Australian Prosecution of Corporations for International Crimes

The Potential of the Commonwealth Criminal Code

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Abstract

On 1 July 2002 new provisions for the prosecution of genocide, crimes against humanity and war crimes came into operation within the Australian Commonwealth Criminal Code. The offences were introduced as a part of Australia’s ratification of the Rome Statute of the International Criminal Court. Through the enactment of these crimes within the broader context of the Criminal Code, Australia has, perhaps unwittingly, created a basis to prosecute corporations for these crimes even under the universal jurisdiction principle. A current investigation by the Australian Federal Police into the possible role of mining company Anvil Mining Limited in facilitating a military offensive in the town of Kilwa in the Democratic Republic of the Congo indicates that Australia, like many nations today, is grappling locally with the possibility of corporate involvement in international crime. As a potential source of action against companies implicated in international crime, the possible reach of the Australian Criminal Code provisions warrants consideration. This article outlines the application of the new Australian international crimes provisions to corporations and argues that, if used appropriately, these will represent a positive development toward corporate accountability.

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1. Introduction

As part of its ratification of the Rome Statute of the International Criminal Court (ICC Statute), Australia introduced offences 'equivalent'\(^1\) to the ICC Statute offences of genocide, crimes against humanity and war crimes into its domestic federal criminal legislation, i.e. into the **Criminal Code 1995** (Cth.) (Criminal Code). The enactment of these offences within the Criminal Code prima facie confers jurisdiction to certain Australian courts already exercising federal criminal jurisdiction to prosecute corporations for such offences. Given the current lack of criminal accountability of corporations at an international level, the application of Australian ICC Statute equivalent offences against corporations provides an opportunity for Australia to participate in improving corporate accountability for international crimes.

The possibility of corporate entities being involved in international crimes is not fanciful. Unfortunately examples abound.\(^2\) Many of the most serious examples of corporate involvement in international crime arise in the context of relationships with rights-violating security forces. For example, in the extractive industries, security forces are increasingly employed to control and protect land crucial to mining operations. The practice of corporations supporting military services or para-military forces as security for mining operations has been described as 'militarized commerce'.\(^3\) Two principal sources are used for security: a national military of the host country or private military companies, and the phenomenon is growing.\(^4\) The World Bank Extractive Industries Group has acknowledged that the practice of human rights violations by military, police or commercial mercenaries in the context of securing company control over a given territory and protecting their operations is not uncommon.\(^5\) The private security industry has been estimated at US$100 billion in annual global revenue\(^6\) and presents its own particular problems arising from

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1 This is how the Australian government described the domestic offences when the legislation was being introduced: Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth.) (Aus.) 1.


the apparently unregulated status of corporate entities under international criminal and humanitarian law.7

For Australia, the case of mining company Anvil Mining Limited (Anvil Mining) in the Democratic Republic of the Congo (DRC) has raised the issue to local prominence. The company has been at the centre of allegations that it participated in serious human rights abuses by providing the logistical support necessary for a military counter-offensive in the town of Kilwa in the DRC, an offensive that allegedly involved egregious human rights abuses including summary executions of civilians. The company is currently under investigation by the Australian Federal Police for its possible part in facilitating the military conduct.8 If pursued, it would represent the first application of the ICC Statute equivalent offences against any person in Australia.

The issue of domestic criminal legislation expanding the effective scope of international criminal law is likely to be a matter of growing interest to international and criminal lawyers. Implementation of the ICC Statute into national legislation is expected to increase the opportunities for domestic courts to address international crimes. The International Criminal Court (ICC) is in fact intended to encourage domestic courts to increasingly do so.9 And, despite the ICC’s lack of jurisdiction over corporate entities,10 a number of states, such as the Australian example below, are eschewing any distinction between legal and natural persons in their domestic implementation of ICC crimes.11

2. Providing the Means to an Unfortunate End: The Case of Anvil Mining in the DRC

A report on the Australian Broadcasting Commission’s investigative journalism program, Four-Corners,12 brought to the attention of the Australian public details of the involvement of Anvil Mining in a counter insurgency operation

10 The ICC’s jurisdiction is limited to natural persons: Art. 25 of the ICC Statute.
12 The report aired on Australian national television on 6 June 2005. Transcripts and background material are available online at http://www.abc.net.au/4corners/content/2005/s1384238.htm (visited 5 August 2006).
undertaken by military forces of the DRC in the town of Kilwa, about 50 kilometres from the Company's Dikulushi copper–silver mining operations.\textsuperscript{13} Anvil Mining is incorporated in Canada but has major operations, including its principal headquarters, in Australia.\textsuperscript{14}

The United Nations Mission in the Democratic Republic of the Congo (MONUC), as well as a local human rights group, have released reports detailing the events that form the basis of allegations against Anvil Mining.\textsuperscript{15} On the morning of 14 October 2004, a small group of lightly armed insurgents occupied Kilwa. The group claimed to belong to the Revolutionary Movement for the Liberation of Katanga (MRLK), to be widely supported by politicians and soldiers of the Katanga region and to be seeking separatism of the resource rich area.\textsuperscript{16} Over the course of the morning, the MRLK held a public meeting urging the local community for their support, took strategic locations in the town including the police office, looted military and police stores for weapons and then moved toward the port of the town. The insurgency was reported to have been largely peaceful as the few police officers that were stationed in the town either joined the group or ran away and because the military capacities of the insurgents were limited.\textsuperscript{17}

