

PROSECUTING CORPORATIONS UNDER INTERNATIONAL CRIMINAL LAW: WHO IS IT PROTECTING?

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The Russia-Ukraine conflict has reignited debates concerning the selectiveness of the International Criminal Court ('ICC'): which situations it actively pursues and who it chooses to prosecute. The conflict has also once again highlighted the role of capital and finances in enabling and sustaining such atrocities. This paper builds on the selectiveness critique of the ICC and explores the possibility of holding corporations, responsible for financing atrocities, responsible for violations of International Criminal Law ('ICL'). It observes that while under the Rome Statute of the ICC, the ICC lacks jurisdiction to hold corporations liable, the development of the ICL in this area shows that charging corporations under ICL is possible in the past. The paper argues that the argument of complementarity, often used to justify lack of corporate criminal liability in the Rome Statute, is inadequate. The paper adopts a TWAIL framework and questions the legitimacy implications of this exclusion to argue that such an exclusion serves to protect western capital and invisibilises structural causes of conflict.

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I. INTRODUCTION

Following the recent and ongoing invasion of mainland Ukraine by Russia in 2022, there has been a renewed interest in International Criminal Law ('ICL') by scholars and states alike. The growing interest resulted in the Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC') launching an investigation into the situation in Ukraine on 2 March 2022, following referrals by 39 state parties.¹ Other state parties have also subsequently referred the matter.² The ICC has also issued arrest warrants for Vladimir Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Russian Commissioner for Child Rights.³

The promptness of the OTP in Ukraine has reignited debates concerning the selective nature of prosecutions at the ICC.⁴ The legitimacy threat extends not only to the situations the OTP chooses to investigate but also to the range of actors that the ICC can hold accountable.⁵ The role of multi-national corporations ('MNCs') in supplying Russia with arms and unarmed aerial vehicles ('drones' or 'UAVs') in its efforts against Ukraine has been well

¹ Karim AA Khan, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>> accessed 23 April 2025; ICC, 'State Party Referral under article 14 of the Rome Statute' <<https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf>> accessed 23 April 2025.

² Karim AA Khan, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact Portal Launched for Provision of Information' (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and>> accessed 23 April 2025.

³ PTC II, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (*International Criminal Court*) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 23 April 2025.

⁴ Vava Tampa, 'Justice should be colour blind. So why is it served for Ukraine but not the Congolese?' *The Guardian* (23 August 2022); Amnesty International, 'The ICC at 20: Double Standards Have No Place in International Justice' (*Amnesty International*, 1 July 2022) <<https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/>> accessed 23 April 2025.

⁵ While the author recognises that ICL extends beyond the ICC, the ICC occupies a special position as the only permanent international court competent to try offences defined under ICL. Alternate perspectives from other courts are discussed below as well to offer a comparison with the practice of the ICC.

established,⁶ but whether they will be held responsible under ICL for the role they have played remains to be seen.

Concerns regarding the liability of corporations for violations of norms of international law are not new. As Ramasastry demonstrates, MNCs might be liable '(1) directly for certain violations, (2) as an accomplice, or (3) as a joint actor who is complicit in state action that violates international law.'⁷ She also argues that ICL may act as a stronger deterrent because of its ability to stigmatise, which may prevent MNCs from engaging in gross violations of human rights.⁸

This paper explores the legitimacy threat posed by the question of corporate criminal liability under ICL by considering the possibility of holding corporations liable under ICL before the ICC. The paper observes that while corporations possess the required legal personality to be held liable under ICL, the ICC lacks jurisdiction to hold them liable. It proceeds to assess the legitimacy implications of this *de facto* immunity by adopting a TWAIL framework to locate the exclusion of corporate criminal liability in the corporation-state nexus that exists in the global north, and demonstrates that the exclusion of corporate criminal liability is a logical extension of the ICC's design that has favoured the global north.

