in this chapter – although in their embryonic stages – are in conversation with the notion of an incrementally evolving 'justice cascade'. They could thus be instrumental for creating a synthesised and holistic network of rules pertaining to CCL, thereby "enhanc[ing] the jigsaw of legal norms for the prevention and punishment" of TNCs and affirming the proposition that ending corporate impunity in Africa may be within reach.[148]

[147] Marong (2020) at p.121
[148] Marong (2020) at p.110

4 The Malabo Protocol and the Proposed African Criminal Court: An Overview

4.1 Introduction

The African Union's (AU) drafting of the Malabo Protocol would give effect to an 'African Criminal Court' should it come into force. In light of some of the shortcomings of the ICC described above, the idea of an ACC was spawned out of what many AU members perceived to be a practical necessity. One key rationale is in direct conversation with a main theme of the current discussion: that the ICC does not possess jurisdiction over legal persons. In this respect, Africa could be the first – but by no means last – regional block to engineer a treaty intended to give effect to a region-specific criminal court with jurisdiction over corporations, a strong indication that ending corporate impunity on the continent may be within distance. This chapter will provide a largely objective account of the aspects to the Malabo Protocol most relevant to the current contribution ahead of the next chapter on the implications associated with the ACC.

4.2 Historical background

4.2.1 Timeline of events leading up to the Malabo Protocol

Aside from the perennial issue of CCL, AU members sought to establish an ACC after becoming enthused by a string of events based on the related issues of immunity, universal jurisdiction and the role of African nations in redressing atrocity crime committed on the continent. A brief timeline of events leading up to the drafting of the Malabo Protocol can be summarised as follows:

1. 11th April 2000: the *'Arrest Warrant'* case is heard by the ICJ. The DRC and other African countries condemn Belgium's invocation of universal jurisdiction to arrest and try Congolese Minister of Foreign Affairs Abdoulaye Yerodia Ndombasi.[149]
2. 14th February 2002: the ICJ concludes that Belgium "failed to respect the immunity" enjoyed by Yerodia under international law.[150]
3. 1st to 3rd February 2009: AU members publish its decision on the doctrine of universal jurisdiction. African States express their united concern over the perceived misuse and

[149] *Democratic Republic of Congo v Belgium* (the *'Arrest Warrant'* case) [2002] ICJ Reports
[150] *Arrest Warrant* case at Para 70

overuse of the universal jurisdiction doctrine, tacitly understood to refer to the exercise of the doctrine by European countries like Belgium.[151]

4. 4th March 2009: an arrest warrant is issued by the ICC against sitting Sudanese President Omar Al-Bashir.[152] The arrest warrant provokes significant pushback from AU members, particularly because the indictment was made against a sitting Head of State and, moreover, Sudan itself was not a State-party to the Rome Statute. This response can be seen against the wider background of the ICC's supposed overemphasis on African atrocity crimes (discussed further below).[153]
5. 22nd August 2012: Senegal reaches an agreement with the AU to set up an Extraordinary African Chambers to prosecute former Chadian dictator Hissène Habré. The move was perceived as a cold shouldering of the ICC in favour of setting up an African framework – as per the doctrine of universal jurisdiction – to solve an African problem, namely alleged atrocity crimes committed during the Habré regime between 1982 and 1990.[154]
6. 2009-2014: starting in early 2009, AU delegates begin talks over the possibility of a criminal division being added to the African Court of Justice and Human Rights, culminating in the current Malabo Protocol finalised in June 2014.

The above demonstrates that the main motivations for negotiating the Malabo Protocol stemmed from the notion that Africans were best positioned to provide solutions to African problems. But relatedly, one cannot deny that this sentiment was driven in large part by the resentment felt by many AU members against non-African legal systems for encroaching upon closely guarded values like State sovereignty and diplomatic immunity. This may therefore explain why the AU was keen to set the wheels in motion for an ACC, as the same kind of issues would not arise with respect to a regional criminal court whose judges and prosecutors would all be African nationals. The precursor to this development is best demonstrated by Senegal's permission by the AU to prosecute a former foreign Head of State under its national laws.[155] However, it is also important to recall that the admission of CCL to the Malabo Protocol was not an afterthought, nor a mere appendage to the issues described

[151] African Union, 'Observations of the African Union on the Scope and Application of the Principle of Universal Jurisdiction' > https://www.un.org/en/ga/sixth/75/universal_jurisdiction/au_e.pdf <
[152] *The Prosecutor v Omar Hassan Ahmad Al Bashir* [2009] ICC-02/05-01/09
[153] African Union press statement on the decision of the Appeals Court of the International Criminal Court on Darfur (4th February 2010) > http://www.operationspaix.net/DATA/DOCUMENT/407~v~Communique_de_la_Chambre_d_Appel_de_la_Cour_Penale_Internationale_sur_le_Darfour.pdf <
[154] Accord between the Government of Senegal and the AU on the creation of the EAC within the Courts of Senegal (22nd August 2012) > Accord UA-Senegal Chambres africaines extra Aout 2012.pdf <
[155] Ibid

above. Rather, it too falls under the rubric of 'African solutions to African problems' (also abbreviated to ASAP), a point discussed in closer detail at 4.3.2.

4.2.2 Tensions between the African Union and the ICC

In recent years some African Union members have shown considerable discontentment towards the ICC. Three African States – South Africa, Burundi and The Gambia – submitted withdrawal notifications under Article 127 ICCSt. Burundi and The Gambia's reasons for seeking to withdraw from the Rome Statute are dubious, and will not be discussed in detail here.[156] South Africa, on the other hand, justified their withdrawal notification by submitting that the ICC's jurisdiction was untenable because of its relationship with the UN Security Council under Article 13(b) ICCSt. According to South Africa, this supposed infiltration of politics by the UN's unofficial executive organ explains the "political bases" on which investigations and prosecutions are made.[157] In other words, the privileged position of the Security Council's 'Permanent Five' enables them to veto referral proposals made against close allies. The current situation in Syria is perhaps the most striking contemporary example of how the ICC has been forced to "ignore similar or worse situations" than alleged crimes committed on African soil.[158] With the Kremlin's close links to President Bashar Al-Assad, any attempt to refer alleged atrocity crimes during the Syrian civil war to the ICC might prompt Russia to invoke its vetoing powers.[159] Pursuing Africans accused of committing atrocity crimes are, however, fair game. This is in part because there are fewer diplomatic obstacles to overcome between Permanent Five members over the political admissibility of such referrals. The "deep politicisation" embedded into the Rome Statute architecture is therefore one reason States unable to hide behind a Permanent Five ally for protection have become disenchanted with the ICC.[160]

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[156] Burundi and The Gambia's reasons are dubious because they "were intended to ensure State officials… escaped possible criminal investigation". Burundi is the only State to follow through on its withdrawal notification. See Manisuli Ssenyonjo, 'State Withdrawals from the Rome Statute of the International Criminal Court South Africa, Burundi, and The Gambia' in Charles C. Jalloh & Ilias Bantekas (eds), *'The International Criminal Court and Africa'*, Oxford: Oxford University Press 2017, p.217

[157] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17 *Journal of International Criminal Justice* 1005, p.1011

[158] Ssenyonjo in Jalloh & Bantekas (2017) at p.220

[159] This has occurred already in the past with Russia and China's veto against UN Security Council referral to the ICC prosecutor. See Human Rights Watch, 'UN Security Council: Vetoes Betray Syrian Victims' (22nd May 2014) *Human Rights Watch* > https://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims <

[160] Nimigan (2019) at p.1011

A natural consequence of this supposed politicisation is an overfocus on African atrocity crimes. The ICC's caseload is dominated by situations that have occurred in African countries, adding to the sense of unfairness that sparked negotiations to set up a regional criminal court. Envisioning an operational regional criminal court, it is perhaps less likely that the ACC and its prosecutor would be given to Realpolitik considerations in the same way the ICC has shown to have been. The nationality of the defendant corporation would probably be less material, not least because the Permanent Five have no say in African regional affairs. The ACC would thus be less hindered by the diplomatic and political obstacles that continue to hobble the ICC.

4.2.3 A brief tour of the factors that distinguish the Malabo Protocol from the Rome Statute

The Malabo Protocol has been signed by fifteen AU States parties, and needs a total of fifteen ratifications for it to come into force; the current number of ratifications stands at zero. As well as the existing General Chamber and Human and People's Rights Chamber, under the Malabo Protocol a third *criminal* chamber would be added to the African Court of Justice and Human Rights. Like Article 17 ICCSt, Article 46H *bis* of the Malabo Protocol makes the ACC's jurisdiction conditional on whether the relevant national legal system has failed to adequately investigate and prosecute the alleged international crime. But Article 46H *bis* adds another layer to the complementarity principle by precluding the ACC from exercising its jurisdiction where a subregional court, set up across the various Regional Economic Communities, is already dealing with the matter. This may be interpreted as a filtering mechanism to reduce the ACC's caseload.

It is also worth mentioning that Article 46H *bis* does not include the ICC as part of its complementarity framework, possibly because of the longstanding tension between the AU and ICC described above. While a controversial matter in itself, this is outside the purview of the current discussion because the Rome Statute does not recognise CCL at any rate. Indeed, probably the most controversial aspect of the Malabo Protocol is not its inclusion of CCL, but rather its exclusion of liability for sitting Heads of State and other senior State officials under Article 46A *bis*. While also an interesting topic in itself, the obligation of the ACC to respect this provision is outside the scope of the current debate. What is most pertinent to note is that Articles 46A *bis* and 46H *bis* are, quite clearly, direct responses to the type of immunity, universal jurisdiction and overemphasis on African crimes controversies outlined at 4.2.1.

Another noteworthy provision of the Malabo Protocol is its enumeration of 'transnational crimes' under Article 28A *bis*. Under Article 28A *bis*, the Malabo Protocol confers jurisdiction on the ACC to try a defendant for the four 'core crimes' also enumerated by the Rome Statute, as well as the transnational crimes of (1) piracy, (2) terrorism, (3) mercenaryism, (4) money laundering, (5) trafficking of hazardous wastes, (6) drug trafficking, (7) trafficking of persons, and (12) the illicit exploitation of natural resources. In addition, the Malabo Protocol includes (1) the unconstitutional change of government and (2) corruption in its chapeau, since these crimes have had a particularly chronic effect on many African nations.[161] The AU added these fourteen additional crimes pursuant to its commitment to fulfilling the promise of ASAP. Under a reading of Article 28A *bis*, the ACC Prosecutor would have competence to charge a corporation on numerous counts. So, for example, a TNC may be charged with complicity for crimes against humanity under Article 28C *bis* and on a second count for the illicit exploitation of natural resources under Article 28L *bis*. These transnational crimes are not novel per se, and instead derive from pre-existing sources of international law to which most or all AU members are States parties. As Ndiaye succinctly observes:

> What emerges from these precedents of the Malabo Protocol is a regional codification of universal norms of international criminal law that ensures the progressive development of a certain number of regional rules in that domain.[162]

The crimes over which the ACC has jurisdiction are therefore intended to be textured by an African understanding of them. While neither atrocity crimes nor transnational crimes are peculiar to Africa, one must labour the fact that certain issues – like unconstitutional changes of government or the illicit exploitation of natural resources – have had a particularly chronic impact on the continent and should be addressed as a matter of priority.

[161] Charles C. Jalloh, 'A Classification of the Crimes in the Malabo Protocol' in Kamari M. Clarke, Charles C. Jalloh & Vincent O. Nmehielle (eds), *'The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges'* (2019 CUP), pp.246-249

[162] Ndeye A. Ndiaye, 'The Habré Trial and the Malabo Protocol' in Sharon Weill, Kim Thuy Seelinger & Kerstin B. Carlson (eds), *'The President on Trial: Prosecuting* Hissène Habré*'*, Oxford: Oxford University Press 2020, p.238

4.3 Other Key Features

4.3.1 No surprise a regional criminal law regime is emerging out of Africa

The emergent 'regionalisation' of ICL has been met with little surprise in the scholarly discourse. For example, Clarke et al assert that the Rome Statute can be understood as "a floor rather than a ceiling" and that, as such:

> …the inclusion of Article 46C [which adds CCL to the ACC's jurisdiction] should not be that surprising given the increasing global convergence towards corporate criminal liability in domestic systems.[163]

What is less surprising – "if not near inevitable" according to Jalloh – is that the nascent regionalisation of ICL is emerging out of Africa.[164] Jalloh further submits that the Malabo Protocol was borne out of necessity, since it has historically been Africans at the 'short end of the stick' when it comes to corporate impunity. This suggestion is in close conversation with the theme of this paper, insofar as it demonstrates that there is a clear impetus for an authoritative CCL governance regime with courts whose jurisdictional reach is capable of closing the accountability gap.

4.3.2 'African solutions to African problems' within the context of corporate impunity

Linking to the above is the ASAP slogan, which the Malabo Protocol sets out to achieve with its ambitious interpretation of the notion that the Rome Statute is a 'floor rather than a ceiling'. African countries have been confronted with the "monumental challenge" of ensuring atrocity crimes and other human rights violations are not perpetrated by profit-driven corporations.[165] This challenge is exacerbated by the corporate mentality that the bottom-line must always take priority. And as vivid examples at 2.10 demonstrate, corporations are oftentimes willing to maximise natural resource extraction irrespective of the human impact. What is further clear is that successful "extractive resource management… demand[s] a clear system of judicial recourse" be established, which has hitherto been

[163] Kamari M. Clarke, Charles C. Jalloh & Vincent O. Nmehielle, 'Origins and Issues of the African Court of Justice and Human and Peoples' Rights' in Kamari M. Clarke, Charles C. Jalloh & Vincent O. Nmehielle (eds), *'The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges'* Cambridge: Cambridge University Press 2019, p.28

[164] Charles C. Jalloh, 'The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa' Charles C. Jalloh & Ilias Bantekas (eds), *'The International Criminal Court and Africa'* Oxford: Oxford University Press 2017, p.296

[165] Abe & Ordor (2018) at p.844

missing across the majority of resource-rich African nations.[166] A regional criminal court, if operational, would mark a major step towards actualising the historically "symbolic and rhetorical" expression that African problems should be met by African solutions.[167] Here the African 'problem' – corporate accountability in atrocity crimes – could be 'solved' by the African solution of a fully operational regional criminal court. According to the purpose of Article 46C *bis*, those corporations bent on maximising profits despite the harmful impact would be prosecuted at the ACC, irrespective of the country in which they are registered. Implications of this aspect which go beyond the binary relationship between the ACC and foreign TNCs shall be explored at 5.3.