In response to the insurgency, a counter-offensive was undertaken by a brigade of the armed forces and was facilitated by the use of Anvil Mining vehicles. Anvil Mining trucks and planes were used to transport soldiers to the town, to move about within the town, as well as to withdraw.\textsuperscript{18} The MONUC and local human rights group reports both find that the military forces

\textsuperscript{13} Anvil Mining is the parent company of Anvil Congo s.a.r.l., which owns and operates the Dikulushi mine. Anvil Mining holds 100% of the equity of its subsidiary, comprised of a 90% equity interest and administrative responsibility for the economic benefit of the remaining 10% equity, which is held in trust for the social, economic and infrastructure development of the Dikulushi mine region. Anvil Mining Ltd., \textit{Annual Report to December 31 2004}, at 13, available online at http://www.anvil.com.au/inv_financial.shtml (visited 5 August 2006).

\textsuperscript{14} In 2004 the company redomiciled from Australia to Canada for the purpose of allowing a joint listing on the Australian and Canadian stock exchanges: Anvil Mining Ltd, \textit{Annual Report 2004}, at 14, available online at http://www.anvil.com.au/inv_financial.shtml (visited 5 August 2006). For the purpose of Australian corporations' law, the company is governed as a registered foreign company: s 9 of the \textit{Corporations Act 2001} (Cth.) (Aus.).


\textsuperscript{16} There is speculation that the insurgency was indeed known to, and orchestrated by, high ranking state military and administrative officers, possibly for the purpose of destabilizing the town. See for example, italic\textsuperscript{ note 15, at} italic\textsuperscript{ note 15, at} § 3 and 20–23; ASADHO/Katanga Report, \textit{supra} note 15, at 10.

\textsuperscript{17} ASADHO/Katanga Report, \textit{supra} note 15, at 13.

\textsuperscript{18} MONUC Report, \textit{supra} note 15, at §§ 36–42; ASADHO/Katanga Report \textit{supra} note 15, at 11, 16, 18, 19.
engaged in summary executions of insurgents and civilians believed to be collaborating with the MRLK, incidents of rape, widespread looting and extortion of civilian property and goods (some of which was later sold back by the army to the local population), arbitrary arrests and detentions. Some detainees subsequently disappeared or died in custody. MONUC obtained independent verification of 73 deaths during the counter-attack, at least 28 of which were by summary execution, and details of a number of mass graves. In one instance, a group of 12 men were allegedly forced to kneel on the edge of a grave and were killed in succession. The report of the local human rights organization cites up to 90 summary executions. The real violence appears to have commenced after the insurgents had given up and the army had recaptured the town, within a few hours of their arrival and without any real opposition.

The Congolese government initially sought to downplay what had occurred in the town. Anvil Mining also downplayed what had occurred in their public statements following the violence. In a news release in January 2005, the company stated that the evacuation of their staff due to the unrest and their subsequent return to work a few days later were ‘...carried out efficiently and without incident...’ and that ‘...[t]he government and military response on both provincial and national levels was rapid and supportive of the prompt resumption of operations.’ In the days immediately after the violence, the company indicated that they were ‘... in consultation with the Government of the DRC to provide additional security for the mine so that, should such incidents occur again, the company would be able to continue its operations.’

The company has been brought under scrutiny as a result of these events. Aside from the Australian Federal Police investigation, Anvil Mining is also being investigated by Canadian authorities over their possible role in assisting in the conduct of hostilities and by the World Bank, an underwriter for the company, into the company’s due diligence on security and human rights. In addition, a group of non-government organizations has retained Australian law firm Slater and Gordon on behalf of civilian victims to investigate a civil action against the company for their part in the violent military reprisal.

20 ASADHO/Katanga Report, supra note 15, at 13–15. In one incident, 47 boys were reportedly brought together by soldiers and executed using a rocket.
21 See for example, ASADHO/Katanga Report, supra note 15, at 4.
25 The World Bank has now released the CAO Audit Report, which is available online at http://www.cao-ombudsman.org/html-english/DemocraticRepublicofCongo.htm (visited 5 August 2006).
26 Slater and Gordon, Congo Victims Seek Legal Action Against Anvil, Media Release, 7 June 2005.
Finally, Congolese military prosecutions will proceed against three former Anvil Mining employees for their role in the violence.27

3. The Australian Rome Statute Offences and Corporations

A. General Applicability of Australian Federal Criminal Law to Corporations

Division 268 of the Criminal Code enacts within Australian federal criminal legislation the crimes of genocide, crimes against humanity and war crimes (referred to collectively hereafter as the ‘Division 268 offences’). The offences were inserted by the International Criminal Court (Consequential Amendments) Act 2002 (Cth) for the purpose of creating, as offences against Australian criminal law, the offences over which the ICC has jurisdiction, so that Australia will be in a position to take full advantage of the principle of complementarity.28 By enacting the Division 268 offences within the framework of the Criminal Code, Australia has arguably created a basis to prosecute companies, as well as individuals, for these crimes.29