The second part of the paper reviews the international law relating to the responsibility of corporate actors and observes that while MNCs possess personality under public international law, as the Rome Statute stands, it is impossible to hold corporations themselves responsible for crimes under it. It reviews the opposing views concerning the liability of MNCs under ICL and argues that it is possible to hold MNCs responsible under ICL. Part three locates the ICC's inability to hold corporate actors accountable under a larger umbrella

⁶ US Department of Treasury, 'Treasury Targets Actors Involved in Production and Transfer of Iranian Unmanned Aerial Vehicles to Russia for Use in Ukraine' (*U.S. Department of the Treasury*, 15 November 2022) <<https://home.treasury.gov/news/press-releases/jy1104>> accessed 23 April 2025; Sumathi Bala, 'Ukraine Wants Big Banks to Be Prosecuted for "war Crimes," Zelenskyy's Top Economic Aide Says' (*CNBC*, 26 July 2022) <<https://www.cnbc.com/2022/07/26/ukraine-wants-jpmorgan-citi-hsbc-prosecuted-for-war-crimes-zelenskyy-aide.html>> accessed 23 April 2025; see also Raphael Oidtmann, 'Fighting on the Business Front: On Corporate Criminal Liability and the War in Ukraine' (*Verfassungsblog*, 1 August 2022) <<https://verfassungsblog.de/fighting-on-the-business-front/>> accessed 23 April 2025.

⁷ Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

⁸ *ibid* 153.

of accountability and legitimacy concerns regarding the functioning of the ICC. Part four concludes.

II. LIABILITY OF CORPORATIONS

ICL is split between two factions: the first and the classical view, labelled the liberal view, grounds criminal liability in individual agency.⁹ According to this view, actors acting for corporations can be held responsible, but not the corporations themselves, as corporations only act through their agents.¹⁰ This view is often attributed to the Nuremburg Military Tribunals ('the Tribunal(s)').¹¹ In *IG Farben*, the Tribunal noted:

But corporations act through individuals and, under the conception of personal individual guilt ... the prosecution... must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.¹²

The second view, which this paper argues is the correct position, is called the romantic view. According to this view, international crimes by their very nature happen through collaborations and are thus more closely connected with collective wills and corporate cultures.¹³ It identifies corporations as having a separate legal personality, autonomy, and capabilities extending beyond just its members. So, under this view, MNCs possess the necessary personality for being prosecuted under ICL. In fact, this position is better supported in light of the development of ICL post World War II.

So, while the Tribunal held 'crimes against international law are committed by men, not by abstract entities,'¹⁴ it needs to be understood in its proper context. When deciding this, the tribunal was specifically rejecting the defence's plea that states are the only subjects of international law and hence

⁹ Carsten Stahn, 'Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law' (2018) Vol 50(1) Case Western Reserve Journal of International Law 91 <<https://scholarlycommons.law.case.edu/jil/vol50/iss1/7/>> accessed 12 June 2025.

¹⁰ *ibid* 102.

¹¹ *ibid* 98-100; see also Ryan Long, 'Bioethics, Complementarity, and Corporate Criminal Liability' (2017) 17(6) International Criminal Law Review 997.

¹² *The United States of America v Carl Krauch et al* (1948) VIII Trials of War Criminals Before the Nuremberg Military Tribunals 1081 (International Military Tribunal, Nuremberg) 1153.

¹³ Stahn (n 9).

¹⁴ *United States v Goring* (1946) 22 The Trial of German Major War Criminals Proceedings of the International Military Tribunal sitting at Nuremberg, Germany III (International Military Tribunal, Nuremberg) 447.

individuals cannot be held responsible under international law.¹⁵ To read it, as the liberal view reads it, to mean that corporations cannot be held responsible for crimes under international law would be to read against the grain.¹⁶

As Bernaz notes, the Tribunal in practice labelled groups as criminal, thus recognising that legal persons can engage in criminal activity.¹⁷ The prosecution tied individual responsibility to decision-making at different levels within a corporation, and thus, it becomes impossible to separate individual guilt from the guilt of the corporation.¹⁸ Ramasastry has demonstrated through references to the texts of the judgments that the tribunals fastened liability on individuals because of their connection with corporations that violated the Hague regulations and were considered criminal.¹⁹ She goes further to suggest that the situation was likely similar in tribunals set up to punish Japanese war crimes.²⁰ As Bush has shown through reliance on internal communications, at Nuremberg, criminal charges against companies were considered entirely permissible.²¹ These were not pursued because of prosecutorial choices and not because of any legal determination that corporations cannot be held responsible for crimes in ICL.²²

To this analysis, the Special Tribunal for Lebanon ('STL') adds in *New TV S.A.L.* that ICL has long recognised the possibility of holding non-humans liable. It notes that while enforcing the prohibition on the slave trade, entire vessels

¹⁵ Photeine Lambridis, 'Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity' (2021) 53 *Journal of International Law and Politics* 144 <<https://www.nyujilp.org/wp-content/uploads/2021/07/4-Online-Annotations-Lambridis-144-151.pdf>> accessed 23 April 2025.

