Complementarity and Criminal Liability of Companies in Africa: Missing the Mark?

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1 Introduction

In this chapter I seek to explore the idea of accountability for international crimes in national courts in the context of Africa, pivoting from South Africa, with specific focus on the corporation as a juristic person. In so doing I will ask the question whether in undertaking this exercise, debates about direct versus indirect liability and which platforms are best suited, we may be missing the mark. Here I am referring to a mark as both a point/goal and as a person.[1] In other words I will contend with whether the debate on corporate criminal accountability for international crimes and the reforms being advocated for have identified the correct person to hold accountable.

[1] *Merriam-Webster* https://www.merriam-webster.com/dictionary/mark (accessed 31 May 2021).

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E. C. Lubaale and N. Dyani-Mhango (eds.), *National Accountability for International Crimes in Africa*,
https://doi.org/10.1007/978-3-030-88044-6_5

In part I, I will situate the significance for accountability in a brief historical foregrounding of the relationship between the state and corporation in the founding South Africa, drawing parallels to Nigeria, the implications of continuing corporate harm and the relationship between the state and the corporation as juristic persons. In so doing I aim to provide a brief critical historicism of the object of analysis: the juristic person of the corporation and problematise its nature.[2]

In part II, I will attempt to systematically unpack the meanings of the core concepts employed in this exercise: international crimes and accountability. I will consider both what they tend to mean currently in mainstream international criminal law discourse and what they have the potential to mean in the light of arguments for a more substantive systematic approach.

In part III, I will use a similar model, consideration of both 'is' (current position) and 'ought to be' (arguments for reform), to outline the current accountability mechanisms for international crimes across international and domestic platforms and their limitations. I will proceed to a consideration of the regional mechanisms, as collective power to support increased domestic control the parameters of juristic personality, that emerge as a possible solution to navigate the challenges that both international and domestic levels present. Having established a sense of what is meant by accountability and the mechanisms that exist to secure it I will attempt to zoom the lens of analysis outwards in order to interrogate the unstated assumptions that dominate debates about corporate accountability. The intention is to understand the existing regime of corporate criminal liability for international crimes, arguments for its reform and articulate the way in which this falls short of a systemic intervention into the root causes of harms facilitated by the corporation. Thus, attempting to reveal how the focus on the corporation as a person and the consequences of its conduct elides the more fundamental issue of the authorisation of the corporation as a person and the parameters in which it is permitted to operate.

[2] See A Sekyi-Otu 'Fanon and the Possibility of Postcolonial Critical Imagination' in Gibson N (ed), *Living Fanon—Global Perspectives* (2011) Palgrave Macmillan, New York 46, as employed in S Sibanda '"Not Yet Uhuru"—The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy' unpublished PhD Thesis, University of the Witwatersrand, 2018 33–35 on history as more than mere context, but the challenge of colonial narratives of knowledge and purported universal truths.

I will conclude with a critical consideration of the paradox of the existing liberal paradigm that utilises an abstract individualism to justify corporate accountability for harm while simultaneously entrenching the corporate power that enables the harm to be systemically perpetuated in the first instance, and whether accountability could be better achieved with an African philosophy paradigm that centres the human being-becoming beyond atomistic conceptions of accountability and human relations broadly; a paradigm that is arguably already implicit in the regional mechanisms.

2 Part I: Historicising the Corporation and Interrogating Its Nature

2.1 Foregrounding the Relationship Between the Corporation, the State in the Formation of African States

Before unpacking the concept of accountability, it would be useful to consider both the harm, the perpetrators of that harm and the persons who endured the harm for which accountability is contemplated. Indeed, at face value the need for accountability arises from the perpetration of international crimes by corporations. This can be construed as accountability for the harm caused by the excesses of corporate power. However, in order to appreciate the systemic nature of the problem of power, harm and accountability it is useful to consider the workings of corporations at some significant moments in history. Rather than to provide a comprehensive account, which would be beyond the scope of this chapter, I hope to simply ground these otherwise abstract conceptions. In so doing I endeavour to demonstrate the tenuous (if not fictitious) delimitations of public and private power in the context of juristic personality (as state and corporation) in Africa.

While in the interests of expediency this analysis is anchored in South Africa, it is important to recognise that this phenomenon was not exclusive to it. For example though Nigeria and South Africa are on opposite ends of the continent, they have more in common than meets the eye. They both have been described as 'economic giants of Africa' and they have been reported as having the highest amounts of illicit capital flight

in the world.[3] Fundamentally both states were precipitated by colonial corporations. These corporations served as vessels to exploit the vast natural resources in the territories to the exclusion, exploitation and mass decimation of the people indigenous to those territories.

I have argued that the Dutch East India Company (DEIC) illustrates how the corporation is an instrument of coloniality.[4] Spearheaded by Jan van Riebeck in 1652, the DEIC set out to establish a refreshment station at the Cape, and later established a colony of which van Riebeck also served as governor.[5] Despite reliance on trade with indigenous peoples, as their commercial strength grew, the DEIC started expanding inward territorially.[6] Wars were instigated to remove perceived threats to their domination; eventually enabling the DEIC to tax the indigenous Khoi communities in cattle and eventually force them into a monetary economy of the DEIC's design.[7,8] This is reported to have precipitated the collapse of the economic and socio-political existence of the indigenous communities, transforming their relationship from free traders with agency to captive labour.[9] The Roman Dutch common law, imposed by the DEIC, formed the foundations of mercantile law and labour relations in South

[3] K Dev & D Cartwright- 'Illicit Financial Flows from Developing Countries: 2004–2013' (Global Financial Integrity 2015) 8 http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf (accessed 31 May 2021); B Meyersfeld 'Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate' 160–172 in C Rodriguez-Garavito (ed) *Business and Human Rights Beyond the End of the Beginning* (2017) 178.

[4] C Samaradiwakera-Wijesundara 'Interrogating Recognition of the Legal Personality of the Company: Is the Company an Instrument of Coloniality?' unpublished LLM Thesis, University of the Witwatersrand, 2018 58–66; C Samaradiwakera-Wijesundara 'The Fiction of the Juristic Person: Reassessing Personhood in Relation to People' in Melissa Steyn & William Mpofu (eds) *Decolonising the Human: Reflections from Africa on Difference and Oppression* (2021) Wits University Press 186 at 194–196.

[5] Geen *The Making of the Union of South Africa* (1946) 7.

[6] Lucas *An Archaeology of Colonial Identity: Power and Material Culture in the Dwars Valley, South Africa* (2004) 72.

[7] As above.

[8] As above.

[9] As above.

Africa while the epistemicidaly substituting and perversely misconstruing indigenous law and governance systems.[10]

A similar pattern unfolds in 1878 in the Niger Delta. George Goldie formed the United Africa Company (UAC) made in the image of the East India Company (EIC) and obtained control of the Niger Delta's and its next main export, after it was established as the Slave Coast, palm oil.[11] This control secured the territory for Brittan from other European interests at the Berlin Conference and changed the UAC, later The National Africa Company, through a royal charter of incorporation with authority to administer the Niger Delta and surrounds into the Royal Niger Company (RNC).[12] Despite verbal agreements with the indigenous Kings, Goldie is reported to have moved inland and instituted treaties granting the RNC monopoly to the exclusion of the local communities who had been selling palm oil competitively to Europe.[13] Attempts to sell outside of the monopoly were met with charges of 'obstructing commerce' followed by exile and mysterious deaths such as was the case with Jaja of Opobo.[14] This is said to have set the tone for Kings in the area to view trade agreements with Europeans with greater circumspection and culminated in King Koko Mingi VIII, after unsuccessful attempts to break the monopoly, succeeding in an attack on the RNC headquarters.[15] The attack was successful. Nonetheless, British recalcitrance to negotiate and later retaliation resulted in King Koko being outlawed.[16] This happened after he refused a settlement from the British Parliamentary Committee.[17] He then committed suicide in exile in 1898.[18] The circumstances are said to have lost RNC publicity in Britain and resulted in the sale of Nigeria

[10] MB Ramose 'In Memoriam: Sovereignty and the "New" South Africa' *Griffith Law Review* 16, no. 2 (2007) 314.

[11] C Nwanze 'Who Sold Nigeria to the British for £865k in 1899?' https://africasacountry.com/2014/04/historyclass-who-sold-nigeria-to-the-british-for-865k-in-1899 (accessed 28 May 2021).

[12] As above.

[13] As above.

[14] As above.

[15] As above.

[16] As above.

[17] As above.

[18] As above.

to the British Crown.[19] The RNC carries on as an early predecessor of Unilever after having been acquired by the joint efforts of the British Lever Brothers and Dutch Jurgens' and Van der Bergh's.[20] Now still in operation, Unilever lives on.

The pattern is chillingly similar—down to the white male figurehead of the sovereign-corporation.[21] The ideological golden thread of domination and appropriation of labour and land runs through the history of encounters with the corporation.[22] This process often elides the relationship between political and commercial interests and the symbiotic relationship between the state and the corporation.[23] As Grovogui has noted, international law provided the framework for erasing the subjectivity of colonised peoples and denying their/our humanity.[24] International law treatises were utilised in this context to legally permit genocide, slavery and large-scale appropriation of land and other resources.[25] Anghie reflects on how positivism was used to develop a vocabulary that objectified and dehumanised in order to legitimise heinous violence in the name of the divine right to conquest and later the civilising mission.[26] Systemic dehumanisation and the installation of conditions of poverty and inequality were perpetrated through the corporation thus embedding the irony of corporations having personhood over human beings deprived of theirs.[27] The contemporary connection to Unilever reminds us that this is not behaviour that can be relegated to the past as a mere relic of

[19] As above.

[20] BS Yamey 'The History of Unilever. By Charles Wilson' *The Economic Journal* 66, no. 264 (December 1956) 730.

[21] C Samaradiwakera-Wijesundara (n 4 above) 40–41.

[22] As above.

[23] V Rao "*A Brief History of the Corporation 1600–2100*" 2011 http://www.ribbonfarm.com/2011/06/08/a-brief-history-of-the-corporation-1600-to-2100/ (accessed 05 August 2020); Callinicos *Imperialism and Global Political Economy* (2009) 136.

[24] S Grovogui *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (1996) 55.

[25] KB Nunn 'Law as a Eurocentric Enterprise' *Law and Inequality: A Journal of Theory and Practice* 15, no. 2 (1997) 362.

[26] A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005) 38.

[27] Samaradiwakera-Wijesundara (note 4 above).

colonialism, but lives on in the very design and purpose of the corporation. Again, we can turn to South Africa and Nigeria for contemporary examples.