Throughout the drafting and passage of the implementing legislation, the key concern that emerged was the issue of maintaining Australian sovereignty.30 To address discontent on this issue, the government introduced a number of measures to confirm the primacy of Australian law and legal process over matters otherwise within the ICC’s jurisdiction.31 This was reinforced by, among other things, statements by the government confirming that Division 268 offences would be interpreted according to Australian domestic law and principles.32

One difference between the Division 268 offences and their international counterparts is the extension of criminal responsibility for such offences to corporations that arises from the enactment of the offences within the Criminal Code. The Criminal Code contains a clear presumption that all

27 Anvil Mining Ltd, Anvil Mining Congo Receives Notification from Congolese Military Court in Relation to the Kilwa Incident in October 2004, News Release, 18 October 2006.
31 One controversial measure is that no person will be surrendered to the ICC, nor arrested on the request of the ICC, without the approval of the Federal Attorney-General: ss 22 and 29 of the International Criminal Court Act 2002 (Cth) (Aus).
offences contained therein apply equally to bodies corporate\(^{33}\) as to natural persons. Part 2.5, section 12.1 of the Criminal Code states:

(1) This code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.\(^{34}\)

There may be objections that Parliament did not intend to extend liability for the Division 268 crimes to corporations, given that at no stage during the ICC Statute implementation process did Parliament explicitly address the extension of criminal responsibility to corporations.\(^{35}\) The purpose of the implementing Act, the second reading speech and the description by the government of the Division 268 offences as equivalent to those within the ICC Statute, all suggest that to the greater part the crimes introduced in the Criminal Code were to cover the same acts as within the jurisdiction of the ICC, which by implication would not include corporate offenders.\(^{36}\) On the other hand, the principle that Commonwealth indictable or summary offences should apply equally to bodies corporate as to natural persons is reaffirmed elsewhere in Commonwealth law\(^{37}\) and was a founding principle in the development of the Criminal Code.\(^{38}\) Further, the drafting of the offences

\(^{33}\) The term ‘body corporate’ is not defined in the Code, but to be subject to criminal liability an artificial entity must be incorporated. This extends to include both public and private companies, as well as both for profit and not for profit companies. On the other hand, it excludes unincorporated bodies such as partnerships, unincorporated associations, trusts, unincorporated joint ventures and so forth: J. Clough and C. Mulhern, The Prosecution of Corporations (South Melbourne: OUP, 2002), 65–66.

\(^{34}\) Section 4B (3) of the Crimes Act 1914 (Cth) (Aus) sets out the formula for the order of penalty units (monetary fines) against corporate offenders in lieu of terms of imprisonment.

\(^{35}\) On the other hand, simply by its decision to enact the Division 268 offences within the Criminal Code Parliament might be taken to have intended the inclusion of corporate criminal responsibility for those offences. A lack of debate does not itself confirm that the extension was not intended, although the issue of parliamentary silence could point to a problem in legal culture.

\(^{36}\) There are however limits to the uses of extrinsic material for the purpose of statutory interpretation in Australia. For example, beyond assisting in determining the purpose of a law when interpreting its provisions, use of extrinsic material is limited to either confirm a construction of the ‘ordinary meaning’ of a provision where it is ambiguous or obscure, or when the ordinary meaning leads to manifestly absurd or unreasonable results: s 15AB of the Acts Interpretation Act 1901 (Cth) (Aus). For details regarding interpretation of the ‘ordinary meaning’ of statute provisions taking into account the Act’s purpose, see D.C. Pearce and R.S. Geddes, Statutory Interpretation in Australia (5th edn., Sydney: Butterworth, 2001), 25–26, 56.

with ‘persons’ as their subject incorporates bodies corporate.39 If the Division 268 offences were not intended to apply to corporations, an exception to this effect should presumably have been included, or the term individual rather than persons used in the drafting of the offences.40

B. Evaluation

At any stage, the Australian Parliament could amend the Criminal Code to exempt corporations from the operation of Division 268 offences. But it is submitted that it would be retrograde for it to do so. First, Australian law recognizes corporate criminality and does not face the same problems, such as the operation of the principle of complementarity, which were of concern during the Rome Conference debates regarding the extension of the ICC’s jurisdiction to include legal persons.41 Second, in as much as the offences could be used to regulate the conduct of corporate nationals for their conduct abroad, whilst under international law ‘home states’ are not obliged to regulate such conduct, it is permitted for them to do so.42 It has in fact been argued that this would be one of the most immediately achievable ways in which to address the current gap in regulation and accountability of multinationals abroad.43 Third, the Criminal Code fundamentally seeks to treat corporations as subject to the same criminal law as individuals in the context of a best practice model.

39 See the definition of person contained in the Criminal Code: s 4 and Schedule. On the general presumption in Australian statutory interpretation that the term ‘person’ includes bodies corporate, see Pearce and Geddes, supra note 36, at 190–191.

40 Sections 22(1)(a) and 22(1)(aa) of the Acts Interpretation Act 1901 (Cth.) (Aus.) provides that in any Act, unless the contrary intention appears, the term person includes a corporation as well as an individual, while the term individual means a natural person.