4.3.3 The advantage of proximity

Having an operational ACC arguably elevates the "effectiveness and legitimacy" of international criminal justice.[168] It is also perceived to supply greater "visibility to justice" and, within the context of corporate impunity, exposes the wrongfulness of corporate defendants' actions across the continent.[169] This has the dual effect of minimising the chances of recurrence in the future, as well as demonstrating to African citizens that they can rely on an effective regional enforcement mechanism if corporate atrocity crimes were to arrive upon their communities. Indeed, it is a way of announcing to corporations, the international community and perhaps most importantly African people, that the continent of Africa "is no longer going to do business as usual".[170] The distance between the Hague and Africa means the ICC would heavily struggle to emulate this, even if CCL were to be added to the Rome Statute. Furthermore, the ICC has been unlovingly nicknamed the 'European Court for Africa'. Having an operational ACC might therefore help undo these negative perceptions of the ICC's role in international criminal justice.

4.3 Conclusion

This brief survey shows the way in which ASAP has been embedded into the spirit of the Malabo Protocol by its draftsmen. While the Malabo Protocol has been a subject of controversy for possibly being intentionally structured to prevent prosecution against African

[166] Abe & Ordor (2018) at p.851
[167] Clarke et al in Clarke et al (2019) at p.11
[168] Jalloh in Jalloh & Bantekas (2017) at p.301
[169] Jalloh in Jalloh & Bantekas (2017) at p.301
[170] Clarke et al in Clarke et al (2019) at p.27

leaders and senior officials, it still sends a powerful statement to the international community with respect to corporate impunity. The Malabo Protocol is innovative but not unreasonably so, to the extent that any factors that differentiate it from the Rome Statute are grounded in pre-existing sources of international law. The next chapter will evaluate the implications of the ACC and the ways in which the Malabo Protocol can act as a key catalyst – or 'propellor' – for developing a global network of legal regimes towards ending corporate impunity for atrocity crime in Africa.

5 Implications of an Operational African Criminal Court

5.1 Introduction

As described in the last chapter, a key development in recent years has been the drafting of the Malabo Protocol, which would establish for the first time a regional criminal court. One of the driving forces behind the creation of the proposed ACC is corporate impunity, an issue that continues to plague the continent. At present fifteen AU members have signed the Malabo Protocol, with a minimum of fifteen ratifications needed for it to come into force. Though the fifteen signatures is promising, the absence of any ratifications at the time of writing is somewhat troubling. As such, the effects of the Protocol "can only be imagined for now".[171] It is nevertheless possible to make inferences as to the type of implications the Malabo Protocol would have for the issue of CCL in atrocity crimes. Its lack of ratifications notwithstanding, the Protocol could be harnessed as a valuable normative source of international law, with widespread implications particularly for Global North home States.

As will be shown below, the Malabo Protocol aims to build linkages between the ACC and third-party home States. A central theme of this chapter will thus concern the predicted relationship between these home States and the ACC. The admission of CCL to the ACC's *jurisdiction personae* aside, the most pathbreaking and ambitious aspect to the Malabo Protocol is its implied inclusion of Global North States. I will combine this aspect to the Protocol with observations from preceding chapters to promote the idea of a 'de facto' or 'soft' complementarity principle emerging from an operational ACC. This will then provide the segue to the next chapter on the role of national legal systems in redressing corporate involvement in atrocity crimes.

5.2 Corporate Criminal Liability at the African Criminal Court

5.2.1 The transnational crime of illicit natural resource extraction in relation to CCL

In addition to the four core international crimes listed by the Rome Statute, the Malabo Protocol goes a step further by establishing a set of transnational crimes over which the ACC would also have jurisdiction. As 4.2.3 demonstrated, these transnational crimes are not novel per se, and instead derive from "regional conventions… [and] other international

[171] Nimigan (2019) at p.1007

instruments".[172] One transnational crime is particularly pertinent to the current discussion, namely the illicit extraction of natural resources under Article 28 *bis*. The commission of this crime is one of the clearest expressions of corporate impunity, with the illicit extraction of natural resources "continu[ing] unabated" in the absence of any preventative enforcement mechanism.[173] For prosecution to succeed, the commission of the alleged act must be of a "serious nature affecting the stability of a state, region or the Union".[174] Though the word 'serious' is vague and open to interpretation, it is interesting that the main element of the crime relates to the question of *stability*.[175] As 2.10 showed, instability is a common feature amongst those resource-rich States that provide ideal environments for TNCs to thrive with impunity. But here, affecting the stability of a region is considered a cause in itself. This implies that the wording of Article 28 *bis* was intended to tackle a vicious cycle that makes impunity both a cause and consequence of international crime.

While not an atrocity crime in itself, one might struggle to decouple the illicit extraction of natural resources from incidents that do satisfy the requisite threshold for one of the four core crimes, a point echoed by the following remarks from a former ICC Prosecutor:

> …particular consideration [should be given] to prosecuting Rome Statute crimes that are committed by means of, or that result in... the illegal exploitation of natural resources…[176]

Similarly, Article 28 *bis* is rooted in existing ICL – specifically the war crime of pillaging under Article 8 (2)(b)(xvi) ICCSt – thereby giving it expression in the form of CCL before a regional criminal court. And because international crimes do not exist in a vacuum, a defendant can be charged with complicity in an atrocity crime and as a principal perpetrator in the transnational crime of illicit natural resource extraction, for which remedies would be available under the Malabo Protocol. Article 28 *bis* therefore has a certain supplementary quality that in turn provides a more holistic evaluation of the events in question by building an unequivocal nexus between illicit natural resource extraction and other, more serious

[172] Jalloh in Clarke et al (2019) at p.247
[173] Abe & Ordor (2018) at p.856
[174] Article 28L(1) *bis* of the Malabo Protocol
[175] Daniella Dam De Jong & James G. Stewart 'Illicit Exploitation of Natural Resources' in Kamari M. Clarke, Charles C. Jalloh & Vincent O. Nmehielle (eds), *'The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges'*, Cambridge: Cambridge University Press 2019, p.591
[176] ICC Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (15th September 2016) at Para 41 > https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf <

international crimes. It therefore has a 'catch-all' effect to ensure that, even where a TNC does not meet the requisite threshold to be charged for an atrocity crime, its role in the commission of that crime will not go unmissed. Here, quite unlike the Rome Statute, the Malabo Protocol invites the ACC to examine the economic causes of atrocity crime in Africa pursuant to its role as an agent for delivering African solutions to African problems.

5.2.2 Parameters of CCL under Article 46C *bis*

Article 46C *bis* is generally consistent with domestic legal systems across Africa insofar as only a small number of countries – such as Egypt – do not recognise the doctrine of CCL. Article 46C *bis* is therefore not pathbreaking in the sense that it establishes an entirely novel field of criminal law. Rather, Article 46C *bis* is pathbreaking in the sense that the ACC will become the first international criminal court of its kind to expand its *jurisdiction personae* to corporations. Furthermore, Article 46E (2) *bis* – which sets out the preconditions to the ACC's exercise of jurisdiction – is notable for not limiting the proposed court's jurisdiction to African natural and legal persons. TNCs incorporated in Global North countries are therefore subject to the jurisdiction of the ACC where: (i) the conduct was carried out on the territory of a State party; (ii) the victim of the crime is a national of a State party; or (iii) the acts of non-nationals (of States parties to the Protocol) – even if extraterritorial – threaten a vital interest of a State party.[177] This aspect to the Malabo Protocol forms a central part of the current discussion as it provides an apparatus for the ACC to prosecute Global North based TNCs or – even if that fails – normatively impress upon home States clear standards and rules to ensure greater compliance with the regional enforcement mechanism when operating on African soil.

Under Article 46C (2)-(5) *bis*, a defendant corporation must satisfy the minimum mental element of being at least aware of the alleged crime committed. Awareness may then be inferred through looking at the company's policy to engage "in the act which constituted the offence", thereby making the crime attributable to that corporation.[178] Importantly, by adopting an organisational model to prosecute corporations the Malabo Protocol differs from the dominant approach to CCL found in domestic legal systems discussed at 2.3. Kyriakakis explains that liability under the Malabo Protocol would not hinge upon:

[177] Article 46E (2) *bis* of the Malabo Protocol
[178] Art 46C (2) *bis* of the Malabo Protocol

> …the attribution of the conduct and state of mind of specific individuals to the corporation[,] but rather it situates corporate culpability within the corporate policies and corporate knowledge that enabled the offence.[179]

It is perhaps surprising that the drafters of the Malabo Protocol chose to adopt the organisational model when the identification principle – the dominant model in domestic legal systems – would have likely been "accommodated more readily".[180] One persuasive rationale for this approach might relate to the question of control. Drawing a clear causal link between those that represent the 'directing mind and will' of a parent corporation with the subsidiary alleged to have been involved in atrocity crimes, over whom that parent possesses control, is a very complex undertaking. Assessing CCL through this lens may therefore allow parent corporations to simply discharge blame for the actions of their subsidiary. An organisational model might not run into these same difficulties, since the actual level of parent control over its subsidiary can be more readily ascertained through examining corporate policies – formal and informal – as a whole. Rather than being atomised according to rank and status, the corporation is therefore viewed as an entire organism, the idea being that:

> The wider the net is cast, the more amenable the model will be to corporate prosecutions, particularly in transnational settings where business is often transacted through local subsidiaries…[181]

It is outside the scope of this discussion to assess the technical intricacies of this approach, save to say that the organisational model may not be the optimal choice within the context of atrocity crime, as mooted at 2.5.

As well as diverging from existing ICL norms and principles (with particular reference to the mental element required to satisfy the high threshold for atrocity crime), perhaps more troublingly the organisational model could create complementarity issues with African domestic legal systems and even more severe 'de facto' complementarity issues with Global North legal systems. Due to this lack of doctrinal consistency vis-à-vis CCL, with the exception of Australia – which uses the organisational model – it may be easier for home

[179] Joanna Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in Kamari M. Clarke, Charles C. Jalloh & Vincent O. Nmehielle (eds), *'The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges'*, Cambridge University Press 2019, p.816
[180] Kyriakakis (2021) at p.274
[181] Kyriakakis in Clarke et al (2019) at p.822

States to deflect responsibility for prosecuting a defendant corporation.[182] This is because different approaches to CCL will at some point reach different conclusions. The organisational model requires a less strict investigation into the conduct and intent of individual actors inside a corporation, meaning that it may be easier to prosecute the offending corporation than a model like the identification principle. So if a home State adopts an identification principle model to CCL, there may be valid *non bis in idem* arguments at the disposal of a home State refusing to cooperate with the ACC over a matter concerning one of its corporations.

Any doctrinal discrepancy might therefore produce suboptimal results with reference to the predicted relationship between the ACC and home States, since inconsistency risks undermining the need to foster a consistent network of CCL governance regimes towards the common goal of ending corporate impunity in Africa. Perhaps therefore I overestimate the Malabo Protocol's conscious effort to galvanise different legal systems – particularly those in the Global North – by deliberately grounding itself in existing norms and standards found across the gamut of the international legal order. Be that as it may, inconsistencies between the organisational approach adopted by the ACC and the dominant identification model used in domestic legal systems is not a fatal flaw. For example, at the ICC the "plurality of national approaches" is accepted as a given and:

> …demonstrated plainly by the fact that the ICC Statute came into operation despite the divergence of national systems on numerous principles of criminal law.[183]

One can probably draw a similar conclusion for a future regional African regime, especially because the possible relationship between home States and the ACC would be governed purely by permissive principles rather than anything legally binding per se, a point discussed below at 5.3.5.

5.3 The Complementarity Question

5.3.1 General overview

The challenges associated with operationalising the ACC are manifold. Some major challenges include: (1) AU members' reluctance or unwillingness to ratify the Malabo

[182] Which it is argued would be an expectation of home States for various reasons broached at 5.3
[183] Kyriakakis in Clarke et al (2019) at p.828

Protocol, (2) the possibly overbroad jurisdiction of the ACC, which would have competence to review atrocity and transnational crimes by natural and legal persons, (3) serious budgetary shortages and a lack of resources to accommodate the broad jurisdiction of the proposed ACC (4) case selectivity owing to a limited budget and thinly spread resources, (5) investigatory issues in light of the transnational nature of corporate defendants.