¹⁶ Stahn (n 9) 98-100; Kai Ambos, 'Article 25: Individual Criminal Responsibility' (*SSRN*, 29 August 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831626> accessed 6 June 2025.

¹⁷ N Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' (2015) 13 *Journal of International Criminal Justice* 313 <https://media.business-humanrights.org/media/documents/files/documents/JICJ_Lebanon_Contempt_Case_Bernaz.pdf> accessed 6 June 2025.

¹⁸ *ibid* 321.

¹⁹ Ramasastry (n 7).

²⁰ *ibid* 113-117.

²¹ Jonathan A Bush, 'The prehistory of corporations and conspiracy in international criminal law: What Nuremberg really said' (2009) 109(5) *Columbia Law Review* 1094.

²² *ibid* 1176.

used to be condemned.²³ The appeals chamber of STL finally held ‘New TV’, a corporation liable for the crime of contempt and obstruction of justice under Rule 60bis of the Rules of Procedure and Evidence for the STL (‘RoPE’).²⁴ Thus, from the above discussion, culminating in the *New TV S.A.L.* decision, it is clear that corporations have the personality to be held responsible under ICL.

While the discussion is insufficient to conclude that corporations can be proceeded against under ICL as a matter of customary international law, it provides conceptual clarity and disturbs the view that some authors have had that corporations cannot be proceeded against under ICL at all. The reliance of commentators on the industrialist trials for the proposition that corporations cannot be held liable under ICL is misplaced, and charges against corporations, conceptually, as well as in the past, have been considered completely possible.

III. JURISDICTION

The STL in *New TV S.A.L.* decided it had jurisdiction to try legal persons based on its interpretation of Rule 60bis of the RoPE, which used the phrase ‘any person’ as the subject of the rule.²⁵ Applying the rules of treaty interpretation, as per the Vienna Convention on the Law of Treaties (‘VCLT’), to interpret ‘person,’ the STL concluded that the ordinary meaning of the word included legal persons.²⁶ It further held that the purpose of the contempt provision is to hold those who interfere with the administration of justice accountable.²⁷ This would require ‘person’ to include legal persons who are also capable of interfering with the administration of justice.

In contrast, Article 25(1) of the Rome Statute of the International Criminal Court (‘the Rome Statute’) states ‘[t]he Court shall have jurisdiction over natural persons pursuant to this Statute.’²⁸ This excludes jurisdiction over MNCs. This was a conscious choice by the drafters as at the time, there was insufficient

²³ *New TV S.A.L. and Karma Mohamed Tashin Al Khayat*, Case No STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction and Legal Elements of Offence (Special Tribunal for Lebanon).

²⁴ Rules of Procedure and Evidence for the Special Tribunal for Lebanon 2009 (STL-BD-2009-01-Rev10) Rule 60bis.

²⁵ *ibid.*

²⁶ *NEW TV SAL* (n 23).

²⁷ *ibid.*

²⁸ Rome Statute, art 25(1).

domestic jurisprudence regarding corporate criminal liability.²⁹ It was thought that the introduction of corporal criminal liability would not allow the principle of complementarity under the Rome Statute to function as intended.³⁰

Further, it was thought that the novelty of corporate criminal liability would render many states hesitant to ratify the Rome Statute.³¹ There was also too little time left in the negotiations to meaningfully incorporate corporate criminal liability.³² So, despite attempts by France to introduce some form of corporate liability, the final version of the treaty ended up restricting the jurisdiction of the ICC to natural persons only.³³

One last example worth taking a look at is the Malabo Protocol to the African Court of Justice and Human Rights, which extends the jurisdiction of the Court to legal persons, including corporate entities.³⁴ Article 46C provides that an intention to commit an offence by a corporate entity can be established by proof 'that it was the policy of the corporation to the act which constituted an offence.'³⁵ It also provides that knowledge may be proved constructively even if the relevant information is divided between personnel.³⁶

The above three examples show us distinct ways of dealing with corporations in ICL. The STL approach leaves it to the discretion of the court to decide on a crime-by-crime basis, based on the object and purpose of criminalisation, whether its jurisdiction extends to corporations or not. The Malabo Protocol approach very clearly extends the jurisdiction of the court to corporations. The Rome Statute variant chooses not to prosecute legal persons, *inter alia*, on the grounds of complementarity. This ground, amongst other issues, is considered in the following section.