41 The question of the inclusion of legal persons in the jurisdiction of the ICC was debated during the Rome Conference, but the proposal to extend jurisdiction to corporate entities did not receive sufficient support. This was based on a number of practical concerns, including the argument that many domestic law systems do not recognize the criminal liability of corporate entities and therefore the complementarity regime of the Court would be compromised. For an assessment of the complementarity objection regarding the ICC legal person proposal, see J. Kyriakakis, ‘Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare’, Criminal Law Forum (forthcoming). Of course a contrario one could argue that where the national system provides for such a responsibility there seems to be no reason to exclude the applicability of general notions to international crimes. For the statements of delegates on the issue see, UN Doc. A/CONF 184/C1/L.3, reprinted in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, Official Records, Vol. 2, 133–136. See also K. Ambos, ‘Article 25: Individual Criminal Responsibility’, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes: Article by Article (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 475–492, at 477–478.

42 This is on the basis that it is generally recognized in international law that states can exercise extraterritorial jurisdiction over wrongs committed by their nationals abroad: S. Joseph, ‘Taming the Leviathans: Multinational Enterprises and Human Rights’, 46 Netherlands International Law Review (1999) 171–203, at 177.

The exclusion of corporations from the operation of the Division 268 offences, arguably the most serious crimes contained in the Criminal Code, would undermine this purpose. This is particularly so in light of evidence that corporations are capable of committing some, if not all, of the international crimes contained therein. For example, in the I.G. Farben trial before the United States Military Tribunal at Nuremberg, the Tribunal acknowledged that a corporate entity was capable of committing certain war crimes. There is also increasing jurisprudence from the United States pursuant to the Alien Tort Claims Act 1789 (ATCA) as it has been applied against corporate defendants that, whilst involving civil suits for tort violations, have considered the capacity of corporations to breach the law of nations, which has been taken to equate to customary international law. In particular in the District Court decision of Presbyterian Church of Sudan v. Talisman Energy the defendant corporation’s claim that a corporation is legally incapable of violating the law of nations was rejected following the Court’s comprehensive review of prior ATCA decisions, as well as international tribunal, treaty and organization

44 Under principles of Australian statutory construction, the nature and scope of an offence will be relevant in interpreting whether it applies equally to corporations as to natural persons: Clough and Mulhern, supra note 33, at 70. For example, in the case of R. v. Young (1986) 7 NSWLR 689, the New South Wales Court of Criminal Appeal found that because a corporation was capable of committing the offence of delivering dangerous goods for the purpose of their being placed on board an aircraft, the words of the provision were to be given their ordinary meaning and scope in the context of a statutory presumption that the offence applied to corporations. This was notwithstanding that the offence occurred in the context of a series of offence-creating provisions applicable only to natural persons.

45 US v. Krauch (I.G. Farben Trial), US Military Tribunal sitting at Nuremberg, Judgment of 29 July 1948, Trials of War Criminals Before Nuremberg Military Tribunals, Vol. VIII, 1081–1210. The case concerned the prosecution of 23 ‘industrialists’ for various war crimes, including slave labour, torture, killings, plunder and spoliation, and the production and supply of drugs for experimentation and extermination purposes in connection with their management of the I.G. Farben corporation. Twenty of the indicted individuals were members of the corporation’s management cabinet and four others were leading officials.

46 Whilst the Tribunal did not have jurisdiction over the corporation, the Prosecution case was that ‘... the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crime enumerated in the indictment’. In its decision the Tribunal stated: ‘When private persons, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.’ Trials of War Criminals before the Nuremberg Military Tribunals, Vol. VIII, at 1153, quotes taken from A. Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons’, in M.T. Kamminga and S. Zia-Zarifi (eds), Liability of Multinational Corporations Under International Law (The Hague: Kluwer Law International, 2000), 139–195, at 167. See also, A. Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations’, 20 Berkeley Journal of International Law (2002) 91–159, at 104–119.

47 28 USC §1350.


49 244 F Supp 2d 289 (SDNY 2003), at 308–319.
precedent. Instead, Judge Schwartz concluded that there is no logical argument for differentiating corporations from other private persons, given ‘... a private corporation is a juridical person and has no per se immunity under US domestic or international law’.50

Finally, it would have been illogical to make corporate entities liable for ordinary crimes and to exclude their accountability for more serious offences.

4. Universal Jurisdiction over Corporate Entities

A. General

A distinct although interconnected issue is whether applying the principle of universal jurisdiction to the responsibility of corporate entities for international crimes is admissible under international and Australian law. One could argue that provided that Australia is meeting its international obligations there seems no reason why it should not go beyond the call of duty, except perhaps where this would involve an unprecedented incursion on other states. In Australian law, the fact that the Division 268 offences sought to cover the same ground as the ICC Statute offences does not in itself preclude their encompassing a wider ambit.51 provided the Commonwealth does not exceed its constitutional powers. On the other hand, as the jurisdictional reach of the Division 268 offences is equivalent to universal jurisdiction, in international law an objection may be that a national legislator may only enact universal jurisdiction with international legal empowerment.52

50 Ibid., at 319 (emphasis in the original).

51 The extension of liability to corporations is not the only example of the Australian law exceeding the scope of the ICC Statute. Another example is the Australian genocide offences, which do not adopt one of the conditions set out in the Elements of Crime, thus presumably making the Australian offences of genocide easier to satisfy: T.L.H. McCormack, 'Australia's Legislation for the Implementation of the Rome Statute' in M. Neuner (ed.), National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries (Germany: Berliner Wissenschafts-Verlag, 2003), 65–82, at 70; G. Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law', 25 Sydney Law Review (2003) 507–534, at 522–523. Differences of this kind may presumably lead to differences between Australian and international jurisprudence over time, although given Australia’s dualist system this is not a concern from a domestic law perspective.