These related challenges are underpinned by the complementarity question and how it might apply to Global North home States. Like the Rome Statute, the wording of the Malabo Protocol is engineered to ensure that the ACC would be a court of last resort. It is in the interests of justice to give domestic legal systems opportunity to investigate and prosecute atrocity crimes prior to supranational judicial intervention. Many resource-rich African States have patently failed to do this in the past with reference to the CCL of corporations, a trend that may well continue even if the ACC comes to pass. This then raises the delicate question of how Global North home States would interact with the ACC. To elaborate, Michalakea predicts that:

> …it will be challenging to exercise jurisdiction over transnational companies, seated and operating in different States across Africa and beyond, and this will require legal assistance from other States… not parties to the Malabo Protocol.[184]

Indeed, it would be a brazen assault on State sovereignty to include any direct reference to the responsibility of home States to investigate and prosecute non-African TNCs for their alleged involvement in atrocity crimes without those States acceding to the Malabo Protocol. With the remote exception of a protocol on cooperation, it is difficult in theory and practice for a Global North State to accede to any African regional convention; there is thus no 'strong', legally binding complementarity requirement between the ACC and Global North domestic legal systems. On its face, this lack of a formal link between the proposed ACC and home States makes it conceivable to suggest that a home State would be unable to cooperate. But in order for the ACC to be operable, and for the initial challenges pertaining to budget, resources etc. described above to be overcome, home States must assume "primary responsibility" for the actions of corporations based within their jurisdictions (a point discussed at length in Chapter 6).[185]

[184] Taygeti Michalakea, 'Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and its Contours' (2018) 7 *IHRL Review* 225, p.236
[185] Nimigan (2019) at p.1013

I will therefore forward the idea of a predicted 'de facto' complementarity principle[186] that might arise through the combination of the following factors:

(1) The normative purchase of the Malabo Protocol and future ACC jurisprudence;
(2) The existing and emerging sources of international law to which Global North states are signatories;
(3) The successful orchestration of political and diplomatic agreements capable of ensuring mutual legal assistance inter alia.

These factors aim to justify the prediction that a 'de facto' complementarity principle will emerge in the undefined but hopefully near future, pursuant to the notion that robust CCL norms for atrocity crime might be within reach. The probability of this prediction materialising depends on the coalescence of multiple variables to be discussed in the Chapter 7. For now it suffices that the factors to be discussed provide the underlying impetus for this prediction to be realised; if it fails then at worst it can be viewed as delivering a Utopian vision that reflects CCL for atrocity crimes as tantamount to a practical necessity.

5.3.2 The normative purchase of the Malabo Protocol

Generally speaking, the Malabo Protocol represents a normative shift towards CCL at the supranational level. The drafters' inclusion of Article 46C *bis* was intended to form a core part of the ACC's work. Its admission is part of a wider normative trend towards CCL, as reflected by the majority of domestic legal systems that now recognise it as a legal doctrine. The notion of CCL is therefore not a new phenomenon, and in fact originates outside of Africa. Furthermore, Abe and Ordor note that Article 46C *bis* is "consistent with the commitment of African countries" to ensure corporations protect human rights under Pillars II-III of the Guiding Principles.[187] As discussed at 3.3.2, the Guiding Principles – although couched in assertive language – are fundamentally unenforceable as a source of international soft law. In this respect, the drafters of the Malabo Protocol built on the Guiding Principles by providing the widely accepted norm – that corporations must respect human rights – some authoritative thrust. One can therefore surmise that Article 46C *bis* reflects the hardening of soft law norms that have hitherto been rhetorically useful but wanting in enforceability. Global North States are generally supportive of international soft law sources like the

[186] Defined here as the proposition that an operational ACC would only intervene in a matter when the home State in question is either unwilling or unable to investigate and/or prosecute the foreign corporation alleged to have committed the extraterritorial crime over which the ACC exercises jurisdiction.
[187] Abe & Ordor (2018) at p.846

Guiding Principles, yet acting upon their rhetorical commitments still remains a perennial issue.[188] Normatively speaking, the Malabo Protocol might be viewed as an expression of AU States' united disapproval of corporate impunity. So even if the ACC ends up 'stillborn' – as some scholars have disparagingly predicted – the Malabo Protocol provides an important normative reference point for how "fighting impunity" might be addressed in practice.[189]

5.3.3 Existing sources of international law

Global North States are generally proponents of international law standards relating to BHR.[190] As explained above, the Malabo Protocol hardens existing soft law already widely accepted by the international community. The Protocol similarly invigorates existing hard law under ICL by extending the ACC's *jurisdiction personae* with the inclusion of legal persons. This includes the four core crimes considered jus cogens, as well as innovative adaptations of associated crimes like pillaging, which is now given expression under Article 28 *bis* described at 5.2.1. These factors, compounded by Global North States' broad acceptance of CCL, might thus make it difficult for a home State to circumvent responsibility by claiming the Malabo Protocol is peculiar to Africa. There would then be an expectation – pursuant to the normative factors described above – for the home State to investigate alleged atrocity crimes themselves. The existence of a fully operational regional court could act as a positive influence over home States; a propellor for inducing changes at the national level. Serious diplomatic embarrassment may flow from the ACC concluding that the home State in question was *unwilling* to investigate despite their rhetorical commitment to ICL and BHR discoverable through their support at the international level. Keeping the ACC's caseload to a minimum is a key requirement if it is to succeed, and it is implied that the fewer cases the Court hears, the more responsive home States are to investigating and prosecuting corporate atrocity crimes. The ACC could therefore have a deterrent effect on host States to ensure (1) that preventative mechanisms are introduced, or in other words, national CCL rules do not 'lose their teeth' when applied extraterritorially and (2) where an alleged atrocity crime is committed, the State would spare itself embarrassment by investigating the matter before the ACC takes matters into its own hands.

[188] Brigitte Hamm, 'The Struggle for Legitimacy in Business and Human Rights Regulation: a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty' (2021) 23 *Human Rights Review* 103, p.104
[189] Nimigan (2019) at p.1029
[190] Hamm (2021) at p.104 and p.121

5.3.4 Orchestrating cooperation between home States, host States and the ACC

Perhaps the greatest challenge to the ACC is its likely reliance upon Global North States for mutual legal assistance (MLA). The idea of MLA runs along the principle that States should cooperate with one another to the greatest extent possible, meaning investigators are not impeded by national boundaries when factfinding and evidence gathering.[191] Murray and Harris quip that in the ideal scenario:

> …international boundaries [would] cause as few problems to the investigators as they do to criminals.[192]

Though MLA is traditionally framed to apply horizontally between national legal systems, under the Malabo Protocol MLA is also anticipated between the ACC and third party States. Specifically, Article 46L(3) *bis* provides that "[the ACC] is entitled to seek the cooperation or assistance of… non-States Parties…". But in order for this provision to be effective, the "cooperation or assistance" of home States must actually be forthcoming. This could be easier said than done, especially when a home State is unable or unwilling to cooperate.

A successful MLA apparatus "requires a supportive international political environment" and a willingness for "effective coordination… [and] interdependence" between different legal regimes.[193] It is thus hoped that the abovementioned factors at 5.3.2-5.3.3 would prompt home States to cooperate and develop amenable relationships with the ACC and African national legal systems, perhaps in the form of bilateral agreements and/or memorandums of understanding. A collaborative relationship between home States and the ACC would have the added benefit of preventing the duplication of efforts. These are however delicate questions that require skilled diplomacy. So while Article 46L(3) *bis* alludes to the importance of cooperation with home States, Bisset suggests the fact remains that:

> Many states require a legal basis for the provision of assistance and most are more likely to cooperate where they have a legal obligation to do so.[194]

Because there is no formal legal obligation for a home State to cooperate, both African national legal systems and the ACC will have to rely entirely on good faith in the absence of

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[191] For a comprehensive review of MLA see Gerhard Kemp, 'Mutual Legal Assistance in Criminal Matters and the Risk of Abuse of Process: A Human Rights Perspective' (2006) 123 *South African Law Journal* 730
[192] Christopher Murray & Lorna Harris, *'Mutual Assistance in Criminal Matters'*, Sweet & Maxwell 2000, p.2
[193] Nimigan (2019) at p.1026
[194] Alison Bisset, 'And Then Two Came Along at Once: Inter-State Cooperation on Core Crimes, the ILC and the Group of Core States' (2020) 20 *International Criminal Law Review* 551, p.562

official MLA agreements. This means that even where an African national legal system is *willing* to investigate alleged atrocity crimes committed by a foreign TNC, it may be *unable* to do so because of a home State's refusal to cooperate. But if one views the Malabo Protocol as a part of the wider normative landscape on CCL, then it becomes more conceivable to imagine home States cooperating with the ACC and African national legal systems. This is a point analogous to the idea of an emerging 'justice cascade' alluded to at 3.6, a term "used to describe the spread of accountability systems throughout the globe".[195] It follows that potential future developments like an enforceable treaty on CAH read in line with the ILC's Draft Articles would be a major boon to the ACC. It would legitimate Article 46L(3) *bis* and solidify the link between Global North home States and the ACC. Indeed, Article 14 *bis* of the Draft Articles requires future States parties to "afford one another the widest measure of mutual legal assistance".[196] Interplay between these convergent global norms places a strong expectation on home States to cooperate with the ACC by either conducting its own investigations or offering extensive support to the ACC Prosecutor.

5.3.5 De facto complementarity and 'African solutions to African problems'

While the foregoing discussion places significant emphasis on the role of Global North States, the ASAP sentiment that has driven the Malabo Protocol does not lose its essence. This is because the Malabo Protocol could act as the propellor for ending corporate impunity by inducing a CCL regime capable of prosecuting atrocity crimes at the domestic level. Its origins are rooted in a deliberate reawakening of ICL, with AU draftsmen adding CCL to its chapeau and attempting to build collaborative networks between different legal regimes, including those in the Global North. Here, it is possible that the very presence of an operational ACC would act as a catalyst for inducing changes at the national level within Global North legal systems – an outcome directly related to a key purpose of the Malabo Protocol. While there is a legal distinction between the 'strong', legally binding complementarity principle attached to Article 46H *bis* and the 'soft', nonbinding complementarity principle pertaining to the ACC and non-African States, the outcome of each is fundamentally the same. In other words, the ACC would try a corporation if the State to which it is incorporated has proven unable or (more likely) unwilling to do so.

[195] Kathryn Sikkink, *'The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics'*, WW Norton & Company 2011
[196] Draft Articles on Prevention and Punishment of Crimes Against Humanity 2019, Article 14

It is therefore not a stretch to say that Article 46E *bis* embodies a permissive principle that would likely have teeth in practice. So, while this potentially central role of home States may appear a prima facie erosion of the ASAP slogan if Global North States start positioning themselves more assertively when addressing corporate impunity, the reality is that ASAP might be a main causal factor in these substantive domestic changes even if the Malabo Protocol is never ratified. In this sense, the AU will be triumphant in achieving one of its main aims under the Malabo Protocol. Even where a home State does not embrace these changes – assuming the Protocol does attain fifteen ratifications – their resistance could lead to acute international scrutiny and diplomatic embarrassment if it is both unwilling to investigate and/or unwilling to cooperate with either the host State or the ACC's in their own investigations. Further, any trial delivered by the ACC *in absentia* would still retain significant symbolic and normative value when one considers the high level of public scrutiny both major TNCs and Global North States are subjected to by nature of their place in the international community, echoing the words of Stewart cited at 2.2.2. To this end, it is "entirely feasible that corporations… may simply submit to ACC proceedings" given that the defendant corporation's reputation could end in tatters if the ACC decided to conduct proceedings *in absentia*.[197]

5.4 Conclusion

Even if the Malabo Protocol does not amass the requisite fifteen ratifications, it is still highly symbolic in the way that it expresses pre-existing and widely accepted ICL norms, a sentiment that would not be lost on the international community should further developments arise in the future. Nevertheless, the AU may have taken the ASAP slogan a step too far by attempting to solve all of Africa's problems in one fell sweep. The Malabo Protocol attracted significant attention when it was drafted but its momentum has since lost steam, perhaps in some part because it is simply too ambitious as to be practicable. And one cannot deny that the term 'ambitious' is an accurate adjective to use when describing the seismic implications that might flow from an operational ACC. Circumspection is not an option when it comes to tackling corporate impunity for atrocity crimes, and should the Malabo Protocol attain the minimum fifteen ratifications, Global North home States would be thrust into action for the reasons described above. Perhaps if the Malabo Protocol had been ratified by at least a few

[197] Kyriakakis in Clarke et al (2019) at p.833

AU members, it would be possible to conclude here that the ACC's function as a 'propellor' of tackling corporate impunity might make the closing of the accountability gap within reach. Yet alas, it is important not to lose sight of the fact that the Malabo Protocol is in its eighth year without garnering enough support from AU States parties to add a criminal section to the African Court of Justice and Human Rights. Much of the above discussion has therefore been relatively speculative, and one wonders whether the Malabo Protocol's current normative purchase carries enough weight for it to impact upon the CCL trajectories of Global North home States. For now it is therefore too premature to say that the Malabo Protocol contributes to the proposition that closing the accountability gap in Africa is within reach. The variables mooted at 7.2.5-7.2.6 will return to this issue and hopefully build a more optimistic account of how this limited likelihood may be reversed in the future.

6 Global North National Legal Systems

6.1 Introduction

The role of Global North States represents the third part of the jigsaw towards building a streamlined CCL governance regime for redressing corporate involvement in atrocity crime. This chapter will show how national legal systems might be beginning to take a firmer position on corporate atrocity crime by 'marrying' internationally defined rules governing ICL with domestic CCL. Using a 'marriage' metaphor is illustrative to the reader as it captures the mutual interdependence between internationally defined atrocity crimes and domestic CCL rules; in other words, the purpose of closing the accountability gap in Africa is heavily dependent on this 'marriage' working successfully across national jurisdictions in the Global North. Though there have so far been only two examples of this 'marriage' being tested in practice, there are existing frameworks in many domestic legal systems that make the emergence of more cases in the future increasingly likely. Now in its eighth year, discussing the Malabo Protocol at length in Chapters 4 and 5 may not be viewed as particularly fashionable. However, this chapter will demonstrate why renewed interest in the Malabo Protocol is called for in light of emerging trends in the Global North.