IV. CRITICISMS OF ICL FOR FAILING TO PROSECUTE CORPORATIONS

²⁹ David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 Harvard International Law Journal 35 <https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Scheffer_0615.pdf> accessed 6 June 2025.

³⁰ *ibid.* This objection is revisited in Part III when discussing the legitimacy of ICL.

³¹ *ibid.*

³² *ibid.*

³³ Stahn (n 9).

³⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force) (Malabo Protocol), art 46C(1).

³⁵ *ibid.*, art 46C(2).

³⁶ *ibid.*, art 46C(3), 46C(4).

A. LEGITIMACY IMPLICATIONS

There has been no shortage of criticism of the ICC's functioning. The criticism can broadly be criticised as (1) selectiveness in prosecution and (2) failure to hold all actors accountable. The first criticism is born from Article 1 of the Rome Statute. It provides that the ICC 'shall have the power to exercise its jurisdiction over persons for the *most serious* crimes of *international concern*[.]'³⁷ Further, article 17, which deals with admissibility, renders inadmissible cases which are not of sufficient 'gravity'.³⁸ As Koskenniemi reminds us, what counts as *most serious, of international concern*, and of *sufficient gravity* depends on informal epistemic networks dominated by the West.³⁹ Vasiliev also notes, 'the exceptionality of 'crisis' pervading the international criminal law field and seeping into the strategic and operational workings of the Rome Statute system is fraught with serious legitimacy risks for the ICC.'⁴⁰

The prosecutor, according to the Rome Statute, has significant independence and autonomy in deciding to commence an investigation into the situation.⁴¹ This was designed to prevent the politicisation of the ICC or the OTP.⁴² However, there is growing criticism from African states that they are disproportionately targeted by the OTP.⁴³ In its first decade of operations, the operations of the ICC were limited entirely to the African states.⁴⁴ This is not because there have not been opportunities for such investigation or that they have not been considered. The prosecutor had an opportunity to prosecute UK nationals following the UK and US invasion of Iraq.⁴⁵ It decided not to by citing

³⁷ Rome Statute, art 1.

³⁸ Rome Statute, art 17.

³⁹ Martti Koskenniemi, *What Is International Law For?* (Malcolm D Evans ed, 4th edn, OUP 2014).

⁴⁰ Sergey Vasiliev, 'Watershed Moment or Same Old?' (2022) 20 *Journal of International Criminal Justice* 893.

⁴¹ Rome Statute, art 15(1).

⁴² *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (2010) International Criminal Court ICC- 01/09.

⁴³ Yvonne McDermott, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (William A Schabas ed, 1st ed, Routledge 2013); Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30 *Leiden Journal of International Law*, 221 <<https://www.cambridge.org/core/services/aop-cambridgecore/content/view/B1B861A5B2E55EE9CA1B96A30D0D1FD4/S092215651600065.pdf/corporations-before-international-criminal-courts-implications-for-the-international-criminal-justice-project.pdf>> accessed 6 June 2025.

⁴⁴ Schabas (n 43).

