11 Multinational Corporate Complicity

A Challenge for International Criminal Justice in Africa

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11.1 Introduction

There have been debates about the legitimacy of the focus by the International Criminal Court on crimes committed in Africa in comparison with other troubled regions of the globe. There have also been debates about whether there may be alternative, perhaps more appropriate, mechanisms for advancing peace, order and good governance in Africa. There is, however, another issue relating to the relationship between the Court and Africa which has attracted less attention: the Court's exclusive focus on local, African perpetrators of international crimes to the neglect of external parties who may arguably share responsibility for these crimes: in particular, multinational corporations. The Rome Statute of the International Criminal Court (ICC) does not at present permit the prosecution of corporations. Arguments are presented in this paper for amendments to the Statute in order to introduce corporate liability and to bring the characteristic modes of corporate involvement in international crimes within the scheme for accomplice liability.

The first references to the ICC concerned allegations of crimes committed in Africa by African perpetrators. All the resulting arrest warrants issued by the Court have been directed at these alleged local, African perpetrators.[1] Yet, attention to international crimes committed on African soil does not require a preoccupation with crimes committed only by Africans. Even if the perpetrators of crimes are Africans, external parties may be linked as accomplices. Such links are most likely to occur in cases where international crimes are

1 See Uganda: *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05; Congo: *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07; Sudan: *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Case No. ICC-02/05-01/07; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09*; The Prosecutor v. Bahr Idriss Abu Garda,* Case No. ICC-02/05-02/09; Central African Republic: *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08.

connected with business operations. In pursuit of profit, businesses can become involved in international crimes in such ways as by providing access to infrastructure used for the commission of the crimes, or by supplying instruments or materials used in their commission, or by providing financial support for the perpetrators.

Moreover, as businesses increasingly operate on an international scale, the result may be increased instances of complicity of multinational businesses operating from one country in crimes committed in another country.[2] For example, it has been widely alleged that some multinational businesses seeking to obtain minerals from eastern parts of the Democratic Republic of the Congo have been complicit in crimes against humanity and war crimes committed by armed forces in the region.[3]

Allegations of the complicity of multinational businesses in international crimes have increased significantly in the last sixty years.[4] Africa has figured prominently in such allegations. Much of the African continent boasts of vast deposits of natural resources, which include: oil, diamonds, iron ores, coffee, timber and gold.[5] The presence of these natural resources has led to a significant number of African countries becoming the "new frontier for the extractives sector".[6] Extractive corporations operate in conflict zones characterized by unstable local environments where the rule of law is weak or non-existent or the governments face difficulty enforcing internationally recognized human rights.[7] The struggle to control natural resources has been one of the factors fuelling the conflicts in destabilized African countries. Granted, natural resources are not the only source of conflict in the African continent; however, the exploitation of these resources has contributed significantly to the on-going conflicts in the region.[8]

There is a major legal barrier to the prosecution of multinational businesses for involvement in international crimes. Business operations are now mainly conducted through the vehicle of corporations. Corporate criminal liability is established in many domestic jurisdictions. Moreover, recognition of the central role of corporations in modern commerce,

2 It has been claimed: "Most cases in which allegations and charges of corporate complicity have arisen concern multinational corporations." See Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity,* 8 Journal of International Criminal Justice 803, 815 (2010).

3 See Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146 (October 16, 2002).

4 International Commission of Jurists, *Corporate Complicity in International Crimes* (2008) Volume 1, 1.

5 See generally, Jonathan M. Winer & Trifin J. Roule, *Follow the Money: The Finance of Illicit Resource Extraction, in* Natural Resources and Violent Conflict: Options and Actions (World Bank, Ian Bannon & Paul Collier eds., 2003)

6 Alyson Warhurst, *Insight: Human Rights are a Business Issue*, BusinessWeek, December 14, 2007.

7 See Maplecroft, Media Release, *Human Rights Risk Extreme Throughout Much of Asia and Africa*, 3 <www.maplecroft.net/HR09_Report_Press_release.pdf> (last accessed October 24, 2009).

8 World Bank, (Bannon & Collier eds., 2003) *supra* note 5.

and of the potential for criminal conduct to occur in the course of corporate operations, has led in recent years to some radical changes to the nature and scope of corporate criminal liability. Yet, international criminal law does not currently recognize corporate criminal liability in any form. Thus, Article 25(1) of the Rome Statute of the ICC provides: "The Court shall have jurisdiction over natural persons pursuant to this Statute." Corporate personnel can be prosecuted before the Court in their personal capacity. However, corporations themselves are immune from liability.

This chapter will examine: (1) the need to introduce corporate liability under the Rome Statute of the ICC for the purposes of international criminal law generally and to address issues arising in the specific context of international crimes committed in Africa; (2) the forms of corporate liability which may be appropriate, particularly with respect to the operations of multinational corporations; and (3) the amendments which may be made to the law of complicity for international crimes in order to accommodate the characteristic forms of corporate involvement. Of course, complicity must be of sufficient gravity to justify action by the Court.[9] The chapter will not, however, examine the issues of prosecutorial policy which would arise in relation to the use of the legal framework which we propose.

11.2 The Case for Corporate Complicity Liability

11.2.1 The Businesses and the Crimes

It is conceivable that multinational businesses might perpetrate international crimes as principals. Complicit perpetration is, however, more likely than actual perpetration. There are several ways in which this might occur.[10] The simplest cases would involve the provision of infrastructure, instruments or materials used in the commission of crimes. A business might even provide the instruments or materials used to actually perpetrate the crimes. For example, a Dutch businessman who sold poison gases to Saddam Hussein's Regime in Iraq was convicted by a Dutch court of complicity in war crimes arising from the subsequent use of the gases.[11] Alternatively, a multinational business might supply

9 See Art. 17(1)(d) of the ICC Rome Statute.

10 See generally, Wolfgang Kaleck & Miriam Saage-Maaβ, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 Journal of International Criminal Justice 699, 700-709 (2010); Hans Vest, *Business Leaders and Modes of Individual Criminal Responsibility under International Law,* 8 Journal of International Criminal Justice 851, 852-855 (2010).

