

# *International Criminal Responsibility of the Corporate Entity for Complicity in International Crimes: A Policy and Legal Case*

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## I. INTRODUCTION

In international criminal law, corporations as entities cannot be held criminally responsible for complicity in international crimes. Under the Rome Statute of the International Criminal Court (ICC), international crimes refer to genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>1</sup> The ICC is the main international legal institution that prosecutes international crimes and those who are complicit in them.<sup>2</sup> The ICC, however, can only prosecute human individuals and not corporations for complicity in international crimes because it only has jurisdiction over natural persons.<sup>3</sup>

Nevertheless, there are currently two available legal approaches with respect to corporate complicity in international crimes. The first approach directly addresses corporate complicity by holding individuals, namely corporate executives, criminally responsible for the corporation's complicity.<sup>4</sup> Given its jurisdiction over natural persons, the International Criminal Court (ICC) can prosecute corporate agents. This logic underlying the first approach has been enunciated by the International Military Tribunal (IMT), which posited “[c]

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<sup>1</sup> The Rome Statute, Article 5.

<sup>2</sup> The Rome Statute, Article 25(3).

<sup>3</sup> The Rome Statute, Article 25(1): “The Court shall have jurisdiction over natural persons pursuant to this Statute”.

<sup>4</sup> There exists a consensus that the ICC can hold corporations accountable for international crimes by prosecuting natural persons, such as corporate executives or agents. See David Scheffer, ‘Corporate Liability under the Rome Statute’ (2016) 57 *Harvard International Law Journal* 36, 39.

crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.”<sup>5</sup>

The second approach indirectly addresses the complicity of corporations. It holds State and non-state actors who directly commission international crimes criminally responsible,<sup>6</sup> instead of corporations that are complicit in these international crimes. By holding direct perpetrators criminally responsible, the ICC can prevent corporate complicity through deterring international crimes from even being commissioned in the first place. Additionally, by prosecuting the direct perpetrators of international crimes, the ICC holds the most culpable actors criminally responsible.

Absent from these two approaches is the international criminal responsibility of corporations as entities. This legal lacuna echoes British Lord Chancellor Edward Thurlow’s observation that “[c]orporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”<sup>7</sup> The legal lacuna may be attributable to how the protection of individual rights has been primarily conceptualized through the relationship between individuals and States. This lacuna has been termed as a ‘regulatory gap’ or ‘governance gap’, which refers to the “misalignment between the capacity of transnational corporations to contribute to serious human rights abuses and the governance capacity of governments to respond to those harms.”<sup>8</sup>

Integrating perspectives from law, history, and economics, this paper first demonstrates that these two existing legal approaches are ultimately ineffective in addressing and preventing corporate complicity in international crimes. It is thus proposed that the corporation as an entity should bear international criminal responsibility for complicity in international crimes. Corporations as entities should be liable to international criminal prosecution by the ICC for complicity in international crimes because international criminal prosecution is the most effective way to regulate and prevent corporate complicity in international crimes.

<sup>5</sup> *The Trial of German Major War Criminals (Judgment)* [1 October 1946] International Military Tribunal (Nuremberg) 447. See also, *Decision and Judgment of the Tribunal, Statement by Judge Hebert*, 1214. The Tribunal ruled, “as Farben did not run itself, someone should be held responsible for what Farben did”.

<sup>6</sup> According to Article 25(1) of the Rome Statute, the ICC has jurisdiction over natural persons. Article 25(3)(a) provides the ICC jurisdiction to hold natural persons criminally responsible for the commission of international crimes.

<sup>7</sup> John Poynder, ‘Literary Extracts from English and Other Works; Collected During Half a Century: Together with Original Matter Volume 1’ (John Hatchard & Son 1844) 268.

<sup>8</sup> Joanna Kyriakakis, ‘Developments in International Criminal Law and the Case of Business Involvement in International Crimes’ (2012) 94(887) *International Review of the Red Cross* 981, 985.

Second, this paper seeks to articulate a legal case for expanding the jurisdiction of the ICC to include juridical persons, namely corporations. Specifically, by taking into account history and recent legal developments, this paper argues international corporate criminal responsibility is a general principle of international law.

## II. CURRENT STATE OF INTERNATIONAL CRIMINAL LAW WITH RESPECT TO CORPORATE COMPLICITY IN INTERNATIONAL CRIMES

### A. COMPLICITY IN INTERNATIONAL CRIMES

This paper will define complicity as encompassing actions under Articles 25(2)(b), 25(3)(c), and 25(4)(d) of the Rome Statute. This means that ordering, soliciting or inducing the commission of international crimes under Article 25(2)(b), aiding, abetting or assisting in the commission or attempted commission of international crimes under Article 25(3)(c), and contributing to the commission or attempted commission under Article 25(4)(d) render corporations complicit. It is not the scope and purpose of this paper to engage in a theoretical discussion of the definition of complicity. These three Rome Statute articles offer a satisfactory range of complicit actions as they encapsulate the idea underpinning complicity, namely the “indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors”.<sup>9</sup> Complicity is thus different from direct commission of international crimes, in that a complicit actor “is said to have provided support to those who actually committed the abuses, either by encouraging them and/or by providing some form of assistance”.<sup>10</sup> In commercial dealings, a corporation can be considered complicit when it supplies goods, services, technology, or other financial resources, including bribes, which facilitate or contribute to international crimes.<sup>11</sup>

A case study would be the Shell Oil Company’s complicity in the commission of international crimes by the Nigerian State in Ogoniland in the 1990s. Internal company documents, minutes, and witness statements revealed that Shell “solicited”, “actively lobb[ie]d” and “repeatedly encouraged” the Nigerian military and police to deal with Ogoniland protests with “full knowledge” that extrajudicial executions,

<sup>9</sup> John Gerard Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of The Special Representative Of The Secretary-General On The Issue Of Human Rights And Transnational Corporations And Other Business Enterprises (A/HRC/8/5)* (UN Human Rights Council 2008) 20.

<sup>10</sup> Jonathan Clough, ‘Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses’ (2008) 33(3) *Brooklyn Journal of International Law* 899, 905.

<sup>11</sup> Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (Office of the UN High Commissioner for Human Rights 2014) 24.

torture, rape and burning of villages were the likely outcome.<sup>12</sup> Furthermore, Shell “provided the security forces with logistical support”,<sup>13</sup> including transportation.<sup>14</sup> Shell has admitted to “importing weapons into Nigeria to arm the police” and “paying allowances to the Nigerian military and providing logistical support in the form of access to Shell helicopters and boats”.<sup>15</sup>

A Shell scientist has referred to such corporate provision of financial and logistical support for the State to militarily enforce their corporate interests as the “militarization of commerce”.<sup>16</sup> This phenomenon of “militarized commerce” has seen the “acquisition by companies of military services from military or paramilitary forces as security for firm operations and includes assistance granted these troops in return for protection”.<sup>17</sup> “Militarized commerce” stands at the heart of corporate complicity, as it enables corporations to outsource or externalize the suppression of resistance to States while evading moral responsibility for extending the ambit of a State’s use of violence. It also perniciously incentivizes corporations to resort to and rely on the military capabilities of States to quell local resistance to its business operations, instead of formulating more socially responsible and equitable solutions to address local discontent over the exploitation of their indigenous land and resources.

Focusing on complicity of corporations in international crimes follows from the observation that corporations do not usually commission international crimes directly; they tend to be complicit by providing assistance to perpetrators committing international crimes.<sup>18</sup> For example, thirty-three corporations were complicit in Saddam Hussein’s genocidal use of chemical weapons against the Kurdish civilian population in Iraq between 1987 and 1988.<sup>19</sup> The same German industry that supplied the Nazi leaders with poison gas during the Holocaust also supplied the Iraqi regime Mustard gas, VX, and Sarin during the 1988

<sup>12</sup> Amnesty International, *A Criminal Enterprise? Shell’s Involvement in Human Rights Violations in Nigeria on the 1990s* (Amnesty International 2017) 10, 13, 83–84; Amnesty International, ‘Investigate Shell for Complicity in Murder, Rape and Torture’ (*Amnesty International*, 28 November 2017) <<https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/>> (accessed 30 March 2020).

<sup>13</sup> Amnesty International (n 12) 11.

<sup>14</sup> *ibid* 13.

<sup>15</sup> Al Gedicks, *Resource Rebels: Native Challenges to Mining and Oil Corporations* (South End Press 2001) 49.

<sup>16</sup> Stephanie LeMenager, *Living Oil: Petroleum Culture in the American Century* (Oxford University Press 2016) 127.

<sup>17</sup> Craig Forcese, ‘Deterring “Militarized Commerce”: The Prospect of Liability for “Privatized” Human Rights Abuses’ (2000) 31(2) *Ottawa Law Review* 171, 175.

<sup>18</sup> Jonathan Clough, ‘Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses’ (2008) 33(3) *Brooklyn Journal of International Law* 899, 905.

<sup>19</sup> Michael Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016) 129–130, 152.

Halabja chemical attack, which killed 5,000 Kurdish civilians.<sup>20</sup> Three German corporations, namely Preussag AG, Heberger Bau, and Karl Kolb, were involved in “building, in whole or in part, Iraq’s chemical warfare agent facilities”.<sup>21</sup> The German corporation Hoechst Group, which is currently “in business working with pharmaceutical, agricultural, and chemical weapons”, supplied Saddam Hussein with “chemical warfare agent production or related materials”.<sup>22</sup>

## B. PUNISHMENTS FOR COMPLICITY

Although a corporation cannot be jailed, the ICC can use a spectrum of penalties to punish criminally prosecuted corporations. These include confiscation or liquidation of assets, dissolution of the corporation or particular subsidiaries complicit in international crimes, financial penalties and victim compensation, as well as temporary or permanent exclusion from certain tenders or commercial dealings.<sup>23</sup> Since “parent corporations should not be able to reap the benefits of a distinct corporate identity yet disown their subsidiaries when issues of accountability arise”,<sup>24</sup> such criminal penalties should also apply to parent corporations whose subsidiaries are complicit in international crimes.

## III. LIMITATIONS OF THE FIRST APPROACH: WHY HOLDING CORPORATE AGENTS CRIMINALLY RESPONSIBLE IS INEFFECTIVE

The first approach to addressing corporate complicity is to hold corporate executives criminally responsible for the corporation’s complicity in international crimes. This approach is ultimately ineffective because it fails to target the structural causes behind corporate complicity. The prevailing ‘shareholder primacy’ doctrine, as well as the corporate structures of limited liability and transferable shares collectively render corporations susceptible to complicity in international crimes.