⁴⁵ *ibid* 400–401.

the aforementioned gravity requirements and stating that the number of victims was too few and that British courts were prosecuting the accused.⁴⁶ However, later the OTP proceeded to bring charges against two rebel leaders in *Darfur* for crimes of similar magnitude.⁴⁷ Even when investigations are opened against great powers, they remain in limbo for years, as is the case with the situation in Georgia, or become deprioritised, as is the case with Afghanistan.⁴⁸

The issue is structural. As Schabas explains, a court that is stripped of resources will be forced to choose from an enormous number of possible situations, and the choice inevitably becomes political.⁴⁹ The resource constraints don't only affect which situations get investigated but also who gets investigated in specified situations, and the gravity requirement supplies the justification for these choices.⁵⁰ In Uganda, the prosecutor chose to pursue only rebel leaders and not government military leaders. Again, gravity was cited as a justification for this.⁵¹

B. A NEOCOLONIAL FRAMEWORK

While budgetary constraints are cited as a reason for the ICC's selectiveness, the choice also goes against the register of civilisation, which is relatively independent of the ICC's budgetary constraints and forwards a neo-colonial narrative.⁵² One of the requirements of admissibility is that the concerned state is unable or unwilling to carry out an investigation and prosecution, which is also known as the complementarity requirement. This was another reason cited by the OTP to not pursue the UK, as it considered the UK able and willing to carry out independent prosecutions.⁵³ The same has not been the case when the states or the actors concerned are from the global south.⁵⁴ Such reasoning stands

⁴⁶ Luis Moreno-Ocampo, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' (International Criminal Court, 2005).

⁴⁷ *Prosecutor's Application under Article 58 of the Rome Statute for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 14 July 2008) (ICC).

⁴⁸ Vasiliev (n 40).

⁴⁹ Schabas (n 43).

⁵⁰ *ibid* 399.

⁵¹ Statement by Luis Moreno-Ocampo (n 46).

⁵² Kyriakakis (n 43) 5.

⁵³ Statement by Luis Moreno-Ocampo (n 46).

⁵⁴ For a discussion on the connection between the argument of civilization and the doctrine of unable or unwilling (albeit in the context of terrorism) see Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (1st edn, Cambridge University Press 2020) ch 6.

independent of the budgetary capabilities of the ICC and represents an active choice not to pursue the 'civilised' north as opposed to the 'savage' south. Thus, the legitimacy threat can be traced to the design of the ICC, in the Rome Statute, and the discretion with which the OTP is allowed to operate.

Adding to the argument, Chimni and Anghie offer a TWAIL critique of the functioning of ICL by noting that the short arms of the ICC never reach financial institutions that are often responsible for creating situations that led to situations where atrocity crimes were committed.⁵⁵ As Kyriakakis notes, ICL can provide an efficacious way to deal with corporate crime in an unequal and globalised world.⁵⁶ Resource scarcity and economic underdevelopment are also causes of modern-day conflicts.⁵⁷ International Financial Institutions such as the World Bank and International Monetary Fund ('IMF') have been responsible for creating the environment within which atrocity crimes are then committed.⁵⁸ The report of the Organisation for African Unity ('OAU') panel responsible for investigating the Rwandan Genocide noted:

Rwanda's economic integration with the international economy had been briefly advantageous; now the inherent risks of excessive dependence were felt. Government revenues declined as coffee and tea prices dropped. International financial institutions imposed programs that exacerbated inflation, unemployment, land scarcity, and unemployment. Young men were hit particularly hard. The mood of the country was raw.⁵⁹

However, the International Criminal Tribunal for Rwanda did not prosecute any World Bank or IMF executives, let alone the World Bank or the IMF. The non-prosecution of corporations principally belonging to the global north, responsible either for financing the war or for supplying arms to perpetrators of atrocity crimes, adds to the growing discontent of the global south with respect to ICL. It is through the business side of criminality, acting through an organisational mind that transcends the mental states of individuals,

⁵⁵ Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) *Chinese Journal of International Law* 77 <<https://doi.org/10.1093/oxfordjournals.cjilaw.a000480>> accessed 6 June 2025.

⁵⁶ Kyriakakis (n 43).

⁵⁷ *ibid* 2-3.

⁵⁸ Anghie and Chimni (n 55) 89.

⁵⁹ Rachel Murray, 'Report of the International Panel of Eminent Personalities Asked to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' (2001) 45(1) *Journal of African Law* <<https://www.jstor.org/stable/3558971>> accessed 6 June 2025.

that individual crimes reach unprecedented scale.⁶⁰ This is not to suggest that criminal liability for corporations would solve the issue of economic triggers of atrocities. The OAU's findings go beyond individual corporations and seem to point to larger structural issues in the economic order. But the immunity enjoyed by corporations before the ICC prevents public conversations on the active role of finance and capital in these atrocities from occurring at a global level. The above-quoted passage from the OAU's report should make us all think seriously about the violence of the international financial and economic system more broadly.