11 See generally, Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*, 4 Journal of International Criminal Justice 239 (2006); Harmen G. van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 6 Journal of International Criminal Justice 557 (2008); Huisman & van Sliedregt, *supra* note 2, at 807-810.

logistic support for the commission of crimes, such as transport for the perpetrators. This was the kind of complaint made against an Australian mining company operating in the DRC, which allegedly allowed its vehicles to be borrowed for transporting troops to the place where they committed crimes.[12]

The acts alleged to make a business complicit might even appear neutral in effect, having legitimate as well as criminal consequences.[13] For example, complaints have been made about the conduct of a Canadian corporation engaged in natural resources extraction in the Sudan on the ground that its development of infrastructure such as roads and airports facilitated the commission of crimes against the local population by the Government of the Sudan.[14]

Where an appropriate *mens rea* such as intent or knowledge can be established, the provision of infrastructure, instruments or materials which facilitate the commission of crimes falls within conventional notions of complicity by aiding. More complex issues arise if multinational businesses engaged in manufacturing happen to purchase materials when international crimes have been committed in their extraction, as has been alleged with respect to certain mining operations in the DRC.[15] Such cases might be viewed simply as instances of beneficial complicity, in which advantage is taken of crimes but there has been no active involvement in their commission. On this view, traditional principles of criminal responsibility would exclude any liability for the crimes.[16] However, it might be argued that purchasers sustain on-going operations and thereby contribute to the commission of future crimes.[17] On this view, there could be complicity by aiding when the future crimes are committed, assuming at least some measure of foresight and therefore culpability with respect to what will happen.

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12 See Global Witness Report, *Rights and Accountability in Development, Action against Impunity for Human Rights, and African Association for the Defence of Human Rights, "Kilwa Trial: A Denial of Justice" A Chronology, October 2004-July 2007* (July 17, 2007).

13 See the discussion in Christoph Burchard, *Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime" Initial Enquiries Concerning the Rome Statute,* 8 Journal International Criminal Justice 919 (2010).

14 See the action brought under the U.S. Alien Tort Claims Act: *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009. The Court rejected the claim on the ground that the appropriate mens rea could not be established. See also the discussion in Norman Farrell, *Attributing Criminal Liability to Corporate Actors; Some Lessons from the International Tribunals*, 8 Journal International Criminal Justice 873, 884-885 (2010).

15 See Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources, *supra* note 3.

16 See discussion on limits of holding corporations liable in John Ruggie, *UN Special Representative of the Secretary-General on the Issue of Human Rights in Transnational Corporations and other Business Enterprises, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development 'Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, U.N. DoC., A/HRC/8/16 (May 15, 2008) (41).

17 See Burchard, *supra* note 11 at 932.

11.2.2 The Corporate Form

Modern businesses usually work through the corporate form. An alternative to prosecuting corporate personnel could be to prosecute the corporate entity. At the level of domestic criminal law, there has been increasing recognition of the worth of exposing corporate entities to criminal liability. Corporate criminal liability is well-established in the common-law jurisdictions. Moreover, although it was resisted by Western European legal systems for most of the twentieth century, it has become widely accepted in these systems in recent years.[18]

There are several rationales for corporate criminal liability.[19] Most obviously, it can allow sanctions against corporate assets that might otherwise be protected. This can deprive shareholders of profit and provide an incentive to improve future behavior. It can also generate funds for compensation for the victims of crime. There are other, less tangible, benefits which apply particularly to large corporate entities such as many of those involved in multinational business. In large corporate entities, individuals come and go and are easily replaced. The genesis of complicity in crime may lie more in the policies and culture of the corporation than in the individual characteristics of the personnel involved.[20] Imposing liability on individuals may therefore not appropriately express the condemnatory message that is desired. Moreover, it may even be impossible to identify and pursue the particular individuals who are responsible. This is a particular problem with multinational corporations, where the effective decision-makers may be far from the scene of the crimes, shielded by distance and by barriers of organizational complexity and cultural impenetrability.

Depending on the domestic law, a corporation might be prosecuted for complicity in an international crime in the jurisdiction where the crime occurred, the jurisdiction where it is incorporated or anywhere else asserting universal jurisdiction. There are several

18 Countries with legislative regimes for corporate criminal liability now include the Netherlands, Belgium, France, Portugal, Denmark, Norway, Finland, and Switzerland. Countries still lacking such regimes include Germany, Italy and Spain. *See* Sara Sun Beale & Adam G. Safwat *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 Buffalo Criminal Law Review 89, 105-106 (2004). Also, membership to the Organization for Economic Co-operation and Development (OECD) encourages member States to implement the necessary measures to criminalize corporate complicity in crimes.

19 On the various rationales for corporate liability in international criminal law, *see* Mordechai Kremnitzer *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 Journal of International Criminal Justice 909 (2010).

20 It has been argued that the dominant motive for corporate complicity in international crimes is loss minimization, with corporations operating in conflict-ridden regions seeking to recover their capital investment: Huisman & van Sliedregt, *supra* note 2 at 818.

countries which recognize corporate liability and also assert universal jurisdiction over international crimes.[21] In addition, a number of civil actions against corporations have been brought in the United States on the basis of universal jurisdiction under the Alien Tort Statute.[22]

A corporation cannot, however, be prosecuted for complicity in an international crime before an international tribunal. The ICC Rome Statute currently does not allow for corporate liability. Neither does the general body of international criminal law recognize any form of corporate criminal liability. The ICC as well as the existing *ad hoc* international institutions dealing with international crimes only exercise jurisdiction over natural persons.[23]

There is some adverse history to the idea of corporate liability in the international sphere. Article 23(5) and (6) of the Draft Statute for the Establishment of an International Criminal Court contained provisions dealing with the liability of legal persons.[24] However, these draft provisions were rejected by delegates at the Rome Conference deliberations.[25] Although the French Delegation presented a revized version of the controversial provision,[26] the amended proposals were also rejected. Some delegates strongly opposed the notion of corporate liability arguing that the doctrine was not even recognized in most of the existing legal systems at the time.[27]

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21 Australia is an example. See Criminal Code (Cth) ss 12.1, 15.4, 268.117.