52 For example, when implementing the ICC Statute, German legislators deviated from the ICC Statute only in so much as customary international law exceeds the ICC Statute, on the basis that only such crimes entitle universal jurisdiction: H. Kaul, A. Mlitzke and S. Wirth, International Criminal Law in Germany. The Drafts of the International Crimes Code and the Rome Statute Implementation Act (Paper presented to the Preparatory Commission for the International Court, New York, 18 April 2002), 3, available online at http://www.iccnow.org/?mod=romeimplementation (visited 30 January 2007).

For an assessment of national legislative competence under international law to exercise universal jurisdiction over international crimes committed by, or with the complicity of, legal persons, see O. De Schutter, Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations (Background Paper, December 2006), 10–18.
The jurisdictional scope of the Division 268 offences is particularly broad. The Criminal Code sets out five categories of jurisdiction; the fifth and broadest category (Category D) applies to the Division 268 crimes: it establishes that anyone, anywhere, regardless of citizenship or residence, can be tried for an offence committed anywhere in the world, without the availability of a foreign law defence. The scope of the jurisdiction that attaches to the Division 268 offences therefore reflects the universality principle under international law (and also encompasses any claim involving some nexus to Australia). Accepting that the Division 268 offences do extend to corporations, Australia could therefore prosecute a corporate entity of any nationality for conduct amounting to a Division 268 offence wherever in the world it is committed.

Despite limitations the ICC Statute places on the jurisdiction of the ICC, a number of other countries aside from Australia, including Canada, the Netherlands and the United Kingdom, have implemented genocide, crimes against humanity and war crimes offences as per the ICC Statute in their domestic laws on the basis of universal jurisdiction and as applicable also to legal persons. There may be however some concerns on the consistency of such a broad approach with Australian constitutional law: the question being whether Division 268 is consistent with constitutional provisions, given that it departs from the ICC Statute in so far as corporate entities are concerned.

B. Australia’s Constitutional Competence and International Affairs

Due to the federal nature of the Australian system, the Australian Commonwealth government is only entitled to make laws with respect to a number of specified subjects. Criminal law is not one of those subjects and most domestic criminal laws are therefore matters for Australian State parliaments. However, the scope of the Commonwealth’s law making powers with respect to ‘external affairs’ is particularly broad. The external affairs power is of particular interest to Australian international lawyers as it will often be the principal ground for Commonwealth legislative competence in relation to matters pertaining to its involvement in the international community and its ability to respond to international concerns, for example to participate in a global criminal order.

In a series of cases, the High Court of Australia has confirmed that the external affairs power entitles the Commonwealth to legislate on any affairs, matters or things that are geographically external to Australia, regardless of


54 Ramasastry and Thompson, supra note 11, at 16, 30.
55 These are enumerated in s 51 of the Constitution Act 1901 (Cth.) (Aus.) (Australian Constitution).
56 Section 51(xxix) of the Australian Constitution.
whether such matters are otherwise the subject of a treaty or are of interna-
tional concern.\footnote{57} This principle has been coined the 'geographical externality 
principle'. It includes the power to regulate the conduct of persons outside of 
Australia, both natural and corporate.\footnote{58} The leading case on the geographical 
externality principle is \textit{Polyukhovich v. Commonwealth}.$^{59}$ \textit{Polyukhovich} was con-
cerned with amendments to the \textit{War Crimes Act 1942} (Cth.) to allow for prose-
cution within Australia of persons alleged to have committed certain war 
crimes in Europe during the course of World War II. The majority of the High 
Court found the law to be valid in as much as it dealt with conduct that 
occurred outside of Australia. They held that nothing further than the extra-
territoriality of the matter being regulated is required to bring the matter 
within the valid scope of the external affairs power.\footnote{60} Some of the judges in 
\textit{Polyukhovich} considered that in addition to relating to a matter, person or thing 
geographically external to Australia, there must also be some connection 
between such matter or thing the subject of the law and Australia.$^{61}$ This 
issue now appears to have been settled in favour of the majority view by 
subsequent endorsement by the High Court.$^{62}$ This has led one commentator 
to state that the law in Australia is now such that the Commonwealth has the 
‘...constitutional capacity to ban all Parisians from smoking in the streets of 
Paris.’$^{63}$

The High Court has also had the opportunity to consider the 
Commonwealth's use of the external affairs power to legislate on the basis


\footnote{58} Although none of the decisions to date have dealt with legislation addressing the conduct of a 
body corporate outside of Australia and instead have been limited to natural persons, there 
does not appear to be any ground under the principle to differentiate natural and legal persons. 
Justice Brennan has in fact stated that the ‘persons’ whose overseas conduct can be regulated 
under this aspect of the external affairs power includes corporate persons: \textit{Polyukhovich} (1991) 
172 CLR 501, at 552.


\footnote{60} \textit{Ibid.}, at 530–531 (Mason CJ), 599 (Dean J), 634 (Dawson J), 714 (McHugh J).

\footnote{61} \textit{Ibid.}, at 550–552 (Brennan J), 653–654 and 684 (Toohey J), 695–696 (Gaudron J).