In August of 2012, 34 human beings occupied as miners were killed extra-judicially, by South African Police Services personnel, in the course of demanding a living wage on Lonmin's Marikana Mine.[28] This was purportedly reprisal by the Mine precipitated by growing discontent with the impact of the strike action gaining traction across the country on its bottom line.[29] This massacre is one instance of the broader state of repression and resistance in the context of the exploitative conditions faced by mineworkers and affected communities in South Africa long established in colonial-apartheid.[30] Terblanche comments on how unfree black labour '…has been a permanent feature of South Africa's economic history since 1652 and is destined to remain a defining characteristic of the South Africa landscape for decades to come'.[31] 'The reality is that mining operations often result in worse conditions after the conclusion of the operations, than existed before mining began'.[32] The context has and continues to be exploitative by design and as such corporations do not only contribute to creating poverty but actively 'bank on it'.[33] While a commission of inquiry was led—the scope focused on state accountability.[34]

In a similar turn of events, the devastation faced by the Ogoni peoples in the Niger Delta can be traced to the Shell Petroleum Development Corporation (SPDC), a joint venture between British Shell (Shell) and

[28] T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution.' *Stellenbosch Law Review* 1 (2016) 138–139; N Ndlovu Morgan Ndlovu 'Living in the Marikana World: The State, Capital and Society' *International Journal of African Renaissance Studies* 8, no. 1 (2013) 47–48.

[29] As above.

[30] As above.

[31] S Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* (2012) 4.

[32] B Meyersfeld 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' *Business and Human Rights Journal* 2, no. 1 (January 2017) 33 and 50.

[33] As above.

[34] Marikana Commission of Inquiry: Report (2015) https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf.

Royal Dutch-Petroleum (RDP), for the extraction and production of oil formed in 1956.[35] The SPDC later formed a joint venture with parastatal Nigerian Petroleum Company (NPC).[36] Rather than benefit, this resulted in great harm to the Ogoni Peoples including severe air, soil and water pollution resulting in toxic contamination of air, soil and water supplies.[37] In 1990 the Movement for the Survival of the Ogoni People (MOSOP), which was formed to defend the human rights of the Ogoni Peoples, was met with violent repression and reprisal by the Nigerian military after requests for intervention by Shell and RDP.[38] This intervention precipitated atrocities against the Ogoni Peoples including 'widespread' and 'systemic', extra-judicial executions, arbitrary killings and extended detention, and torture.[39] In addition to the provision of resources Shell and RDP is alleged to have invested in the extra-judicial and judicial murders of Ogoni activists.[40] Attempts at holding the corporations liable in foreign courts were unsuccessful.[41] What is relevant is that the accountability of the Nigerian government was established by the quasi-judicial regional African Commission (AC).[42] The new Nigerian government admitted in a verbal note in the Ogoni case that there were and still are human rights violations perpetrated by oil corporations in Nigeria.[43] As was the case in the Marikana Massacre it appears that, while the states received some

[35] M Jain & B Meyersfeld, 'Lessons from Kiobel v Royal Dutch Petroleum Company: Developing Homegrown Lawyering Strategies Around Corporate Accountability' *South African Journal on Human Rights* 30, no. 3 (2014) 430.

[36] F Coomans 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' *The International and Comparative Law Quarterly* 52, no. 3 (July 2003) 749.

[37] Jain & Meyersfeld (n 35 above) 430.

[38] As above.

[39] Jain & Meyersfeld (n 35 above) 433.

[40] As above 430.

[41] *Kiobel v Royal Dutch Petroleum Co* 2013 133 s Ct 1659 (No 10 1491).

[42] Communication 155/96, The Social and Economic Rights Action Center and the Center Economic, and Social Rights/Nigeria; http://www.cesr.org/ESCR/africancommission.htm. It was communicated to the parties on 27 May 2002 (Ogoni case).

[43] N Verbale 127/2000 submitted by the Nigerian government at the 28th session of the Commission in Oct 2000 (Verbal note Ogoni case).

censure, the corporations at the centre, with their roots in the same countries that perpetuated colonial conquest of the same territories, evaded liability and 'business as usual' continues.

It is clear from this that the corporation has been instrumental in establishing the legal systems that circularly justify their own operations in the jurisdictions that they continue to cause systemic harm in—and thus there appears no break from the colonial interests and orientation that first propelled them. Given this far reaching and ongoing harm, both spectacular and systemic, the contemplation of accountability requires the identification of the actor/s to be held to account. This raises the question of who or what the corporation actually is.

2.2 Who or What Is a Corporation?

In the broad sense the pragmatic question of what the object of analysis is becomes immediately complicated in the case of the corporation as a juristic person. Is it in fact an object or a subject? Domestically the corporation as we know it today is a construct of the law granted as a concession of state power to enable a juristic person to come into being thereby limiting the liability of the natural persons that animate it to their financial investment and efforts.[44] This is not to suggest that corporations are homogenous, however does point out the ideological golden thread and fundamental characteristics that make a corporation.[45] Core to the corporation as we know it is this juristic personality that renders it a distinct person. Ultimately a '[p]erson' signifies what the law makes it signify'.[46] This grants the corporation characteristic perpetual/immortal ownership of property and attendant rights of personhood while shielding the actual human beings who animate and benefit from it through the device of 'limited liability'.[47] According to Boberg '[t]he importance of being a person in the eyes of the law, both public and private, lies in the

[44] O Gierke *Political Theories of the Middle Age* (1900) 68.

[45] Samaradiwakera-Wijesundara (note 4 above).

[46] J Dewey "The Historic Background of Corporate Legal Personality" *The Yale Law Journal* 35, no. 6 (1926) 655; for a critical history of the nature and purpose of the corporation see C Samaradiwakera-Wijesundara 'The Fiction of the Juristic Person: Reassessing Personhood in Relation to People' in Melissa Steyn & William Mpofu (note 4) 194–196.

[47] R Penington 'Origin of Corporations' *Corporate Practice Review* 3 (1931) 33–37.

fact that only a person can have rights and duties'.[48] As a juristic person it is technically a subject in domestic law being a rights bearer.

In Africa the colonially founded nation state and corporation have been conspicuously co-constitutive. The development of the nation state and corporation are parallel.[49] The argument for the need for human rights to protect against an excess of state power logically extends to the excess of corporate power as the juristic person serves in both cases to concentrate power and enable such excesses.[50] Notwithstanding this, corporations are not recognised as subjects in international law even though they, like states, are juristic persons. Pahuja and Saunders account for this as First World States having secured a discursive shift away from critical consideration of the role of corporations and the authority of Developing and Third World countries to exercise their sovereignty in determining their powers within their territory—to one that entrenched the idea that the corporation was necessarily beneficial for development and inherently a private entities which should be allowed to travel across domestic jurisdictions, but be outside the purview of international regulation but to ensure the fair treatment of these private entities.[51] The focus of international law has been justified as concerning public actors and thus states excluding private actors (which corporations are regarded to be). In this way the corporation mirrors the nation state yet avoids public-scrutiny through evoking the public–private binary.[52]

Pahuja situates this shift in the racialised global world order that reveals that newly independent states in the late 1970s unsuccessfully challenged on an international institutional level.[53] Third World states grappling to reimagine and reconstruct international law as a tool to

[48] PQR Boberg *Law of Persons and The Family* 2 ed (1999) 3.

[49] RC Slye 'Corporations, Veils, and International Criminal Liability.' *Brooklyn Journal of International Law* 33, no. 3 (2008) 956 and 961.

[50] As above 961.

[51] S Pahuja & A Saunders 'Rival Worlds and the Place of the Corporation in International Law' in Dann and Von Bernstorff (eds), *Decolonisation and the Battle for International Law* (2018) 172.

[52] Slye (n 49 above) 956.

[53] S Pahuja 'Corporations, Universalism and the Domestication of Race in International Law' (29 January 2018). Forthcoming in Duncan Bell (ed) *Empire, Race and Global Justice* (Cambridge University Press), Available at SSRN: https://ssrn.com/abstract=3324846.

secure control over property and conduct of actors in their jurisdictions was met with the perverse entrenchment of private property even illicitly gained through colonisation and protection of the continued activities of putatively private actors.[54] As such this juristic person is neither authentically a subject nor an object, and its continued recognition is not an inevitable fact but rather the product of political, economic and social power. Fundamentally it is persons acting through and benefitting from the instrument that need to be held accountable for the harm it causes.

3 Part II: Unpacking the Content of 'International Crimes' and 'Accountability'

3.1 Spectacular Aberrations or Systemic Harm? Understanding Poverty and Inequality as Crimes Against Humanity

3.1.1 Expanding Our Understanding of International Crimes Under the RS

I contend that we should favour a purposive approach that focuses on the substance of accountability being sought, over form, namely the technical aspects of how accountability is sought. As such when navigating structures for corporate accountability we should consider a lens that accurately captures the range of harm for which accountability is sought rather than one that obfuscates it. In this instance it would mean not only seeing how corporations can be held criminally liable for international crimes, but how our understanding of international crimes can and should be expanded to account for harm caused by corporations. In this way we transcend liability as simply attribution of blameworthiness for harm towards accountability as taking responsibility for that harm and its consequences.

According to the Rome Statute (RS), which sets up the International Criminal Court (ICC) as the flagship of international criminal law, international crimes are crimes against humanity, genocide war crimes and aggression (international crimes).[55] The ICC only has jurisdiction over natural persons for crimes committed after its enactment and provides liability for punishment on the basis of individual responsibility.[56] This

[54] As above.

[55] Article 5 RS.

[56] Article 25(2) RS.

definition focuses on the instant of spectacular aberrations that cause large-scale harm. This may be situated in the mainstream liberal conception of the individual as an abstract agent at the centre of affairs and thus, in terms of the critique of liberalism, does not account for the systemic operation of powers that co-constitute the individual and collectives as both actors and those acted upon.[57] As such, within this paradigm poverty is often reduced to material lack or scarcity of basic amenities needed for survival and is often presented as acontextual and inevitable.[58] Pogge, while operating within a liberal paradigm committed to universal morality and non-racial equality, recognises that colonialism, slavery and genocide have shaped global poverty and inequality, but prescribes to teleology that suggests this shaping ends at political liberation.[59] Blunt argues that Pogge's evocation of global poverty as a crime against humanity may expand our conception of international crimes.[60] This departs from the premise that global poverty is a human rights violation and that extreme and widespread poverty is a crime against humanity.[61] Blunt recognises that this assessment needn't be pegged against the RS's conception of crimes against humanity, but that this provides an entry point to evaluate the plausibility of this notion within the operational international criminal law framework.[62] While attempting to capture the institutional operation of poverty that expands the consideration beyond individual relations, this argument doesn't account for its relationship to continued global racialised and gendered inequality. Despite being accepted as a problem it is not generally situated within the dynamics of colonial and imperial power disparities.[63]

Still, Pogge's account of human rights as institutional goes some way in linking atomistic individual relations with institutional dynamics of

[57] R Abbey *The Return of Feminist Liberalism* (2011) 15.

[58] S Fredman "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" *Stellenbosch Law Review* 22, no. 3 (2011) 566.

[59] T Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' *Leiden Journal of International La* 18 (2005) 723.

[60] T Pogge *World Poverty and Human Rights* 2000 176 in GD Blunt 'Is Global Poverty a Crime Against Humanity?' *International Theory* 7, no. 3 (2015) 541.

[61] Blunt (n 60 above) 540.

[62] As above.