22 See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Northwest University Journal of International Human Rights 304, 305-306 (2008); Jonathan Drimmer *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, 3(2) Journal of World Energy Law and Business 121 (2010).

23 Art. 25(1) of the ICC Rome Statute provides only for jurisdiction over natural persons. See also, Art. 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended May 17, 2002), May 25, 1993; Art. 6 of the Statute of the International Criminal Tribunal for Rwanda; Art. 29new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Art. 29 of the UN/Cambodia Agreement Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Art. 6 of the Sierra Leone Special Court Statute; Art. 15 of the Iraqi High Tribunal Statute.

24 See UN Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, "Draft Statute for the International Criminal Court", Rome, Italy, June 15-July 17, 1998 U.N. Doc. A/Conf.183/2/Add.1. (April 14, 1998).

25 Kai Ambos *Article 25: Individual Criminal Responsibility*, *in* Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article By Article 746 (Otto Triffterer ed., 2d ed. 2008).

26 United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court* (July 3, 1998), UN Doc. A/Conf./183/WGGP/L.5/Rev.2. (Hereafter "Draft Statute of an ICC").

27 Kai Ambos, *supra* note 25 at 743, 746 (Otto Triffterer ed., 2d ed. 2008). To date, there are a number of domestic jurisdictions that do not recognize criminal liability for corporate entities. These include: Brazil, Bulgaria, Luxembourg and the Slovak Republic.

Nevertheless, the trend among domestic jurisdictions towards recognizing corporate criminal liability is well established and has accentuated in the years since the text of the ICC Rome Statute was negotiated.[28] Corporate liability would be a welcome addition to the sphere of international criminal law, particularly with respect to multinational corporations which have the means to contribute to compensation for victims and the personnel of which it would be difficult and inadequate to pursue. Leaving corporate liability to domestic jurisdictions risks letting it fall through the net of liability, given the variability of domestic law and the vagaries of domestic law enforcement.

The introduction of corporate criminal liability in the international sphere would require the amendment of the ICC Rome Statute.[29] In designing any amendments, the questions to be addressed are: on what basis should corporations be held liable in international criminal law and, in particular, on what basis should they be held liable for complicity?

11.3 Models of Corporate Liability

There are two competing models of corporate liability found within domestic jurisdictions: derivative liability and non-derivative liability.[30] Under the derivative model, corporate liability must always be located through the liability of a human actor who is part of or an agent of the corporation. An individual first commits the offence; the culpability of the individual is then imputed to the corporation. In contrast, under the non-derivative model, the liability of the corporation is primary and not dependent on the liability of any individual. It is diagnosed through questions about the culpability of the corporation itself rather than imputed from another source. This paper proposes corporate criminal liability

28 See, Beale & Safwat *supra* note 18 at 105-106; Sara Sun Beale, *A Response to Critics of Corporate Criminal Liability*, 46 American Criminal Law Review 1481, 1493-1494 (2009).

29 Art. 123 of the ICC Rome Statute contains enabling provisions that provide a review to consider any amendments to the Rome Statute. The first of such reviews took place May 31–June 11, 2010. Art. 121 of the Rome Statute details the procedure to be followed by State Parties wishing to amend the Rome Statute at any time in the future after the first review conference has been held.

30 See generally, Eric Colvin, *Corporate Personality and Criminal Liability,* 6:1 Criminal Law Forum 1(1995); Celia Wells, *Corporate Criminal Responsibility, in* Research Handbook on Corporate Legal Responsibility 147-152 (Stephen Tully ed., 2005) and James Gobert & Maurice Punch, Rethinking Corporate Crime 146-153 (2003). For example, derivative liability is adopted in domestic jurisdictions such as the USA, South Africa and the United Kingdom. Non-derivative liability is found in Australia and Switzerland. These models are not mutually exclusive. Multiple bases for corporate liability have been implemented in several domestic jurisdictions. For example, Part 2.5, Division 12 of the Australian Criminal Code (Cth) contains provisions dealing with corporate liability which incorporate both derivative liability and non-derivative liability. Note that the term 'non-derivative liability' is used here to avoid confusion with the term "organisational liability". Non-derivative liability is generally described by academics as "organisational liability". This paper uses the term 'non-derivative liability' to distinguish it from derivative liability.

on the basis of non-derivative liability as the better model to transplant internationally and adopt within the ICC Rome Statute.

Derivative liability is the traditional model in most domestic jurisdictions. Legal theorists who support the derivative liability model tend to favor the nominalist view of legal personality. According to the nominalist view of legal personality, corporations are fictitious, artificial persons and essentially nothing more than collections of individuals.[31] There are two main varieties of derivative liability: vicarious liability and identification liability.[32] They differ in the range of persons whose individual liability can be imputed to the corporation.

When vicarious liability is adopted, the corporation can become liable for the conduct of any individuals if their actions fall within the ambit of their corporate employment or authority. Vicarious liability for corporations has been developed as a matter of common law by federal courts in the United States.[33] It has also been adopted by statute in South Africa.[34]

Under identification liability, a narrower range of actors can make the corporation liable. There are different versions of identification liability, encompassing narrower or broader ranges of persons with whom the corporation is identified. However, corporate liability is usually established only through the liability of specific individuals that act as the "directing minds" of the corporation.[35] Hence, the responsibility for corporate conduct and fault lies with the board of directors, the managing director, or other person to whom supreme power has been delegated. These persons are said to be acting *as* the company.[36] Literally, "what the senior executive does and thinks in the performance of his (or her) duties is identified with, and becomes the acts and thoughts of, the company itself."[37] Identification liability has been the traditional model for corporate liability in Australia, Canada and England, although there have been some changes in recent years.[38] It was also adopted in the American Model Penal Code.[39]

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31 See Colvin, *supra* note 30 at 1-4; Jonathan Clough & Carmel Mulhern, The Prosecution of Corporations 4-5 (2002).

32 For discussions of derivative liability models, see Colvin *supra* note 30; Wells, *supra* note 30 at 147-152; Clough & Mulhern, *supra* note 31 at 146-153.

33 See for example, *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972); *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).

34 Criminal Procedure Act, No. 51 of 1977, Art. 332 (S. Afr.).

35 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 at 171 (HL).