Though this chapter will focus primarily on criminal prosecutions, a detour shall be taken to discuss civil lawsuits, which have hitherto been the principal mode for imposing liability on corporations for their involvement in atrocity crimes on African soil. The purpose of this detour is to make the inferential proposition that States' generally possess an underlying receptiveness for building stronger CCL regimes to redress atrocity crimes committed by TNCs in Africa. Other aspects, such as the advantages of closing the accountability gap as a matter of criminal law as well as its associated risks, drawbacks and concerns shall also be discussed in detail. The principal objective in this chapter is to demonstrate to the reader that engendering a culture for prosecuting corporations under national criminal law is not a pipe dream but – as per the notion of a 'justice cascade' – presenting itself as a real possibility.

6.2 Overview of Legal Systems and Modes of Liability

6.2.1 Civil and common law legal systems

There are two macro legal systems, (1) civil law and (2) common law. Civil law legal systems are widespread across continental Europe and common law legal systems are used by Anglophone countries like the UK, USA, Australia and Canada. It is not necessary to undertake a detailed comparative analysis of the legal systems employed by Global North States as it suffices that, while no two legal systems are identical in their approach to CCL, one can distil "core structural" similarities between them.[198] Moreover, national jurisprudence does not exist in isolation to other jurisprudential developments, "as seen in the interaction between Dutch and English court decisions" in litigation against TNCs.[199]

6.2.2 Tort lawsuits and criminal trials

A striking theme in Global North States' jurisprudence on CCL is the scarcity of criminal prosecutions. The majority of cases that address corporate involvement in atrocity crime are instead tort-based (or delict-based in civil law legal system parlance). A tort-based claim is brought by private individuals (i.e. victims of atrocity crime) rather than the State. Torts are generally negligence oriented, meaning that the respondent must have breached a duty of care owed to the plaintiff. The presiding judge will then order the respondent to pay damages should the plaintiff's complaint succeed. Criminal prosecutions are brought by the State against a defendant accused of committing a crime. Successful prosecution is dependent on whether the requisite mens rea and actus reus standards have been met. The defendant is then sentenced if found guilty. Because a TNC cannot be sentenced to a term of imprisonment, they are generally subject to fines payable to the State as opposed to the private individuals who suffered the harm.

Although the focus of this chapter is corporate *criminal* liability, it would be remiss not to discuss the tort-based jurisprudence at some length since "the vast majority of litigation against [TNCs] have been commenced by a civil claim".[200] According to McCorquodale, this may be attributed to (1) tort law's ability to provide financial remedies to injured claimants

[198] Robert McCorquodale, 'The Litigation Landscape of Business and Human Rights' in Richard Meeran (ed), *'Human Rights Litigation against Multinationals in Practice'* Oxford: Oxford University Press 2021, p.3
[199] McCorquodale in Meeran (2021) at p.5
[200] McCorquodale in Meeran (2021) at p.8

and (2) the comparatively low negligence-based standard of proof to demonstrate a TNC had breached its duty of care.[201] Criminal law is, conversely, based on a moral pursuit of achieving 'justice'. The burden of proof on the prosecutor is remarkably high for atrocity crimes; take for instance the famously high threshold for proving a defendant possesses the requisite *dolus specialis* to be found guilty of participating in the core crime of genocide.

6.3 A Closer Look at Tort Law Jurisprudence

6.3.1 Recent developments in UK jurisprudence

Civil law claims brought by plaintiffs from Africa are based on the doctrine of foreign direct liability. A constituent of extraterritorial jurisdiction, foreign direct liability occurs when a TNC has committed a tort overseas but remains subject to the jurisdiction of the home State in which it is incorporated.[202] Within the context of EU member states, this factor is complemented by the Brussels-I Regulation, which imposes 'mandatory jurisdiction' on domestic legal systems. In its interpretation of Brussels-I Regulation, the ECJ in *Owusu v Jackson* proscribed States from employing the *forum non conveniens* principle.[203] In other words, a State cannot use divergent domestic legal norms to override the Regulation. Instead, States must respect the raison d'etre of the Regulation: "that defendants shall be sued in the place where they are domiciled".[204] Until Brexit these sources of EU law successfully "removed a major barrier" for claimants wishing to file a lawsuit in the UK, and continue to act as an important mechanism for "harmonis[ing] all rules for jurisdiction" across remaining Union member States.[205]

As preceding chapters have shown, atrocity crimes are typically committed by subsidiary corporations, and a major challenge to private individuals bringing successful claims has been the issue of separate corporate personality. In this sense, many parent corporations have been able to successfully 'hide behind the corporate veil' by deflecting blame for their involvement in alleged atrocity crime. But recent caselaw emerging from the UK has started to pierce the corporate veil by subordinating corporate law norms like separate corporate

[201] McCorquodale in Meeran (2021) at p.8
[202] Lucas Roorda, 'Jurisdiction in Foreign Direct Liability Cases in Europe' (2019) Fourth Annual Detlev F. Vagts *Roundtable on Transnational Law* 161
[203] Case C-281/02, *Owusu v. Jackson* [2005] ECR I-1383
[204]Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels-I Regulation') 2001 OJ (L 12) 16.1.2001, Article 2(1) and Article 4(1)
[205] Roorda (2019) at p.162

personality in favour of providing access to a judicial remedy for victims of atrocity crime. Here the question of *control* is the main criterion for parent company liability. This trend began with the case of *Chandler v Cape Plc*, where the Court of Appeal (England and Wales) found that a duty of care was owed by the parent company due to its "close involvement in the health and safety policies" of the negligent subsidiary in question.[206] More recently, and in closer conversation with the theme of this paper, the UK Supreme Court held in *Lungowe v Vedanta Resources plc* that a parent may be liable when it oversees – either directly or indirectly – the actions of its negligent subsidiary.[207] In *Okpabi v Shell*[208] the same court affirmed *Lungowe* and solidified its:

> Factual approach when determining whether parent companies are liable for their foreign subsidiaries.[209]

The UK Supreme Court's recent adoption of a more "factual approach" to determining parent company liability has been a major advantage for foreign claimants wishing to file a lawsuit against a British corporation, and is reminiscent of the 'practical necessity' justification for CCL outlined at 2.2.1. While it may be a stretch to say the corporate veil has been entirely dismantled, observers like Whitham point out that there is now a much stronger expectation for UK parent corporations to implement "effective group-wide corporate governance policies and procedures".[210] One can therefore draw a link between the positive impact of UK tort law developments and the pre-existing international soft law mechanisms that pursue the same objective. And while not directly transferrable to the criminal justice system, if Whitman's assertion is accurate then (1) civil law jurisprudence is inducing impactful changes in the way parent corporations structure their CSR policies to avoid liability and (2) there is a growing underlying judicial receptiveness to holding corporations accountable for wrongdoing committed extraterritorially.

6.3.2 The USA's Alien Torts Statute

The USA's Alien Torts Statute (ATS) has been the historically dominant method for bringing civil lawsuits against corporations before courts in the Global North.[211] Under the old reading

[206] *Chandler v Cape Plc* [2018] EWCA Civ 525
[207] *Lungowe v Vedanta Resources plc* [2019] UKSC 20
[208] *Okpabi v Shell* [2021] UKSC 3
[209] Sadie Whittam, 'Responsible Parenting: When Might UK-Domiciled Parent Companies be Held Liable for the Actions of Their Foreign Subsidiaries?' (2021) 42 *Company Law Review* 389, p.1
[210] Whittham (2021) at p.6
[211] Alien Tort Statute 1789 (codified in 1948 as 28 U.S.C 1350)

of the ATS, the alleged harm may take place outside American territory and against non-American nationals. Moreover, the respondent corporation in question did not need to be incorporated in the US either. American judges could hear such cases provided that the act in question violated "the law of nations or a treaty". For example, in *Filártiga v Peña-Irala* the plaintiff – a non-American national – was allowed to sue a police inspector – also a non-American – for acts of torture that occurred outside American territory.[212] The case was found to be admissible before a US court because torture was held to contravene customary international law. This interpretation of the ATS had been applied fairly liberally by US courts within the context of corporate wrongdoing, thus providing many African and other non-American nationals access to a judicial remedy where options were scarce elsewhere.

Although the ATS "does not concern criminal law"[213] and therefore has limited value to the current discussion, for what it is worth the ATS has been highly symbolic and a contributor to the development of:

> …an emerging norm that corporations can and should be held liable for violations of international criminal law.[214]

Normatively speaking it is largely immaterial whether the TNC in question is a respondent to a civil lawsuit or a defendant in a criminal trial. What is salient is that there is a proven responsiveness by US courts to hear cases that involve atrocity crimes committed by TNCs overseas. One can thus use the ATS as the most heavily relied upon source of domestic law to suggest that Global North judiciaries are decidedly cognizant of corporate impunity and, by extension, potentially receptive to employing CCL norms to hold corporations *criminally* responsible as well.

Despite its normative value, the ATS has been rendered largely obsolete after a string of cases that took a much narrower interpretation of the Statute. The most notable case is *Kiobel v Shell*, where the US Supreme Court majority held that the draftsmen of the ATS did not intend to make American courts a "uniquely hospitable forum for the enforcement of international norms".[215] Framed in simpler terms, the US Supreme Court demanded that there would have to be some direct connection with America for jurisdiction to be invoked. This

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[212] *Filártiga v Peña-Irala* [1980] 630 F.2d 876 (2d Cir)
[213] Harmen G. van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) *Chinese Journal of International Law* 43, p.49
[214] Dieneke de Vos, 'Corporate Criminal Accountability for International Crimes' (30th November 2017) *Just Security* https://www.justsecurity.org/47452/corporate-criminal-accountability-international-crimes/
[215] *Kiobel v Royal Dutch Petroleum Co. et al* [2013] 569 U.S. 108

interpretation of the ATS established the current presumption *against* extraterritorial jurisdiction. So while American TNCs may be held liable under the ATS, non-American corporations like the Anglo-Dutch respondent in *Kiobel* cannot. The more recent cases of *Nestle USA v Doe*[216] and *Jesner v Arab Bank*[217] 'hammer the nails into the coffin' even further. In the former case Justice Clarence Thomas, speaking for the majority, found that although Nestle USA was an American-registered corporation, its "mere corporate presence" could not alone rebut the presumption against extraterritoriality.[218] There was inadequate evidence to suggest that the alleged conduct (aiding and abetting slavery in Cote D'Ivoire) took place on American soil. Rather, the aiding and abetting occurred on Ivorian soil making it an issue outside the remit of an American court.[219] In *Jesner*, the US Supreme Court affirmed the earlier decision in *Kiobel* and highlighted in closer detail the State sovereignty and international relations concerns that may arise should there be a presumption in favour of extraterritoriality for actions committed by foreign corporations (a valid concern discussed further at 6.7.3).[220]

6.4 Problems with Tort Law Litigation as the Primary Mode for Tackling Corporate Impunity

6.4.1 Procedural problems

Tort law litigation is replete with procedural and doctrinal obstacles that make it exceptionally difficult for private individuals to successfully file a lawsuit, even if the domestic courts in question are receptive to hearing such a claim. Some initial doctrinal challenges, particularly relating to *forum non conveniens* and piercing the corporate veil, were discussed at 2.9.1. That section helped illuminate some major doctrinal shortfalls of the civil law approach and developed an early argument in favour of using the criminal justice system instead. The following procedural obstacles further help to substantiate this point: (1) the cost of remedial action, (2) finding and then instructing highly specialised legal practitioners willing to absorb the financial risk of losing, (3) a lack of legal aid for civil lawsuits, (4) the 'loser pays' principle, (5) the deeper pockets of TNCs with respect to financing their side of litigation, (6) the onerous and time-consuming nature of building an

[216] *Nestle USA Inc v Doe et al* [2021] No.19-416
[217] *Jesner v Arab Bank PLC* [2018] 138 S.Ct. 1386
[218] *Nestle v Doe*, Opinion of Thomas J, at Part II
[219] *Nestle v Doe*, Opinion of Thomas J, at Part II
[220] *Jesner v Arab Bank PLC*, majority opinion of Kennedy J

admissible case by gathering the requisite evidence that the wrongdoing (i) occurred and (ii) is attributable to the respondent corporation's breach of a duty of care, (7) the related obstacle of corporations' potential lack of readiness to cooperate by disclosing relevant internal information without a court order. This non-exhaustive list casts doubt on the notion that the civil courts are an appropriate forum for addressing corporate impunity for atrocity crimes at the domestic level.