### A. SHAREHOLDER PRIMACY

Shareholder primacy has dominated the understanding of the purpose of modern corporations. The shareholder primacy doctrine states that corporations “operate in the interest of the shareholders and that directors owe to them a

<sup>20</sup> *ibid* 130.

<sup>21</sup> Michael Kelly, “‘Never Again’? German Chemical Corporation Complicity in the Kurdish Genocide” (2013) 31(2) *Berkeley Journal of International Law* 348, 372.

<sup>22</sup> *ibid* 374.

<sup>23</sup> Caroline Kaeb, “The Shifting Sands of Corporate Liability Under International Criminal Law” (2017) 49(2) *The George Washington International Law Review* 351, 390.

<sup>24</sup> Jonathan Clough, “Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses” (2008) 33(3) *Brooklyn Journal of International Law* 899, 929–930.

fiduciary duty”.<sup>25</sup> The prevailing interpretation of the “interests” of shareholders is the maximization of shareholder value, which is measured by share price of the corporation.<sup>26</sup> This interpretation has been given force by Milton Friedman who argued that the “social responsibility of business is to increase its profits” because shareholders “own the corporation” and the “manager is the agent” of the shareholders.<sup>27</sup> Since shareholders’ interest is to maximise share value, the purpose of corporations is to accordingly maximise shareholder value. For instance, in *Dodge v Ford Motor*, the business corporation was normatively affirmed as “organized and carried on primarily for the profit of the stockholders” and that “the powers of the directors are to be employed for that end”.<sup>28</sup> This case is “not a doctrinal oddity” and “an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation” as bearing the purpose of profit maximization for the benefit of the shareholders.<sup>29</sup>

This conceptualization of the purpose of corporations in terms of shareholder primacy has endured globally and its dominance in many jurisdictions has been termed as “the end of history for corporate law”.<sup>30</sup> There is a ‘consensus’ amongst academic, business and governmental leaders that “ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders”.<sup>31</sup> The success of the shareholder-oriented model vis-à-vis the failure of alternative models, global economic competition, and the rise of the shareholders’ political and economic power have led to a legal convergence on shareholder-oriented corporate models in America, Europe, and Japan.<sup>32</sup> The incentives, motivations, and business strategies of corporate agents are thus tied to maximizing shareholder interest, namely higher share value through profit maximization. This is evident from how in many corporations, the pay packages and bonuses of corporate managers are tied to share price, thereby incentivising

<sup>25</sup> Allison Garrett, ‘The Corporation as Sovereign’ (2008) 60(1) *Maine Law Review* 129, 136.

<sup>26</sup> Lynn Stout, ‘The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public’ (Berrett-Koehler 2012) 2–3.

<sup>27</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ (*The New York Times Magazine*, 13 September 1970) <<https://www.nytimes.com/1970/09/13/archives/article-15-no-title.html>> (accessed 30 March 2020).

<sup>28</sup> *Dodge et al v Ford Motor Co et al* [1919] 204 Mich 459, 170 NW 668.

<sup>29</sup> Jonathan R Macey, ‘A Close Read of an Excellent Commentary on Dodge v. Ford’ (2008) 3 *Virginia Law and Business Review* 177, 178.

<sup>30</sup> Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89(2) *The Georgetown Law Journal* 439.

<sup>31</sup> *ibid* 440–441.

<sup>32</sup> *ibid* 443–453; Henry Hansmann and Reinier Kraakman, ‘Reflections on the End of History for Corporate Law’, *The Convergence of Corporate Governance: Promise and Prospects* (Palgrave Macmillan 2012) 32, 39–41.

managers to maximise share value. Indeed, surveys have found that directors are rarely expressly required to consider the interests of non-shareholders.<sup>33</sup> Such corporate structures based on limited liability could thus facilitate corporate complicity in international crimes.

Given that corporate decision-making revolves around maximizing shareholders' interest, the interests of other stakeholders such as the local community in which the corporation operates in could be neglected. A business model based on maximizing shareholder value would conceive compliance with environmental regulations or international human rights standards as contrary to profitability due to its financial costs. Accordingly, shareholder primacy exposes directors to possible shareholder claims that steps taken to respect human rights fall outside the range of actions required to fulfil their agency obligations of short-term profit maximization and thus constitute breaches of the directors' fiduciary duties to shareholders.<sup>34</sup> Apart from the threat of shareholder lawsuits, managers are "frequently prevented or discouraged from acting in the interest of non-shareholder constituencies" unless doing so would be in the shareholders' best interests.<sup>35</sup> Additionally, directors face risks of being replaced or fired by shareholders who find them to have illegitimately expended resources to implement socially important objectives.<sup>36</sup> This profit maximization logic underpinning shareholder primacy could also encourage the exploitation of regulatory and governance gaps, especially in States with regulatory gaps or corrupt and unaccountable governance systems.<sup>37</sup>

## B. LIMITED LIABILITY

Coupled with the doctrine of shareholder primacy, the corporate structure of limited liability encourages short-termism in investors and results in investors pressurising managers to pursue risky business dealings that are highly profitable in the short-term. Limited liability means that shareholders of a corporation are only liable for the amount they have initially invested in the corporation. In other words, shareholders "could not lose more than the money they had put in in purchasing

<sup>33</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton & Company 2013) 133.

<sup>34</sup> Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 164; Ruggie (n 33) 191.

<sup>35</sup> Seher Khawaja, 'Corporate Free Market Responsibility: Addressing Rights Violations with a Fiduciary Duty Approach to Natural Resource Extractions in Weak Governance Zones' (2008) 3(1) *Brooklyn Journal of Corporate, Financial & Commercial Law* 185, 199.

<sup>36</sup> Denis G Arnold, 'Libertarian Theories of the Corporation and Global Capitalism' (2003) 48 *Journal of Business Ethics* 155, 158.

<sup>37</sup> Denis G Arnold, 'Corporations and Human Rights Obligations' (2016) 1(2) *Business and Human Rights Journal* 255, 271.

their shares”<sup>38</sup> and thus “cannot be sued for any transgressions of the firm”.<sup>39</sup> This aspect of limited liability has been called the “shielding effect”.<sup>40</sup>

Limited liability has thus created a moral hazard. A moral hazard arises when individuals do not bear the full consequences of their actions and have a concomitant inclination to take on more risk than they would have, thereby leaving another party responsible for the consequences of their actions. Since “shareholders do not put their personal assets at risk, they stand to make huge gains if things go well but can lose their original stake only if they go badly”.<sup>41</sup> By turning investment into a rational bet, limited liability has encouraged shareholders to pressurize corporate managers to embark on risky and short-term business ventures that can potentially offer high returns. In this context, shareholders want greater profits because higher profits would increase their share value. Nevertheless, as a result of limited liability, they do not bear the full consequences of pushing the corporation to take on excessively profitable yet risky commercial deals.

### C. TRANSFERABLE SHARES

Moreover, the corporate structure of transferable shares detaches retail shareholders from the actual managerial decisions and operations of a corporation. Transferable shares are shares that can be bought and sold at an agreed price between shareholders. There are two ways in which transferable shares render corporations more susceptible to complicity in international crimes. First, a corporation with publicly traded shares comprise many retail investors who lack the interest and incentive to scrutinize the business decisions and operations of the corporation. This is because retail investors, who tend to have diversified portfolios, “rarely have a big enough stake in any single company to make it sensible to closely monitor what’s going on; they suffer from their own rational apathy”.<sup>42</sup> If so, even if these retail investors are civic-minded, they will not closely monitor corporate management. This also means that short-term speculators and institutional investors keen on maximizing share value will be the actors who disproportionately influence corporate managers in terms of corporate decisions and strategies.

Second, transferable shares create a moral distance between the shareholders and the impact of corporate management on human rights. This

<sup>38</sup> Robert Shiller, *Finance and the Good Society* (Princeton University Press 2013) 48.

<sup>39</sup> *ibid* 174.

<sup>40</sup> Eilis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press 2014) 96.

<sup>41</sup> Schumpeter, ‘Don’t Limit the Revolution’ (*The Economist*, 29 September 2016) <<https://www.economist.com/business/2016/09/29/dont-limit-the-revolution>> (accessed 30 March 2020).

<sup>42</sup> Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public* (Berrett-Koehler 2012) 70.

is because they are not directly involved in the daily affairs of a corporation. As principals, shareholders delegate the task of managing their capital to managing agents. In this sense, shareholders may perceive themselves as being detached from how their capital is used. For example, Professor Lynn Stout raises doubts over the number of BP shareholder who felt responsible for the Deepwater Horizon disaster. This is because “uninvolved shareholders are unlikely to feel personally responsible” when such disasters occur.<sup>43</sup> Indeed, research has shown that investors are more concerned with a corporation’s overall positive social behaviour than its specific actions or products when investing in a corporation.<sup>44</sup> This suggests that the distinction between the investor’s provision of capital and the corporation’s eventual use of this capital in business ventures creates a moral distance between the investor and the ethical consequences arising from such ventures. What matters is whether they perceive themselves to be morally implicated in corporate decisions that facilitated or contributed to international crimes. Since investors do not perceive themselves to be morally implicated, there exists little impetus for shareholders to take a more activist approach to ensure that corporations do not use their capital in ways that render them complicit in international crimes.

#### D. WHY CORPORATIONS AS ENTITIES SHOULD BE RESPONSIBLE?

In view of such structural reasons behind corporate complicity, corporate entities, rather than corporate agents, should be held responsible. This is because it effectively and accurately targets the root cause of corporate complicity, namely the corporate culture and incentive structures of a corporation.

Given the hierarchical complexity and size of corporations, it would be both difficult and unfair to single out specific corporate managers for criminal prosecution, especially when the complicity was a result of corporate culture,<sup>45</sup> which is crucially caused by the shareholder primacy doctrine and the reality of hierarchical organizational corporate structures. Prosecuting corporate agents involves the high threshold of proving the requisite *mens rea* or the criminal intent of these individuals. This difficulty has been acknowledged in the Explanatory Report of the 1998 Council of Europe Convention on the Protection of the Environment Through Criminal Law, which provides for corporate criminal

<sup>43</sup> *ibid* 99.