36 Matthew Goode, *Corporate Criminal Liability*, 3, <www.aic.gov.au/publications/proceedings/26/goode.pdf> (last accessed December 7, 2008), discussing *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153, HL.

37 Russell Heaton, Criminal Law 466 (2d ed., 2006). Gender neutral terms added.

38 See for example, *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 (HL); *Canadian Dredge & Dock Co. v. The Queen* [1985] 1 S.C.R. 662 (Can.).

39 American Law Institute, *Model Penal Code*, Art. 2.07.

Several domestic jurisdictions have now moved towards the model of non-derivative liability for at least offences of negligence.[40] Non-derivative liability makes the corporate entity itself directly liable.[41] Legal theorists who support this model tend to favor the realist view of legal personality. According to the realist view of legal personality, corporate entities have an existence that is, to some extent, independent of the existences of their individual members. Corporations are more than the sum of their individual parts. They comprise institutionalized relationships embodying distinctive cultures which shape the outlook and channel the conduct of their members. They can therefore possess a separate legal personality which makes them appropriate subjects for criminal liability in their own right.[42] Hence, the culpability of the corporation itself rather than the culpability of its individuals is of primary concern.[43] The questions to be asked are what the corporation did or did not do, as an organization; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent crimes occurring. Non-derivative liability is established on the basis of "corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate 'cultures' that tolerate or encourage criminal offences."[44]

When the question of corporate liability was before the Rome Conference on the establishment of an International Criminal Court, it was derivative liability that was contemplated. The amended proposals which were finally rejected were based on the identification version of derivative liability, with liability imputed from the liability of an individual "in a position of control":

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

   Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged, if:

   (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

40 See Beale & Safwat, *supra* note 18 at 136, 138; Beale, *supra* note 28 at 1496.

41 Gobert & Maurice, *supra* note 30 at 97.

42 Clough & Mulhern, *supra* note 31 at 64-65.

43 The Australian Criminal Code (Cth) is an example of a domestic jurisdiction that adopts a non-derivative liability approach when dealing with corporate criminal liability.

44 Allens Arthur Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations,* paper prepared for the UN Special Rapporteur to the Secretary General (February 2008) 6 <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> (last accessed July 29, 2008); see also, Colvin, *supra* note 30; Celia Wells *International Trade in Models of Corporate Liability* (2002), The Centre for Business Relationships, Accountability, Sustainability and Society <www.brass.cf.ac.uk/uploads/cacorptoolkitcw0203.pdf> (last accessed December 7, 2008). Note that Celia Wells refers to this model as the "Holistic" Theory Model.

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged . . .[45]

This proposal would provide the narrowest conceivable version of corporate liability and would also be practically very difficult to enforce. Its adoption could present near insuperable problems for enforcement against multinational corporations with wide physical separation of the head office from diffuse global operations. These difficulties might be alleviated by adopting a broader version of identification liability or by switching to the vicarious liability version of derivative liability. A wider range of individuals could then make the corporation liable. There would, however, still be the potentially difficult task of isolating the activities and culpability of specific individuals within what can be large and complex organizations. The difficulty can be particularly great when the organization is multinational in character. Moreover, any form of derivative liability faces the objections that it is artificial and arbitrary. There is no necessary relationship to culpability. A corporation's liability turns simply on the conduct of corporate personnel rather than on the presence of some form of corporate fault for this conduct.

Non-derivative liability offers a more attractive alternative for corporate liability generally and, in particular, for responding to the problem of multinational corporate complicity in international crimes. The Australian Commonwealth Criminal Code provides an example of what non-derivative liability can comprise which is particularly interesting because, unlike most schemes for non-derivative liability, it covers not only offences of negligence but also offences requiring subjective fault.[46]

For offences of negligence, a corporation can be held liable under the Australian Commonwealth Code even when no individual has the required fault element. The negligence of the corporation can be established by viewing its conduct "as a whole" – "that is, by aggregating the conduct of any number of its employees, agents or officers".[47] This

45 See Draft Statute of an ICC, *supra* note 26, Art. 23, paras. 5-6.

46 See Criminal Code (Cth). In Australia, criminal law is primarily a matter of jurisdiction for the states and territories rather than the Commonwealth. However, despite the lack of an express power to enact criminal law, the Commonwealth does possess a supplementary or incidental power to create criminal offences in areas over which it has specific constitutional jurisdiction, such as external affairs, international trade and commerce, and taxation. It can use penal sanctions in order to enforce its regulatory schemes in these areas.

47 Criminal Code (Cth) s. 12.4(2).

is particularly relevant where criminal negligence is in issue but, although organizational sloppiness has been pervasive, simple negligence is all that can be established against any single individual. For offences where intention, knowledge or recklessness is required, this fault element is attributed to a corporation that "expressly, tacitly or impliedly authorized or permitted the commission of the offence".[48] Authorization or permission can be attributed to a body corporate under various conditions. These include express, tacit or implied authorization or permission by the board of directors or a "high managerial agent", unless the corporation proves that it exercised due diligence to prevent the conduct, or the authorization or permission.[49] More radically, the conditions for authorization or permission also include the existence of a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant provision. Authorization or permission is even established by the failure of the body corporate to create a corporate culture of compliance.[50]

The Rome Statute of the ICC would benefit from the introduction of some kind of non-derivative scheme of corporate liability. The provisions on subjective fault would be the critical elements in an ICC scheme, since liability for negligence is generally excluded for international crimes.[51] The advantage of the Australian scheme is that it allows subjective fault for corporations to be proved not only through identification with key personnel but also through criminogenic corporate cultures. For this purpose, "corporate culture" is defined in broad terms that encompass informal conduct and practices as well as stated policies and formal rules: "Corporate culture" is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place."[52]

The focus on corporate culture is the key to non-derivative liability. However, the Australian scheme may cast the net of liability too widely for offences requiring forms of subjective fault. Under the Australian scheme, there are two ways in which a corporate culture can be linked to commission of an offence: either through a culture of noncompliance with the law or through the failure of a body corporate to develop a culture of compliance. The Australian scheme does not identify collective meanings for each type of subjective fault. Instead, it abandons the distinctions between types of subjective fault in favor of the uniform standard of a culture of noncompliance or a failure to develop a culture of compliance. Admittedly, a culture of noncompliance must positively favor

48 S. 12.3(1).
49 Ss. 12.3(2)(b), 12.3(3).
50 S 12.3(2)(d).
51 Art. 30(1) of the ICC Rome Statute states: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."
52 Australian Criminal Code (Cth) s. 12.3(6).

the commission of the offence. This might be viewed as a collective form of subjective recklessness. The difficulty, however, is that the same scheme of liability applies for all offences requiring some form of subjective fault, including those offences which require intention or knowledge rather than just recklessness for their commission by individuals. Moreover, the alternative basis for liability, failure to develop a culture of compliance, involves a form of negligence rather than subjective fault. It is a questionable ground on which to hold a corporation liable for an offence involving any form of subjective fault.