[63] As above.

power with colonial and imperial origins.[64] Especially to the extent that it presents how global poverty and inequality operates within a coercive international state-based system with asymmetries in power that grant poor states no alternative.[65] This coercive international system makes poverty 'foreseeable and avoidable'.[66] This is on the basis that privileges are granted to states (including control over territorial resources and borrowing powers to indebt the people of the state) regardless of how states came to power, and that powerful states disproportionately determine the rules of the global economy.[67] This provides no incentive for poorer states to secure human rights over the interests of corporations.[68] The poverty that results is not an accident, but the product of a refusal to change the system by those empowered to do so.[69] Human rights instruments such as the Universal Declaration of Human Rights (UNDHR) already recognise the right to a living standard sufficient for 'health and well-being' and the entitlement to a 'social order in which' these rights can be 'fully realised'.[70]

In terms of Article 7(1)(k) the RS allows for acts comparable to listed crimes against humanity which amount to 'causing great suffering, or serious injury to body or to mental or physical health' to be included among them.[71] This suggests that global poverty would be classifiable as a crime against humanity if it meets the definitional criteria or if it resembles acts specifically named as crimes against humanity. Blunt suggests that it does both.[72] According to article 7(1) of the RS a crime against humanity

[64] Pogge also suggests that individual human beings have a 'negative duty to not support coercively imposed social institutions that "foreseeably and avoidably" leave people without secure access to the content of their human rights; Pogge (n 60 above) 176 in Blunt (n 60 above) 542.

[65] Pogge (n 60 above) 41–42 in Blunt (n 60 above) 542–545.

[66] As above.

[67] As above.

[68] Pogge (n 60 above) 120 in Blunt (n 60 above) 545; B Meyersfeld 'Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate' 160–172 in C Rodriguez-Garavito (n 3 above) 178.

[69] Pogge (n 60 above) 41–42 in Blunt (n 60 above) 542–545.

[70] The United Nations Declaration of Human Rights 1948 (UNDHR) Articles 25(1) and 28; Blunt (n 60 above) 542.

[71] Blunt (n 60 above) 540.

[72] As above.

is 'any of the [listed acts] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Blunt draws out the acts of enslavement (Article 7(2)(c)) and the crime of apartheid (Article 7(2)(j)) as parallel to global poverty as they deprive human beings of the ability to live a life with agency and pursue their own definitions a meaningful life.[73] Slavery, apartheid and global poverty operate through dehumanisation and domination which grants absolute power over humans who are subsequently robbed of their agency to pursue their own conceptions of lives of meaning.[74] Extreme poverty is intertwined with slavery as the global system erodes states stability and abilities to protect their citizens/inhabitants rendering them vulnerable to exploitation in order to survive.[75] Blunt argues that there is an observable causal nexus between institutions that cause global poverty and contemporary forms of slavery.[76] Domination and exploitation persist under dangerous working conditions, indentured labour and wage-slavery.[77]

Furthermore an attack does not have to amount to physical/explicit violence according to the ICTR case of *Akayesu*.[78] Implicit violence or the threat of violence is inherent in slavery—yet it is not an explicit form of violence alone that makes slavery reprehensible—it is the deprivation of agency of another human being.[79] Article 7(2)(a) of the RS encompasses an attack 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. This provision is meant to cover militias and actors that operate at a distance from the state.[80] Blunt argues if organisational capacity serves as ground for liability then it would logically follow that an organisation such as the WTO is capable of such organisational responsibility given how it sets economic policy that impacts the

[73] As above.

[74] As above.

[75] As above 561.

[76] As above.

[77] As above 561–562.

[78] Judgement, Akayesu (ICTR-96-4-T), Chamber I, 2 September 1998, par. 581 (*Akayesu*); Blunt (n 60 above) 552.

[79] Blunt (n 60 above) 552.

[80] As above 553.

lives of billions.[81] The requirement that the attack be widespread and systematic connects otherwise disparate acts.[82] In *Akayesu* 'attack' has been described as large-scale action carried out against multiple victims in an organised pattern reliant on common policy which draws on public or private resources.[83] The global aspect of poverty together with global economic policy and trade instruments that are the workings of certain actors suggests it is systemic and widespread.[84] Knowledge of the attack to establish *mens rea* may be argued on the basis of *dolus eventualis* in respect of reasonable awareness of the likely consequences of conduct.[85] This is consistent with the burden of proof in respect of 'command responsibility' and 'common purpose'.[86] Blunt argues that an international system that deliberately creates and perpetuates extreme poverty certainly suggests knowledge or at least reasonable foreseeability of the outcome of extreme poverty.[87] This results in large-scale preventable death.[88]

The 'churchillian' position that 'the poor will always be with us' and that the international economic system, albeit imperfect, is the best we have is exposed as a delusion comparable to others used to propagate crimes against humanity throughout history.[89] This understanding ought to alert us to the moral urgency of the problem and incite us to action.[90] The question persists: Why hasn't it? Before turning to the question of accountability it is useful to point out the conspicuous absence of consideration of the gendered and racialised nature of poverty and its relationship to inequality. This can be superficially attributed to the widely recognised situation of human rights, in its current lexicography, in liberal

[81] As above 554.

[82] As above.

[83] *Akayesu*; Blunt (n 60 above) 555.

[84] As above 554.

[85] As above 554–555.

[86] As above.

[87] As above 557–558.

[88] As above.

[89] As above.

[90] As above.

ideology.[91] Stahn reflects on Critical Race Theory Scholars and Third World Approaches to International Law's long-standing critiques on the framing of international crimes around atrocity violence and the tendency to obfuscate the underlying socio-economic (and political) causes of varying forms of violence.[92] This observation is astute, but must go further.

3.1.2 Racialised and Gendered Poverty and Inequality as Violence

When global poverty and inequality are considered two historical aspects are often either underplayed or omitted in favour of a liberal non-racial and apolitical narrative of incremental legal progressivism.[93] One the one hand, is how a hierarchical conception of race and gender was both crystallised by and circularly used to justify colonial and imperial domination in the interests of a co-constitutive capitalist, patriarchal white supremacist global world order.[94] On the other hand, is that political independence of the colonies did not automatically transform the colonial ideology and supporting infrastructure upon which they were established; nor provide liberation from subordination by settler-colonial, colonial and imperial power.[95] Therefore mainstream discourse tends to elide the systemic installation of poverty and inequality, and it's racialised and gendered operation.[96]

[91] MW Mutua 'Savages, Victims, and Saviors: The Metaphor of Human Rights' *Harvard International Law Journal* 42, no. 1 (2001) 221.

[92] C Stahn 'Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law' *Case Western Reserve Journal of International Law* 50 (2018) 98.

[93] ER George 'The Enterprise of Empire: Evolving the Understandings of Corporate Identity and Responsibility' 19–50 in Martin & Bravo (eds) *The Business and Human Rights Landscape: Moving Forward, Looking Back* (2015) 50.

[94] JM Modiri 'Towards a "(Post-)apartheid" Critical Race Jurisprudence: "Divining Our Racial Themes"' *SAPL* 27 (2012) 265; A Quijano 'Coloniality of Power, Eurocentrism, and Latin *America*' *Nepantla: Views from South* 1, no. 3 (2000) 543.

[95] S Sibanda 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' *Stellenbosch Law Review* 22, no. 3 (2011) 495–497*;* Madlingozi (n 28 above) 124.

[96] JM Modiri 'Law's Poverty' *Potchefstroom Electronic Law Journal* 18, no. 2 (2015) 228–231; C Albertyn 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' *Stellenbosch Law Review* 3 (2011) 592.

It is not simply that global poverty is an accident, nor is a historical fact; it is an ongoing function of racialised and gendered oppression.[97] Modiri causes us to recognise that this oppression is not to be understood as resulting from a single force, but rather a vector of 'cultural, social, economic and political forces' that continue with the momentum of the global colonial-imperial system.[98] This poverty and inequality is, in this way systemic, not only in the material sense but in the psychosocial sense that implicates our being in the world.[99] Thus ending poverty is more than a distributive question, but one of ontology.[100] This sanitising tendency of liberalism elides the manner in which concepts such as the corporation operate charged with ideology instrumental to maintaining poverty and inequality.[101] For example the suggestion that the 'the business of business is business' justifies the prioritisation of profit as legitimate and inherently harmless[102]; as opposed to pathological and inherently dangerous.[103] Meyersfeld reflects on how international law was not 'designed' to achieve accountability for human rights violations of corporations that could travel across jurisdictions across inconsistently empowered regulatory systems.[104] It certainly wasn't, but it has been established that this was not an accident either—to the contrary Nigeria and South Africa provide evidence of how it was designed to facilitate impunity not accountability.[105] The liberal lens through which the

[97] Modiri (n 96) 225 and 246.

[98] As above 230.

[99] As above.

[100] As above.

[101] Samaradiwakera-Wijesundara Played by the Rules The Problem with Business—And Human Rights (forthcoming for Corporate Accountability, Business and Human Rights: an African Perspective project hosted by CALS in collaboration with the Open Society Initiative for Southern Africa and Southern African Research Watch).

[102] DG Baird & MT Henderson. 'Other People's Money' *Stanford Law Review* 60, no. 1 (2008) 1323–1324; M Friedman *Capitalism and Freedom* 1962 112; Hahlo *South African Company Law Through the Cases* 6 ed 1999 4.

[103] J Bakan *The Corporation: The Pathological Pursuit of Profit and Power* 2 and 158.

[104] B Meyersfeld 'The South African Constitution and the Human-Rights Obligations of Juristic Persons' *South African Law Journal* 137, no. 3 (2020) 456.

[105] Anghie (n 26 above) 38; Grovogui (n 24) 55; Ndlovu-Gatsheni & Makoni 'The Globaility of the Local? A Decolonial Perspective on Local Economic Development in South Africa' *Local Economy* 29 no. 4 (2014) 512.

world is viewed distorts the picture of a global system of power designed to flourish off poverty and inequality and the relative vulnerability and disempowerment of the Global South.[106]

In this way we may understand the instrumentality of the company in perpetuating racialised and gendered poverty and inequality amounts to systemic violence. In addition to this, Baron et al. provoke thinking about violence through phenomenological terms and suggest that outside direct violence (physical world), indirect violence (in the world of thoughts and ideas) there is the underexplored violence of pacification (in the ontological and existential world-making).[107] That violence is not only an object but a structure within which people operate that influences our intersubjective relations.[108] This allows recognition of the ways in which violence is normalised and made invisible through domination and how liberalism both elides and produces this violence.[109] Baron et al. reflect on how Romans understood *pax* not only as peace, but as submission to Rome (with parallels to *pax* Britannia and Americana).[110] 'Liberal imagination blinkers itself to the ways pacification functions as violence in our world order'.[111] This is reflected in the sentiment of the liberal philosopher Mill 'What [the natives] require is not a government of force, but one of guidance. Being, however, in too low a state to yield to the guidance of any but those to whom they look up as the possessors of force, the sort of government fittest for them is one [that] possesses force, but seldom uses it'.[112] This is a liberal endorsement of pacification as violence as the most effective instrument of domination (couched in terms of curatorship). It is not surprising then that under this paradigm slavery is growing in the

[106] This may warrant a healthy dose of circumspection when considering 'reforms' championed by those in power who not only benefit from poverty and inequality as status quo but have been instrumental in orchestrating it; see Madlingozi (n 28 above) 128–129.