<sup>44</sup> Thomas C Berry and Joan C Junkus, ‘Socially Responsible Investing: An Investor Perspective’ (2013) 112 *Journal of Business Ethics* 707, 717.

<sup>45</sup> Michael Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016) 190.

liability for environmental crimes under Article 9.<sup>46</sup> Corporate criminal liability is a response to the “serious difficulties in prosecuting natural persons acting on behalf of these legal persons”, especially when “the largeness of corporations and the complexity of structures of the organization [renders it] more and more difficult to identify a natural person” who may be held criminally responsible for the offence.<sup>47</sup> Complex corporate structures may also ‘problematize’ the attribution of individual responsibility because “decision-making within a modern MNC may involve multiple persons whose activity leads collectively to human rights violations”.<sup>48</sup>

This difficulty of holding individual corporate agents criminally responsible perhaps accounts for Article 46C of the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (‘Malabo Protocol’), which provides for criminal responsibility of corporate entities. Article 46C of the Malabo Protocol provides that knowledge “may be possessed within a corporation even though the relevant information is divided between corporate personnel” and a policy can be attributed to a corporation if it is the “most reasonable explanation of the conduct of that corporation”. Such provisions precisely recognize the difficulties of relying on criminal responsibility of natural persons within a corporation.

On the other hand, holding individual corporate employees accountable also neglects the reality of “pressures imposed by the organizational structure”.<sup>49</sup> Even if individuals are prosecuted, “the incentive system which led to the criminal behaviour remains intact within the corporation”.<sup>50</sup> Furthermore, given their collective nature and control over significant resources, corporations possess the ability to engage in misconduct that dwarfs what an individual is capable of doing.<sup>51</sup> Therefore, holding corporate entities criminally responsible accurately and efficiently targets the root cause of complicity, namely organizational culture and

<sup>46</sup> Article 9 of the Convention states “Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative”.

<sup>47</sup> Council of Europe, *Explanatory Report to the Convention on the Protection of Environment Through Criminal Law* (Council of Europe 1998) 14.

<sup>48</sup> 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(1) *Berkeley Journal of International Law* 91, 97.

<sup>49</sup> Ann Foerschler, ‘Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct’ (1990) 78(5) *California Law Review* 1287, 1289.

<sup>50</sup> *ibid* 1289.

<sup>51</sup> Sara Sun Beale, ‘A Response to the Critics of Corporate Criminal Liability’ (2009) 46 *American Criminal Law Review* 1481, 1484.

structures of that particular corporation, thereby incentivizing reforms internally within corporations.

#### IV. LIMITATIONS OF THE SECOND APPROACH: WHY CORPORATE COMPLICITY MATTERS IN INTERNATIONAL CRIMINAL LAW

The second approach holds individual State and non-state actors who directly commission international crimes,<sup>52</sup> but not the corporations that are complicit. Although this approach holds the most culpable actors criminally accountable, it not only fails to do justice, but it also acts as a poor deterrent to corporate complicity. To effectively regulate and prevent future cases of corporate complicity in international crimes, corporations should bear international criminal responsibility for complicity in international crimes.

Although prosecuting direct perpetrators holds the most culpable actors criminally responsible, it fails to do justice because it does not account for the role that corporations play in facilitating and contributing to the commission of international crimes. In some cases, the complicit actions of the corporation were instrumental to the commission of international crimes. For example, according to an investigation report by the UN Organization Mission in the Democratic Republic of Congo (MONUC), the Australian-Canadian multinational corporation Anvil Mining offered logistical land and air support to government soldiers in the 2004 Kilwa massacre in the Democratic Republic of the Congo.<sup>53</sup> In fact, a regional military commander informed the MONUC that the military intervention by the Nigerian State was “made possible thanks to the logistical assistance given by Anvil Mining”.<sup>54</sup> This suggests that the commission of international crimes may not have been possible without corporate complicity, thereby highlighting the inadequacy of merely holding direct commissioners accountable for international crimes.

Furthermore, even if the commission of international crimes would have been possible without corporate complicity, complicity is still morally blameworthy

<sup>52</sup> According to Article 25(1) of the Rome Statute, the ICC has jurisdiction over natural persons. Article 25(3)(a) provides the ICC jurisdiction to hold natural persons criminally responsible for the commission of international crimes.

<sup>53</sup> MONUSCO and OHCHR, ‘Report on the Conclusions of the Special Investigation Concerning Allegations Of Summary Executions and Other Human Rights Violations Perpetrated by the Armed Forces of the Democratic Republic Of Congo (FARDC) in Kilwa (Katanga Province) On 15 October 2004’ (MONUSCO and OHCHR 2004) 8, 9, 11; Raid, ‘African Commission: Landmark \$2.5 Million Award to DR Congo Massacre Victims’ (4 August 2017) <<http://www.raid-uk.org/blog/african-commission-landmark-2-5-million-award-dr-congo-massacre-victims>> (accessed 30 March 2020).

<sup>54</sup> MONUSCO and OHCHR (n 53) 8, para 37; Global Witness, *Oil And Mining In Violent Places: Why Voluntary Codes For Companies Don't Guarantee Human Rights* (Global Witness 2007) 7.

and should be made to bear legal consequences under international criminal law. The moral blameworthiness of complicity stems from the moral recognition that for international crimes, “there is often a sense that, even if one starts by thinking about the principal perpetrator, there is a need to consider others who finance, facilitate, encourage, support and assist in the enterprise”.<sup>55</sup> Moreover, the blameworthiness of complicity is legally codified in the Rome Statute under Articles 25(3)(b), 25(3)(c) and 25(3)(d).<sup>56</sup> Holding complicit corporate entities criminally responsible furthers the objectives of the Rome Statute. Despite its non-binding nature, the preamble of the Rome Statute contextualizes the legal provisions of the Rome Statute and reflects some important objectives of international criminal law. International corporate criminal responsibility for complicity in international crimes not only ensures that “the most serious crimes of concern to the international community as a whole must not go unpunished”, but also puts “an end to impunity for the perpetrators of these crimes”.<sup>57</sup>

## V. POLICY JUSTIFICATIONS FOR INTERNATIONAL CORPORATE CRIMINAL RESPONSIBILITY

### A. WHY DOES RESPONSIBILITY HAVE TO BE CRIMINAL?

While criminal responsibility and civil liability are not mutually exclusive and could be complementarily used, criminal prosecution has unique deterrent effects on corporate complicity in two ways. First, criminal responsibility enables the imposition of more severe forms of punishment on the complicit corporate entity as compared to civil liability. Unlike civil liability, which primarily seeks to place the victim and the wrongdoer in a position before the wrongful act was committed, criminal responsibility takes into account considerations that would permit punishments that go beyond restitution or compensation. Such considerations not only include moral and financial victim redress, but also deter both existing and potential wrongdoers as well as reinforce the moral stigma against international crimes. For example, civil liability is unlikely to cause a corporation to dissolve

<sup>55</sup> Andrew Clapham, ‘Issues of Complexity, Complicity and Complementarity: From The Nuremberg Trials to The Dawn of the New International Criminal Court’ in P Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003) 51.

<sup>56</sup> Article 25(3)(b) criminalizes the ordering, soliciting, or inducing the attempted or actual commission of international crimes, Article 25(3)(c) criminalizes the abiding, abetting, or assistance in the commission or attempted commission of international crimes with the purpose of facilitating the commission of such crimes. This includes providing the means for its commission. Article 25(3)(d) holds individuals responsible if they in any other way contributes to the commission of attempted commission of international crimes by a group of persons acting with a common purpose.

<sup>57</sup> Rome Statute, Preamble.

as long as the corporation is able to pay the required compensation. Criminal prosecution, however, can dissolve a corporation even if the corporation is able to pay compensation without being rendered insolvent.

This deterrent effect posed by criminalization could address the moral hazards of limited liability. Admittedly, investors' loss would only be restricted to the amount they originally invested. Nevertheless, while criminal sanctions such as dissolution, activity restrictions or asset seizure may not change the moral hazards accompanied by *short-term* and *speculative* investors, they could potentially inflict greater financial costs on *long-term* investors who have originally invested significant sums as well as certain institutional investors such as pensions that value stable gains. Criminal sanctions could thus incentivize such investors to take a more proactive role in ensuring corporations conduct the required due diligence on all its operations.

Second, criminal prosecution poses unique reputational risks to a corporation. The threat of negative publicity and its loss of share value and profits arising from a criminal investigation (let alone a criminal prosecution) will be sufficient to incentivize corporations to conduct rigorous due diligence to ensure that their commercial transactions do not facilitate international crimes. Although civil liability may also create negative publicity for a corporation, a criminal label could be viewed more seriously due to its expression of moral condemnation.<sup>58</sup> Accordingly, criminal prosecution or even the mere credible threat of such a prosecution could change the decision-making calculus of *both* corporate managers and shareholders. Criminal prosecution, along with its attendant victim reparation and negative publicity, will ensure that corporations internalize the human costs of their operations. As previously argued, the doctrine of shareholder primacy, which creates perverse incentives and pressures on corporate managers to increase shareholder value relentlessly, has encouraged corporations to pursue profitable yet risky business ventures.

Corporate criminal responsibility would probably alter the decision-making calculus of corporations in two fundamental ways. First, since corporate managers are rationally concerned about their business performance, criminal responsibility would compel them to conduct consistent and serious due diligence in commercial projects before choosing to embark on them and throughout their operations. This is because a criminal investigation by the ICC would likely reduce profits since "any association with an ICC investigation or prosecution could have devastating reputational consequences for a business given the serious gravity of

<sup>58</sup> Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 957, 970.

the crimes with which the Court is concerned”.<sup>59</sup> For corporations, “managing the risk of adverse human rights impacts was not strategic for firms; most were still in a reactive mode, responding to external developments they experienced”.<sup>60</sup> Therefore, criminal responsibility compels corporations to proactively factor the reputational and financial costs of complicity in decision-making and corporate business plans.

Second, since shareholders are concerned with share price and would rationally ensure that corporate managers’ incentives are aligned with share price, criminal responsibility could compel shareholders to shift away from short-term profits and incentivise them to monitor and ensure that the corporation pursues projects that are compliant with human rights standards. This is because an ICC criminal investigation or prosecution of the corporation would cause a loss of investor confidence and the concomitant selling of shares. An international criminal investigation or prosecution would result in investors having poor or negative expectations of the corporation’s future growth. Poor expectations of future growth will thereby hurt share price. This scenario is also against the interest of institutional investors who are the ones who exercise actual influence over the direction of corporations as opposed to retail investors.