An appropriate scheme of non-derivative corporate liability for offences of subjective fault in the ICC Rome Statute should incorporate collective meanings for terms, like "intention" and "knowledge", which are used in the Statute to specify distinctive mental states.[53] First, in order for a corporation to commit an offence "intentionally" in the sense of *purposefully*, it should be necessary that it was corporate *policy* to commit the offence rather than just that the corporate culture favored its commission. There could be a specific corporate directive for the offence to be committed. However, a policy might also be attributed to a corporation when it provides the most reasonable explanation for the corporation's conduct and would therefore be seen as an implied authorization by individual members or agents. Secondly, in order for a corporation to commit an offence "knowingly", it should be necessary not only that the corporate culture favored the commission of the offence but that knowledge of its commission was held somewhere within the corporation. The idea of collective knowledge might be invoked even where the relevant information is divided between corporate personnel.[54] For example, suppose that a multinational corporation purchases minerals the extraction of which involves crimes against humanity by the local suppliers and that the suppliers use the money to acquire guns and other instruments of crime. The corporation should not be held liable for knowingly aiding the crimes simply because its culture encouraged the morally blind pursuit of profit. The corporation should, however, be held liable if it had been warned how the money would be used, even if the warning had not reached the personnel making or authorizing the purchases.

53 See Colvin, *supra* note 30 at 38-41.

54 The foregoing suggestions could be expressed in statutory form in this way:

1. (a) Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to commit the offence.
   (b) A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
2. (a) Corporate knowledge of the commission of an offence may be established by proof that the relevant knowledge was possessed within the corporation and that the culture of the corporation caused or encouraged the commission of the offence.
   (b) Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

Other schemes of non-derivative liability for offences of subjective fault might be devised. The crucial point, however, is that distinctions between forms of subjective fault should be respected in any scheme of corporate liability, even if the forms of subjective fault are conceived somewhat differently for corporations than for individuals.

11.4 Models of Complicity

As was discussed earlier, the involvement of corporations in international crimes is characteristically by way of complicity in the actions of others rather than through perpetration. Corporations and their personnel do not actually commit the crimes themselves. Instead, they are involved in such ways as supplying the instruments or materials for the commission of the crimes or providing logistic or financial support to the perpetrators. Modes of participation which are recognized in international criminal law include, *inter alia*: ordering, instigating, inducing, soliciting, inciting, planning, and aiding and abetting.[55] Complicity by aiding and abetting is the form of participation most often alleged against multinational corporations.[56]

Aiding and abetting is defined in the Rome Statute of the ICC. Article 25(3)(c) makes a person criminally responsible for a crime within the jurisdiction of the Court if the person: "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."

This definition is relatively loose with respect to the conduct elements of aiding and abetting. Customary international law emerging from the *ad hoc* tribunals and special courts indicates that aiding and abetting can involve encouraging or providing moral support for the commission of a crime as well as providing practical assistance.[57] In addition, the provision of assistance, encouragement or moral support can be given before, during or after

55 See, Art. 6 of the International Military Tribunal Charter, Art. 2 of the Control Council Law No. 10, Art. 5 of the International Military Tribunal for the Far East Charter, Art. 7 of the ICTY Statute, Art. 6 of the ICTR Statute, Art. 25 of the ICC Rome Statute, Section 14 of Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the District Courts in East Timor, Art. 29new of the Extraordinary Chambers in the Courts of Cambodia Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 29 of the UN/Cambodia Agreement on the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 6 of the SCSL Statute and Art.15 of the IHT Statute.

56 International Commission of Jurists, *supra* note 4 at 27.

57 *Prosecutor v. Furundzija* (Judgement) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-95-17/I-T, 10 December 1998) [249].

the commission of the crime.[58] Furthermore, the aider and abettor can incur liability for assisting in the planning, preparation or execution stage of the crime.[59] The tribunals have differed from the ICC Statute in requiring that aiding make a "substantial contribution" to the commission of the crime.

The ICC definition of aiding and abetting is more specific with respect to its mental element. To constitute aiding and abetting, Article 25(3)(c) of the Statute requires that the action have been taken "for the *purpose* of facilitating the commission of such a crime". This differs from the *mens rea* adopted for aiding and abetting by the international tribunals, which is *knowledge* that the acts performed would assist the commission of the crime.[60]

The "purpose" approach contained in Article 25(3)(c) of the ICC Rome Statute was chosen by delegates at the Rome Conference deliberations on the Draft Statute for the Establishment of an International Criminal Court.[61] Under Article 23(7)(d) of the Draft Statute, a person would be criminally responsible if the person: [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission.

The Preparatory Committee were unable to agree upon Article 23(7)(d) of the Draft Statute provisions, as evidenced by the words which appear in brackets.[62] The matter was then resolved at the Rome Conference by introducing the "purpose test".[63] This was adopted from the provision on aiding in the Model Penal Code of the American Law Institute.[64] A similar "purpose" test was also used in the definition of aiding in a draft code prepared for England in the late 1870s, known as the 'Stephen Code' after its principal drafter, Sir James Stephen. The Stephen Code was never enacted in England but became the basis for the Canadian Criminal Code 1892 and the New Zealand Crimes Act 1893. "Purpose" is still a required element of aiding in these jurisdictions.[65]

58 *Prosecutor v. Milutinović* (Judgment) International Criminal Tribunal for the former Yugoslavia, Trial Chamber, ICTY Case No. IT-05-87-T, volume 1 of 4, 26 February 2009 91.