C. REVISITING THE EXCLUSION

At this stage, it is appropriate to revisit the legal justification given for excluding corporate criminal liability from the Rome Statute, namely that it would interfere with the principle of complementarity. The principle is given in Article 17 of the Rome Statute, which provides, as a condition to admissibility, that the state must be 'unwilling or unable genuinely' to carry out the investigation and prosecution. The underlying premise is that the ICC should only step in when national justice systems fail to hold accountable those responsible for international crimes.⁶¹ Accordingly, national systems are given primacy in prosecuting violations of ICL.

The objection is that since states lack a common standard on which to hold corporations criminally liable, the introduction of corporate criminal liability into the Rome Statute would render the principle of complementarity unworkable.⁶² It has been suggested that the lack of a national system to hold corporations criminally responsible would *de facto* lead to satisfying the complementarity requirement and give the ICC jurisdiction over MNCs.⁶³ However, it is difficult to see how that's a tenable objection considering the object and purpose of the Rome Statute, ie, to end impunity,⁶⁴ especially in light of the lack of objections during the negotiations to the principle of holding corporations criminally responsible.

⁶⁰ Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010) 61.

⁶¹ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 187.

⁶² Ambos (n 16) 4.

⁶³ Kathryn Haigh, 'Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns' (2008) 14(1) *Australian Journal of Human Rights* 199 <<https://classic.austlii.edu.au/au/journals/AUJlHRights/2008/8.pdf>> accessed 6 June 2025.

⁶⁴ Rome Statute, Preamble.

Kyriakakis recognises that the objection in its above form is under-elaborated.⁶⁵ Within complementarity, there is a tension between sovereignty and the 'establishment and progressive development of functional international criminal justice.'⁶⁶ The objection lends itself to two interpretations. First, the inclusion of provisions on corporate criminal liability would be inconsistent with the complementarity framework based on the text of the complementarity provision in the Rome Statute (Article 17).⁶⁷

This version of the objection is untenable in light of the interpretation accorded to the complementarity requirement.⁶⁸ Inaction on the part of a state vis-à-vis the perpetrators has been held to satisfy the complementarity requirement.⁶⁹ The inaction may be because of legal impediments as well.⁷⁰ Further forms of unwillingness not explicitly recognised by the Rome Statute have also been held to be included where they forward the object and purpose of the Rome Statute 'to put an end to impunity'.⁷¹ Thus, the lack of provisions on corporate criminal liability domestically would not be inconsistent, nor interfere with the operation of the complementarity requirement as articulated in the Rome Statute and interpreted by the ICC. Its codification in the Rome Statute could have, instead, acted as a catalyst for the adoption of similar provisions in domestic legislations, which would further the goal of ending impunity.⁷²

The second interpretation objects to the discriminatory effect it would have on states that do not have provisions concerning corporate criminal responsi-

⁶⁵ Joanna Kyriakakis, 'Cooperations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19(1) Criminal Law Forum 115.

⁶⁶ *ibid* 121-122.

⁶⁷ *ibid* 122.

⁶⁸ *ibid* 126.

⁶⁹ *Katanga et al, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial by Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 September 2009 (ICC-01/04-01/07 OA 8) 78.

⁷⁰ Kyriakakis (n 65) 126-128. The practice of the ICTR also supports this, see *Bagaragaza, Decision on the Prosecution's Motion for Referral to the Kingdom of Norway*, [2006] ICTR-2005-86-R11bis; *Bagaragaza, Decision on Rule 11bis Appeal*, [2006] (Appeals Chamber) ICTR-05-86-AR11bis. See also Antonio Cassese, *International Criminal Law* (OUP 2003) 352. Alternatively, Kyriakakis also relies on the wording of art 17(3) which states 'total or substantial collapse or unavailability' (emphasis Kyriakakis') to note that the notion of collapse and unavailability are disjunctive and thus the lack of provisions for corporate criminal liability in domestic law would fall within the phrasing of art 17(3).

⁷¹ Schabas (n 61) 194.