[107] IZ Baron, J Havercroft, I Kamola, J Koomen, J Murphy, & A Prichard 'Liberal Pacification and the Phenomenology of Violence' *International Studies Quarterly* 63 (2019) 203.

[108] Baron et al. (n 107 above) 203–204.

[109] As above.

[110] As above 204.

[111] As above.

[112] JS Mill *Considerations on Representative Government* 1998 232–233 in Baron et al. (n 107 above) 206.

form of indentured labour, forced labour and contract slavery.[113] As such violent outbursts, in the context of colonialism and neoliberal capitalism, are simply breakdowns of pacification as opposed to breaks in peace.[114]

This accounts for the realm outside of humanity to which black peoples have been relegated in justification and production of global domination characterised by violence and marginality.[115] The deprivation of subjectivity normalised arbitrary death in its practices and social conventions.[116] Gordon contends that any attempt to change this state amounts to an act of violence since change requires visibility and visibility is violent when you are meant to be invisible through erasure.[117] This recalls the argument that eruptions amount to a breakdown of pacification which operates as a violence of subjugation.[118] Modiri references state sanctioned violence against through extra-judicial killings, torture and assault that is meted out to subdue service delivery protests, wage protests, evictions and demolitions.[119] Relating this back to the corporation we may,

> consider that personhood at the time that the legal personality of the company was first recognised had a particular profile. This is the profile of authority being the white man.[120] It is evident that the first companies were not owned or controlled by women or black people; did not carry on activities aimed at benefiting women or black people; were not sanctioned by the authority of women or black people; and status as a legal person at the time was not attributable to women or black people. The recognition of the legal personality of the company therefore, implies that the company could not be characterised as either a woman or black person.

[113] JA Gordon 'Theorizing Contemporary Practices of Slavery: A Portrait of the Old in the New' Paper presented at *American Political Science Association Annual Meeting* New Orleans 2012 in Baron et al. (n 107 above) 206.

[114] Baron et al. (n 107 above) 204.

[115] LR Gordon 'Through the Hellish Zone of Nonbeing: Thinking Through Fanon, Disaster, and the Damned of the Earth' *Human Architecture: Journal of the Sociology of Self-knowledge* 5, no. 12 (2007) 11.

[116] As above.

[117] As above.

[118] Baron et al. (n 107 above) 206.

[119] Modiri (n 96 above) 238.

[120] As above.

> Attribution of personhood meant attribution of the status of the white man. Therefore, within this colonial frame of reference the person that the legal person of the company is equated to is the white man. The company therefore entered the system of world power as a colonizer.[121]

Corporations have not only been complicit but have been directly instrumentalised to perpetrate racialised and gendered violence of varying forms. Even in the absence of visible armed warfare, poverty and inequality are violence and the perpetrators must be held accountable in order for justice to prevail. Therefore, when we conceptualise international crimes, we should account for the fact that the corporation does not operate in a vacuum. In the light of this conception of international crimes, I turn to considering what is contemplated by accountability.

3.2 How May We Understand Accountability Substantively? The Peace Versus Justice Debate as a Question of Immunity and Impunity

Having understood the corporation's instrumentality in perpetuating spectacular violence as well as the systemic violence of poverty and inequality as seen in the historicisation of the corporation in South Africa and Nigeria, we may turn to consider what accountability could entail in respect of corporate accountability for international crimes. In undertaking this exercise, we would benefit from a consciousness of what is framed as accountability but is substantively not. In other words, how can we understand accountability substantively?

In international criminal law the 'peace versus justice' debate has come to euphemise situations where realpolitik and pacification is favoured over justice for human beings. Bassiouni draws the parallel between 'peace' used in this context and realpolitik and parallels 'justice' to accountability.[122] Realpolitik can be described as the aim of political settlement without regard for moral and ethical outcomes.[123] Accountability on the other hand envisions conflict resolution through accounting for the

[121] Samaradiwakera-Wijesundara (note 4 above) 39–40.

[122] MC Bassiouni 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' *Case Western Reserve Journal of International Law* 35, no. 2 (Spring 2003) 191.

[123] As above.

truth, imposing sanctions against perpetrators, and providing redress to victims in a manner that encompasses both redistributive and retributive justice.[124] 'The pursuit of realpolitik may settle more immediate problems of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability and reconciliation'.[125] Bassiouni reveals that the resolution to adopt realpolitik strategies tends to take place during clandestine discussions or through deliberately complicated formalities and processes that are designed to manipulate the narrative and public perceptions.[126] In this way formalities are deliberately deployed to elide the realpolitik in operation and render norms, principles and institutions unenforceable due to opacity; or through designing deliberate administrative, logistic or monetary barriers to accessing institutions mandated to provide justice to reduce or nullify their efficacy.[127] The human rights movement that followed World War II (WWII) has crystallised the opposition between realpolitik and justice.[128]

'The advocates of realpolitik demand justice… as, at worst, a nuisance and, at best, a tool to achieve their goals'.[129] For example, realpolitik was at play in the international community's treatment of the Armenian genocide.[130] The preamble to the Hague Statute was used to attempt to frame the systematic killing of a civilian population as a violation of 'the laws of humanity' orchestrated by Turkish officials.[131] However it was rejected by the United States of America (US) and Japan as a violation of legal positivism, which was also the reason for the rejection of 1910 Treaty of Sevres which would have provided for the prosecution of Turkish troops (several of whom were already in British custody at the time).[132] However, it was the Treaty of Lausanne that was ratified instead, which carried an unpublished protocol granting amnesty to those that

[124] As above.
[125] As above.
[126] As above 192.
[127] As above.
[128] As above.
[129] As above 194.
[130] As above.
[131] As above.
[132] As above 195.

would have been prosecuted had the Treaty of Sevres been ratified.[133] This amnesty can be traced to the desire to secure Turkey's cooperation as a strategic ally against the communist Soviet Union.[134] Political interests trumped justice for the Armenians and, as Bassiouni reminds us, Hitler posed the question, '[w]ho now remembers the Armenians?' in 1939 serves as a reminder of the chilling consequences of realpolitik.[135]

While Nuremberg and Tokyo broke new ground '…the guiding vision for these prosecutions was political strategy'.[136] The ICTY also saw the prioritisation of realpolitik which resulted in a truce more than peace and may account for the massacres that followed in later years.[137] In questioning whether it is naïve to argue for accountability rather than realpolitik, Bassiouni notes, '… the complex truth of political violence, its harsh reality, has a way of resurfacing long after half-truths and misrepresentations encouraged by realpolitik have been voiced and officially accepted'.[138] As such we may regard the ICTY as having only partially secured accountability; having reshaped psychological, political and legal frames of reference for international criminal justice.[139] The ICTR did not prosecute persons associated with the incumbent government party (RPF).[140] The reservations have been attributed to dependence on government cooperation for operations.[141] Bassiouni warns,

> [n]ow that the advocates of realpolitik have realized that they can no longer eliminate justice from the political settlement equation, as was the case after World War I and II and so many cases thereafter, the danger is that justice will be co-opted, subverted, and used as a fig leaf to achieve accommodation. Even so, the efforts of advocates of realpolitik to barter and compromise justice go on, and impunity is the carrot that they offer

[133] As above.

[134] As above.

[135] As above.

[136] As above 197.

[137] As above 198–199.

[138] As above 200.

[139] As above.

[140] M Sirleaf 'The African Justice Cascade and the Malabo Protocol' *International Journal of Transitional Justice* 11 (2017) 83.

[141] As above.

> to leaders of conflicts who have committed terrible crimes, as a way of securing a political settlement.[142]

As such he contends that we should see the ICC not as something that will prevent injustice but rather as one means of striving for accountability.[143]

It may be argued that liberalism has been deployed as this fig-leaf to co-opt the values underpinning human rights into an institutional system of realpolitik that would render any meaningful realisation or accountability defunct. This is exacerbated by perceptions that the ICC is excessively immersed in domestic politics in Africa, and the focus on individual as opposed to systemic interventions create the impression that violations occur in a vacuum and absolve other contributors, such as corporate actors, of liability.[144] As such the concern is that reliance on the ICC may compromise Africa's efforts to develop independent and sustainable solutions to its challenges.[145] Gathii has highlighted how the preoccupation with the human rights corpus had shifted the Global South agenda from more pertinent questions of self-determination.[146] Propelled by this argument I have argued that recent the framing of Business and Human Rights (BHR) interventions play into states being 'played by the rules' to the extent that 'Third World states must submit to the authority and rules of the game, with the West as a rule-maker and player, in the aspirations of replicating the West as the universal ideal - thereby legitimating its superiority and authority while simultaneously delegitimizing its own'.[147]

On this issue of the implications of realpolitik on sovereignty of African states, Dyani-Mhango provokes us to consider the nuances of (head of state personal) immunity by considering the rationale being the equality of states preventing one state from claiming judicial authority over another, and safeguarding the sovereignty of a state by preventing

[142] Bassiouni (note 122 above) 204.

[143] As above.

[144] Sirleaf (n 140 above) 84.

[145] WM Matasi & J Brohmer 'Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis.' *South African Yearbook of International Law* 37 (2012) 252.

[146] JT Gathii '*International Law and Eurocentricity*' *European Journal of International Law* 9 (1998) 191.

[147] Gathii (n 146 above) 187; Samaradiwakera-Wijesundara (note 101 above).

interference under the guise of personal indictments of heads of state.[148] This nuance is especially valuable in the context of the apparent disproportionate focus on African heads of states for ICC intervention, falling short of targeting on the basis of consensual jurisdiction, but being conspicuous enough to warrant notice.[149] This becomes even more of a contention, as Dyani-Mhango points out, in the context of ambiguity on the part of the United Nations Security Council (SC) on the obligations of a party-state of the RS to surrender a non-party state serving leader.[150] In the context of the dynamics of the Global North and South it may even be argued that there is a degree of overreach on the part of the ICC given that three of the permanent members of the SC (US, China and Russia), and their allies, are beyond the reach of the ICC due to veto powers and non-ratification of the RS.[151]

While the *Al Bashir* case[152] raised much consternation about the issue of immunity the lingering question is not about who is being indicted, but who is not.[153] The corporation can be conceived as granting the natural persons behind the juristic personality de facto immunity by rendering the pursuit of profit banal.[154] Furthermore, it facilitates smoke-and-mirror evasion of accountability through allowing risk to be legally hedged through insurance, shell/liability vehicles in corporate structures and exponential networks of ownership through the proliferation of company groups across jurisdictions with infinite and compounded numbers of shareholders. Limited liability can in fact be argued to be a synonym for

[148] N Dyani-Mhango 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir' *Washington International Law Journal* 26, no. 3 (2017) 544–545.

[149] As above 542.

[150] As above 543.

[151] Sirleaf (n 140 above) 83.

[152] *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) see Dyani-Mhango (n 148 above) 543.

[153] The targets of international law have been African Heads of State rather than the corporations that finance and enable them for example in the case of Charles Taylor's diamond and timber corporate relations in Liberia; see B Meyersfeld 'Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate' 160–172 in C Rodriguez-Garavito (n 3 above) 178.