59 *Prosecutor v. Blaškić*, (Judgment) International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, ICTY Case No. IT-95-14-A, 29 July 2004 48.

60 *Prosecutor v. Tadić* (Judgment) International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, ICTY Case No. IT-94-1-A, July 15, 1999 229; *Prosecutor v. Orić* (Judgment) International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, ICTY Case No. IT-03-68-A, July 3, 2008 43.

61 Draft Statute of ICC, *supra* note 26.

62 Cassel, *supra* note 22 at 310.

63 *Id*. at 310-311. The decision to adopt the purpose test was reached by the Working Group on General Principles of Criminal Law.

64 American Law Institute, *Model Penal Code*, Art. 2.06(3)(a). See, Ambos *supra* note 25 at 757. Ambos was an Observer at the Rome Conference deliberations.

65 See now, Canadian Criminal Code R.S.C. 1985 c. C-46, s 21(1)(1)(b); New Zealand Crimes Act (1961) (NZ), s. 66(1)(b).

The differences between the "knowledge" and "purpose" formulations of the *mens rea* for aiding and abetting are important. The former focuses on what is foreseen as to the consequences of the action while the latter focuses on the reasons why the action is taken. Under a "knowledge" test, an aider or abettor must act knowing what the consequences will be. Action taken in the hope but not the assurance of aiding or encouraging an offence may therefore not qualify More importantly for present purposes, however, a "purpose" test may exclude persons who happen to aid when acting for commercial reasons. The difficulty with what might be called "commercial aiders" is that, even though they may know full well that their actions will assist the commission of crimes, they may do so not for the purpose of facilitating their commission but rather for the purpose of making profit. Multinational corporations will characteristically fall into this category. The same problem would arise with an "intent" test if intent is given a narrow meaning which makes it equivalent with purpose, as it often is in international criminal law.

The issue is how a requirement for "purpose" is to be interpreted in the law of aiding and abetting. The Model Penal Code states that a person acts "purposefully" with respect to the nature or consequences of conduct when "it is his *conscious object* to engage in conduct of that nature or to cause such a result".[66] This fits with ordinary language, where the concept of purpose usually refers to an actor's *reasons* for doing what was done:

> My purpose in doing something is my reason for it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things *with* an intention, but *for* a purpose, since the intention may only accompany the action, whereas the purpose must be a reason for it. We do not naturally speak of "the reason or intention" and "the point or intention" in the way that we do speak of "the reason or purpose" and "the point or purpose" of an action.[67]

On this interpretation, an actor's purpose was to accomplish something if the prospect of its occurrence played a causal role in the decision to act.[68] The connection may have been of a "but for" kind, in which event the prospect would have been the sole purpose. Alternatively, there may have been several purposes, one of which can be isolated and used to ground criminal liability.

66 American Law Institute, Model Penal Code, Art. 2.02(2)(a)(i).
67 Alan R. White, *Intention, Purpose, Foresight and Desire*, 92 Law Quarterly Review 569, 574 (1976).
68 See Eric Colvin & Sanjeev S. Anand Principles of Criminal Law 181 (3d ed., 2007).

Treating "purpose" as equivalent to "object" or "reason" is how Article 25(3)(c) of the ICC Statute has been interpreted by some commentators.[69] It has been argued that most commercial aiders or abettors are excluded. Thus, if a corporation or its personnel were to successfully raise the possibility that the reason they provided practical assistance for the commission of a crime was simply in order to make a profit, they would not be liable.[70]

This restrictive interpretation is not, however, accepted by everyone. There are two main ways in which it has been attacked.[71] One way challenges the application of the purpose test in cases of complex motivation. The other way challenges the proposition that the term "purpose" has a distinctive meaning which excludes mere knowledge of an outcome. Both challenges stem from a policy-based rejection of the idea that the commercial aider should be exempt from liability for the known consequences of aiding. In our view, both challenges are unsuccessful. We believe that exposing most commercial aiders to liability under the ICC Rome Statute would require the removal of the "purpose' provision in Article s 25(3)(c).

Some writers have sought to argue that at least some commercial aiders can fall within the ambit of ICC liability even if the "purpose" requirement is interpreted to mean that the person must act in order to aid.[72] The argument concerns the application of the "purpose" test in cases of complex motivation. Consider the example of a businessman who sold Zyklon B gas which was used in the gas chambers for the mass killings of Jews by the Nazis. Doug Cassel suggests that one of the purposes would have been to encourage continued mass killings of Jews: "Only so could they continue selling large quantities of gas to the Nazis for profit".[73] In Cassel's view, the killings constituted a secondary purpose of the sales. In other words, the gas was supplied for the secondary purpose of killing because the primary purpose of making continued profits was dependent on the killings occurring.

It is true that, if it is to be concluded that an actor's purpose in doing something did not include an outcome which was foreseen, then the actor must have been genuinely opposed or indifferent to it. Purpose is not negatived where an actor chose to bring about an outcome as a means of attaining some further objective. However, there are two major limitations to the application of this approach to commercial transactions.

69 See for example, Farrell, *supra* note 14 at 882-885; Burchard, *supra* note 13 at 939-941.

70 Robert Cryer Et Al, An Introduction to International Criminal Law and Procedure 377 (2d ed., 2010).

71 A third way has been proposed in Vest *supra* note 10 at 862. Vest has suggested that the general requirement for "intent and knowledge" under Art. 30(1) of the ICC Statute be used to give an expansive interpretation to the "purpose" requirement in Art. 25(3)(c). Vest rightly concedes, however, that the opening words of Art. 30(1), "Unless otherwise provided . . . 0", present a formidable obstacle to this interpretation.

72 Cassel, *supra note* 22 at 312-313; Vest, *supra* note 10 at 862.

73 *Id.* at 312.