Furthermore, criminal responsibility could potentially encourage socially responsible shareholders. Criminal responsibility incentivises shareholders to exert monitoring influence to ensure that corporations’ projects are compliant with human rights standards. Moreover, self-interested shareholders would choose to invest in corporations that do not bear the risks of an ICC criminal investigation and prosecution. Since corporations and institutional investors have an interest in higher share prices, they would be incentivised to reduce such risks by ensuring that their businesses are compliant with human rights standards.

Apart from deterrence and changing corporate incentive structures, another advantage of criminal liability is that it allows victims to seek moral vindication and remedies. Unlike civil liability, criminal liability expresses and reinforces the moral importance of individual dignity. Civil and criminal liabilities have different social meanings, in that civil liability quantifies damages whereas criminal liability morally condemns the wrongdoer’s incorrect assessment of the inherent worth of the victims.<sup>61</sup> Such moral condemnation by the ICC strengthens

<sup>59</sup> Antony Crockett, Marco de Sousa, and Jerome Temme, ‘International Criminal Court To Prosecute Business And Human Rights’ (*Herbert Smith Freehills*, 2 November 2016) <<https://www.herbertsmithfreehills.com/latest-thinking/international-criminal-court-to-prosecute-business-and-human-rights>> (accessed 30 March 2020).

<sup>60</sup> Ruggie (n 33) 76.

<sup>61</sup> Lawrence Friedman, ‘Essay in Defense of Corporate Criminal Liability’ (2000) 23 *Harvard Journal of Law and Public Policy* 833, 854–855.

the norms of corporate accountability and respect for human rights. This is because “international criminal trials declare, in the most public way possible, that the condemned deeds are serious transgressions”.<sup>62</sup> As noted in *Prosecutor v Rutagana*, moral condemnation expressed by criminal penalties is valuable in deterring “others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights”.<sup>63</sup> By establishing and affirming norms of corporate accountability and respect for human rights, the ICC can in the long-term prevent such complicity from even occurring in the first place.

Furthermore, the corporation has inappropriately profited from its complicity. It is only morally just to offer restitution and compensation to victims whose rights the corporation has indirectly violated while pursuing its commercial projects. Criminal fines offer a direct way to offer restitution and compensation. Similarly, criminal sanctions such as confiscation of corporate assets and dissolution of the corporation could be used to generate a monetary sum to achieve restitutionary and compensatory objectives. Moreover, corporate criminal responsibility contributes to the long-term stability of the global economic order because “the loss of confidence in the financial system results not from criminal prosecution (which repairs confidence) but from the crime itself”.<sup>64</sup> The perceived impunity of corporations may lead to public disillusionment and populist cynicism about globalization and corporations. Holding complicit corporations criminally accountable may contribute to trust in the global economic system, thereby facilitating the long-term sustainability of the system.

## B. WHY DOES CRIMINAL RESPONSIBILITY HAVE TO BE INTERNATIONAL?

The second component of corporate criminal responsibility is it has to be international. Its effectiveness derives from the fact that corporations can be held responsible internationally even if they are not held responsible in domestic courts of States. The ICC operates on the principle of complementarity. Complementarity is fundamental because in many cases, States are either unwilling or unable to criminally prosecute complicit corporations. Under the status quo, complicit corporations can only be investigated and prosecuted by

<sup>62</sup> David Luban, ‘Beyond Moral Minimalism: Response to Crimes Against Humanity’ (2006) 20 *Ethics and International Affairs* 353, 354–355.

<sup>63</sup> *The Prosecutor v Georges Anderson Nderubumwe Rutaganda* (Trial Chamber I) [1999] ICTR-96-3-T [456].

<sup>64</sup> Mary Kreiner Ramirez and Steven A Ramirez, *The Case for the Corporate Death Penalty: Restoring Law and Order on Wall Street* (New York University Press 2017) 9.

national courts. The principle of complementarity ensures that international criminal law punishes complicit actors where national courts fail to do so. The role of international criminal law in acting as a punitive mechanism to safeguard individual rights against international crimes is essential in a legal reality where rights are predicated on nationality. In other words, “human rights flow from membership of a political community, the one true human right is the right to belong to such a community – the right to have rights”.<sup>65</sup> This implies that an individual has rights not because the individual is a human being, but because the individual is a member of a nation. Therefore, when a nation is either unwilling or unable to prosecute perpetrators or complicit actors, rights are rendered vulnerable to international crimes.

States may be unwilling to enforce their human rights laws or prosecute complicity in international crimes. If a State is committing international crimes, it has no political incentive at all to prosecute complicit corporations. As in the case of the Nigerian government vis-à-vis Shell, these governments may be relying on the provision of logistical and financial support of corporations to carry out such international crimes. In fact, victims of international crimes sometimes belong to ethnic or religious minorities; those which governments often lack the political will to protect. For example, a subsidiary of the multinational corporation Kirin Holdings Company made a \$30,000 donation to Myanmar’s military and authorities during the height of an ethnic cleansing campaign carried out by the same very forces against the Rohingya community in late 2017.<sup>66</sup> Furthermore, dependence on multinational corporations as a source of investment and local employment can disincentivise States from criminally prosecuting corporations because such prosecution would deter corporations from doing business in their State or result in corporations exiting the State.

Additionally, even if States are willing to criminally prosecute corporations complicit in international crimes perpetuated by non-state actors, States may be unable to do so because they may lack the legal infrastructure, political will and financial wherewithal to hold complicit multinational corporations accountable. Such constraints faced by States can be attributable to “race to the bottom” phenomenon, whereby States compete with one another to deregulate to attract or keep corporate commercial activity. To “attract investments and promote exports, governments may exempt national firms from certain legal and regulatory

<sup>65</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 3.

<sup>66</sup> Karen McVeigh, “Japanese brewery gave donation to Myanmar army chief during Rohingya crisis”, (*The Guardian*, 15 June 2018) <<https://www.theguardian.com/global-development/2018/jun/15/japanese-brewery-admits-donating-to-myanmar-army-during-rohingya-crisis-kirin-ethnic-cleansing-rakhine-state>> (accessed 30 March 2020).

requirements or fail to adopt such standards in the first place”.<sup>67</sup> This trade-off between economic gains and regulatory autonomy has been termed as the “golden straitjacket”.<sup>68</sup> The “golden straitjacket” refers to how the pursuit of economic growth has led to shrinking governmental power because of deregulation and privatization required for foreign investment. Another factor for weak environmental and human rights regulation is that States, which enact robust laws to protect its citizens, could face expensive investor-State arbitration claims, such as expropriation and breach of legitimate expectations. States’ pursuit of attracting multinational corporations and investments pressurizes them to deregulate competitively, thereby limiting their legal capacity to hold complicit corporations accountable.

Given that States may be unwilling or unable to criminally prosecute corporations for complicity in international crimes domestically, international legal responsibility “would bypass weak or corrupt States and would serve as a more credible deterrent for corporations, thus potentially inducing corporate compliance”.<sup>69</sup> Therefore, international corporate criminal responsibility “allows citizens in any nation to potentially seek protections against abuses that their own government might not otherwise provide them”.<sup>70</sup> Moreover, international legal standards, as opposed to divergent domestic laws, create greater consistency and clarity in applying criminal laws to complicit corporations.

Lastly, *international* criminal responsibility is especially critical in light of the inadequacies of present civil liability remedies, such as class action lawsuits. Currently, civil liability lawsuits in national courts face two main limitations. First, and in respect of civil lawsuits in the victims’ home State, the political reasons behind States’ unwillingness and inability to criminally prosecute complicit corporations could obstruct the success of civil lawsuits. Second, and in respect of civil liability lawsuits in foreign national courts, victims face “considerable legal, financial, practical and procedural barriers to accessing judicial remedies” in foreign courts.<sup>71</sup> Additionally, the space for civil lawsuits before foreign national courts has narrowed.<sup>72</sup> The clearest example of this phenomenon is the Alien Torts

<sup>67</sup> Ruggie (n 9) 6.

<sup>68</sup> Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (HarperCollins Publishers 2000) 103.

<sup>69</sup> Markos Karavias, *Corporate Obligations Under International Law* (Oxford University Press 2014) 3.

<sup>70</sup> David Naguib Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice* (MIT Press 2007) 69.

<sup>71</sup> Gwynne Skinner, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (2015) 72(4) *Washington and Lee Law Review* 1769, 1803; Jennifer Zerk (n 11) 7.

<sup>72</sup> Business & Human Rights Resource Centre, *Corporate impunity is common & remedy for victims is rare: Corporate Legal Accountability Annual Briefing* (Business & Human Rights Resource Centre 2017) 7.

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Claims Act, which is increasingly being circumscribed. The Alien Torts Claims Act is a United States Statute that allows foreign citizens to seek tortious claims in United States' domestic courts for international law violations committed by individuals and corporations overseas. The United States Supreme Court, however, has recently restricted its scope of application. In 2013, it ruled that the Statute is not extraterritorial and that the case must concern the United States for the Statute to be applicable.<sup>73</sup> In 2018, it also ruled that foreign corporations could not be held liable under the Statute.<sup>74</sup> Given that both civil and criminal proceedings before national courts are inadequate, they cannot be fully relied upon to ensure moral accountability and deterrence for international crimes. Accordingly, criminal responsibility of an international nature is necessary.

### C. INADEQUACIES OF NON-LEGAL MEASURES

The imperative of international corporate criminal responsibility is highlighted by the inadequacies of non-legal measures, namely Corporate Social Responsibility (CSR) and consumer activism, in preventing corporate complicity in international crimes. CSR is inadequate for two reasons. First, in contrast to criminal responsibility, CSR does not change the underlying incentive structure of a corporation, which is to maximise shareholder value. This is because CSR is voluntary and conditional on the good will of corporations. In contrast, international criminal responsibility imposes an obligation to respect human rights. In fact, CSR initiatives are sometimes implemented after the complicit action has taken place as a means of restoring a corporation's image. Unlike criminal responsibility, CSR is a poor deterrent because it is essentially a reactionary and voluntary measure dependent on corporate goodwill.