\footnote{62} \textit{Victoria v. Commonwealth} (1996) 187 CLR 416, at 485. See also, L. Zines, \textit{The High Court and the 
Constitution} (4th edn., Sydney: Butterworths, 1997), 297; T. Blackshield and G. Williams, 
\textit{Australian Constitutional Law and Theory: Commentary and Materials} (4th edn. Abridged, 
A Contemporary View} (2nd edn., Pyrmont: Lawbook Co., 2006), 111. It should however be noted 
that the particular issue of whether a nexus with Australia is required has been intentionally 
bypassed in both High Court decisions since \textit{Polyukhovich} addressing the geographical externality 
[2006] HCA 25 (13 June 2006), at § 10 (Gleeson CJ), § 37 (Gummow, Hayne and Crennan JJ), § 116 
(Kirby J).

\footnote{63} Joseph and Castan, \textit{supra} note 62, at 111. They go on to state ‘[o]f course, the Commonwealth 
Parliament could hardly expect such a law to be recognised or enforced by French courts.'
of extraterritoriality where the law in question may conflict with international law. In the case of *Horta v. Commonwealth* the Commonwealth introduced domestic legislation in order to implement a Treaty signed between Australia and Indonesia regarding exploration and exploitation of petroleum in the Timor Gap. Proceedings were commenced in the High Court challenging the validity of the implementing legislation on the basis that the Treaty was void under international law and that any performance of the Treaty by Australia would be in breach of a number of Australia’s international treaty and customary law obligations. On these grounds it was claimed that the laws were not with respect to external affairs and beyond the constitutional competence of the Parliament. In response the High Court unanimously stated:

... even if the Treaty were void or unlawful under international law or if Australia’s entry into or performance of the Treaty involved a breach of Australia’s obligations under international law, the Act and the Consequential Act would not thereby be deprived of their character as laws with respect to “External affairs” ... Neither s.51(xxix) itself nor any other provision of the Constitution confines the legislative power with respect to ‘External affairs’ to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law. In particular there is simply no basis... for the plaintiff’s submission that the legislative power conferred ... must be confined within the limits of Australia’s legislative competence as recognized by international law.

On the principles in *Polyukhovich* and *Horta* it seems that a Commonwealth law that regulates the conduct of persons, natural or corporate, outside of Australia comes within the external affairs power, regardless of whether the law otherwise exceeds or conflicts with international law. On this basis it could be argued that, notwithstanding the status of corporate criminal liability for international crimes under the domestic laws of other nations, treaty or international law in general, in so much as the Division 268 offences regulates the conduct of corporations overseas, the laws would be valid. This is further supported by the recent decision of the High Court in

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64 (1994) 181 CLR 183.
65 Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, entered into force on 9 February 1991. The Timor Gap refers to an area of the continental shelf between the coast of East Timor and the coast of mainland Australia.
67 Interestingly, the more contentious aspect of the Division 268 offences under Australian Constitutional law may arise from their indiscriminate application to conduct occurring both outside of, and within, Australian territory, on the basis of an overreaching impact on the federal division of powers. An answer to this might be grounded on the implied nationhood power. As it is a power attendant on sovereign nations under international law to address international crimes wherever in the world they are committed (see for example § 6 of the Preamble of the ICC Statute, ‘... recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’) it might be argued that the competence of the Commonwealth to criminalize such conduct domestically, as well as abroad, is necessary to ensure the totality of its powers in its relations with the international
XYZ v. Commonwealth\(^{68}\) where Commonwealth legislation aimed at addressing ‘sex tourism’ engaged in abroad by Australian residents and citizens was held valid, notwithstanding that by virtue of the age of consent within the legislation the laws could criminalize conduct that is not criminal in the place where it occurs.\(^{69}\) Whilst not necessary to the decision, three judges went further and indicated that the laws would have remained valid even if not limited to Australian residents and citizens.\(^{70}\)

There are other acknowledged aspects of the external affairs power that can ground legislative activity by the Commonwealth on matters arising from its international affairs. The Commonwealth is entitled to enact law to implement treaty obligations,\(^{71}\) on matters affecting Australia’s external relationship with other nation states and with international organizations,\(^{72}\) on matters of ‘international concern’\(^{73}\) or vesting an Australian court with universal jurisdiction.\(^{74}\) Returning to the example of the Division 268 offences, a claim to validity on any of these grounds will, however, demand that the extension of liability to corporations is sufficiently proportionate to the valid purpose of the law.\(^{75}\) This is particularly important in light of the unclear status of

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\(^{68}\) [2006] HCA 25 (13 June 2006).

\(^{69}\) The majority found the relevant provisions to be valid on the basis of the geographical externality principle: at § 10 (Gleeson CJ), § 38 (Gummow, Hayne and Crennan JJ). One Justice found the provision valid on the alternative ground that they were with respect to Australia’s external relations with other nations and with international organizations: at § 148 (Kirby J). Doubt was cast over the appropriateness of the geographical externality principle by one majority and two dissenting justices, so its future may be uncertain: at § 114 (Kirby J), § 206 (Callinan and Heydon JJ).

\(^{70}\) Ibid., at § 49 (Gummow, Hayne and Crennan JJ).