The first is that it can only ground liability for aiding and abetting in on-going relationships in which a commercial supplier has not only the purpose of making profit from a specific transaction but also the purpose of making continued profits from involvement in a series of transactions. There is no liability in profit-driven single transactions because making a profit is not dependent on how the items supplied are used. The profit is made if even the items are thrown away or destroyed. The second limitation is that the relationship must be one in which crimes will necessarily be committed. This may fit the supply of items which could be used only for the purpose of committing crimes, such as the Zyklon B gas supplied to the Nazis. However, it does not fit the supply of items for multiple uses, such as vehicles. Moreover, it does not fit manufacturers who purchase materials knowing that crimes have been and will be committed in the course of their extraction. Such manufacturers can sustain on-going extraction operations and thereby contribute to the commission of future crimes. In most instances, however, the manufacturers will be indifferent or even opposed to the commission of the crimes. Their only purpose in making the purchases is to achieve a profit through their own subsequent dealings with the materials.

The Supreme Court of Canada has taken a more radical approach to the interpretation of "purpose" as the *mens rea* requirement for aiding under the Canadian Criminal Code.[74] In *Hibbert*,[75] the Court considered at length the meaning of the term "purpose" and arrived at the conclusion that purpose is synonymous with "intention" in the broad sense of this term which includes knowledge that an outcome will occur as well as purpose to make it occur.[76] This interpretation would bring the commercial aider within the ambit of liability regardless of why the aid was given, as long as its consequences were known.

The Supreme Court of Canada diagnosed two distinct meanings for the term "purpose". Speaking for the Court, Lamer C.J. said:

> It is impossible to ascribe a single fixed meaning to the term "purpose". In ordinary usage, the word is employed in two distinct senses. One can speak of an actor doing something "on purpose" (as opposed to by accident) thereby equating purpose with "immediate intention". The term is also used, however, to indicate the ultimate ends an actor seeks to achieve, which imports the idea of "desire" into the definition.[77]

74 R.S.C. 1985, c. C-46, s. 21(1)(b).

75 *R v. Hibbert* [1995] 2 S.C.R. 973, 40 C.R. (4th) 141.

76 See, for example, *R v. Chartrand* (1994) 31 C.R. (4th) 1, 21 (SCC); *R v. Woollin* [1999] A.C. 82 (HL); *Peters v. The Queen* (1998) 192 CLR 493, [68].

77 *R v. Hibbert* [1995] 2 S.C.R. 973, 40 C.R. (4th) 141, [27].

In the former meaning, "purpose" is synonymous with "intention", in the broad sense of this term which includes knowledge that an outcome will occur.[78] In the latter meaning, reference is made to "desire" but the basic idea appears to be the equation of purpose with reasons for acting. In most instances, a purpose to achieve some outcome will be accompanied by a desire for it. Nevertheless, it may be possible to act for some purpose which is distasteful: for example, if the lesser of two evils is chosen. It is therefore preferable to speak of objects or reasons rather than desire.

The Supreme Court took the view that "purpose" could carry either of these meanings in statutory provisions. The specific concern in *Hibbert* itself was the meaning of "purpose" in s. 21(1)(b) of the Canadian Criminal Code, which makes everyone a party to an offence who "does or omits to do anything for the purpose of aiding any person to commit it". An argument had been made that the appellant had acted out of fear and therefore did not have the *mens rea* for aiding an offence of aggravated assault. The Court rejected this argument on the ground that, in the context of s. 21(1)(b), purpose could be equated with intention. Therefore, *mens rea* could not be negated by evidence of having acted out of fear.[79] It was stressed in *Hibbert* that the decision was restricted to the interpretation of s. 21(1)(b) and that a different interpretation of "purpose" might be appropriate for some other statutory provision.[80]

The decision in *Hibbert* was expressly made in light of policy considerations. The Supreme Court of Canada was concerned that someone who aids an offence for solely commercial reasons should not escape liability. Indeed, the Court commented that it would be absurd if such a person could escape liability.[81]

Similar reasoning on the meaning of "purpose" is apparent in the Report of the International Commission of Jurists Expert Legal Panel on *Corporate Complicity in International Crimes*. It was argued that it makes little practical difference whether the *mens rea* standard for aiding and abetting is expressed as knowledge or purpose:

> [P]ractically speaking, if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the

78 The following analysis of the *Hibbert* decision is taken from Colvin & Anand, *supra* note 68 at 188-189.

79 It was said that, if fear was to be relevant, it could only be in the context of a special excusing defence of duress.

80 *R v. Hibbert* [1995] 2 S.C.R. 973, 40 C.R. (4th) 141, [30].

81 *R v. Hibbert* [1995] 2 S.C.R. 973, 40 C.R. (4th) 141, [32]; endorsing Allan W. Mewett & Morris Manning, Criminal Law 112 (2d ed., 1985).

> official knowingly aided a crime in order make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime "on purpose".[82]

Such broad interpretations of "purpose" requirements are curious. The two meanings of purpose which have been diagnosed appear to refer to different phrases in which the term is used rather than different meanings for the term itself. When we speak loosely of something having being done "on purpose", we ordinarily mean that the action was accompanied by some purpose; it was deliberate, goal-oriented conduct rather than conduct which occurred by accident. A statement of this kind makes no claim about what the purpose actually was. In contrast, when it is said that action was taken "for the purpose of" something specific such as facilitating the commission of a crime, a claim is made about the nature of the purpose. This is the way that Article 25(3)(c) of the ICC Rome Statute is framed. It does not say that a person who, *acting on purpose*, aids, abets or otherwise assists a crime is criminally responsible. Instead, it makes a person criminally responsible who, "*for the purpose of facilitating the commission of such a crime*, aids, abets or otherwise assists in its commission . . . ." Article 25(3)(c), in its present form, should therefore mean that the specific purpose of, and therefore reasons for, an action must be identified if it is to make the actor liable.