Second, since CSR is driven by the need to present a favourable public image to consumers, the amount of money spent by the corporation on its CSR initiatives and whether the corporation even chooses to implement CSR crucially depend on consumer pressure. CSR depends on the responsiveness of consumer demand. A prominent example of consumer activism is the Boycott, Divestment, and Sanctions Movement (BDS). One of its goals is to pressurize corporations to refrain from and cease their business dealings in Israeli-occupied settlements in

<sup>73</sup> *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

<sup>74</sup> *Jesner et al v Arab Bank PLC* 584 US (2018).

the Palestinian Territories. For instance, in 2018, following political pressure from political groups, including BDS, Airbnb ended its West Bank Settlement business.<sup>75</sup>

Nevertheless, consumer activist movements suffer from the Collective Action Problem. The problem of collective action postulates that “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”<sup>76</sup> Even if one were to assume that all consumers have a common interest in ensuring that corporations are either punished for complicity or compelled to conduct due diligence, consumers would be unable to achieve this common interest. Professor Mancur Olson provides two reasons why large groups of individuals face collective action problems.

First, each individual consumer is rational and is not incentivised to either bear the cost of personally boycotting the corporation or to sacrifice his time or effort to organize or coordinate mass boycotts. This is especially so when the benefits arising from successful changes in corporate behaviour are diffused and not directly felt. For example, a consumer in one State would not directly experience the effects of ethical corporate behaviour in another State, where the corporation operates its business.

Second, as the population size of consumers is large, the costs of organizing consumers into a movement are significantly high. A single consumer boycott is ineffective. Coordinated and organized consumer pressure is necessary to effect changes in corporate behaviour. Therefore, the immense difficulty and costs associated with coordinating consumers would render both the formation and operation of consumer boycotts difficult. Moreover, this also assumes that all consumers have a common interest in ensuring corporations are not complicit in international crimes. This, however, is unlikely given the possibility of consumer apathy. Apathy can be due to geographical distance, which makes it difficult to fully empathize with victims of international crimes. For example, despite BDS activism, Airbnb later reversed its decision to remove property listing in the West Bank Settlement and reinstated its listings.<sup>77</sup> The inadequacies of these current

<sup>75</sup> Isabel Kershner, ‘Airbnb Bans Listings in Israeli Settlements in West Bank’ (*The New York Times*, 19 November 2018) <<https://www.nytimes.com/2018/11/19/world/middleeast/airbnb-west-bank.html>> (accessed 30 March 2020); Palestinian BDS National Committee, *Airbnb’s Decision to Exit Israel’s Illegal Settlements: A Partial Victory for Human Rights & Accountability* (Palestinian BDS National Committee 2018).

<sup>76</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965) 2.

<sup>77</sup> Kershner (n 75).

measures thus reinforce the imperative of corporate criminal responsibility for complicity in international crimes.

## VI. LEGAL PROSPECTS FOR INTERNATIONAL CORPORATE CRIMINAL RESPONSIBILITY

The policy grounds for international corporate criminal responsibility for complicity in international crimes are buttressed by legal justifications. Although the Rome Statute was adopted in 1988, international criminal responsibility for international crimes emerged three decades earlier. The post-World War Two Nuremberg trials not only set a precedent for individual criminal responsibility for international crimes, but also for corporate criminal responsibility. Furthermore, new legal developments have also crystallised the precedent laid out in the Nuremberg trials.

As indicated in the *travaux préparatoires* of the Rome Statute, delegates at the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court did consider the French proposal to include juridical persons within the Court's jurisdiction. Although "all delegations had recognized the great merits of the relevant proposal" to include legal persons within the Court's jurisdiction, they eventually omitted the proposal because some delegations "felt that it would perhaps be premature" to do so.<sup>78</sup>

Nevertheless, the absence of jurisdiction over corporate complicity in international crimes does not mean that the norm of international corporate criminal responsibility does not exist. These are two separate issues. A norm can exist despite the absence of forums where it could be enforced; "the norm thus would lie dormant, but it could be activated, without breach of the *nullum crimen* principle, through the establishment of a court or tribunal vested with jurisdiction over transnational business corporations."<sup>79</sup>

Furthermore, as stipulated by Article 10 of the Rome Statute, the absence of corporate criminal responsibility in the Rome Statute itself does not preclude the existence or development of international rules pertaining to corporations.<sup>80</sup> This is evident from how the reason behind the delegations' omission to include corporations within the ICC's jurisdiction was due to definitional problems rather

<sup>78</sup> Extract from Official Records of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court - Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, 26th Meeting of the Committee of the Whole, A/CONF.183/C.1/SR.26, 1998, Volume II, 275.

<sup>79</sup> Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 *The Journal of International Criminal Justice* 898.

<sup>80</sup> Rome Statute, Article 10.

than a conceptual rejection that corporations are bound by international criminal law.<sup>81</sup> Similarly, the Appeals Panel in the Special Tribunal for Lebanon (STL) notes, “omission of legal persons from the Rome Statute should not be interpreted as a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law”.<sup>82</sup> This is because such an omission reflects a lack of political consensus rather than a conclusive rejection of international corporate criminal liability.<sup>83</sup>

As emphasized by the IMT in Nuremberg, international law is “not static, but by continual adaptation follows the needs of a changing world.”<sup>84</sup> Although international criminal responsibility of natural persons was not legally codified or expressed in treaties, the prosecution of natural persons for international crimes was still legally possible because it did “no more than express and define for more accurate reference the principles of law already existing.”<sup>85</sup> It is proposed that the expansion of the ICC’s jurisdiction would express already existing general principles of international law.

General principles “create obligations which have the implicit consent of States” because they are “derived from the States’ own principles, as ascertained through the inductive approach”.<sup>86</sup> One way of identifying general principles is induction, where one identifies commonality in national legal systems as well as “international law manifestations and expressions of States’ policies and practices, as evidenced by multilateral treaties, custom, and United Nations resolutions”.<sup>87</sup> Importantly, the mere absence of national legislation, treaty or international customary law does not mean that general principles cannot exist.<sup>88</sup>

<sup>81</sup> Jonathan Clough, ‘Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses’ (2008) 33 *Brooklyn Journal of International Law* 914; Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’ in M T Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (Kluwer Law International 2000) 191. Clapham noted that “the disagreements arose over the complexities involved in international trial of a non-natural person: *how* to serve the indictment, *who* would represent the interests of the legal person, *how much* intention need be proved, *how* to ensure that natural persons could not hide behind group responsibility”.

<sup>82</sup> *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (The Appeals Panel) [2014] STL-14-05/PT/AP/ARI26.1 [66].

<sup>83</sup> *ibid* [66].

<sup>84</sup> *The Trial of German Major War Criminals (Judgment)* [1 October 1946] International Military Tribunal (Nuremberg) 445.

<sup>85</sup> *ibid* 445.

<sup>86</sup> Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 *Michigan Journal of International Law* 768.

<sup>87</sup> *ibid* 809.

<sup>88</sup> *ibid* 772, 778, 779.

This functional approach to general principles of international law thus explains why the Nuremberg tribunals rejected the accused Nazi soldiers' invocation of the *nullum crimen* principle (no punishment in the absence of law) with respect to the charges of international crimes. The mere absence of treaties did not prevent the Nuremberg tribunals from recognizing general principles of international law with respect to the prohibition of international crimes such as genocide.

Using an inductive approach, this paper now seeks to argue that international corporate criminal responsibility is a general principle of international law. This general principle can be inferred from two legal developments, namely, the historical and current recognition that corporations can be held responsible for international crimes, and that such corporate responsibility can and should be criminal.

#### A. FIRST DEVELOPMENT: HISTORICAL AND CURRENT RECOGNITION THAT CORPORATIONS CAN BE HELD RESPONSIBLE FOR INTERNATIONAL CRIMES

Expanding the ICC's jurisdiction to encompass corporations is a logical extension of an existing norm that recognizes corporate responsibility for international crimes. The legal precedent that corporations can be held responsible for international crimes was historically established in the post-war Nuremberg trials, which held for the first time that international law and its norms are applicable to *non-state* actors. The Nuremberg trials broadened the application of international law from States to non-state actors. Before World War Two, "traditionally, international law applied only to the relationships among States and state-like entities."<sup>89</sup> The Nuremberg trials broadened the application of international law from States to non-state actors. Indeed, the trials represented a "shift [that] did not lie as much in the fact that rules of international law were found to apply to natural persons, but that subjects that were non-state private actors were considered to be bound by international law norms directly."<sup>90</sup>

Some scholars have argued that the IMT's prosecution of natural persons rather than corporate entities indicates that the legal precedent for international crimes was set for individual, not corporate responsibility.<sup>91</sup> This argument is not convincing because the decision to prosecute natural persons was borne

<sup>89</sup> Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 *The Journal of International Criminal Justice* 895, 899.

<sup>90</sup> Chantal Meloni, 'Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C)' in G Werle and M Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Springer 2017) 154.

<sup>91</sup> Jonathan Kolieb, 'Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability under International Law' (2017) 32 *American University International Law Review* 569, 586.

out of a political desire on the part of the occupation governments to rebuild West Germany's economy,<sup>92</sup> rather than the legal conclusion that such corporate responsibility was untenable under international criminal law.<sup>93</sup> Indeed, the fact that "corporate and associational criminal liability was seriously explored, and was never rejected as legally unsound"<sup>94</sup> demonstrates that the absence of prosecuted corporate entities is no evidence that corporate responsibility did not exist then or that there was no recognition of corporate responsibility.

However, the paper does not merely contend that the Nuremberg tribunals failed to rule out corporate criminal responsibility. This is because the mere fact that the Nuremberg tribunals failed to rule out such a responsibility does not mean that they implicitly recognized it. This paper contends that the Nuremberg tribunals recognized and accepted that the German corporations, which were complicit in the Nazi war efforts, could and were criminally responsible. Therefore, the Nuremberg trials could constitute a precedent for international corporate criminal responsibility. The eventual fact that these German corporations were not prosecuted must be distinguished from the recognition that those corporations did and could be criminally responsible. These are two separate issues.

The IMT trials did evince the recognition that German corporations could be responsible for complicity in international crimes. This is evident from how the Nuremberg Prosecutor instituted legal proceedings against corporate agents to hold corporations accountable for complicity in international crimes. For instance, the "the Prosecutor selected the individuals according to their connections to the organizations which were also targeted in the trial."<sup>95</sup> This deliberate prosecutorial decision was motivated by "a determination to ensure that German industry, and the industrialists who had supported the German war effort, were also exposed and punished."<sup>96</sup> Additionally, these corporate organizations "even had their own counsel appointed by the Tribunal to represent them at the trial."<sup>97</sup> The focus on corporate accountability is evident from how the Prosecutors noted, "the Krupp companies profited greatly from destroying the peace of the world through support

<sup>92</sup> Jonathan A Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094, 1240.