\(^{71}\) Validity argued on this basis, however, must satisfy a test of whether the Australian laws are in sufficient conformity with the founding treaty. The question is determined by whether the law is capable of being reasonably considered to be appropriate and adapted to achieving the object of the treaty: H.P. Lee, ‘The High Court and the External Affairs Power’, in H.P. Lee and G. Winterton (eds), Australian Constitutional Perspectives (Sydney: The Law Book Co., 1992), 60–91, at 82–84.

\(^{72}\) Justice Kirby, for example, has argued that it is enough that a relationship with another state or international organization is ‘enlivened’ by a law to show there is ‘incontestably’ an external affair: XYZ [2006] HCA 25 (13 June 2006), at § 132. In the same case, however, Justices Callinan and Heydon took a far narrower view of this aspect of the power: at §§ 207–212.

\(^{73}\) Joseph and Castan, supra note 62, 127–30. The future of this principle hangs in doubt however given comments by some of the judges in XYZ [2006] HCA 25 (13 June 2006), at §127 (Kirby J) and § 218 (Callinan and Heydon JJ).

\(^{74}\) Polyukhovich (1991) 172 CLR 501, at 562–563 (Brennan J). Aside from the external affairs power, a distinct constitutional power entitles the Commonwealth to make laws with respect to foreign, trading and financial corporations: s 51 (xx) of the Australian Constitution. However, indiscriminate regulation of all persons under the Code may mean it is not deemed to fall within this power: Stickland v. Rocla Concrete Pipes Ltd (1971) 124 CLR 468, at 499 (Barwick J); Joseph and Castan, supra note 62, at 85.

\(^{75}\) The question of proportionality is determined by whether a law’s operation ‘... is capable of being reasonably considered to be “appropriate and adapted” to deal with ... or to achieve an identified purpose or object which is itself a legitimate subject of external affairs...’ Polyukhovich
corporations under international law and the exercise of universal jurisdiction in relation to such subjects, and the exclusion of corporations from the ICC Statute.

In terms of the Division 268 offences, the form that an argument for proportionality could take might be gleaned from the reasoning of Justice Kirby in _XYZ_ in relation to the Australian sex tourism offences. In relation to the choice of the Commonwealth to set a minimum age of 16, a choice which might render the law inconsistent with the age of consent in some of the nations where its provisions would reach, Kirby considered that the choice of age was ‘neither unusual nor impermissibly overreaching’ given that the decision was based on reasonable grounds, in particular being that it reflects the common age of consent in Australian criminal law. Likewise, the extension of liability to corporations could be argued reasonably adapted in light of the position of the Commonwealth to all federal crimes that there shall be no demarcation, on policy grounds, between the criminal capacity of individuals and corporations. Justice Kirby also based his conclusion on the consistency of the law with that of laws passed by many other nation states and so similar legislative approaches taken by other nations in their implementation of the ICC Statute could also support the Australian approach to reject any distinction between legal and natural persons.

The extension of liability to corporations for international crimes, be that by Australia or other nations implementing the ICC Statute, or potentially by bringing corporations within the jurisdiction of the ICC itself, generally begs the question of why individual accountability should not be sufficient. The delegate for Greece during the Rome Conference debates argued against the inclusion of legal persons in the ICC’s jurisdiction on the basis that ‘... there was no criminal responsibility which could not be traced back to individuals’. The following section considers the claim that individual criminal responsibility should suffice to address corporate involvement in international crime.

5. Why Make Corporations, not only Individuals, Accountable for Extraterritorial Human Rights Abuses

William Schabas has written on ways in which general principles of individual criminal responsibility under international criminal law, in

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77 _Ibid_.

particular principles of accomplice liability, might form the basis of prosecu-
tions of 'economic actors' who participate in international crimes.\(^{79}\) By focus-
ing on economic actors, he is concerned with how far complicity principles
might be applied to the economic dimensions of international crime, for exam-
ple to address the contribution of the diamond trader, or of the small arms
dealer, or of the airline director or pilot transporting fuel or weapons to perpe-
trators. Individual actors engaging in the kinds of commerce, Schabas argues,
that can make a 'direct and significant contribution to breaches of international
humanitarian law'.\(^{80}\) In the context of corporate crime, such principles might
be applied to prosecute individuals within the corporate body, for example
directors, for the conduct of a corporation in their control.\(^{81}\)

The full potential of accomplice liability to address the role of individual
economic actors in international crimes is underdeveloped given the limited
focus such actors have received by international tribunals to date.\(^{82}\) This may
be changing however, considering, for example, comments by the ICC's Chief
Prosecutor that suggest attention will be paid to the relationship between
business and international crime.\(^{83}\) On the potential of the ICC in this regard,
two points might be made. First, as Schabas has pointed out, Article 25 of the
ICC Statute does not specifically stipulate that assistance must be 'substantial'
in order to constitute aiding and abetting, which may indicate this higher
threshold was being rejected.\(^{84}\) Second, it has been suggested that the wording
of Article 25 entitles a prosecution of an individual on the basis of having acted
through a corporate entity to commit an international crime.\(^{85}\) Both these
features might broaden the scope of individual criminal responsibility and
hence the capacity of these principles to address the economic dimension of
international crimes.