6.4.2 Substantive problems

More important to the current discussion concerns the substantive problems associated with tort law litigation as the dominant mode for closing the accountability gap and ending corporate impunity in Africa. The overarching substantive problem is the most obvious one: that tort law cannot deliver criminal justice. It is by extension limited to framing claims in purely tort law terms, meaning that the mens rea and actus reus standards that probably *ought* to apply when considering corporate atrocity crime are not available in the judicial toolkit for judges in such proceedings. Judges are instead guided by negligence-based standards of proof, even when the alleged wrongdoing concerns an atrocity crime for which only the highest evidentiary standards should apply. The related problems here are threefold:

(1) A low standard of proof flies in the face of the much higher evidentiary standards associated with atrocity crime, which include a mental element of intent or knowledge/awareness under Article 30 ICCSt. This lower standard of proof may unfairly prejudice the respondent TNC. While a court presiding over a civil matter cannot return a guilty verdict for the respondent TNC's involvement in an atrocity crime, the lay public may not understand the vital distinction between tort and criminal liability – problematic because any civil lawsuit involving a TNC is likely to attract considerable public interest. TNCs are subject to high levels of scrutiny by the public and a successful lawsuit may have an unduly detrimental impact on the respondent corporation. It is thus imperative that only the most thorough evidentiary standards apply; without a higher evidentiary standard of proof one cannot but question whether civil lawsuits might become susceptible to unfairly prejudicing TNCs;
(2) The idea of liability resting on the wrongdoer's negligent conduct is antithetical to the wording of the Rome Statute, which should be used as the main reference point for addressing corporate involvement in atrocity crime at the domestic level. Neither negligence nor *dolus eventualis* is generally applicable under Article 30 ICCSt. While

there is room for interpretation of the Rome Statute at the domestic level, non-criminal liability for the most egregious international crimes "puts the severity of the crime and the importance of the protected value in doubt";[221]

(3) A successful civil lawsuit "diminishes the potential significance" of the ruling since the liability incurred may not be consonant with the gravity of the crime committed.[222] A TNC held liable for tortiously committing an international crime can pay the successful plaintiff damages then proceed with business as usual. Under the civil law there are no punitive consequences for being sued for atrocity crime, which again seems contemptuously at odds with ending corporate impunity. Stewart suggests that tort litigation as the dominant model for redress "allow[s] corporations to purchase massive human rights violations", since tort remedies are framed in "purely monetary terms".[223] This leads one to question whether tort law is the most appropriate model for redressing corporate involvement in "unimaginable atrocities that deeply shock the conscience of humanity".[224]

6.4.3 Tort lawsuits as evidence of an underlying judicial receptiveness for criminal trials

An important rejoinder to the above is the adage that 'something is better than nothing'. In this sense, Global North legal systems are still providing victims of corporate atrocity crimes access to a judicial remedy. If we proceed from the assumption that the corporation in question was involved in an atrocity crime, then it may be irrelevant whether liability was criminal or tort-based. So while the approaches taken by civil courts and criminal courts may be fundamentally different, the outcome may be fundamentally the same. There is no doubt that the ascendance of tort law litigation is a boon for those who wish to put an end to corporate impunity in Africa. Further, and as discussed earlier, there is clear normative value in tort law jurisprudence and – although controversial – some victims may actually prefer to seek a pecuniary remedy over the punitive remedies on offer by the criminal justice system.

Relatedly, the deluge of civil lawsuits against corporations for atrocity crimes demonstrates the potentially supportive judicial environment for transitioning to CCL in the future. Given the scantiness of criminal cases to be described in detail at 6.5.2, the strong judicial culture

[221] Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, p.915
[222] McCorquodale in Meeran (2021) at p.10
[223] James G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *NYU Journal of International Law and Policy* 121, p.179
[224] Preamble to the Rome Statute

for accepting tort law claims is helpful in showing that the characteristic inertia of criminal prosecutors is not attributable to an unsupportive judicial environment. Instead it is a lack of political will on the part of Global North home States that deprives judiciaries of diversifying their jurisprudence on the matter of corporate liability for atrocity crime by adjudicating over *criminal* matters as well. This lack of political will is inferable by the fact that it is the State that is responsible for prosecuting corporations and not private actors. It is moreover impossible for the prediction of a 'de facto' or 'soft' complementarity principle between the ACC and Global North legal systems to materialise unless criminal prosecution becomes more commonplace. Criminal trials should not replace civil lawsuits entirely, and importantly the two legal systems can coexist with one another. The below discussion will instead make the point that, for a variety of reasons, the civil approach should take the backseat for the purposes of closing the accountability gap for corporate involvement in atrocity crime.

6.5 Domestic Criminal Justice Systems

6.5.1 CCL for atrocity crimes: existing legislative frameworks in domestic legal systems

Most States that accept the doctrine of CCL can accommodate or already have accommodated CCL in legislation pertaining to ICL. This is achieved primarily by 'marrying' internationally defined crimes with domestic rules relating to CCL. A good reference point is EU States' interpretation of the Rome Statute as transposed into domestic legislation. For example, France imposes CCL against corporations for all crimes under its *Code Pénal*, including internationally defined atrocity crimes committed extraterritorially (provided the offending corporation in question is registered in France).[225] Though at present there is "no general [EU] legislation that incriminates" corporate involvement in atrocity crime overseas, States parties are already accepting that CCL extends to atrocity crimes.[226] Despite this lack of EU legislation, the European Parliament has not been silent on the issue and in 2016 passed a resolution calling on States parties to impose CCL measures against TNCs for serious human rights violations perpetrated extraterritorially.[227] This vocal support for imposing CCL on corporations for serious human rights violations committed

[225] The French Criminal Code (*'Code Pénal'*) 2004, Article 121-2
[226] Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse' (3rd November 2008) Report for UN SGSR on Business and Human Rights, p.338
[227] OJ C 215/125 European Parliament resolution of 25th October 2016 on corporate liability for serious human rights abuses in third countries 2015/2315(INI) > https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016IP0405 <

extraterritorially may have a galvanising effect across EU States parties, thereby supporting the proposition that closing the accountability gap in Africa may be within reach. Beyond the EU block, Norway also criminalises genocide, crimes against humanity and war crimes under ss.101-107 of its Penal Code using the vocabulary of the Rome Statute.[228] A Norwegian corporation may then be punished "where individuals acting on its behalf commit or are complicit in the commission" of an atrocity crime.[229] Common law jurisdictions in Australia and Canada are similarly amenable to prosecuting corporations for atrocity crimes, in principle at least. Australia includes express provisions recognising CCL in atrocity crime (with the exception of aggression) under its Commonwealth Criminal Code 1995.[230] Canada's Crimes Against Humanity and War Crimes Act (CAHWCA) meanwhile imposes liability on perpetrators for the commission of internationally defined atrocity crimes that occurred outside Canadian territory.[231] CAHWCA neither refers explicitly to natural nor legal persons, instead opting for the more inclusive language "person who commits". Pizzi concludes that this language is intended to cover corporations, since the definition of 'person' under the Canadian Criminal Code includes natural and legal persons unless expressly stated otherwise.[232] It follows from these examples suggest that the Rome Statute provides an implicit mandate for States parties to draw on it as a unifying source of international law and expand upon it domestically, by including nationally defined rules on CCL, pursuant to the notion that it acts as a 'floor rather than a ceiling'.

Other common law legal systems appear less amenable to such interpretation. The restrictive wording of the UK's ICC Act 2001 is one good example, since the provisions therein specifically refer to terms of imprisonment as the principal mode of punishment. Because a TNC cannot be imprisoned, and "no alternative non-custodial punishments" are listed, the ICC Act 2001 was probably not originally intended to extend to corporations despite the UK's clear affirmative position on the matter of CCL more generally.[233] Moreover, existing legislation on CCL – such as the Corporate Manslaughter and Corporate Homicide Act 2007 – does not extend extraterritorially.[234] Another common law legal system with limited hopes

[228] Norwegian General Civil Penal Code *(Lov om Straff (Straffeloven))* LOV 2005-05-20-28
[229] Simon O'Connor, 'Corporations, International Crimes and National Courts: A Norwegian View" (2012) 94 *International Review of the Red Cross* 1007, pp.1012-1013
[230] Australian Commonwealth Criminal Code Act 1995, part 2.5 div 12, s.12.1(1)
[231] Canadian Crimes Against Humanity and War Crimes Act, s.6(1)
[232] Jeremy Pizzi, 'Peddling Atrocity: Holding Canadian Corporations Responsible for Core International Crimes' (2022) *Journal of International Criminal Justice* 1, p.5
[233] Oxford Pro Bono Publico (2008) at p.265
[234] Corporate Manslaughter: The Government's Draft Bill for Reform (March 2005) Cm 6497, at Para 56

of contributing to closing the accountability gap as a matter of criminal law is the USA. Despite being at the forefront of prosecuting industrialists at Nuremberg and playing a central role in enlivening the debate on corporate liability in its jurisprudence under the ATS, US criminal courts have never tried a defendant for atrocity crimes. The USA has "unused" Acts for genocide and war crimes, and lacks a statute for crimes against humanity.[235] Former US Ambassador-at-Large for War Crimes Stephen J. Rapp describes American legislation on atrocity crimes as "hodgepodge", and this is *before* zooming in on specific matters pertaining to extraterritoriality or CCL.[236] Perhaps this is partly attributable to America's non-membership to the Rome Statute, which has the doubly negative effect of undermining the role of the Rome Statute as an anchor for creating a streamlined body of rules for prosecuting corporations across Global North jurisdictions.

When the most powerful Global North State with the highest number of TNCs has perhaps the least supportive environment for prosecuting corporations under the doctrine of CCL, there is little confidence in the notion that closing the accountability gap in Africa is within reach. Similar formal legal obstacles that do not accept extraterritorial jurisdiction or CCL may render a Global North home State *unable* to investigate and prosecute TNCs for crimes committed in Africa. The most extreme example is Germany, where the *societas delinquere* principle means that the State is inherently unable to cooperate with an operational ACC due to the absence of CCL in its criminal justice system.[237] Nevertheless, in some cases it is possible to reverse this rigidity provided CCL is recognised as a legal doctrine. For example, it is possible for existing UK legislation to undergo legislative reform to include CCL and extraterritorial jurisdiction. The ICC Act 2001 was drafted before the Rome Statute came into force, meaning that legislative revision could be overdue. It follows that, even for those States that currently take a more circumscribed position on CCL for atrocity crime, there is generally a "latent legal possibility" that most domestic systems are capable of

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[235] Stephen L. Rapp, 'Impact-Based Jurisdiction and Crimes Against Humanity Statutes are Needed for Effective Accountability' (23rd September 2021) *Just Security* > https://www.justsecurity.org/78324/impact-based-jurisdiction-and-crimes-against-humanity-statutes-are-needed-for-effective-accountability/ <

[236] Ibid, Rapp cites the US Genocide Act and War Crimes Act, noting that both "have never been used"

[237] Weigend notes that Germany is one of the last "hold outs" against CCL, despite clear regional support for the doctrine across the European block, in Thomas Weigend, 'Societas Delinquere Non Potest?: A German Perspective' (2008) 6 *Journal of International Criminal Justice* 927, p.929. Also note the draft Corporate Sanctions Act (*Verbandssanktionengesetz*), which would introduce a form of CCL in Germany. Although not yet enacted, the bill "remains on the horizon", in Emmanuelle Brunelle et al, 'Global Enforcement Outlook: Europe's Evolving Corporate Criminal Liability Laws' (25th January 2022) *Freshfields Bruckhaus Deringer* > https://riskandcompliance.freshfields.com/post/102hh57/global-enforcement-outlook-europes-evolving-corporate-criminal-liability-laws <

accommodating legislative amendments to reflect dominant trends on the topic.[238] Much is therefore conditional on the political will of States to make these changes.

6.5.2 Past and ongoing jurisprudence

If not already obvious to the reader, this paper promotes the use of Global North States' criminal justice systems as the dominant approach to ending corporate impunity in Africa. However, while 6.5.1 indicates that it is conceivable for CCL to be read into States' existing ICL obligations, efforts to prosecute corporations and/or their agents for atrocity crime has been historically paltry. But recent developments in Europe, incidental to and contemporaneous with the demise of the ATS in America, suggests that the future of tackling corporate impunity may soon be steered by national criminal law. This will mark an important shift in the CCL trajectory and help facilitate the materialisation of the 'soft' or 'de facto' complementarity principle outlined in Chapter 5. There are five examples to illustrate this point (1) the *van Anraat* case, (2) the *Kouwenhoven* case, (3) the *Lundin* case, (4) the *Argor-Heraeus* investigation and (5) the *Lafarge* case. The first three cases concern the individual criminal responsibility of corporate executives while the latter two directly relate to CCL. Each shall be discussed in turn:

(1) The *van Anraat* case concerned a business executive whose business sold thiodiglycol, a key ingredient for mustard gas, to the Sadam Hussein regime in Iraq.[239] Van Anraat was charged with complicity to commit genocide and complicity to commit war crimes. The District Court of the Hague concluded that the defendant lacked the knowledge at the time the chemicals were sold to the Iraq government that they would be used for the perpetration of genocide against the Kurdish minority group targeted by the Hussein regime. On the second charge, the same court held that the defendant was complicit in war crimes and sentenced him to a term of fifteen years imprisonment. This case is significant as the first domestic trial brought against a business executive for the commission of atrocity crimes.

(2) The *Kouwenhoven* case involved the prosecution of a natural person at the helm of a large timber company.[240] In that case, the defendant was charged with aiding and abetting war crimes committed during the Liberian civil war. In 2018 the Dutch Appeals Court concluded that the defendant "must have been aware" that the weapons his company

[238] Stewart (2014) at p.165
[239] *Van Anraat v Netherlands* [2009] Hoge Raad, 07/10742
[240] *Kouwenhoven v Netherlands* [2018] Hoge Raad, 17/02109

imported and distributed were to be used to commit war crimes during the Liberian civil war. This case builds on *van Anraat* and points to an emerging body of jurisprudence in the Netherlands for prosecuting businesspersons under the doctrine of individual criminal responsibility.