<sup>93</sup> *ibid* 1239.

<sup>94</sup> *ibid*.

<sup>95</sup> Clapham (n 55) 34.

<sup>96</sup> *ibid* 34, 35.

<sup>97</sup> *ibid* 34.

of the Nazi program”<sup>98</sup> and that it was imperative that there “be a representative of the Krupp interests before the Tribunal.”<sup>99</sup> Although the corporate entity Krupp was not prosecuted, the prosecution of its employee Alfried Krupp indirectly held Krupp accountable for contributing to international crimes.

Furthermore, in the subsequent Nuremberg Military Tribunal (NMT) trials, complicit corporations were held accountable for international crimes. For instance, the German corporation I. G. Farben (“Farben”) also faced dissolution and seizure of their assets under the Control Council Law No. 9.<sup>100</sup> Given that Farben was already punished and punitively dissolved, it would be pointless to criminally prosecute Farben alongside the industrialists.<sup>101</sup> Although Farben was not charged as a corporate entity, the NMT specifically framed Farben as an international *violator*, thereby suggesting that the corporate entity itself is capable of bearing obligations. The tribunal stipulated that “where private individuals, 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”.<sup>102</sup> It further noted that corporate complicity violates international law. The tribunal notes that “a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.”<sup>103</sup> The tribunal further noted that the actions of corporations could violate international law. It expressly states that “action on the part of Farben constituted a violation of the Hague Regulations.”<sup>104</sup> This shows that the Tribunal accepted that corporate entities had obligations to avoid being complicit in international crimes and were capable of violating such obligations. Therefore, by characterizing Farben as an entity capable of bearing and violating

<sup>98</sup> Robert Jackson, ‘Answer of the United States Prosecution to the Motion on Behalf of Defendant Gustav Krupp von Bohlen’ (12 November 1945) < [www.yale.edu/lawweb/avalon/imt/proc/v1-11.htm](http://www.yale.edu/lawweb/avalon/imt/proc/v1-11.htm) > (accessed 30 March 2020).

<sup>99</sup> *ibid.*

<sup>100</sup> ‘Brief of Amici Curiae Nuremberg Scholars Omer Bartov, Michael J. Bazylar, Donald Bloxham, Lawrence Douglas, Hilary Earl, David Fraser, Matthew Lippman, Fionnuala D. Ni Aolain in Support of Plaintiffs-Appellants Seeking Reversal’ (2011) 2–3.

<sup>101</sup> *ibid.* 13.

<sup>102</sup> Decision and Judgment of the Tribunal, Statement by Judge Hebert, 1132–1133, 1136, 1140.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.* 1140.

international criminal law, the NMT demonstrates that international criminal law and laws of war could bind corporations like Farben.

Additionally, the 1945 Yalta agreement “included the dissolution of private corporations, the seizure of industrial facilities, restitution of confiscated properties and reparations to both the States and natural persons who had suffered harm.”<sup>105</sup> Similarly, the Charter of the IMT enables the Nuremberg tribunals to declare “a group or organization” criminal.<sup>106</sup> In totality, these facts cumulatively show that corporations are bound by international criminal law and the norms pertaining to international crimes. In fact, in their *amici curiae* to the United States Court of Appeals for the Seventh Circuit in *Boimah Flomo et al v Firestone Natural Rubber Company*, Nuremberg legal and history scholars not only noted that “there is nothing in the historical record to indicate that the Allies believed that corporations could not be punished under international law”,<sup>107</sup> but that it is “factually and legally incorrect in stating that the Nuremberg precedent stands for the proposition that corporations cannot be punished either criminally or civilly under international law.”<sup>108</sup> In sum, by reorienting the applicability of international law from States to non-state actors, including juristic persons, the Nuremberg trials set a legal precedent for corporate responsibility for international crimes.

The general principle of corporate responsibility for international crimes is also evident from the increasing State practice of holding corporations liable for international crimes. States have incorporated Rome Statute provisions in their domestic laws and such incorporated provisions apply to corporations. A survey of sixteen national legal systems “illustrates a potential web of liability created by the integration of International Criminal Law/International Humanitarian Law provisions to a wide range of domestic legal systems containing provisions for the prosecution of legal persons, including business entities, as well as extraterritoriality and universality provisions which extend jurisdiction abroad.”<sup>109</sup> A report commissioned by the Office of the UN High Commissioner for Human Rights also noted, “most jurisdictions appear to recognise the possibility of corporate criminal responsibility (if not as a general concept then at least in relation to specific offences

<sup>105</sup> Brief of Amici Curiae (n 100) 11.

<sup>106</sup> United Nations, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”) of 8 August 1945, 82 UNTC 280, Article 10.

<sup>107</sup> Brief of Amici Curiae (n 100) 13.

<sup>108</sup> *ibid* 1.

<sup>109</sup> Anita Ramasastry and Robert Thompson, *Commerce, Crime and Conflict Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries – Executive Summary* (FAFO 2006) 27.

or types of offences)".<sup>110</sup> Even in some jurisdictions where corporate criminal responsibility is absent due to constitutional or doctrinal reasons, corporations do not enjoy impunity; they are "dealt with through a system of administrative offences and penalties."<sup>111</sup> The UN Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises has recognized this "expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility."<sup>112</sup>

Admittedly, some civil jurisdictions still rely on non-criminal administrative sanctions to hold corporations liable and States adopt various forms of corporate criminal responsibility. Nevertheless, this lack of uniformity in holding corporations liable across various jurisdictions "should not necessarily lead to the conclusion that there is no liability in international law for corporations engaging in behaviour which violates international norms contained in treaties that specifically target legal persons."<sup>113</sup> Such "absence of unanimous international acceptance of criminal liability for corporations does not necessarily entail that they are entirely exempted from the application of criminal law."<sup>114</sup> For instance, even civil laws such as the Alien Tort Claims Act hold corporations responsible for international crimes. Regardless of the criminal or civil nature of the law, both laws similarly recognize that corporations are responsible for international crimes.

Moreover, the Malabo Protocol provides the African Court of Justice and Human Rights (ACJHR) with international criminal jurisdiction to try legal persons<sup>115</sup> such as corporations for complicity<sup>116</sup> in genocide,<sup>117</sup> crimes against

<sup>110</sup> Jennifer Zerk (n 11) 32.

<sup>111</sup> *ibid.*

<sup>112</sup> John Gerard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework (A/HRC/17/31)* (United Nations 2011) 21.

<sup>113</sup> Andrew Clapham, 'Corporations and Human Rights' in A Clapham (ed), *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 251.

<sup>114</sup> *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (n 82) [50].

<sup>115</sup> Article 1 defines "person" to be a natural or legal person. See also Article 46(C)(1), which provides for corporate criminal liability: "the Court shall have jurisdiction over legal persons".

<sup>116</sup> Article 28N(i): "incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present statute" and Article 28N(ii): "aids or abets the commission of any of the offences set forth in the present Statute".

<sup>117</sup> Article 28B.

humanity,<sup>118</sup> and war crimes.<sup>119</sup> Although currently not in force, this legal provision of corporate criminal responsibility for international crimes on a regional level does not only represent a recognition of corporate responsibility for international crimes, but also a “progressive and positive development for international criminal law and could perhaps serve as an inspiration for future amendments of the ICC Statute.”<sup>120</sup>

Additionally, an ancillary of this norm of corporate responsibility for international crimes is the recognition that corporations have responsibilities to respect human rights. The human rights obligations of corporations could contribute to the norm of corporate responsibility for international crimes due to the close conceptual overlaps between international crime and serious human rights violations, and the artificiality of divorcing international criminal law from human rights law.<sup>121</sup> Moreover, given that international crimes are the “most serious crimes of concern to the international community as a whole”<sup>122</sup> and thus constitute the gravest crimes vis-à-vis human rights violations, the recognition that corporations have human rights responsibilities means *a fortiori* that corporations bear responsibility for international crimes. Therefore, the increasing recognition of corporate human rights obligations can conceivably and logically facilitate the entrenchment of corporate responsibility for international crimes.

Accordingly, that corporations can be held responsible for international crimes violations could be deduced from public international law jurisprudence in respect of corporate responsibility for human rights violations. The recent investor-State case *Urbaser v Argentina* is particularly pertinent, where Argentina made a counterclaim against Urbaser for its failure to make the required investments, which in turn violated the human right to water. The arbitral tribunal rejected Urbaser’s argument that the human right to water is an obligation that may be borne by States, but never borne by corporations. According to the tribunal, the principle that corporations are by nature not subjects of international law and thus incapable of holding obligations has “lost its impact and relevance in similar

<sup>118</sup> Article 28C.

<sup>119</sup> Article 28D.

<sup>120</sup> Meloni (n 90) 154.

<sup>121</sup> Hans-Peter Gasser, ‘The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law’ in J Doria, H-P Gasser, and M C Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Brill 2009) 1111; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press 2015) 17.

<sup>122</sup> Rome Statute, Preamble.

terms and conditions as this applies to individuals.”<sup>123</sup> Given that international law accepts that corporations operating in international commerce have a commitment to comply with human rights in the States other than their home State, it could “no longer be admitted that companies operating internationally are immune from becoming subjects of international law.”<sup>124</sup> To find otherwise would render individual rights protections against international crimes and human rights violations hollow. This implication was also noted by the tribunal, which observed that no private individual or entity could be allowed to act in disregard of individual rights if such rights were to be enjoyed by individuals.<sup>125</sup>

Although the tribunal eventually rejected Argentina’s counterclaim, it did not do so due to the conceptual deficiency of construing corporations as international law subjects, but because the human right to water did not impose a *positive* obligation on corporations to perform the provision of water to Argentinian citizens.<sup>126</sup> The situation, however, would be different if the obligation concerned was an obligation to *abstain* from committing acts violating human rights because such an obligation equally applies to individuals and corporations, not only States.<sup>127</sup> Therefore, applying this principle, although corporate entities do not have *positive* human rights obligations, they do have *negative* obligations to refrain from international crimes. This is consistent with the NMT Tribunal’s observation that corporations have an obligation to refrain from being complicit in international crimes commissioned by the Nazi German State. Specifically, States have both positive and negative obligations, but corporations may only have negative obligations; while States and corporations differ in the kind of personality they possess as subjects of international law, this does *not* mean that corporations are unable to bear international criminal responsibility for international crimes.