Despite this, individual accountability alone is not likely to satisfy those
concerned with addressing the problem of corporate involvement in interna-
tional crime. First, it has been argued that corporate crime cannot always be
reduced to an individual actor. For example, Fisse and Braithwaite note that

\(^{79}\) W.A. Schabas, ‘Enforcing International Humanitarian Law: Catching the Accomplices’, 83
International Review of the Red Cross (2001) 439–456. He also notes the limitations of existing
international law to address the economic dimension of international crime and proposes
additional schemes: see, W.A. Schabas, ‘War Economies, Economic Actors and International
Criminal Law’, in K. Baillentine and H. Nitzschke (eds), Profiting From Peace: Managing the

\(^{80}\) Schabas, ‘Catching the Accomplices’, supra note 79, at 452.

\(^{81}\) See for example, K.E. Jacobson, ‘Doing Business with the Devil: The Challenges of Prosecuting
Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against

\(^{82}\) Schabas, War Economies, supra note 79, at 427–428.

\(^{83}\) Ibid., at 425–426.

\(^{84}\) Schabas, ‘Catching the Accomplices’, supra note 79, at 448.

and P. Malcontent (eds), From Sovereign Impunity to International Accountability: The Search for
individual actors in a corporate structure may commonly contribute to collective decision-making processes, without a full consciousness of the totality of that process. In this sense, no single individual may properly embody a corporate decision and its outcomes. They also suggest that there can be situations where, while a corporation may be to blame for a corporate crime, no individual deserves such blame. For example, where the corporate policies that led to blameworthy conduct have been devised by individuals no longer present in the company. Interestingly, even in the final and most advanced draft proposal for the inclusion of legal persons in the jurisdiction of the ICC, prosecution was to be predicated on the prosecution and guilt of a natural person in a position of control within the legal person. Such a model might therefore fall short of resolving the claim that corporate accountability cannot in all cases be reduced to an individual.

Even where the conduct of a corporation might theoretically be reducible to an individual, Fisse and Braithwaite note that various features of the corporate form can make the identification of an individual perpetrator both extremely practically difficult and even undesirable. Features such as the commonly opaque nature of accountability within corporate structures, the expendability of individuals, the practice of corporate separation of those responsible for past violations and those responsible for preventing future offences, as well as the safe harbouring within corporations of individual suspects, can all contribute to the difficulty of locating individual wrongdoers, as well undermining any deterrent value of prosecution. Such features are undoubtedly greatly accentuated in the case of a multinational corporate group.

Indeed, if deterrence is a key concern it has been argued that punishment of the corporate entity directly, as opposed to individuals therein, is more likely to create lasting results. Among other things, prosecution of the corporation acts as an incentive to the corporation to internally monitor its processes and hence bring about changes to internal culture and procedures likely to influence conduct in the longer term. A similar argument has been made in favour of targeting parent companies in litigation. Changes at the level of the parent company are more likely to impact throughout the corporate group.

There is also the moral concern that corporations that receive the profits from serious international crime may continue to operate in the economic sphere with effective impunity. Indeed, it is common parlance for

87 Clapham, supra note 46, at 150–154.
88 Fisse and Braithwaite, supra note 86, at 17–58.
89 Ibid., at 36–41.
90 Clough, supra note 43, at 10. There are also good arguments from the perspective of deterrence and retributive theory for the prosecution of individuals within positions of power in corporations: see for example, C. Wells, Corporations and Criminal Responsibility (2nd edn., New York: OUP, 2001), 160–163.
91 See for example Ramasastry, supra note 46, at 96–97.
communities to point the finger of blame, not to individuals, but to corporations as morally responsible and blameworthy entities. Finally, and perhaps the most commonly cited basis for corporate criminal responsibility, is that this would allow access to corporate assets for the benefit of reparations to victims.

6. Conclusion

Australia is in an interesting position to play a normative role in the development at an international level of the criminal accountability of corporations for involvement in international crime. Whilst beyond the scope of this article, this is particularly so in light of its progressive approach to the attribution of criminal responsibility and in particular the notion of corporate culture, meaning a corporation's attitudes, policies, rules, course of conduct or practices, as a means of establishing a corporation's fault.

Wells and Elias have argued that there is an increasing international convergence in approaching corporate misbehaviour and suggest that 'the debate [in international spheres] is perhaps no longer whether to have corporate liability but what form it should take'. To date the ambitious Australian Criminal Code provisions in relation to corporate criminal liability have not been used. However, as prosecutors are presented with appropriate circumstances and begin to utilize these novel provisions, the development of jurisprudence in Australia on the concept of corporate culture for serious corporate misbehaviour could be instructive in the international debate toward models of corporate criminal liability.

Whatever the outcome of investigations by the Australian Federal Police into the involvement of Anvil Mining in the events in the Kilwa in October 2004, the attention that the issue has received not only by relevant international agencies but particularly by Australian government and law enforcement agencies is to be welcomed. It indicates some willingness on the part of Australia to consider using its federal powers to address extraterritorial corporate misconduct. Corporate involvement in international crime, together with other aspects of global business and human rights, is a phenomenon that the international community is struggling to address. With means available to participate in the global criminal order, Australia's jurisdiction relating to the domestic prosecution of genocide, crimes against humanity and war crimes to address corporate, as well as individual, misconduct could contribute to the further and better enforcement of international criminal law and challenge corporate impunity.

94 Fisse and Braithwaite, supra note 86, at 25.
95 Section 12.3 of the Criminal Code. For details on the Australian provisions, see Clough and Mulhern, supra note 33, at 138–158.