(3) The ongoing *Lundin* case relates to the defendants' alleged complicity in war crimes and crimes against humanity committed by the Sudanese army between 1997 and 2003.[241] Providing assistance and support to the Sudanese army gave the Lundin consortium – a group of energy corporations – exclusive access to an oilfield known as Block 5A in a heavily contested part of the war torn country. As a major petroleum company, Lundin's motivation for its involvement in these crimes was financial. It is a vivid example of how Global North TNCs profit from African States "engulfed in armed conflict".[242] The *Lundin* case provides another persuasive example of how Global North home States are mobilising their powers to prosecute corporate executives pursuant to holding them criminally responsible for egregious wrongdoings while conducting business in Africa. Although charges were brought against individuals at the helm of Lundin Petroleum, the company itself is heavily implicated in the proceedings. In 2018 Lundin was notified that the prosecutor may seek a corporate fine of SEK three million and a forfeiture of the economic benefits the company itself accrued from the Block 5A concession.[243] There could therefore be an explicit link made between the natural person defendants and the corporation that profited from the alleged wrongdoings of its agents. Or in the words of Riello and Furtwengler, the "prosecution authority has brought corporate liability for international crimes into play" in the *Lundin* case.[244]

(4) The 2013 *Argor-Heraeus* investigation was conducted by Swiss authorities against one of the biggest gold refinery businesses in the world for their alleged involvement in the war

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[241] Miriam Ingeson & Alexandra Lily Kather, 'The Road Less Travelled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad' (13th November 2018) *EJIL:Talk!* > https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/ <

[242] Victoria Riello & Larissa Furtwengler, 'Corporate Criminal Liability for International Crimes: France and Sweden are Posited to Take Historic Steps Forward' (6th September 2021) *Just Security* > https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/ <

[243] Business and Human Rights Resource Centre, 'Lundin Petroleum receives information regarding a potential corporate fine and forfeiture of economic benefits in relation to past operations in Sudan' (1st November 2018) *Business and Human Rights Resource Centre* > https://www.business-humanrights.org/en/latest-news/lundin-petroleum-receives-information-regarding-a-potential-corporate-fine-and-forfeiture-of-economic-benefits-in-relation-to-past-operations-in-sudan/ <

[244] Riello & Furtwengler (2021)

crime of pillaging in the DRC.[245] Under Swiss law a corporation may be held criminally responsible if the illegal conduct cannot be imputed to an individual within that corporation.[246] The Argor-Heraus investigation marks one of the "first criminal cases involving corporate responsibility for international crimes", and helps animate the idea that a 'marriage' exists between internationally defined atrocity crimes and national rules on CCL.[247] Though the investigation was closed due to lack of evidence, the *Argor-Heraeus* case is important to the current discussion as it "gestures at [the] powerful but still ill-considered option" of redressing corporate impunity through national criminal justice systems as opposed to tort law.[248]

(5) The ongoing *Lafarge* case concerns the charging of a French parent company whose Syrian subsidiary, which it had "significant operational and financial control" over, had been accused of financing terrorism and complicity in crimes against humanity.[249] *Lafarge* is the first case of its kind for charging a parent company with atrocity crimes allegedly committed by a subsidiary. While pathbreaking, the Paris Court of Appeal dropped the crimes against humanity charge owing to a lack of evidence to demonstrate the parent company possessed the intent needed to be complicit in the wrongdoing. This decision was informed by the domestic law principle of shared intent, located under Article 121-7 of the French Criminal Code. As 2.2.6 pointed out, requiring shared intent is problematic vis-à-vis corporate involvement in atrocity crime since the TNC in question will likely have different motivations to the principal offender. Although this interpretation is disappointingly restrictive, the Court of Cassation recently held that the crimes against humanity charge could stand.[250] The Court of Cassation referred this matter back to the Court of Appeal of Paris, which recently decided to uphold the crimes

[245] Argor-Heraeus investigation: dismissal of proceedings under Article 319 of the Swiss Code of Criminal Procedure [2013] (Bern, 10th March 2015), case no.SV.13.1374-MUA
[246] Swiss Criminal Code 1937 (SR/RS 311), Article 102(1)
[247] Stewart (2014) at p.125
[248] Stewart (2014) at p.129
[249] *Lafarge* case [2016] Court of Appeal of Paris No.865 (19-87.031), No.866 (19-87.036) and No.868 (19-87-367). See also Business and Human Rights Resource Centre (re complicity in crimes against humanity in Syria), *Business and Human Rights Resource Centre* (7th November 2019), https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/
[250] Court of Cassation *Décision sur la complicité de crimes contra l'humanité de Lafarge en Syrie* (24th March 2022) https://www.business-humanrights.org/en/latest-news/d%C3%A9cision-sur-la-complicit%C3%A9-de-crimes-contre-lhumanit%C3%A9-de-lafarge-en-syrie-le-18-mai-2022/

against humanity charge.[251] The outcome of the *Lafarge* case is thus hotly anticipated and has already marked an important turning point in the CCL trajectory.

There is some ambivalence about whether these cases are affirmative of the notion that closing the accountability gap is within reach. On one hand, they push the envelope for treating national criminal justice systems as the most appropriate forums for redressing corporate crime. On the other, the difficulties encountered during the two CCL cases of *Argor-Heraeus* and *Lafarge* demonstrate that there are remarkably high evidentiary obstacles for demonstrating the defendant (1) was causally connected to the alleged crime and (2) meets the requisite mental element. Because this paper can only draw on two existing CCL cases, it may be a stretch to assert that a trend is emerging in Global North home States for prosecuting corporations qua corporations.

On a more positive note, the triad of individual criminal responsibility cases might be seen as representing a nascent trend towards holding corporations and their agents criminally liable for their alleged wrongdoings. And although they do not engage the CCL of corporations per se, De Vos argues that they clearly indicate:

> …the important conversation on corporate accountability for international crimes is only just beginning.[252]

Yet the fact remains that only a small handful of major investigations have taken place in the Global North, a telling indication that most States remain highly reluctant to engage with these issues whether under the doctrine of individual criminal responsibility or CCL. Another point is that none of the cases surveyed above were heard in a common law jurisdiction, meaning that Anglophone countries (perhaps with the exception of Australia) could be lagging behind the civil law jurisdictions of Europe. Nevertheless, the ongoing *Lafarge* and *Lundin* cases in particular represent a "major driver for expanding the application of criminal law to multinational groups".[253] The quintet of cases surveyed demonstrate that the idea of CCL for atrocity crime at the domestic level is not a starry eyed aspiration but in fact a real possibility that ought to be carried further. And should the Malabo Protocol amass its fifteen

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[251] Reuters, 'Lafarge Loses Latest Appeal Over Crimes Against Humanity Charges' (18th May 2022) *Thompson Reuters* > https://www.reuters.com/world/paris-appeals-court-upholds-charges-complicity-crimes-against-humanity-against-2022-05-18/ <

[252] De Vos (2017)

[253] Claire Tixiere, Cannelle Lavite & Marie-Laure Guislain, 'Holding TNCs Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case Part 2' (27th July 2020) *Opinio Juris* > https://opiniojuris.org/2020/07/27/holding-transnational-corporations-accountable-for-international-crimes-in-syria-update-on-the-developments-in-the-lafarge-case-part-ii/ <

ratifications, it is hoped that the ACC will contribute to these developments by providing a propellor for engendering a culture of domestic support towards prosecuting corporate involvement in atrocity crimes.

6.6 Advantages of Domestic Criminal Prosecutions

6.6.1 Consistency between ICL and national criminal law

It is submitted that there are several advantages to prosecuting TNCs for involvement in atrocity crimes, the current scarcity of caselaw on the matter notwithstanding. For one, corporate responsibility for the commission of atrocity crimes demands that a subjective mental element is met. Negligence simply does not fit the bill when it comes to atrocity crime, as conventional wisdom holds that one cannot 'accidentally' or 'negligently' commit an offence capable of 'deeply shocking the conscience' of humankind. National criminal justice systems are equipped to undertake these examinations, thereby creating consistency between the international rules defining/governing atrocity crime and the redress provided at the national level. Or as Kremnitzer rather bluntly opines, "only criminal responsibility fits the requirement to take the core international crimes seriously".[254] Indeed, the efficacy of ICL arguably rests on its successful transposition into domestic criminal legislation. ICL "defines the international crimes" and national criminal law incorporates those crimes, furnishing them "with whatever domestic standards of blame attribution come with the system".[255] By 'marrying' internationally defined atrocity crimes with domestic rules on CCL it is therefore theoretically viable and doctrinally sensible to use the criminal justice system as the principal mechanism for addressing corporate impunity in Africa.

6.6.2 Criminal prosecutions are an expression of moral condemnation

While it is understandable that victims of corporate atrocity crimes in Africa might be drawn to the financial remedies on offer by tort law, it is impossible to replicate the effects criminal law can deliver for the reasons provided above. According to Robinson, criminal and civil liability are diametrically opposed in their objectives: Civil liability is framed in purely financial terms and is strictly non-retributive whereas criminal liability is aimed at

[254] Kremnitzer (2010) at p.915
[255] Stewart (2014) at p.164

"reflect[ing] [a] moral blameworthiness deserving [of] condemnation and punishment".[256] This distinction makes it quite clear that the criminal justice system is better placed to close the accountability gap, with its triple effect of (1) delivering nonphysical ideals of justice, (2) punishing the offending TNC and (3) deterring the same or other TNCs from committing atrocity crimes in the future. The remedies on offer by tort law are, conversely, "woefully incommensurate with… [the] wrongdoing" committed as they risk creating the "commodification" of human suffering by making the payment of reparations a simple cost of doing business for offending corporations. [257]

6.6.3 Criminal prosecution as a State's 'declaration of intent' to end corporate impunity

This suggestion is closely related to the proposed 'de facto' or 'soft' complementarity principle emerging from an operational ACC. The current dearth of criminal investigations is indicative of a general State reluctance to tackle corporate impunity, since it is the State that is responsible for prosecuting suspected offenders. As far as States are concerned, there is no analogous requirement to engage in a tort lawsuit since they are strictly private proceedings. One commonality between the quintet of cases surveyed at 6.5.2 is that they each amount to a 'declaration of intent' by the prosecuting State to tackle corporate impunity, whether under the doctrine of CCL or individual criminal responsibility. This sentiment is a key attendant feature when undertaking criminal prosecutions, and it makes the idea of a 'de facto' complementarity principle seem less farfetched to potential doubters. It provides stakeholders with a symbolically powerful statement that "the time has come for [domestic] courts" to impose CCL for atrocity crimes, thus potentially filling the most important piece of the jigsaw vis-à-vis the aforementioned 'justice cascade'.[258]

6.7 Challenges, Drawbacks and Rejoinders to Future CCL Prosecutions

6.7.1 Practical financial challenges

A central challenge relating to CCL prosecutions is a lack of resources, even for powerful Global North home States with ostensibly better prosecutorial infrastructure than African host States. Prosecuting a corporation under the doctrine of CCL for atrocity crime is a high risk

[256] Paul H. Robinson, 'The Civil-Criminal Distinction and Dangerous Blameless Offenders' (1993) 83 *Journal of Criminal Law and Criminology* 693, p.694
[257] Stewart (2014) at p.179
[258] Riello & Furtwengler (2021)

(but high reward) undertaking. It is research intensive and financially costly, and is consequently a burdensome undertaking for prosecutors to investigate TNCs whose structures are complex and opaque. In light of the transnational nature of TNCs, this challenge is exacerbated when gathering evidence overseas is a key criterion for building a viable case. As such, a prosecutor will be heavily constrained by "the size and adequacy of his or her budget".[259] This makes one question whether a home State could indeed be 'unable' to investigate and prosecute TNCs for alleged atrocity crimes as well as being potentially unwilling to do so. It follows that a prosecutor will have to assess whether investigating a corporation for atrocity crimes is actually worth their time – i.e. that they are *willing* to investigate – when already lumbered by thinly spread resources and a backlog of domestic cases that are lower risk financially speaking. The risk of squandering taxpayer money is thus an understandable reason for home States to be unwilling to help actualise some of the rhetorical commitments they signal at the international level (i.e. signing BHR declarations).

Though legal aid in countries like the UK might be famously weak, defendant corporations do have the wherewithal to hire their own defence counsel, thereby relieving some of the financial pressure that might otherwise arise through CCL trials.[260] This leads to the second practical challenge relating to the scarcity of expertise available to both the State prosecution and the defendant corporation. CCL for atrocity crime engages a multitude of overlapping areas of law, including (1) corporate law, (2) public international law, (3) international criminal law and (4) national criminal law.[261] Sourcing the legal expertise to prosecute these cases would thus be exceptionally challenging, and corporations might also need to hire a brigade of legal counsel to defend their case; yet another reminder of how practical challenges undermine the notion of a steadily evolving 'justice cascade'. Taylor et al argue that overcoming these financial challenges is necessary for the State to "fulfil their duty to ensure there is a full accounting for… international crimes".[262] They propose that "adequate forums" that are "effective" must be set up to ensure State compliance with these international obligations.[263] But this is less a proposal and more a stating of the obvious; the topic under discussion would be a nonissue were it that simple. Instead, the problem goes

[259] Mark B. Taylor, Robert C. Thompson & Anita Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (2010) FAFO, p.20
[260] The Guardian View on Legal Aid, 'Cuts Have Caused Chaos and Must be Reversed' (12th August 2018) *The Guardian*, > https://www.theguardian.com/commentisfree/2018/aug/12/the-guardian-view-on-legal-aid-cuts-have-caused-chaos-and-must-be-reversed <
[261] McCorquodale in Meeran (2021) at p.11
[262] Taylor et al (2010) at p.26
[263] Taylor et al (2010) at p.26

beyond State unwillingness to investigate/prosecute for reasons of Realpolitik and adds another dimension of complexity – genuine financial and expertise shortages – that only a high level of political will could solve to allocate those resources and expertise.

6.7.2 The success of a de facto complementarity principle depends on political will

Closely related to the above financial constraints, limited political will is perhaps the most telling indicator of the current scarcity of corporate prosecutions in the Global North. Freedman asserts that Global North States treat their largest and most powerful corporations as "the sacred cows of their nation[s] econom[ies]".[264] Freedman supports this argument by citing corporations' successful lobbying of their home States "to do something" about the scathing report published by the UN Security Council with regard to corporate involvement in atrocity crime during the Congolese wars.[265] If this is accurate, then some Global North States may have a vested interest in turning a blind eye to corporate impunity. This is a point that is implicitly supported by the colonial underpinnings of corporate impunity in Africa (discussed at 2.7.2 and 2.8.3) leading to closely maintained relationships between home States and their most powerful corporations into the 21st Century.