Furthermore, this particular understanding of the international legal personality of corporations as bearing negative obligations in respect of international crimes is also consistent with how the *kind* of personality that particular subjects have under international law depends on the needs of the international community. Indeed, the subjects of law in international legal system

<sup>123</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) 1194.

<sup>124</sup> *ibid* 1195.

<sup>125</sup> *ibid* 1196, 1199.

<sup>126</sup> *ibid* 1208–1209.

<sup>127</sup> *ibid* 1210. See also 1195.

are “not necessarily identical in their nature” and their nature in turn “depends upon the needs of the community”.<sup>128</sup>

That the needs of the international community comprise of corporate responsibility for international crimes is particularly evident from the various soft law instruments recognizing that corporations can be held responsible for international crimes and human rights violations. Since the Nuremberg precedents, various soft law instruments were created with the purpose of establishing guidelines and principles for corporate behaviour with respect to international crimes and human rights. Although these guidelines and principles are non-binding, they not only contribute to the norm of corporate responsibility for international crimes, but also reflect an emerging international consensus that corporations are responsible for ensuring that their operations do not render them complicit in international crimes. As a reflection of changed social expectations of acceptable corporate conduct in relation to human rights, soft law facilitates the creation of a normative framework of corporate accountability that meets the needs of the international community. Furthermore, by complementing the legal principles in the Nuremberg precedent, these soft law instruments show that the Nuremberg precedent is not a mere aberration in international criminal law.

One such soft law instrument is the 2011 UN Guiding Principles on Business and Human Rights, which was unanimously endorsed by the UN Human Rights Council, represent “a global standard of expected conduct for all business enterprises wherever they operate.”<sup>129</sup> Under the 2011 UN Guiding Principles, corporations have the responsibility to avoid causing or contributing to the infringement of human rights through their own activities.<sup>130</sup> The UN Guiding Principles have also been “endorsed or employed by individual Governments, business enterprises and associations, civil society and workers’ organizations, national human rights institutions, and investors.”<sup>131</sup> Moreover, the STL has characterized the UN Guiding Principles as “a concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability.”<sup>132</sup> As the UN Guiding Principles is representative of an international effort to concretize human rights standards for corporations, it is “evidence of an emerging international consensus regarding

<sup>128</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 17, 8.

<sup>129</sup> Ruggie (n 112) 13.

<sup>130</sup> UN Guiding Principles on Business and Human Rights, Articles 2.A.11 and 2.A.13(a).

<sup>131</sup> Ruggie (n 112) 4.

<sup>132</sup> *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (n 82) [46].

what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights.”<sup>133</sup>

The Guiding Principles have also been incorporated in the 2011 Organization for Economic Cooperation and Development’s (OECD) Guidelines for Multinational Enterprises, which is also another soft law instrument. The OECD Guidelines “provide principles and standards of good practice consistent with applicable laws and internationally recognised standards”,<sup>134</sup> which includes the corporate responsibility to avoid contributing to human rights violations.<sup>135</sup> Despite its non-binding nature, the OECD Guidelines establish an investigatory procedure, which allows the National Contact Points (NCP) in OECD States to investigate allegations that companies have breached the Guidelines, and such investigations can result in follow-on litigation under other applicable laws if the NCP arrives at adverse findings.<sup>136</sup>

Other soft law multilateral regimes reflect and contribute to the norm of corporate responsibility for international crimes and human rights violations include the 1982 draft UN Code of Conduct on Transnational Corporations, 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,<sup>137</sup> and the 2006 International Labour Organization Tripartite Declaration of Principles on Multinational Enterprises and Social Policy.<sup>138</sup>

Moreover, corporations themselves recognize and accept their responsibility to avoid actions that render them complicit in international crimes and human rights violations. Many corporations explicitly establish human rights policies and leading international business organizations have also affirmed that corporations bear obligations to respect human rights.<sup>139</sup> For instance, Shell and British Petroleum explicitly recognize the UN Guiding Principles in their human rights policy.<sup>140</sup> German corporations’ compensation to Holocaust victims and their families further

<sup>133</sup> *ibid.*

<sup>134</sup> OECD, *Guidelines for Multinational Enterprises* (OECD 2011) 17.

<sup>135</sup> *ibid* Articles 4(1) and 4(2).

<sup>136</sup> Jonathan Bonnitcha, *The UN Guiding Principles On Business And Human Rights: The Implications For Enterprises And Their Lawyers* (Allen & Overy LLP’s Human Rights Working Group 2012) 15.

<sup>137</sup> These norms were approved 13 August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights.

<sup>138</sup> John H Knox, ‘Horizontal Human Rights Law’ (2008) 102 *The American Journal of International Law* 24.

<sup>139</sup> Larissa van den Herik and Jernej Letnar Cernic, ‘Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again’ (2010) 8 *Journal of International Criminal Justice* 737.

<sup>140</sup> Shell, *General Business Principles and British Petroleum Business and Human Rights Policy*, 2.

indicate that corporations themselves do recognize that they bear responsibility for complicity in international crimes and human rights violations committed by the Nazi regime.<sup>141</sup> Underpinning these historical and current developments is the recognition that corporations could be held responsible for international crimes and that such a responsibility to refrain from being complicit is consistent with the needs of the international community, especially in relation to the protection of individual dignity and rights from the gravest crimes. Accordingly, international legal personality of the corporation could and should be conceptualized as bearing such a responsibility.

#### B. SECOND DEVELOPMENT: RECOGNITION THAT THE CORPORATIONS CAN BEAR CRIMINAL RESPONSIBILITY

Relying on historical precedents, soft law instruments, and corporate, national and regional practice, this paper has demonstrated that the recognition that corporations bear responsibility for international crimes exists. This paper will now show that corporations can bear criminal responsibility. The main objections against the expansion of the ICC's jurisdiction to encompass corporations are that corporations cannot bear criminal responsibility especially in civil law jurisdictions, which do not recognize corporate criminal responsibility.<sup>142</sup> This is encompassed by "*societas delinquere non potest*", which means that a legal entity cannot be criminally responsible. In fact, one main reason the delegates at the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court omitted corporate criminal responsibility was because of the lack of common standards of corporate criminal liability across national jurisdictions, which would in turn undermine the principle of complementarity.<sup>143</sup> In view of new

<sup>141</sup> Clapham (n 55) 46.

<sup>142</sup> Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19 *Criminal Law Forum* 115, 117.

<sup>143</sup> Caleb Wheeler, 'Re-examining Corporate Liability at the International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International' (2018) 19(1) *Melbourne Journal of International Law* 369, 373; Extract from Official Records of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court – Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, 1st meeting of the Committee of the Whole, A/CONF.183/C.1/SR.1, 1998, Volume II, 134-135. In response to the French proposal, the delegates from States such as Ukraine, Cuba, and Sweden voiced concerns that accepting corporate criminal liability would be contrary to the principle of complementarity.

developments since 1998, this paper contends that this reason against the inclusion of corporate criminal responsibility in the Rome Statute is arguably untenable.

First, there are many international treaties that recognize corporate criminal responsibility. They include the 1998 European Convention on the Protection of the Environment through Criminal Law,<sup>144</sup> the 2003 UN Convention on Corruption,<sup>145</sup> the 1999 UN Convention on the Suppression of the Financing of Terrorism,<sup>146</sup> the 2000 UN Convention against Transnational Organized Crime,<sup>147</sup> the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>148</sup> the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions,<sup>149</sup> the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,<sup>150</sup> and the 1998 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Wastes within Africa.<sup>151</sup> These multilateral treaties suggest an emerging recognition that corporations can be held *criminally* responsible for various crimes. Therefore, criminal accountability of corporations is a legal possibility under international law and corporations as juridical persons can be criminally responsible for complicity in international crimes.

Second, State practice is increasingly converging on corporate criminal liability. Corporations can be criminally sanctioned in common law jurisdictions such as the Australia, Bangladesh, Canada, India, Jamaica, Kenya, Malaysia, New Zealand, the United Kingdom, and the United States.<sup>152</sup> On the other hand, the “*societas delinquere non potest*” principle is changing as increasing number of civil jurisdictions have incorporated corporate criminal responsibility into their domestic law. In many civil law jurisdictions, there is “a rapid expansion amongst civil law nations introducing corporate criminal liability schemes since the 1970s.”<sup>153</sup> Throughout various jurisdictions, not only are States introducing a growing

<sup>144</sup> Article 9.

<sup>145</sup> Article 12.

<sup>146</sup> Articles 4(a) and 5(1).

<sup>147</sup> Article 10.

<sup>148</sup> Article 1(2).

<sup>149</sup> Articles 1(1), 1(2), and 2.

<sup>150</sup> Articles 2(14), 4(3) and 4(4).

<sup>151</sup> Articles 1(16) and 9(2).

<sup>152</sup> Joanna Kyriakakis, ‘Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge’ (2009) 56(3) *Netherlands International Law Review* 333, 336–339; *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (n 82) [52] and [55] for the list of countries.

<sup>153</sup> Kyriakakis (n 152) 340.

number of offences for which corporations can be criminally prosecuted, they are also increasingly using criminal sanctions to hold corporations accountable.<sup>154</sup>

Regionally, the Council of Europe Committee of Ministers adopted a recommendation to apply criminal liability and sanctions to render enterprises liable for causing damage to individuals and the community.<sup>155</sup> These recommended criminal sanctions include traditional criminal sanctions such as fines and property confiscation. The Committee, however, noted that since pecuniary sanctions could be insufficiently effective in producing the desired deterrent effect, non-pecuniary criminal measures affecting a corporation's assets, exercise of its activities, and even its very existence should be applied.<sup>156</sup> Specific proposed criminal sanctions include corporate compensation to victims, prohibition or suspension of certain activities, annulment of licences, or closure of the corporation.<sup>157</sup> Importantly, these criminal sanctions are complementary, not mutually exclusive and could be imposed in combination.<sup>158</sup> This trend towards adopting corporate criminal liability is evident in civil law jurisdictions such as Austria, Belgium, Brazil, Chile, China, Denmark, Egypt, Estonia, Finland, France, Indonesia, Japan, the Netherlands, Norway, Morocco, Senegal, South Korea, Spain, Switzerland, and the United Arab Emirates.<sup>159</sup> For instance, in 2018, the Swiss-French cement multinational corporation Lafarge was criminally charged in France with complicity in crimes against humanity by paying 13 million euros to armed groups, including the Islamic

<sup>154</sup> 'Corporate Crime: A Global Perspective' (Freshfields Bruckhaus Deringer 2018) 2.