[154] B Stephens 'The Amorality of Profit: Transnational Corporations and Human Rights' *Berkeley Journal of International Law* 20, no. 3 (2002) 46.

impunity especially in the context of realpolitik operating to bar meaningful piercing of the veil to systemically intervene in the harm that corporations cause, as well as serving to obfuscate lines of authority and accountability. On what basis is this immunity that grants impunity justified? Not only is this immunity provided but it is sanitised of immorality through the instrument of the corporation as activities done in the putatively legitimate endeavour to maximise profits.[155] This operates in the context of colonial conquest having been exacted through the corporation as seen in the cases of South Africa and Nigeria.

Bassiouni reflects on the three interlocking dimensions of meaningful international justice being ideas (norms and morality), instruments (legal and institutional) and enforcement.[156] This is useful as it not only emphasises that justice is not possible without enforcement, but reminds us that ideas influence both instruments and their use. It appears that the discussions around corporate accountability all too often focus on the instrumentalisation of law without really confronting the norms and political will that supports the conception of the corporation as we know it now. These guidelines may assist in navigating the relationship between international criminal justice and self-determination.[157] Furthermore it provides a framework for what accountability that is meaningful and sustainable must entail.

4 Part III Considering the Available Mechanisms for Accountability for International Crimes

4.1 International Context: Corporate Accountability in the ICC

4.1.1 The Current Position

International precedent for corporate criminal liability is putatively attributed to the Military Tribunals at Nuremberg post World War II.[158]

[155] Samaradiwakera-Wijesundara (n 101 above).

[156] Bassiouni (note 122 above) 202.

[157] Bassiouni (note 122 above) 202; Gathii (note 146 above) 191.

[158] TJ Fokwa Jean 'In Search of or Direct Corporate Responsibility for Human Rights Violations in Africa: Which Way Forward?' unpublished PhD Thesis, University of Pretoria 2004 37; T van Deventer 'Criminal Prosecution of Corporates for Human Rights Violations.' *Without Prejudice* (December 2012) 9; German conglomerate and chemical firm IG Farben, as a producer of poisonous gas and facilitator of Germany's ability to wage

This has been criticised as no corporation was declared criminally liable during the trials and the RS does not extend jurisdiction directly over juristic persons.[159] The RS decision to exclude direct corporate criminal liability can be attributed to corporate conduct being reducible to individual human conduct.[160] It is argued that the aim of international criminal law is to hold individuals accountable for injustice and remove the devices, such as rank and office, which facilitate impunity and realpolitik.[161] In this sense Nuremberg is precedent for piercing the veil of sovereignty of the state too.[162] The choice to apportion liability individually was therefore deliberate and has the de facto effect of precluding business people from escaping criminal liability behind the veil of juristic personality.[163]

In addition to this barrier to direct liability is the traditional understanding of criminal law that provides that only human beings capable of criminal wrongdoing on the basis of capacity for *mens rea* (criminal state of mind).[164] The argument is that an abstract entity is incapable of *mens rea*. This also speaks to the Germanic origins of guilt derived from

war despite resource sanctions, appeared as a corporate defendant through its directors. Of twenty three defendants fourteen were found guilty and sentenced to imprisonment. They, unlike the others, were unable to raise the defence of necessity on the basis of having acted on their own volition in constructing an operation adjacent to a concentration camp for the purposes of drawing slave labour from it.

[159] MSA Wattad 'Natural Persons, Legal Entities, and Corporate Criminal Liability Under the Rome Statute.' *UCLA Journal of International Law and Foreign Affairs* 20, no. 2 (Fall 2016) 394 and 413.

[160] Since the aim of the RS was to secure human culpability, at the time many state parties did not recognise corporate criminal liability domestically, and buy-in to the RS may also have been jeopardised by insisting on a novel and underdeveloped extension of liability see Wattad (n 159 above) 415.

[161] Wattad (n 159 above) 394.

[162] Slye (n 49 above) 957.

[163] van Deventer (n 158 above) See Justice Robert H. Jackson, Chief U.S. prosecutor at the Nuremberg Trials, Opening Statement before the International Military Tribunal (21 November 1945), https://www.roberthjackson.org/collection/speeches/ (last visited: 21 November 2015) [https://perma.cc/LDZ2-B5MB] in Wattad (n 159 above) 392.

[164] Wattad (n 159 above) 393.

the condemnation of severely antisocial behaviour that warrants punishment in the interests of justice.[165] The logic of holding the individual behind the action liable rather than let a fiction/construct absorb the liability thereby shielding wrongdoers from the consequences of their conduct is sound. The limitation of this logic is the systemic operation of corporations that are not heterogeneous and often employ deliberately nebulous control and liability structures. That behaviour and mental state are co-constituted by and towards what Bakan describes at the pathological pursuit of profit.[166] To this end individual wrongdoers in a corporation could be identified and removed despite gains made by the corporation and this could have no impact on the operations of the corporation—because that's just what corporations do.[167]

A further limitation to consider is that individuals could be deliberately scapegoated, and expendable, attracted to the position by compensation designed to offset the risk attached. That said—it is true that direct (corporation as a person) and indirect (individuals in the corporation) liability is not mutually exclusive. The complexities of the nature of the corporation warrant careful consideration of what conduct and interests of the shareholders are sanitised by the very existence of the juristic person despite the consequences contributing to international crimes.[168] The corporation presents as a person that '… has neither a body to be kicked nor [a] soul to be damned'.[169] This supports the observation that the corporation is by design permitted to be pathologically

[165] M Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law.' *Journal of International Criminal Justice* 8 (2010) 910; Wattad (n 159 above) 398.

[166] Bakan (n 103 above) 158.

[167] As above.

[168] Consider the absence of liability of all the other stakeholders in the corporations present at Nuremberg and those that facilitated heinous activities.

[169] According to Cassim this expression often cited to demonstrate the fictive nature of the corporate person cannot be traced to a primary source but has been widely quoted and credited to Lord Chancellor Baron Thurlow in the late 18th see Farouk HI Cassim 'Introduction to the New Companies Act: General overview of the Act' in Farouk HI Cassim (ed) *Contemporary Company Law* 2nd ed. (2012) 31; *Century in Commissioner Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) 606; *Manong and Associates (Pty) Ltd v Minister of Public Works* 2010 (2) SA 167 (SCA) para. 4; see also Wattad (n 159 above) 400.

antisocial.[170] Nonetheless, the absence of direct liability does not necessarily translate to corporate impunity. The indirect liability may extend to shareholders who either personally commit the crime,[171] or facilitate its commission through aiding and abetting or providing resources such as fuel, weapons, finance, private security, and intelligence towards criminal activity.[172] Stahn describes aiding and abetting as controversial on account of the difficulties of separating regular corporate activities from criminal activities.[173] This further supports circumspection in the very design of the corporation. Nonetheless, the RS contemplates contribution or attempted contribution in any other way by a group of persons acting for a common purpose.[174] As such indirect corporate criminal liability is possible in respect of international crimes.

A practical challenge to this route, however, is that a corporation is not simply a group of people and that the central common profit making purpose is presented as innocuous. The requirement of 'intent and knowledge' needed to be proven in respect of international crimes may be difficult to establish in respect of individuals operating within a broader collective.[175] It is argued that 'organ liability' (directors, shareholders, etc.) or vicarious liability may be used to establish the state of mind of the corporation—but this becomes circular logic since individual liability would already have to have been established.[176]

4.1.2 Arguments for Reform

There are circumstances where the corporate veil is pierced in order to expose individuals to personal liability.[177] While these circumstances vary across jurisdictions this remedy tends to be regarded as exceptional which is not surprising since it undermines the fundamental premise of the corporation which is its distinct legal personality. The insistence of holding individuals rather than the corporation criminally liable appears

[170] Bakan (n 103 above) 158.

[171] Slye (n 49 above) 961.

[172] Art 25(3)(c) of RS; van Deventer (n 158 above); Wattad (n 159 above) 412.

[173] Stahn (n 92 above) 112–113.

[174] Art 25(3)(d) of RS; van Deventer (n 158 above).

[175] Wattad (n 159 above) 420.

[176] As above.

[177] Wattad (n 159 above) 398.

to be dissipating and several jurisdictions recognise corporate criminal liability in the twentieth century.[178] The drive towards recognition of direct criminal liability for corporations has been attributed towards anti-impunity human-rights movements and development of international criminal law.[179]

There are several arguments presented for direct corporate criminal liability. These include that corporations have financial resources that could provide for more meaningful reparations[180]; criminal liability enables greater moral and legal injunctions[181]; since corporations enjoy privileges on account of juristic personality, such as capacity to contract, they should enjoy corollary burdens such as capacity for *mens rea*[182]; corporate action has a greater potential harm[183]; systemic punishment is more effective for systemic conduct that results in harm[184]; the absence of recognition of direct corporate criminal liability allows corporations to contract with states for services that facilitate to perform criminal activity while simultaneously securing immunity from prosecution[185]; corporations' criminal conduct occurs across jurisdictions and thus requires coordinated state intervention in order to achieve enforceable redress, punishment and prevention[186]; corporations are easier to identify for criminal prosecution than individuals within a corporate structure[187] since individuals may die or be difficult to locate,[188] the accumulation of conduct of natural people may result in criminal conduct in a way that individual conduct does not,[189] and this kind of liability incentivises

[178] Stahn (n 92 above) 97.

[179] As above.

[180] Wattad (n 159 above) 398; Stahn (n 92 above) 120.

[181] RS Article 6; Wattad (n 159 above) 417.

[182] Wattad (n 159 above) 398.

[183] Slye (n 49 above) 960.

[184] As above.

[185] Wattad (n 159 above) 412.

[186] As above 416; Stahn (n 92 above) 120.

[187] Wattad (n 159 above) 398.

[188] As above.

[189] Slye (n 49 above) 960.

shareholders to exercise greater discernment when appointing directors (and determining corporate culture).[190]

Wattad suggests equivalent criminal sanctions for corporations who commit international crimes can be deployed in order to reach corporate property.[191] The equivalent of the death penalty or life imprisonment could be liquidation or asset forfeiture; social isolation could be reflected in prohibition of participation in public tenders/procurement.[192] The argument extends, since the right to human dignity is not directly implicated, that the onus for criminal liability may be lower than with natural persons.[193] Furthermore since the RS provides for forfeiture of assets derived directly or indirectly from a crime the existing infrastructure for this liability exists already.[194]

The idea of equivalent penalties on corporate assets, parallel to individual liability, is compelling however is not as straightforward as it may seem. There is often a complex nexus of legal and natural persons holding assets in a corporate structure—again often deliberately designed to funnel resources out of liability's way and concentrate risk in avoidance of liability. Consideration of how to disentangle these structures, potentially across continents, needs to be given. Furthermore competing claims on assets and unintended consequences of actions like liquidation are relevant. The most vulnerable in the corporate food chain are most likely to suffer in the case of liquidation—while fines may be passed down to consumers through price increases and employees through retrenchment. Those who actually benefited from the criminal corporate conduct may go entirely unscathed.