But while there is some possible merit to this assertion, Chapter 5 predicted that because the proposed de facto complementarity principle is permissive in practice, it really is immaterial to the ACC whether the Global North home State in question cooperates or not. This is because (1) the ACC's jurisdiction does not hinge upon non-State party cooperation and (2) the ACC may conduct trials *in absentia* if the defendant corporation and its home State refuse to cooperate. However, it goes without saying that such a course of events would be highly undesirable when pursuing the ostensibly common objective of tackling corporate impunity in Africa. Interstate cooperation is at the core of the 'justice cascade', meaning that a high level of political will would be required for sustained success to be achievable. Yet for the time being, "a lack of action on the part of criminal prosecution and law enforcement bodies" combined by "a general lack of international coordination and cooperation" suggests that closing the accountability gap is still beyond reach.[266] One domestic example that contrasts with this reality is the Dutch prosecutorial services, which has a specialised division set up to

[264] Jim Freedman, 'International Remedies for Resource-Based Conflict' (2007) 62 *International Journal of Natural Resources and Conflict* 108, p.112
[265] Freedman (2007) at p.112
[266] Zerk (2013) at p.9

deal with international crime.[267] Whether intentionally or not, here the Netherlands is already laying the groundworks needed for it to build a cooperative relationship with the ACC and African host States. Although it has not yet been animated within the context of CCL, investigations into the two Dutch business executives discussed at 6.5.2 shows that it is being utilised beyond mere rhetoric. But here the Netherlands is an outlier. While prosecuting atrocity crimes may be paraded as a *moral* priority, practical issues like a lack of prosecutorial specialism indicates that these issues are seldom at the top of the *practical* agenda in most domestic legal systems, with States perhaps preferring to pursue prosecutions that do not engage complex extraterritorial issues. As Taylor et al remark, it will "require significant political will, backed by resources, before such prosecutions become a priority" beyond the few forward-looking but outlying Global North home States that are already responsive to these developments.[268]

6.7.3 Potential State sovereignty concerns and the Malabo Protocol

Global North States' circumspection towards prosecuting corporations for atrocity crimes in Africa may be partly explained by attendant sovereignty concerns, a dilemma that continues to justify the existence of the *forum non conveniens* principle in common law jurisdictions. Schrempf-Stirling and Wettstein point out that home States want to avoid being "accus[ed] of meddling with the sovereignty of other states", since it is purportedly the responsibility of the State in which the crimes were committed to investigate and prosecute the accused perpetrators.[269] Against the historic background of colonialism described at 2.8.3, foreign nations investigating and prosecuting crimes committed on another sovereign territory is a particularly sensitive issue in Africa. It could be interpreted as a home State taking matters into its own hands and depriving the host State the full measure of respect for its territorial sovereignty it is owed under the Law of Nations. The sovereignty issue has been echoed in practice with the UK's invocation of extraterritorial jurisdiction in the *Lungowe* civil lawsuit. In *Lungowe*, the host State – Zambia – endeavoured to "resist the UK courts having jurisdiction over a claim" that took place within its borders.[270] Although this obstacle did not stop the UK courts from accepting jurisdiction, it is an example of the delicate balancing act

[267] Although the International Crimes Act (*Wet Internationale Misdrijven*) 2003 does not explicitly require prosecution of these crimes, see the Netherlands Public Prosecution Service 'international crimes' webpage > https://www.prosecutionservice.nl/topics/international-crimes <
[268] Taylor et al (2010) at p.19
[269] Judith Schrempf-Stirling and Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies' (2017) 145 *Journal of Business Ethics* 545, p.547
[270] McCorquodale in Meeran (2021) at p.15

between closing the accountability gap and sovereignty arguments, particularly in the context of criminal prosecutions where the home State plays the lead role.

Though there may be some merit to the claims made above, the 'sovereignty argument' might also be used as an expedient tool for home States to justify their own inaction. An operational Malabo Protocol can solve this potential sovereignty dilemma, since Article 46L *bis* is intended to confer a significant level of responsibility on non-AU States (i.e. home States) to assist the ACC. AU members would thus be giving foreign home States a clear mandate to investigate and prosecute TNCs, an expression of ASAP in practice. Interpreted this way, AU member States are positively entrusting Global North home States to investigate and prosecute atrocity crimes committed in Africa, so as to reduce the workload of the ACC and create a more streamlined approach to CCL across multiple legal systems. And as 5.3.6 sought to explain, although this may produce a prima facie inversion of the sovereignty issue against home States, there is a strong expectation for home States to cooperate with regard to their rhetorical commitments to achieve the normative goals set out by the Malabo Protocol.

6.8 Conclusion

The aim of this chapter was to show the reader that (1) criminal prosecutions are preferable to civil lawsuits for the purposes of the current debate and (2) there is an underlying receptiveness to generate the support and political/judicial will to 'marry' internationally defined atrocity crimes with domestic rules on CCL across many Global North legal systems. This underlying receptiveness is inferable through the ascendance of civil lawsuits (i.e. judicial willingness to hear those cases) and the numerous examples cited above that signal declarations of intent to prosecute corporations or their agents for atrocity crimes in Africa. These declarations of intent might be explicit (as in the quintet of cases described at 6.5.2) or nascent (as in untested legislation such as the Norwegian or Canadian criminal codes).

It is self-evident that Global North States are at different stages when it comes to CCL for atrocity crimes. And while a body of jurisprudence might be emerging, there are some nations that appear to lag behind; the UK being one key example. As such, it is risky to 'bundle' all Global North States together as if one major domestic development will shape other legal systems. Although the Malabo Protocol has the potential to create a streamlined approach to CCL for atrocity crimes – with particular reference to Article 46L *bis* – the success in each individual Global North home State depends primarily on the question of

political will. The concluding chapter will distil the most important interdependent variables identified across this paper, with the question of political will forming a core part of the debate to answer whether closing the accountability gap in Africa is within reach.

7 Ending Corporate Impunity in Africa: Within Reach?

7.1 A Case for Quiet Optimism

Despite the quietly optimistic tone of this paper, realising the goals I have attempted to set out would still confound most observers expectations. First off the Malabo Protocol – now in its eighth year – has failed to amass a single ratification, never mind the fifteen needed for it to come into force. This lacklustre reception by AU members is compounded by the generally indifferent atmosphere in Global North States towards CCL for atrocity crimes. One of the drawbacks associated with examining Global North legal systems as a whole is that it may not accurately reflect the state of affairs on the ground. In other words, while steps have been taken in certain jurisdictions like Switzerland or France, those developments – although contributing to State practice – do not translate into anything concrete across other Global North jurisdictions. There is thus a disparate tapestry of approaches taken at the domestic level, which only a unifying source of international law – not yet forthcoming – would be able to truly solve.

Although the Malabo Protocol is one way of building a more harmonised approach to CCL for atrocity crimes, it may not be enough even with an operational ACC. Discussion at 3.6 began to describe the critical role international law plays in facilitating this harmonisation process and, as it stands, only the CAH Draft Articles would provide the impetus for achieving this. But with that the scope for interpretation of the Rome Statute can provide significant impetus in itself, as demonstrated by France's marriage of CCL and the chapeau of internationally defined atrocity crimes in its Penal Code, animated in practice by the *Lafarge* case. Fate is therefore not sealed, especially when one considers that normative developments are being crystallised – albeit incrementally – both internationally (as in the CAH Draft Articles) and domestically (as in the quintet of European cases surveyed above). This leads to the tentative conclusion that successfully closing the accountability gap rests on the coalescence of a multitude of interdependent variables, to be discussed below.

7.2 The Variables

7.2.1 Global North States following the example set by France and others

While the Rome Statute does not in itself recognise CCL, France – as well as Sweden, the Netherlands and other European States – set a leading example by 'marrying' internationally defined crimes with domestic rules on CCL. The Rome Statute thus provides the necessary anchor for making corporations liable for atrocity crimes at the domestic level. As such, the Rome Statute supplies a harmonised body of international rules that can be expressed with some room for interpretation at the national level. This factor stands in sharp contradistinction to the disparate patchwork of CSR pledges at the nonlegal level, which for all intents and purposes can only provide supplementary value to ending corporate impunity.

France is not necessarily representative of a 'gold standard', but it does set a leading example as the first State to animate this 'marriage' between ICL and national rules on CCL in its jurisprudence with respect to the ongoing *Lafarge* case. However, this is a delicate variable which to many might not hold water given the resolutely conservative position taken by certain (primarily common law) jurisdictions. It is thus unhelpful to have one group of Global North States that adopt a France-esque attitude towards CCL for atrocity crimes and another group that takes a conservative position on the matter. This would lead to obvious accountability concerns, especially when one appreciates the emerging legal principle that only *home* States can prosecute corporations for atrocity crimes.[271] A disparity might thus emerge between those companies held closely accountable in legal systems whose CCL norms do not fade away due to borders, and those corporations that – by virtue of weaker CCL regimes in their home States – continue to act with the kind of impunity that has contributed to African suffering for centuries.

7.2.2 Civil lawsuits taking a 'backseat'

Closely related to the above variable is the question of whether criminal law prosecutions will supplant civil lawsuits as the principal mode for holding TNCs liable for atrocity crimes. Although 2.3.2 pointed out that in many cases TNC wrongdoing has "rarely been contextualised as criminal", the nexus between corporate impunity and atrocity crime is becoming increasingly accounted for. And while civil lawsuits do not deliver criminal justice,

[271] For instance, the French Penal Code does not allow non-French corporations to be prosecuted in France.

6.3.2 suggested that litigation of this kind represents an "emerging norm" that TNCs "can and should" be liable for extraterritorial human rights violations. But besides these qualities, civil lawsuits cannot provide a form of redress that is consonant with internationally defined atrocity crimes. Litigation of this kind should therefore take a 'backseat', particularly if the predicted 'de facto' complementarity principle between home States and the Malabo Protocol is to come to pass.

The main determinant of a successful national criminal law regime is whether domestic CCL rules on atrocity crime 'lose their teeth' extraterritorially. Although legislative developments and the quintet of cases surveyed above indicate that civil lawsuits may be taking more of a backseat, the current scarcity of jurisprudence on the matter is a clear indication that civil lawsuits are in fact still the main mode for closing the accountability gap. So while there are some promising changes, there is a strong chance civil lawsuits will remain the main mode for imposing liability on corporations looking to the foreseeable future.

7.2.3 The ICC as a contributor to normative development

Chapter 2 showed that there is often an unambiguous link between economic actors and atrocity crime. And although the ICC does not have a great deal to offer regards CCL, it may be close to addressing the 'economic causes' of atrocity crimes lacuna discussed in Chapter 3. This is demonstrated by the Office of the Prosecutor's 2016 policy paper explicitly referencing the exploitation of natural resources as a priority issue for the ICC to address.[272] Of the variables outlined, this one is perhaps the most realistic as the ICC does not need to square any circles to integrate a more holistic approach into its judicial reasoning. Adopting a holistic approach to an atrocity event identifies its potential economic causes, thus providing an important reference point for national jurisdictions to follow. Integrating such a model would have the added bonus of generating prosecutorial interest for investigating corporate executives under the doctrine of individual criminal responsibility. On the other hand, the ICC is already tightly strung in terms of resource allocation and case selectivity. Much is therefore left to the discretion of the ICC whether to pursue a more holistic approach in its reasoning, particularly when it might be easier for them to remain mute on the issue.

[272] Ibid No.176

7.2.4 Ratifying the CAH Draft Articles inter alia

Existing international soft law is mostly inadequate because (1) it is nonbinding by definition and (2) most sources do not allude to atrocity crimes but cover the corpus of international human rights law more generally. The proposed CAH Draft Articles would, conversely, impose legally binding obligations on signatories to prosecute corporations for atrocity crimes wheresoever their legal systems permit. Although the proposed treaty does not cover CCL for the other three core crimes, it would mark an important development in the 'justice cascade' trajectory. Indeed, ratifying the treaty would signal an unequivocal willingness by Global North States to tackle corporate impunity beyond mere rhetoric. Another development is the proposed Business and Human Rights treaty which, although not explicitly intended for atrocity crimes, would be the most comprehensive source of international hard law aimed at closing the accountability gap. What is more, Articles 12-13 of the proposed BHR treaty are devoted to MLA and international (judicial) cooperation. Although not framed in ICL language, the treaty provides yet more normative value by outlining the desirability of MLAs and international cooperation expressed in assertive, legally binding language. Another positive note is that neither of the proposed treaties have stagnated (for example, the third draft for the BHR treaty was published as recently as August 2021).[273] There is thus a strong possibility one or both of these proposed treaties will come into force in the near future.

There is nevertheless reason to doubt the feasibility of these proposals materialising. Both proposals are in their pre-negotiation stages, with many political and diplomatic obstacles to overcome. CCL was a central area of discussion during Rome Statute negotiations but the matter was dropped due to complementarity concerns. And while these complementarity concerns have mostly been allayed – owing to the now broad acceptance of CCL – there is always the chance that the ILC will also be forced to drop CCL in its next draft due to similar or other concerns leading to a stalemate in negotiations.