Some writers have suggested that Article 25(3)(d)(ii) of the ICC Rome Statute might present a way of avoiding these difficulties with Article 25(3)(c). Article 25(3)(d) is a complicated provision. It provides for criminal responsibility on the part of a person who:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime

Under the first alternative, there is a purposive requirement for the contribution: the *aim* must be to further the criminal activity or purpose of the group. However, the suggestion has been that the second alternative, where "knowledge" of the intention of the group suffices for *mens rea*, would make the commercial aider liable.[83] Hans Vest has therefore

82 International Commission of Jurists, *supra* note 4.

83 Vest, *supra* note 14, at 864-865 (2010); Farrell, *supra* note 14 at 880-881.

described the second alternative as "a rescue clause" in relation to the restricted scope of aiding and abetting.[84]

Yet, it seems doubtful that such a broad interpretation of Article 25(3)(d)(ii) is justified, even if it is assumed that most international crimes are committed by groups acting with a common purpose. First, the opening words of Article 25(3)(d) refer to contributing in "any other way", so that the provision appears to establish a supplementary form of liability rather than a form which could supplant the others specified in Article 25(3). Its concern appears to be with contributions, such as assisting in the organisation of group meetings, which might be considered too remote from the commission of a crime to constitute aiding its commission. Secondly, Article 25(3)(d) specifies two forms of *mens rea* for the contribution. Under (i), there need only be the aim of furthering the criminal activity or criminal purpose of the group: there is no requirement for any state of mind respecting the specific crime committed. Under (ii), however, the requirement is for knowledge of "the intention of the group to commit *the* crime", presumably meaning the specific crime for which the contributor is to be held liable.[85] A commercial aider will rarely have this kind of specific knowledge. A commercial aider who knows that crimes will be committed is unlikely to know when, where and against whom they will be committed.

In the result, it must be concluded that exposing most commercial aiders to liability would require an amendment to the ICC Rome Statute. The objective would be to ensure that there is liability when a person knowingly as well as purposefully aids the commission of a crime. This would bring the *mens rea* for aiding under the ICC Rome Statute in line with that adopted by the *ad hoc* institutions such as the ICTY, ICTR, SCSL and ECCC.[86]

There are two ways in which the objective can be accomplished. One is through broadening the express mental element in Article 25(3)(c) itself. For example, the provision could be amended to read so that it makes a person criminally responsible for a crime within the jurisdiction of the ICC if the person:

> (c) *Knowingly, or* for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

84 Vest, *supra* note 10 at 865.

85 See Burchard, *supra* note 13 at 944.

86 E. van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law 93 (2003).

The other way in which the objective could be accomplished is through the deletion of any express mental element, so that the provision would simply read: "(c) Aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;" The mental element would then be read into the provision in the same way as it is read into many other provisions in the ICC Rome Statute, by reference to the general provision on mental elements in Article 30(1): "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

The expression "intent and knowledge" is generally understood to mean "intent *or* knowledge".[87] Article 25(3)(c) of the ICC Rome Statute presently operates as one of the exceptions contemplated by the opening words of Article 30(1). Bringing Article 25(3)(c) under the umbrella of Article 30(1) would mean the commercial aider would be liable for an international crime if it was known that the action would aid, even if the purpose was simply to make a profit. This would be simpler than amending the express reference to a mental element in Article 25(3)(c) itself.

Concerns are sometimes expressed that, if no more is required for *mens rea* than knowledge that a crime would be aided, the net of liability could capture persons engaged in ordinary business activities who make minor contributions to the commission of offences. In response, it might be contended that any legitimate concerns in this respect can be handled through the exercise of prosecutorial discretion, as they usually are in domestic jurisdictions which adopt the "knowledge" test. Alternatively, the ICC Statute could attempt to address the problem, for example by adopting the "substantial contribution" test formulated by the international tribunals for the *actus reus* of aiding and abetting.[88]

11.5 Conclusions

Corporate criminal liability has expanded in many domestic jurisdictions in response to the greater role of corporations in modern commerce and the expanding potential for criminal conduct to occur in the course of corporate operations. The challenge for international criminal justice is to respond to these developments. Corporate criminal liability needs to be introduced into the Rome Statute of the ICC. Moreover, the scheme of liability

87 See antonio cassese, international criminal law 176-177 (2003).

88 *Prosecutor v. Tadić* (Judgment) International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, ICTY Case No. IT-94-1-A, 15 July 1999 229; *Prosecutor v. Orić (*Judgment) International Criminal Tribunal for the former Yugoslavia, Appeal Chamber, ICTY Case No. IT-03-68-A, July 3, 2008 43. *See* generally, Vest, *supra* note 10 at 860-861.

for aiding and abetting crimes under the Statute needs to be amended to take better account of the characteristic forms of corporate complicity.

Our particular concern has been with the potential complicity of multinational corporations which purchase and use materials tainted by the commission of international crimes in the course of their extraction. The personnel of such corporations could perhaps be made liable at present for their activities. However, in large corporate entities, individuals come and go and are easily replaced. It may be impossible to identify and pursue the particular individuals who are responsible. Even if it can be done, prosecution of the individuals may not appropriately express the condemnatory message that is desired about the activities of the corporation. We have therefore argued for the introduction of corporate criminal liability in the ICC Rome Statute. Moreover, we have argued for non-derivative liability, based on the role played by corporate cultures and policies in the genesis of criminal conduct. This avoids the need to establish the liability of some specific individual before the corporation can be made liable. It also avoids the artificiality and arbitrariness of simply attributing the liability of an individual to a corporation.

The introduction of corporate liability would by itself be insufficient to address multinational corporate involvement in its perhaps most characteristic form: the purchase of materials extracted in ways involving the commission of international crimes, with the result that on-going operations are sustained and a contribution is thereby made to the commission of future crimes. Even where the purchaser knows how the materials have been and will be produced, a barrier to liability may be presented by the requirement under the ICC Rome Statute that aid be given "for the purpose of facilitating the commission of such a crime". The barrier should be removed, so that the general *mens rea* requirement under the Statute, intent or knowledge, applies.

The challenge of developing corporate criminal liability in the international sphere has particular significance for the legitimacy of international criminal justice in Africa. Africa has been the scene of some horrendous crimes against humanity and war crimes since the ICC Rome Statute came into force. Such crimes are properly within the purview of the ICC. Nevertheless, questions about the legitimacy of the Court's involvement can be expected if action can only be taken against African perpetrators of crimes and complicit multinational corporations are immune from any liability. We have not proposed principles to guide the determination of whether complicity is of sufficient gravity to justify action by the Court. Issues of prosecutorial policy fall outside the scope of this paper. Our aim has simply been to argue for the removal of certain legal impediments to the prosecution of culpable actors.