Stahn regards it a weakness in international criminal justice that corporate malfeasance has not been investigated and prosecuted on a wide scale given the profiteering from and financing of atrocities.[195] Modern corporate criminal liability remains focused on individuals and how systemic

[190] Wattad (n 159 above) 398.

[191] Wattad (n 159 above) 395. Part VII of the RS provides for forfeiture of assets derived directly or indirectly from a crime.

[192] Wattad (n 159 above) 400.

[193] Kremnitzer (n 165 above) 915; Wattad (n 159 above).

[194] Part VII of the RS; Wattad (n 159 above) 395.

[195] Stahn (n 92 above) 123.

injustice can be addressed is still unresolved.[196] The role of the ICC is likely to remain minimal in this pursuit.[197] To this end direct corporate accountability may have the effect of increasing impunity rather than accountability, especially to the extent that liability (as in a finding of responsibility or guilt) does not necessarily translate to accountability (as elaborated upon in Part II). This presents a tension between atomised responsibility that vests in individuals and systemic accountability. What is important to note is that direct corporate liability does not translate into a systemic intervention. Thus amending the RS to extend to corporate criminal liability is not a solution to the problem of corporate impunity.[198] There is arguably no need to do so as corporations may be held liable through individuals and through domestic legislation. Wattad asserts that there is no fundamental difference between holding a corporation criminally liable at international and domestic levels.[199] I agree with this for reasons detailed below. There are also good reasons to exclude direct corporate liability, while direct and indirect liability is not mutually exclusive, the convenience of the former may give way to further realpolitik rather than accountability.

4.2 Corporate Accountability in the Domestic Context

4.2.1 The Current Position in Foreign Domestic Courts (National Courts Outside of Africa)

In understanding the available remedies for corporate accountability in domestic courts we may again depart from the pivot of South Africa and be informed by similar experiences in Nigeria. Jain and Meyersfeld make the point that there is something to be learnt from failed attempts at corporate accountability.[200] *Kiobel v Royal Dutch Petroleum Company* (*Kiobel*) concerns liability of the SPDC for aiding and abetting the Nigerian government in committing crimes against the Ogoni Peoples of the Niger Delta by providing resources including vehicles and finance.[201] It

[196] As above.

[197] As above.

[198] Wattad (n 159 above) 416.

[199] As above 417.

[200] Jain & Meyersfeld (n 35 above) 430 and 433.

[201] As above 430.

was brought in terms of the Alien Tort Claims Statute (ATCS) by Nigerian Nationals with political asylum in the US precluded from a fair trial in Nigeria due to the incumbent government's implication.[202] While not speaking to criminal liability the case provides important context on the operation of realpolitik in international justice manifesting in domestic courts. The claim was brought on the grounds of aiding and abetting the violation of the law of the nations by inter alia committing crimes against humanity. The ATCS carves out jurisdiction for delict/tort claims to be brought by non-US citizens for violations by the US of its obligations in terms of the law of the nations or agreements.[203] Despite the range of issues before the court being concerned with the law of the nations it elected to 'avoid making decisions which would offend the sovereignty of a nation or be inconsistent with US foreign policy relations'.[204] This is reminiscent of what the South African government submitted in respect of the *Khulumani* ATCS litigation, which I return to below, and begs the question of what that foreign policy is if it is admittedly potentially consistent with atrocities.[205] The court essentially took a formalistic and antiquated approach in the interpretation of the ATCS, even ignoring some of its own precedent in the process, to hold that it doesn't have jurisdiction over conduct in another territory in these circumstances.[206]

While judgement does not preclude corporate accountability in future, Jain and Meyersfeld ask the question of whether it is logical to seek 'economic justice' from those who regard the conduct of corporations as 'business as usual' (where the corporations activities are viewed as legitimate if not valued), have incentive not to hold corporations to account (and rather benefit from exploitation and weak regulation) and actively participate in concentrating power and resources in the Global North?[207] *Kiobel* is not exceptional. US courts dismissed ATS claims against Rio-Tinto, an Anglo-Australian mining corporation, for human rights abuses in the South Pacific and Khulumani's claims against corporations that aided and abetted apartheid atrocities; while United Kingdom (UK)

[202] As above.

[203] As above.

[204] As above 434.

[205] *Khulumani v Barclays National Bank Ltd* 2007 504 F 3d 254 (2d Cir 2007).

[206] Jain & Meyersfeld (n 35 above) 438.

[207] As above 443.

courts dismissed claims by South African mineworkers against UK-based mining companies for human rights violation is South Africa.[208] Despite the absence of accountability for historical (let alone ongoing) atrocities, countries like South Africa continue to look to these same jurisdictions for direction on how to frame its corporate law and even interventions designed at achieving corporate accountability.[209] This does not make it unsurprising given the colonial and imperial reach of Western hegemony and the infrastructure it entrenches.[210]

Mutua's 'savages-victims-saviours' metaphor to represent the international narrative about African states, their citizens as victims (of the state, tradition and culture) and saviours as the human rights corpus itself (represented by NGOs and the enlightened West) is used to expose the fronting as saviours for the propagation of liberal thought and philosophy towards normalising and institutionalising subordination.[211] In this way they serve as instruments of violence.[212] As such the '[ATCS] claims…reinforce the image of the US courts as a beacon of global human rights'.[213] This beacon may share more in common with a jailhouse floodlight.

While *Khulumani* can be reflexive of the limitations of seeking justice outside of South Africa, it also evidences that the interests of the state are not always aligned with those of its peoples. At the time of the *Khulumani* litigation in the US the then Minister of Constitutional Development and Justice, Penuell Maduna, lodged an ex parte application as an amicus curiae advocating for the dismissal of the case on the basis that the TRC had already addressed this political issue; and that failure to dismiss the case would have adverse consequences for foreign direct investment into South Africa.[214] Prior to this, the then President of South Africa Thabo

[208] As above 449.

[209] T Mongalo 'South Africanizing Company Law for a Modern Competitive Economy' *South African Law Journal* 121, no. 1 (2004) 115–116; JP Ongeso 'Corporate Accountability in South Africa: Sharpening the Role of Criminal Law' *South African Journal of Criminal Justice* 29, no. 3 (2016) 243.

[210] Sibanda (n 95 above) 495–497.

[211] Mutua (n 11 above) 204; Jain & Meyersfeld (note 35 above) 445.

[212] Baron (n 107 above) 206.

[213] Jain & Meyersfeld (n 35 above) 446.

[214] N Bohler-Muller 'Against Forgetting: Reconciliation and Reparation After the Truth and Reconciliation Commission' *STELL LR* 3 (2008) 466 474–475; *In re*

Mbeki is reported to have opposed the litigation on the basis that it interferes with South Africa's sovereign entitlement to deal with the legacy of apartheid in accordance with internal politics and constitutional arrangements.[215] Davis notes how the South African government's insistence that the case be dismissed lest economic relations with the US be jeopardised gives the impression of neo-imperialism.[216] This would explain why, rather than simply supporting the litigation in favour a possible compensatory award to South Africans who have suffered under apartheid, the government could allow itself to be positioned in opposition to those interests in the interests of maintaining good favour with the economic powers that prevail.[217]

4.2.2 The Current Position in Domestic Courts (Courts Within South Africa)

The RS has been domesticated into South African Law.[218] This means the South African government has an obligation to investigate and prosecute international crimes.[219] In addition to this South Africa recognises international law, both agreements and customary international law, as the law of the land.[220] There is also a peremptory obligation to consider international law when interpreting the Constitution of the Republic of South Africa, 1996 (Constitution) and to favour interpretations that are consistent with international law.[221] Precedent suggests that this may extend to private actors as well.[222]

South African Apartheid Litigation, 346 F Supp 2 d 538, 542 (SDNY, 2004); Samaradiwakera-Wijesundara (note 4 above).

215 R Davis 'General Motors concedes to Khulumani in apartheid reparations case' https://www.dailymaverick.co.za/article/2012-03-01-general-motors-concedes-to-khulumani-in-apartheid-reparations-case/#.WoVii4Nua01.

216 As above.

217 Samaradiwakera-Wijesundara (note 4 above).

218 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act).

219 Dyani-Mhango (n 148 above) 561.

220 Sections 231 and 232 of the Constitution.

221 Section 39 of the Constitution.

222 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October

How far the domestic accountability can go depends on political will, which becomes murky ground given the economic, political and social power corporations wield.[223] As we have seen, states, including South Africa, generally have been reluctant to extend criminal liability over corporations even when domestic law enables this in order to protect economic and political interests.[224] On that basis states have more incentive to protect or even collaborate with corporations over protecting the human rights interests of affected people even as citizens.[225] Policy plans in the Global South are not always aligned with poverty eradication and that corporations are not in the habit of channelling profit into, rather than out of, impoverished countries.[226] This is part of the problem with the proposed Business and Human Rights (BHR) model that places the obligation on states to protect human rights while corporations only have voluntary obligations.[227] Even on paper this appears to be a contradiction in terms given that an obligation traditionally denotes mandatory rather than voluntary conduct.

George recognises that international and foreign law would reasonably be apprehended with circumspection if not disavowed as a product of colonialism by African states but reflects on how South Africa has both embraced it and innovated '…international law through reconciling indigenous and international normative concepts in revolutionary ways that advance human dignity'.[228] This is an approving reference to the Constitutional Court's Ubuntu jurisprudence. The question of why reconciliation is desirable or necessary is not often interrogated. While seemingly innocuous it may carry within it, if uncritically resorted to,

2014); Jain & Meyersfeld (n 35 above) 453 concerning allegations of torture having taken place in Zimbabwe, with no indication of action by the Zimbabwe authorities, resulting in an obligation on the South African Police Service to investigate and prosecute on the basis of the ICC Act and Constitutional obligations.

223 Wattad (n 159 above) 413. Stahn (n 92 above) 107.

224 Wattad (n 159 above) 413.

225 As above.

226 B Meyersfeld 'Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate' 160–172 in C Rodriguez-Garavito (n 3 above) 178.

227 As above.

228 ER George 'International Law and African Judiciaries: The Example of South Africa.' *American Society of International Law Proceedings* 104 (2010) 329.

dilution, assimilation and pacification—a kind of realpolitik.[229] It's this impulse to reconcile rather than evaluate against. That is to say to centre indigenous knowledge systems and filter out that which is incompatible. I will return to how regional mechanisms may have been more successful at achieving this than South Africa's domestic courts. For now, I will proceed to consider the technical framework for corporate accountability.

Juristic persons including the state and corporations are bound by the Bill of Rights.[230] The Criminal Procedure Act (CPA) provides that liability can follow a director or servant of a company in terms of law or at common law, for an act, with or without intent instructions or permission, express or implied, given by a director or servant of that corporate body, or any omission with or without particular intent in respect of an act that ought to have been performed by or on his instructions given by a director or servant of that corporate body in exercise of his powers or performance of his duties or in furthering the interests of the corporation.[231] Knowledge is not a requirement on the part of the corporation.[232] Farisani points out that this creates a reverse onus to the extent that the director or servant involved is deemed to have committed a crime which potentially violates the presumption of innocence.[233] While this is perfectly sound logic in the abstract, placed in context, this would entail protecting the accused and generating an easy avenue for reasonable doubt in the nebulous nexus of organisational and group conduct. If it were true that this reverse onus provision were also inconsistent with the Constitution and invalid it would essentially render defunct statutory vicarious criminal liability for corporations. Unless followed by a move to lower the standard of proof in respect of corporate misconduct. Farisani does not address the implications of the corporation in this assessment.