7.2.5 The Malabo Protocol attaining the minimum fifteen ratifications

Some observers disparagingly claim that the Malabo Protocol is stillborn.[274] As well as overlooking the clear normative purchase of the Malabo Protocol, this perspective should be

[273] Open-Ended Intergovernmental Working Group Chairmanship, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (17th August 2021) Third Revised Draft
[274] Nimigan (2019) at p.1029

ignored as it is simply inaccurate. So far fifteen AU members have signed the Protocol, symbolic of African States' potential receptiveness to eventually ratifying it. Moreover, the current signatories represent the entire continent, to the extent that countries from Central (e.g. Congo-Brazzaville), East (e.g. Kenya) and West Africa (e.g. Ghana) have signed the Protocol. This suggests that there is no regional block that is either opposed to or in favour of the Protocol. On another positive note, the Malabo Protocol could provide the solution to the valid sovereignty concerns outlined at 6.7.3. That section made the case that ratification of Article 46L *bis* represents African empowerment rather than a relinquishment of State sovereignty; it places a forceful expectation on home States to investigate and prosecute alleged corporate atrocity crime, thereby thrusting them into action and stopping them from invoking the sovereignty question as a mask for deliberate inaction. It is thus not an unrealistic pipe dream for the Malabo Protocol to provide the 'propellor' needed for Global North home States to accelerate their CCL for atrocity crime practices.

But with all things being equal, it is easy to come across as clutching at straws when one continues to endorse the Malabo Protocol despite it being in its eighth year. Not a single State has ratified the Malabo Protocol and evidently neither is it at the top of the AU's agenda, a statement even the most optimistic of observers would be hesitant to disagree with. A simple search on the AU website testifies to this assertion; the most recent report to "urge all [AU] member States to ratify the Protocol…" was published in February 2019.[275] Very little movement on the progress of the Malabo Protocol has occurred since then, with other issues – such as trade agreements – occupying significantly more space on the AU's agenda.[276] Moreover, the economic repercussions associated with endorsing an operational ACC with jurisdiction over corporations might be enough to dissuade AU member States from signing the Malabo Protocol should it enjoy renewed interest. This drawback was outlined at 2.8.2, which elaborated upon the economic dependence – through FDI – of resource-rich States on foreign corporations. Once more it is unhelpful for the Malabo Protocol to be ratified entirely by AU members whose territories are of limited interest to TNCs, but equally States afflicted with the resource-curse and beleaguered by weak rules of law cannot be relied upon to

[275] AU Executive Council, Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court (7th to 8th February 2019) EX.CL/1138(XXXIV) at Para 3

[276] On 2nd April 2019 Togo became the latest country to sign the Malabo Protocol, see the AU's status list at > https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf <

comply with treaty obligations either. Instead it might require assertive action by Global North States to ensure their CCL regimes do not lose teeth extraterritorially, which speaks again to the critical role of a supportive political environment. If it is true that many resource-rich States are beholden to corporations, then it is hard to picture those States – which may refuse to ratify the Protocol but would be subject to it anyway – cooperating with the ACC and home States to prosecute corporations that have proven vital to their economic interests.

7.2.6 Reaching MLAs pursuant to the 'de facto' or 'soft' complementarity principle

Perhaps the most obviously interdependent of these variables is the linkage between the ACC and Global North national legal systems. Success here would be conditional on (1) national legal systems 'marrying' internationally defined atrocity crimes with domestic CCL rules and (2) the Malabo Protocol coming into force. Earlier discussion in Chapter 5 suggested that transposition of internationally defined atrocity crimes into national legal systems alongside pre-existing recognition of CCL as a legal doctrine creates a theoretical linkage to the ACC, since the four core crimes in the Malabo Protocol are verbatim copies of those set out in the Rome Statute. However, there must also be a *practical* bridge to actualise this theoretical linkage. Article 46L *bis* – which impliedly endorses MLAs and third-State cooperation – is the main reference point here.

Global North home States' rhetorical commitments to closing the accountability gap, through their general support for soft law and proposed hard law, combines with the wording of the Malabo Protocol as a reiteration of pre-existing international norms to suggest that the prospects of this variable being achieved is not as infinitesimal as it might seem on its face. Nevertheless, Realpolitik concerns abound and there is no authority to compel Global North states to make good their rhetorical commitments at the international level by cooperating with an operational ACC.

7.2.7 Summary

None of the variables outlined above are self-fulfilling in themselves. They cannot thrive in isolation and rely upon the success of the other variables, thereby making them interdependent. I am also under no illusion about the lofty ambitions set forth by this paper, but by equal measure it is apparent that national, regional and international developments reveal an underlying receptiveness to using CCL as the principal mode for redressing corporate involvement in atrocity crime. This is a point I have attempted to labour

throughout, and although it is a stretch to say that we are on the 'precipice' of successfully closing the accountability gap in Africa through imposing CCL for atrocity crimes, achieving this goal is not in fact out of reach. I have not provided an example of a development that has singlehandedly accelerated CCL for atrocity crimes the world over, because it does not exist. Maximum coalescence of the above variables is thus a medium to long term objective because progress on the matter has clearly been incremental and somewhat piecemeal; for now these are realities that optimistic observers must have to settle with.

The commonest theme relating to the drawbacks associated with the variables outlined above is a lack of political will. Insufficient political will risks overshadowing all of the positive developments that give weight to the notion of an emergent and gradually evolving 'justice cascade'. Lack of political will resonates with AU members and Global North home States alike, as can be inferred through the gradually atrophying Malabo Protocol and the limited interest in investigating TNCs for crimes committed in Africa, respectively. Furthermore, a lack of political will translates to State unwillingness to cooperate under the 'de facto' complementarity principle. And although an operational ACC might thrust Global North States into action, one must also recall that the Malabo Protocol still demands an exceptional level of political will for it to actually come into force. So it is clear that the variables surveyed above are at different stages, with the Malabo Protocol – which I have described as the 'propellor' for CCL regimes in Global North home States – perhaps the least likely to come to pass in the short-medium term. However, 5.2.6 suggested that the Malabo Protocol – even if abandoned – would not lose its essence as a vital text with a high level of normative purchase. Future jurisprudence in the Global North may therefore use the Malabo Protocol as a reference point to substantiate argumentation on the matter of CCL for atrocity crimes in Africa. One can therefore tentatively conclude that although there is limited sign of all the variables coalescing contemporaneously, the actualisation of one may induce the actualisation of others, thus creating a positive 'domino effect' pursuant to closing the accountability gap for corporate atrocity crimes in Africa.

7.3 Research Findings

This paper has made several findings that point to a general failure on the part of Global North home States to harness CCL as a device for tackling corporate impunity for atrocity crimes. But despite this lack of political will, there are a selection of promising developments to suggest that closing the accountability gap for atrocity crimes in Africa might be within reach. For ease, a brief summary of those findings is enumerated below:

1. Despite being a sharp tool domestically, national rules on CCL lose their teeth when TNCs operate extraterritorially in African countries afflicted by a weak rule of law. There is no convincing doctrinal justification to support this historical circumscription;
2. Many States that suffer from the resource curse are beholden to TNCs as a source of economic growth. Those same States are typically unable or unwilling to investigate instances of corporate crime perpetrated on their territories;
3. Although the Rome Statute does not provide the ICC with *jurisdiction personae* over legal persons, the Court can and should contribute to the 'justice cascade' by beginning to consider the 'economic causes' of atrocity crime in its future jurisprudence;
4. There are numerous sources of international soft law on BHR. Although of significant normative value, these sources are wholly inadequate for redressing corporate impunity without being 'hardened';
5. No text under the current gamut of international law draws a direct link between corporations and atrocity crime; if ratified the CAH Draft Articles would be the first to do so. This proposed treaty has the potential to induce seismic changes in the 'justice cascade' trajectory;
6. The Malabo Protocol, if ratified, would be the first source of international law to create a regional enforcement mechanism with *jurisdiction personae* over legal persons for involvement in atrocity crime;
7. A predicted 'de facto' or 'soft' complementarity principle could emerge between the proposed ACC and Global North home States by virtue of Article 46L *bis*;
8. In its eighth year, the Malabo Protocol is at risk of being permanently abandoned. Although fifteen States have signed the Protocol, zero States have ratified it. Developments in Global North home States do, however, justify its renewed interest;
9. Civil lawsuits remain the dominant mode for imposing liability on TNCs in home States' national legal systems. This illuminates the underlying receptiveness of Global North countries to make the shift towards criminal prosecutions;
10. Many Global North States are at least doctrinally capable of 'marrying' atrocity crimes governed and defined by international law with domestic rules on CCL. There are only two national examples where this 'marriage' has been animated in practice;
11. A State that invokes its prosecutorial power to investigate corporate involvement in atrocity crime extraterritorially represents a declaration of intent to end corporate impunity and close the accountability gap in that country's jurisdiction;

12. Global North home States are – for a multitude of reasons – unable or unwilling to prosecute TNCs registered in their jurisdictions. This unwillingness goes beyond simple Realpolitik issues and is also caused by budgetary and expertise shortages;
13. Home States are at different stages of progress vis-à-vis CCL for atrocity crimes. This is inimical to the need for creating a streamlined body of rules on CCL and preventing corporations registered in States with restrictive interpretations on CCL from continuing to operate on African soil with impunity;
14. The 'justice cascade' expands incrementally. Progress in its trajectory depends on international cooperation and a supportive political environment;
15. The question of political will permeates almost every aspect of this paper. It is a cause and consequence of corporate impunity but, by equal measure, acts as the principal vehicle for reversing corporate impunity towards a robust and streamlined body of rules on CCL for atrocity crimes.

7.4 Interpreting Findings Against the Initial Research Question

My overarching research question was outlined at 1.4 but bears repeating here as well:

> Is it possible to assess the likelihood that future corporate involvement in atrocity crime in Africa will be redressed at the national level against the backdrop of international, regional and domestic developments?

The question itself is modest, and I can say in the affirmative that it *is* possible to make an informed measurement regards the subject-matter under discussion in this thesis. Had my research yielded results that pointed to a zero or infinitesimal likelihood, then the question would have been answered in the negative. Because the content of the research question is framed in terms of likelihood, there was nothing to prove or disprove when setting out to answer it. Instead inductive reasoning was called on to measure the likelihood corporate impunity in Africa will be redressed under the doctrine of CCL. This was achieved by evaluating (1) the existing state of affairs with (2) the numerous proposals and early developments that attracts discussion and justifies the probability logic that drives the motivation for the thesis.

On the first point, the existing state of affairs – characterised by prosecutorial inertia and general political circumspection – suggests limited prospects of the research question being met. This is tempered by the underlying doctrinal frameworks and proven appetite for

imposing corporate liability in civil lawsuits to provide a less defeatist account regards the current state of affairs. The second point of evaluation relating to proposals and early developments builds on these promising signs. Importantly, they allowed me to fulfil a main purpose of this thesis: to imagine potential pathways to answer the question of *how* CCL can tackle corporate impunity in Africa. Yet this upside is tempered by a main limitation to relying heavily on normative perspectives when undertaking inductive reasoning: that they are by definition precarious and may not accurately predict the future state of affairs. As an example, although the CAH Draft Articles and the Malabo Protocol are concrete to the extent they are written texts that provide normative value to the discussion, in the absence of a crystal ball it is impossible to reliably say whether they will come into force.

Relying heavily on sources predominantly normative in character meant proceeding with caution when measuring the prospects of CCL adequately redressing corporate atrocity crime in the future. I sought to make my pathway predictions as thorough as possible by applying inductive reasoning to suggest that the prospects of success relied upon the coalescence of six interdependent variables outlined at 7.2. This was achieved through harvesting the normative developments and emerging states of affairs identified in preceding chapters to create a conceivable answer to the titular question of whether a CCL governance regime capable of prosecuting corporations for atrocity crimes is within reach.

7.5 Conclusion

Seen through a human rights lens, the profit-above-all mentality that has driven corporate impunity must be tackled as a matter of practical necessity. Corporations are not going to do this themselves, particularly the ones that profit from turbulent African countries stricken by the resource curse. Despite economic factors playing a central causal role in atrocity crimes, there remains a gaping lacuna in international and national criminal law vis-à-vis CCL. This lacuna has provided space for persistent corporate impunity, despite many States' rhetorical commitment to tackling it as a priority issue. This paper thesis has attempted to show how the accountability gap can be narrowed with the right combination of political will and international cooperation. But at present, progress has been demonstrably slow and piecemeal. Chapter 2 was grounded almost entirely in historical and current events, and painted a decidedly negative picture of how this practical necessity has been met with inaction in practice. Subsequent chapters tempered the negative perspective broached in Chapter 2 with a more positive take on the future of CCL for atrocity crimes. This outlook

provided the segue needed to assess the variables that might determine to what extent corporate impunity can be redressed by CCL in the future.

In the absence of a 'crystal ball' to accurately predict the future, the foregoing discussion leads one to a conclusion that is ambivalent. However, predictions informed by the research findings enumerated at 7.3 can be mooted to help build a picture of how closing the accountability gap could foreseeably occur. The variables mooted in the last section aimed to illuminate how some of these findings might be reflected in practice, overarched by their mutual interdependence under the rubric of the 'justice cascade' trajectory. There are strengths and weaknesses associated with every variable. The likelihood is that even in a best case scenario where the majority of the variables coalesce, a bifurcation in approaches between proactive and conservative States will still emerge, thereby creating inconsistency to ensure corporate impunity continues. Closing the accountability gap and ending corporate impunity in its entirety is therefore an aspiration that will likely remain out of reach for the short-medium term future. However, it is submitted that there is still substantial cause to celebrate the current and emerging developments that will undoubtedly have a corrosive effect on corporate impunity. This incremental and ever-evolving 'justice cascade' makes one appreciate that for the short-medium term, partly closing the accountability gap and tackling corporate impunity for atrocity crimes in Africa may indeed be within reach.

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