⁷² Kyriakakis (n 65) 130-136.

bility and the corresponding undermining of their sovereignty.⁷³ This objection misinterprets complementarity as always privileging the sovereignty of states over objects of ICL rather than understanding it as a compromise between the two. Complementarity represents a balance between sovereignty and the objectives of ICL as it allows the ICC to bypass sovereignty in case the proceedings undertaken by the state are a sham.⁷⁴ Understanding complementarity simply as sovereignty and not for the tension it represents perverts its meaning and claims a political consensus that is not reflected in the text and was never achieved during negotiations.⁷⁵ Instead, it could be argued that by prosecuting corporations, the ICC would plug a gap that exists in several national systems and therefore complement or complete their systems.⁷⁶

Another objection that may be raised to prosecuting corporate entities is that they lack *mens rea* or the subjective element, which is an essential part of establishing criminal liability. As per the travaux of the Rome Statute, *mens rea* is required for criminal responsibility.⁷⁷ Generally, in law, culpability assumes a subject with free will⁷⁸ and considers their immediate mental states.⁷⁹ This is reflected in the defences available to the accused under the Rome Statute, such as lack of mental capacity and intoxication, which hinge on an accused person's 'capacity to appreciate the unlawfulness or nature of his or her conduct.'⁸⁰

This requirement can be fulfilled for corporations through a combination of nominalist and organisational models. The nominalist models consider the mental states of individuals within a corporation to establish constructive mental states of the corporation, whereas the organisational model focuses on corporate culture, attitudes, monitoring, and oversight mechanisms. 'Corporate fault can be established when flawed formal procedures or informal practices have been approved, encouraged, or condoned at the management level.'⁸¹ This

⁷³ *ibid* 136.

⁷⁴ Rome Statute, art 17.

⁷⁵ Kyriakakis (n 65)140.

⁷⁶ *ibid* 141.

⁷⁷ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Proceedings of the Preparatory Committee during March-April and August 1996* (Vol I, UN GAOR, 51st Session, Supp No 22, UN Doc A/51/22 1996) 45.

⁷⁸ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 22.

⁷⁹ Anthony Kenny, *Freewill and Responsibility* (Routledge 1978).

⁸⁰ Rome Statute, art 31.

⁸¹ Elies van Sliedregt, 'The Future of International Criminal Justice is Corporate' (2025) 1(4) JICJ <<https://doi.org/10.1093/jicj/mqaf004>> accessed 6 June 2025.

would exclude cases where corporations were inadvertently contributing to international crimes.⁸²

It is worth reiterating here the discriminatory impact that the complementarity regime has had on states situated in the global south, which have been held to be unwilling and unable to prosecute violations of ICL as opposed to states in the global north. This exclusion and *de facto* immunity of corporations is better understood in the 'intimate historical links between the state and the corporation.'⁸³ Chimni illustrates the point by taking the example of the East India Company, a company established through a royal charter which administered India as a company state from the 17th Century till 1857, and Great Britain. He demonstrates that the corporation and the state are mutually constituted and 'derive from shared ideological and historical context.'⁸⁴ Deep and structural ties continue to exist between MNCs and States in the form of a symbiotic relationship as state policy heavily influences decisions businesses make.⁸⁵

The financial institutions that are shielded by such methodological individualism belong to the global north. In the case of Ukraine, the banks known to have ties to the Russian war effort belong to the very countries that are enthusiastically contributing to the ICC in its investigation against Russia.⁸⁶ The very states responsible for putting into motion mechanisms of accountability are responsible for not preventing the violence they now seek to address through ICL.⁸⁷ If ICL aims to contribute to a durable peace, it needs to find ways to address economic networks that sustain conflict, especially when abuses of their status as transnational corporation violate norms of ICL.

⁸² What counts as inadvertent, however, is a separate question and outside the scope of the paper. It is possible that activities of a business contribute to crimes not simply because management is unaware of some of the business' activities but because the management is uncritical of them. For example, if a business decides to purchase goods from a company that is known to support a regime that is committing war crimes. In this case, it can hardly be said that the business is unaware of its dealings with the company, but the firm may be uncritical in reflecting how its business contributes to the company's ability to fund war crimes.

⁸³ BS Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31(4) EJIL 1211, 1214-1215.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Bala (n 6); Vasiliev (n 40) 897, 901.