[229] Madlingozi (n 28 above) 124; Baron (n 107 above) 206.

[230] Section 8(2) of the Constitution of the Republic of South Africa, 1996 (Constitution).

[231] Section 332(1) of the Criminal Procedure Act 51 of 1977 (CPA).

[232] Ongeso (n 209 above) 234.

[233] Section 332(7) CPA; DM Farisani 'Corporate Criminal Liability in South Africa: What Does History Tell Us About the Reverse Onus Provision?' *Fundamina* 23, no. 1 (2017) 17; *S v Coetzee* 1997 SACR 379 CC where the court held that s 332(5) of the CPA was unconstitutional and invalid to the extent that the reverse onus violated the presumption of innocence in terms of Section 35(3)(h) of the Constitution.

This begs the question of whether this is a move towards greater corporate impunity—what about the victims of corporate crime?[234]

4.2.3 *Arguments for Reform in Domestic Courts (Within South Africa)*

The fact that the RS does not extend jurisdiction over direct corporate criminal liability does not mean that domestic courts cannot.[235] Ongeso advocates for direct liability as it accounts for the complexity of the corporate structure translating to actions being the compounded efforts of groups of individuals.[236] He identifies a gap in the statutory regime in that holding and subsidiary corporations are not addressed.[237] Since these are each independent juristic persons the implications are that they are not liable for the actions or related corporations unless there are grounds for piercing the corporate veil in terms of the Companies Act, 2008 or Common Law.[238] A further gap that I must point out is that shareholders are not covered in terms of the CPA's statutory criminal liability. The implications of this are also far reaching since it is often the shareholders that appoint and influence if not control the board of directors, and whose interests form the bulk of what is regarded as the best interests of the company, which interests the directors have a fiduciary obligation to honour.[239] Ongeso suggests that a direct model of corporate criminal liability for South Africa would harness the state's duty to protect people against human rights violations and that criminal law would be an effective instrument for enforcement.[240] He further suggests

[234] The fact a parallel is drawn between the callous apartheid reverse onus provision without consideration of the historical power position of the corporation and the need for accountability, as well as the benefits that directors and shareholders draw from corporate actions including maleficence, again runs the risk of missing the mark.

[235] Wattad (n 159 above) 412.

[236] Ongeso (n 209 above) 231.

[237] As above 234.

[238] Section 20(9) of the Companies Act allows for piercing the corporate veil where there has been 'gross abuse of the juristic person' and does not preclude common law piercing of the veil.

[239] FHI Cassim 'Introduction to the New Companies Act: General Overview of the Act' in FHI Cassim (ed) *Contemporary Company Law* 2nd ed. (2012) 31.

[240] Ongeso (n 209 above) 243.

taking guidance from jurisdictions that provide for direct corporate criminal liability including Australia's assessment of 'corporate culture' which includes policy, conduct and practice to deduce whether the corporate culture facilitates criminality,[241] and the UK's standard of the 'reasonable company' measured to include oversight by senior members over junior members.[242]

Other than the argument that criminal liability packs more of a punch and that direct liability allows for consideration of collated collective action there is no decisive case for direct criminal liability being a necessary tool for corporate accountability. More particularly the matter of evasion of liability by human actors is not addressed. While it may be appreciated that this is not mutually exclusive—attention to this detail is important to not trade one form of impunity for another—especially accounting for the convenience that only pursuing the corporation will provide legal practitioners. Furthermore, neither the existing nor proposed regime accounts for the systemic actors and their interests in maintaining poverty and inequality.[243] As far as the regulatory framework of South Africa goes despite mention of social responsibility and human rights vocabulary permeating the traditionally 'private law' space—without an intervention in business as usual—it remains short of a systemic intervention.

[241] As above.

[242] As above 244.

[243] Jain & Meyersfeld have given us the counter-argument to logic in the global context - why approach those who benefit from the status quo to change it? (Jain & Meyersfeld [n 35 above] 443) The same question may be asked in the domestic context. The Constitution as it stands represents a political commitment and is not divorced from political will but is co-constitutive of it (see Sibanda [n 95 above] 495–497 and S Sibianda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' *Law, Democracy & Development* 24 [2020]); The question in this context is why Section 8(2) or any other domestic legal instrument would be used to dismantle the privileges of corporate extraction upon which South Africa was built? (see Terreblanche [N 31 above] 63–71) and MP More, More 'Fanon and the Land Question in (Post) Apartheid South Africa' in Nigel C Gibson (ed) Living Fanon: Global Perspectives [2011] 170).

4.3 Regional Context: The ACJHPR After the Malabo Protocol

4.3.1 The Current Regional Position

Any instrument is dependent on the will of the person with the power wielding it—this requires a paradigm shift that may begin with the question of whether a juristic person should be a person at all or whether the human beings that animate it should be held to account for their conduct. This would require a reconsideration and imagination of business relations, in a superficial sense that may recognise human beings' positive obligations towards each other individually and as collectives, and that harmony in society cannot be achieved till poverty and inequality is urgently addressed. This places the impetus on us as human beings to craft instruments that serve society and human welfare, not carve out of the blood, sweat and sorrow of fellow human beings towards the unsustainable and environmentally catastrophic putative prosperity of a few. The same ideological currents that prevent corporate accountability at an international level appear to persist at the domestic level; and this can be situated within the colonial paradigm of global power relations. Therefore, even for states to reimagine the parameters and content of juristic personality and accountability of persons—there appears to be a need for a value driven collective shift.

A starting point to this may be present at the regional level.[244] The infrastructure for regional cooperation already exists such as the African Court of Justice and Human and Peoples Rights (ACJHPR) in terms of the African Charter on Human and Peoples Rights (African Charter), and sub-regional bodies such as the Court for the Economic Community of West African States (ECOWAS) and South African Development Community (SADC).[245] Article 21 of the African Charter provides 'All **peoples shall freely dispose of their wealth and natural resources**. This right shall be exercised in the **exclusive interests of the people**. In no case shall people be deprived of it'. Regional coalitions and NGOs also have capacity to weigh on accountability such as the African Coalition for Corporate Accountability (my emphasis).[246] The Treaty of the SADC (SADC Treaty) explicitly includes objectives to, in terms of Article 5,

[244] Jain & Meyersfeld (n 35 above) 452.

[245] As above.

[246] As above.

> (a) promote sustainable and equitable economic growth and socio-economic development that will **ensure poverty alleviation with the ultimate objective of its eradication**, **enhance the standard and quality of life** of the people of Southern Africa and **support the socially disadvantaged through regional integration**; (b) **promote common** political values, systems and other shared **values which are transmitted through institutions which are democratic**, **legitimate and effective**;… (d) **promote self-sustaining development** on the basis of **collective self-reliance, and the interdependence** of Member States; (e) achieve complementarity between national and regional strategies and programmes; (f) promote and **maximise productive employment and utilisation of resources** of the Region; (g) achieve sustainable utilisation of natural resources and effective protection of the environment; (h) **strengthen and consolidate the long standing historical, social and cultural affinities** and links among the people of the Region. (my emphasis)

A commitment to accountability for corporate actions is evidenced in the AC's decision on the communication on the *Ogoni* case[247] alleging that the military government of Nigeria condoned and facilitated violation of human rights of the Ogoni peoples in its practices and policies in aid of the joint efforts of the NPC and SPDC.[248] Noteworthy in the case is the absence of hierarchy or categorical application of the various civil, political, economic, social and cultural as well as collective rights in the African Charter—where there is no provision for progressive realisation of rights.[249] Thus the African Charter advocates for an urgent rather than incremental approach to the realisation of rights that places a positive obligation on states to act. Conduct of private parties or parties that cannot be identified can be imputed to the state for failure to act with the requisite care to prevent or address a violation of rights.[250] The Commission also recognised a minimum core that can be described as an 'obligation…not to destroy or contaminate food sources; not to allow private parties to destroy or contaminate food sources; and not to prevent people's efforts

[247] Communication 155/96, The Social and Economic Rights Action Center and the Center Economic, and Social Rights/Nigeria; http://www.cesr.org/ESCR/africancommission.htm. It was communicated to the parties on 27 May 2002.

[248] Coomans (n 36 above) 749.

[249] As above 750–751.

[250] As above 755.

to feed themselves'.[251] Although there was decisive condemnation of the Nigerian government for its conduct, a lacuna on the accountability of the corporations involved since the African Commission's jurisdiction did not extend to them.[252] However, the Malabo Protocol, which provides *inter alia* for the ACJHPR to extend to corporate criminal liability, has far-reaching implications on the direction taken by the AC.[253]

4.3.2 Arguments for Reform/pending Reforms in the Region

Sirleaf suggests that the Malabo Protocol presents an important alternative regional vision of criminal justice that seeks to address the circumspection around biases in the prevailing international criminal justice system.[254] The prevailing credibility issues arise from the concerns that 'political considerations predominate over criminal ones..' and the ACJHPR is less likely to reproduce the geopolitical hierarchies that the ICC does and does not carry the taint of neo-colonial power dynamics.[255] The ACJHPR would also theoretically be in a position to navigate between the extremes of the removed and geopolitically influenced international courts and the overfamiliarity and susceptibility to elite influence of domestic courts.[256] This could avoid the custodial power relations of the international courts that replicate the colonial realpolitik and such transformations in the global order have amounted to reconfigurations rather than radical paradigm shifts[257]; as well as the concern that states themselves have not transcended colonial infrastructure and attendant dynamics of power.[258]

The Malabo Protocol envisages three sections of the ACJHPR that encompasses general affairs, human rights and international criminal

[251] As above 757.

[252] As above 759–760.

[253] Malabo Protocol African Court of Justice and Human Rights, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (11 June 2000)/Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

[254] Sirleaf (note 140 above) 71.

[255] As above 74.

[256] As above.

[257] Madlingozi (n 28 above) 124.

[258] As above.

law.[259] It is innovative on many levels including the provision for forcible intervention in the case of serious human rights violations and the positive duty on states to respect and protect human rights.[260] The extension of jurisdiction of the crimes covered '…recognises that massive violations do not exist in a vacuum, but instead are embedded in systems of criminality…' and through regional integration provides a means to navigate colonial borders that have precipitated conflict and instability in the region.[261] The jurisdiction of the court would extend to the currently recognised international crimes as well as '…crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in people, trafficking in drugs, trafficking in hazardous waste and illicit exploitation of resources'.[262] Furthermore, forms of responsibility extend to '…initiating, instigating, organising, directing, facilitating, financing, counselling or participating as principal, co-principal, agent or accomplice'.[263] It challenges corporate immunity by providing for corporate liability while granting serving heads of state immunity.[264] The Malabo Protocol provides for complementary jurisdiction with national courts.[265] The provision for 'hybrid courts' that incorporate international and national judges and staff and synthesise national and international law may provide for more efficacious interventions that are received as more familiar and credible—and potentially pose less of a threat to sovereignty.[266] The Malabo Protocol is also able to leverage the mutually reinforcing potential of regional stability and compliance.[267] A further innovation is the obligation to act positively to prevent the commission of international crimes.[268] This has the potential to allow for both recognising the systemic nature of harm perpetrated

[259] Article 6A Malabo Protocol; Matasi & Brohmer (note 145 above) 254.