<sup>155</sup> Article 1.3, Council of Europe Committee of Ministers of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities Recommendation No. R (88) 18, Adopted by the Committee of Ministers on 20 October 1988.

<sup>156</sup> Paragraph 28 of the Explanatory Memorandum, Council of Europe Committee of Ministers of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities Recommendation No. R (88) 18, Adopted by the Committee of Ministers on 20 October 1988.

<sup>157</sup> *ibid.*

<sup>158</sup> Paragraph 30 of the Explanatory Memorandum, Council of Europe Committee of Ministers of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities Recommendation No. R (88) 18, Adopted by the Committee of Ministers on 20 October 1988.

<sup>159</sup> International Federation of Human Rights, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms – 3rd Edition* (International Federation of Human Rights 2016) 312; Brandon Garrett, 'International Corporate Prosecutions' in D Brown, B Weisse and J Turner (eds), *Comparative Criminal Procedure* (Oxford University Press 2018) 2; *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (n 82) [52] and [55] for the list of countries.

State of Iraq and the Levant, to keep its factory open in Syria.<sup>160</sup> Even in civil law jurisdictions, such as Germany, which have not adopted corporate criminal liability, “there are discussions about the introduction of corporate criminal liability.”<sup>161</sup> Indeed, as noted by the Special Rapporteur of the International Law Commission (ILC) on Crimes Against Humanity, corporate criminal responsibility has “become a feature of many national jurisdictions” in recent years.<sup>162</sup>

Lastly, international criminal law jurisprudence has also recognized that corporations are entities that can bear international criminal responsibility. The 2014 *Case Against New TV S.A.L. Karma Mohamed Tahsin AL Khayat* is instructive. In determining whether it had personal jurisdiction over the corporate entity New TV S.A.L for contempt charges, the STL Appeals Panel had to interpret whether the term “person” in Rule 60 *bis* (Contempt and Obstruction of Justice) of the Rules of Procedure and Evidence includes legal persons.<sup>163</sup> In its interpretation exercise, the STL Appeals Panel surveyed and referenced trends in international human rights standards and international criminal law principles.

The Appeals Panel noted that there is a “growing number of states criminalizing the acts and conducts of legal persons”<sup>164</sup> and that there exists “an emerging shared international understanding on the need to address corporate responsibility [and the] international human rights standards and the positive obligations arising therein are equally applicable to legal entities.”<sup>165</sup> In view of international treaties, converging State practice and recognition of criminal liability in international criminal law jurisprudence, it can be posited, “corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”<sup>166</sup> It is pertinent to note that during the Nuremberg trials, there were no treaties stipulating that international

<sup>160</sup> ECCHR, ‘Lafarge in Syria: Accusations of Complicity Grave Human Rights Violations’ (ECCHR) <<https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>> (accessed 30 March 2020).

<sup>161</sup> Linklaters, ‘Corporate Criminal Liability: A Review of Law And Practice Across The Globe’ (*Linklaters*, 20 October 2016) <<https://www.linklaters.com/en/insights/thought-leadership/corporate-criminal-liability-review/corporate-criminal-liability-review>> (accessed 30 March 2020) 5; Norton Rose Fulbright, ‘Corporate Criminal Liability In Germany’ (*Norton Rose Fulbright*, April 2016) <<https://www.nortonrosefulbright.com/en/knowledge/publications/800922a0/corporate-criminal-liability-in-germany>> (accessed 30 March 2020).

<sup>162</sup> Sean Murphy, *Second Report On Crimes Against Humanity (A/CN.4/690)* (International Law Commission 2016) 29.

<sup>163</sup> *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* (n 82) [1]–[6].

<sup>164</sup> *ibid* [44].

<sup>165</sup> *ibid* [46].

<sup>166</sup> *ibid* [67].

criminal responsibility for international crimes applies to natural persons, yet it was applied because it attained the status of a principle of law.

As demonstrated by the developments towards corporate responsibility for international crimes and corporate criminal responsibility, expansion of the ICC's jurisdiction to include corporations would reflect the increasingly crystallised status of international corporate criminal responsibility for international crimes. These twin developments may account for the 2014 ILC decision to include corporate criminal responsibility for crimes against humanity as part of its draft convention on Crimes Against Humanity. After an examination, the ILC "concluded that, on balance, a provision on the liability of legal persons was warranted for its draft articles on crimes against humanity."<sup>167</sup> The fact that expanding the ICC's jurisdiction to include corporations would reflect rather than newly create the prevailing principle of international corporate criminal responsibility for international crimes implies that the question of expanding ICC's jurisdiction to include corporations is no longer a legal issue; it is a political one.

## VII. RIGHTS AND OBLIGATIONS IN AN UNEQUAL WORLD

This political issue involves questions relating to the political will of States and the justice of constraining the operation of the free market internationally. Such an issue should be resolved decisively in favour of international corporate criminal responsibility. The main justification relates to the long-term sustainability of international law as a legal system. International law lacks moral legitimacy if it unaccountably enriches the few or allow domination of the vulnerable by the financially powerful; such a system is illegitimate and does not reserve respect or compliance.<sup>168</sup>

From the perspective of public international law as a whole, international criminal responsibility functions as a balance against the impunity and expansive set of rights enjoyed by corporations under international law. By holding complicit corporations criminally responsible, the ICC would be able to address the persistent nexus between economics and international crimes. In fact, this economic-crime nexus can be traced to the historical origins of the corporation. In the seventeenth century, the European monarchs created chartered corporations such as the East India Company and Dutch East India Company for imperial expansion and colonization.<sup>169</sup> It is precisely the status of these chartered corporations as

<sup>167</sup> Sean Murphy, *Corporate Liability and Crimes Against Humanity* (Just Security 2019).

<sup>168</sup> John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018) 273.

<sup>169</sup> John Micklethwait and Adrian Wooldridge, *Company: A Short History of a Revolutionary Idea* (Modern Library 2003) 12.

'little republics' or 'sovereigns' free to enter into contracts and make war<sup>170</sup> that enabled their complicity in historical genocides in colonized territories. The inequities inflicted by chartered companies on colonized peoples continue to be suffered by Third World peoples who experience international crimes perpetuated by postcolonial States albeit with the complicity of predominantly western corporations. The continued failure of international law today to address this economic-crime nexus, which disproportionately harms Third World peoples, shows how "international law sustains structures of domination and exploitation".<sup>171</sup>

This paper suggests that international corporate criminal responsibility as enforced by the ICC could function as a balance against the impunity and expansive set of rights enjoyed by corporations under international law, including in the international investment treaty regime. In international law, corporations garner an expansive set of rights without a concomitant constraint on the exercise of those rights or an enlargement of their obligations in the States they operate in. For instance, under the investment treaty regime, States cannot claim or counterclaim against corporations for international crimes committed within the territory of those States; only corporations can claim for rights violations. Indeed, corporations "seek rights to assert obligations in international law towards them, but they deny there are obligations binding on them" and this possession of "power without responsibility is indeed a privileged position to be in."<sup>172</sup> Like regional human rights tribunals that protect the individual rights of natural persons, international investment regimes protect corporations' property rights through retrospective compensation.<sup>173</sup>

Under the investment treaty regime, corporations enjoy significant and expansive property rights protections in the form of State guarantees of fair and equitable treatment, full protection and security, most favoured nation treatment, and international minimum standards. In fact, many of the rights enjoyed by corporations under the investment treaty regime are substantively similar to and share common roots as the international human rights.<sup>174</sup> Although both individuals and corporations enjoy such rights in various international legal regimes, only individuals bear international criminal responsibility for international crimes under the Rome Statute. This inconsistency between rights and obligations possessed by

<sup>170</sup> Allison D Garrett, 'The Corporation as Sovereign' (2008) 60 *Maine Law Review* 129, 133.

<sup>171</sup> B S Chimni, 'Legitimizing the International Rule of Law' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 290, 299.

<sup>172</sup> Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 99–100.

<sup>173</sup> Jose Alvarez, *The Public International Law Regime Governing International Investment* (The Hague Academy of International Law 2011) 54–74.

<sup>174</sup> *ibid* 60–63.

natural and legal persons cannot be sustained in a rule-based international legal order and risks undermining the legitimacy of international law.

## VIII. CONCLUSION

This paper has made a policy and legal case for the ICC to criminally prosecute corporate entities for complicity in international crimes. In this regard, this paper has sought to contribute to existing international criminal law scholarship in three main ways.

First, international criminal responsibility is the most effective way to regulate and prevent corporate complicity in international crimes. Holding corporate executives criminally responsible for the corporation's complicity in international crimes is ineffective because it fails to target the structural causes behind corporate complicity, which are the shareholder primacy doctrine, limited liability, and transferable shares. Similarly, punishing the actors who directly commission international crimes but not complicit corporations fails to do justice and deter corporate complicity.

Second, there are strong policy justifications for international corporate criminal responsibility. Responsibility has to be criminal because of its unique deterrent effects, its impact on corporate incentive structures, and its suitability to offer moral vindication and victim remedy. Such criminal responsibility, however, must be international. Due to the unwillingness or inability of States to criminally prosecute corporations domestically as well as the limits of civil litigation before foreign courts, criminal responsibility that is international offers the most promising legal tool. Moreover, non-legal measures such as corporate social responsibility and consumer activism continue to face limited effectiveness in addressing corporate impunity.

Third, there exists a strong and convincing legal case for expanding the ICC's jurisdiction to include corporations. Specifically, the argument is that international corporate criminal responsibility is a general principle of international law. In turn, this general principle can be inferred from two legal developments. One, there is historical and current recognition that corporations could be held responsible for international crimes. Two, there is recognition such corporate responsibility could and should be criminal in nature. Furthermore, the justification for international corporate criminal responsibility ought to be contextualized in historical injustices faced by the Third World as well as the imperative of according rights with responsibilities.