⁸⁷ Anghie and Chimni (n 55) 90.

V. CONCLUSION

As Pomerantz, one of the strategists during the Nuremberg trials, noted, targeting corporations instead of individuals has several benefits. It is easier to achieve sufficiency of the evidence with respect to an entire corporation than with respect to specific actors in the corporation.⁸⁸ And it helps set the record straight concerning historic wrongs by holding all those who are responsible accountable.⁸⁹ It also has the added advantage of rendering certain elements of crime easier to prove, as knowledge of a crime that is spread across actors within a corporation can be constructively attributed to the corporation alone.⁹⁰ Even issues of *mens rea* can be solved by focusing on corporate policy instead of the intention of specific actors in the corporation.⁹¹ This can provide compensation to victims of atrocities.⁹² Lastly, this also has the potential to initiate public conversations about the role of capital and finance in international atrocities. However, these advantages are yet to be realised by ICL.

For corporations to be prosecuted in ICL, it is required that they have personality for ICL and that the relevant tribunal has jurisdiction. While initially there seemed to be some confusion regarding whether or not corporations have personality for ICL, that was largely because of a misreading of the Nuremberg Tribunal's decisions in the industrialists' case. The lack of prosecution of corporations was not because of a lack of personality but because of prosecutorial choices. Further adverse remarks against crimes being committed by abstract entities were made to prevent the defendants from hiding behind the veil of the state. As the STL has noted in its *New TV S.A.L.* decision, there is nothing inherent in the nature of criminal law that prevents corporations from being put on trial.⁹³

Jurisdiction of the relevant tribunal, on the other hand, ends up being a question of positive law: whether the drafters chose to bestow such a jurisdiction or not. The paper has reviewed three variations that have been adopted in different ICL instruments, which can serve as models from which the drafters may choose. However, it is clear that the ICC, which is the only permanent

⁸⁸ Bush (n 21) 1150.

⁸⁹ *ibid.*

⁹⁰ Malabo Protocol.

⁹¹ *ibid* art 46C(2).

⁹² Stahn (n 9) 101; Armina T Savanovic, 'Corporate Criminal Liability in International Criminal Law' (Lund University 2017) 66.

⁹³ *NEW TV S.A.L.* (n 23) 66.

international criminal tribunal, lacks the jurisdiction to prosecute legal persons. Natural persons working in corporations can still be targeted,⁹⁴ but this requires a high mental element and has an unclear causation requirement that may not be met in the case of individual actors.⁹⁵ This has led some commentators to argue that an amendment should be made to the Rome Statute to allow the ICC to prosecute corporations.⁹⁶

The lack of jurisdiction is often justified by citing the complementarity requirement present in Article 17 of the Rome Statute. However, as the paper has shown, this objection is merely a smokescreen, and the exclusion is better understood in the corporate-state nexus that exists in the global north, which allows states and corporations to benefit from each other. When the lack of jurisdiction to proceed against corporations is contextualised in view of Russia's invasion of Ukraine, it becomes glaringly clear that if ICL is to fulfil its promise to hold perpetrators of atrocity crimes responsible, it must prosecute corporations as well. The corporations responsible for financing and fuelling conflicts in general, and in Russia's case in particular, belong to the global north.

The choice of the OTP to focus on situations in the global south has already raised eyebrows in the past. The lack of priority and investigation of situations that adversely affect Western interests in general and American interests in particular, such as Afghanistan and Iraq, shows a political bias present in the working of the OTP. While the resource scarcity of the ICC would inevitably cause the OTP to make political decisions, the constancy of targeting the global south is a cause of concern.

Though now ICC is investigating a hegemon, it is only after the West demonstrated an interest in the situation that this happened. Before the 2022 invasion, ie, after the annexation of Crimea, there was no similar sense of urgency in the functioning of the ICC. Adding on to this legitimacy crisis, the inability of the ICC to hold corporations accountable reflects its indirect role in providing impunity to Western actors and capital. Alternative tribunals, innovations, and amendments are required in ICL if it is to safeguard its legitimacy against allegations of Western bias.

⁹⁴ Rome Statute, arts 25(3)(c), 25(3)(d).

⁹⁵ Scheffer (n 29) 35.

⁹⁶ Lambridis (n 15) 145–146.