[260] Sirleaf (note 140 above) 73.

[261] As above 76.

[262] Article 28A; Matasi & Brohmer (note 145 above) 254.

[263] Sirleaf (note 140 above) 76.

[264] Article 46C and Article 46A of the Malabo Protocol; Matasi & Brohmer (note 145 above) 254.

[265] Matasi & Brohmer (note 145 above) 262.

[266] Sirleaf (note 140 above) 81; Matasi & Brohmer (note 145 above) 267.

[267] Sirleaf (note 140 above) 87.

[268] Article 4(h); Sirleaf (note 140 above) 76.

by corporations, in addition to the spectacular instances of harm, and allowing for corporate criminal accountability that emphasises redress.

The ACJHPR seems to be responsive to an international criminal system that, at best, has served Africa to a limited extent, and at worst has inhibited its independence. It is not clear how the ACJHPR would relate to the ICC, but it does seem that *pacta sunt servanda* would bind state parties to their obligations in terms of the RS yet withdrawal from the RS would only be a partial solution to concerns around infringement of sovereignty since non-party states would be able to be reached through the SC.[269] It is possible that Lorde's provocation that 'the masters' tools will never dismantle the masters' house' is being adopted on the one hand, with reduced reliance on the ICC,[270] and altered on the other hand to the extent that the tools attributed to the master may very well dismantle his house if they are not in his hands pursuing the works that he envisages. Nonetheless, the challenge of enforceability looms large as does the caution against allowing direct criminal liability of corporations to translate into greater impunity for individuals who operate behind the veil of the juristic person. The fundamental and significant difference between proposed direct liability at international and domestic levels considered thus far, and the Malabo protocol is the latter's contextualisation of criminal liability operating systemically as opposed to in isolation—while recognising that individuals have obligations to safeguard the well-being of others. Despite the potential that the ACJHPR has to be an accountability mechanism towards justice—it will at best be a curative treatment or balm to the broader problem of corporate harm.

4.4 Prevention Is Better Than Cure: African Philosophy on Personhood

Returning to our understanding of substantive accountability in Part II, requiring ideas (norms and morality), instruments (legal and institutional) and enforcement, as per Bassiouni,[271] we may observe that much focus has been placed on the instruments and enforcement, but not very much on the ideas that inform them—especially towards securing

[269] Matasi & Brohmer (note 145 above) 264.

[270] A Lorde *Sister Outsider:Essays and Speeches by Audrey Lorde* 1984 110–111.

[271] Bassiouni (note 122 above) 202.

systemic redress. This can be seen to be attributable from the tendency of liberal conceptions of the legal framework's individualistic ahistorical conception accountability that elides the norms and morality premised on colonial and imperial interests that make poverty and inequality not only a consequence of the world order, but a necessary condition for it.

The paradigm upon which the regional mechanisms cited above operate may provide a hint of the paradigmatic shift fermenting that may assist in achieving substantive accountability of corporations through the interrogation of the legitimacy of juristic personality and the re-imagination of the corporation in its entirety. This paradigm centres collective efforts and accountability to well-being over atomistic individualism and the pathological pursuit of profit. This may be attributed to the ethical influence of African philosophy. While being careful to avoid creating the impression that either 'African' or 'African philosophy' is homogenous or conflating the nuances, I draw here on what has been identified as a unifying thread within these bodies of knowledge.[272] That thread is the centrality of character. On the one hand, generally rejecting the idea that personhood is an essentialist, absolute and static category.[273] On the other hand, recognising that is attained in the process of living in community with other persons and determined through conduct (as obligations to other persons rather than absolute entitlements of oneself).[274]

I shall refer to *Ubuntu* to encapsulate the adage *umuntu ngumuntu ngabantu* that iterates across the continent conveying, non-exhaustively on account of limits of English to capture the bounds of its meaning, 'to be a human be-ing is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them'.[275] As such,

[272] C Ngwena *What Is Africaness?:Contesting Nativism in Race, Culture and Sexualities* (2018) 17.

[273] IA Menkiti. 'Person and Community in African Traditional Thought.' In *African Philosophy, an Introduction* 1984 176; K Gyeke 'African Ethics' https://plato.stanford.edu/entries/african-ethics/.

[274] As above.

[275] MB Ramose *African Philosophy Through Ubuntu* 1999 52; This has been paralleled to *mutunchi*, *iwa* and *agwa* in the context of Nigeria see V Mabvurira 'Hunhu/ Ubuntu Philosophy as a Guide for Ethical Decision Making in Social Work.' *African Journal of Social Work* 10, no. 1 (2020) 73.

> Umuntu must be the embodiment of Ubuntu because the fundamental ethical, social and legal judgement of human dignity and conduct is based upon Ubuntu. Ubuntu is the principle that we act humanely and with respect towards others as a way of demanding the same from them. Similarly, law to be worth its name and to command respect must evince Ubuntu.[276]

This does not translate to a crude utilitarianism which dissolves the individual as, notwithstanding the concern with collective well-being, kindness and humanness features in the centrality of the maintenance of justice and harmony.[277] This does not advocate for superficial politeness and denial of conflict but rather, '[j]ustice as the restoration of equilibrium…'[278] Discharging our ethical behaviour as persons, in relation to ourselves and others, makes us a person in an ongoing process and journey through life. The corollary is that when a human being displays '…conduct very often appears cruel, wicked, selfish, ungenerous or unsympathetic…' they would be described as 'not a person' (e.g. in Akan '*onnye onipa*' or in Sotho 'gase motho').[279]

Even this admittedly over-simplified account of *Ubuntu* carries far-reaching implications for law and the societies that it constitutes.[280] For the purposes of this chapter we can draw the following. Regional instruments call on us to be attentive to our positive obligations to the welfare of fellow human beings as an urgent commitment, that we do not operate in silos but are interconnected and that justice has retributive, reparative and restorative dimensions that must be addressed in order to achieve equilibrium. Therefore, the harm perpetrated by corporations cannot be justified by the pursuit of profit or eventual hope of development—but immediate interventions are required to interrupt the harm that began through colonial enterprising and continues through the instrument of the corporation. Rather than justify the corporation based on perceived

[276] MB Ramose 'An African perspective on justice and race' 2001 https://them.polylog.org/3/frm-en.htm, para. 8.

[277] Molema *The Bantu: Past and Present* 1920 116 in Gyeke (n 273 above).

[278] Ramose (n 276 above) para. 4.

[279] Gyeke (n 273 above); Ramose (n 275 above) 53.

[280] Referring here to Sibanda's call to consider the Constitution as an act of constituting and think about the implications of what it means to constitute a society (see Sibanda [n above 243]).

good, overlooking the embedded harm, is the option to innovate ways beyond the corporation that do not derogate from personhood.

If we read this together with the adage '*Kgosi ke Kgosi Ka Batho*' that can be understood to mean that 'the source and justification of royal power is the people'.[281] We can extrapolate that sovereign power is derived from the people and that there is an obligation on states to ensure justice. This includes through the accountability of persons for the use of their power and, if needs be, curtailment of the parameters of that power. That is to say—these are grounds to interrogate whether the recognition of the personhood of the corporation is justified given how this has allowed ultimately people to conduct themselves in an inherently antisocial manner, and allowed past violations to go without redress. A detailed engagement with the implications of this is beyond the scope of this chapter, but what is important to illustrate is the possibility and importance of a paradigm shift that enables us to think beyond regulating the corporation within the existing paradigm to reimagining the corporation within a paradigm that centres human being-becoming that would not justify a pathological pursuit of profit at the expense of human well-being nor dare call such pursuit amoral given the injustices facilitated by this approach.

In summation the consequences of this shift, cursorily, under the current legal paradigm the juristic person cannot simply be a person by incorporation but must become one through its conduct. The implication is that it would lose this entitlement if it caused harm to other persons (especially if it were committed to its own profit over well-being). The furthermore fundamental implications are that juristic personhood of an abstract entity would not be permissible at all—since it removes from people that animate it the accountability for their conduct—and an entire restricting of economic relations would be in order.

5 Concluding Thoughts

The recurrent challenges around securing corporate accountability crystallises into the question: Why strive to hold corporations accountable for abusing their power when it is available, if not incumbent, on authorities to curtail the parameters of their power at the outset? Rather than

[281] Ramose (n 275 above) 52–53.

departing from the premise that corporations and juristic personality as we know it is legitimate and absolute/perennial/inevitable why not reverse the onus, given that corporate power is a concession and that concession has been used for nefarious purposes, to require that corporations must comply with obligations and provide details of the nexus of accountability? This may force corporations to keep their operations small enough to manage and thereby also allow for greater competition and distribution of work. If the rejoinder is that this is not pragmatic because corporations must be incentivised to operate in a jurisdiction (i.e. we need them more than they need us) then we must concede that we are trapped in a race to the bottom and accountability, inimical to distinct personality and its attendant limited liability, is a farce since people controlling corporations will continue to dictate the terms that are most conducive to their interests. All countries are susceptible to this—including economic giants in Africa as precedent has shown. A further possibility is revising limited liability all together and simply not granting distinct personality to the corporation.[282] This would avoid the displacement of liability onto vulnerable people and ensure accountability.

In this paper I have contended that the meaning of international crimes extends to global poverty and inequality and that substantive accountability must be sought over realpolitik when establishing corporate criminal liability. I have also made the observation that the trend towards direct corporate liability may increase rather than decrease impunity. This is especially so if it is applied in a manner that is uncritical of the instrumentalisation of corporate juristic personality for the precise purposes of sanitising the evasion liability by human actors and beneficiaries. In other words the systemic harm must be accounted for.

Regional mechanisms may prove more effective for these purposes than international or domestic platforms given the power of concerted and collective action, underpinned by shared values, to counter the operations of realpolitik and pervasive colonial and imperial dynamics of power. Furthermore, that these mechanisms gesture towards an entirely different ethical paradigm—that of African philosophy—provides the prerogative to rethink the parameters of juristic personality that enables the concentration of power in the corporation and ultimately immunises human beings from accountability.

[282] P Ireland 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' *Cambridge Journal of Economics* 34 (2010) 839.

Justice does not exist in a vacuum. Like eating and breathing to sustain the body of a person—justice sustains the being. As much as we cannot put off eating and breathing, we cannot put off justice. The notion that there should be 'African solutions to African problems' read in this context disavows accusations of parochialism in favour of revealing the emancipatory and harmonising potential of African knowledge systems and the values systems embedded therein. This is a challenge to liberate ourselves from taking for granted the neutrality of instruments, such as the corporation, in order to interrogate the underlying norms and ideology against the value systems we wish to inculcate and objectives of personhood and human well-being we wish to nurture.

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