INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Corporations before International Criminal Courts: Implications for the International Criminal Justice Project

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Abstract
The debate over whether the International Criminal Court should have jurisdiction over corporations has persisted over the years, despite the failure of the legal persons proposals at Rome. For its part, the Special Tribunal for Lebanon determined that it has jurisdiction over corporations for the purpose of crimes against the administration of the Tribunal, albeit not for the substantive crimes over which it adjudicates. Most recently, the African Union has adopted a Protocol that, should it come into operation, would create a new international criminal law section of the African Court of Justice and Human and People's Rights with jurisdiction over corporations committing or complicit in serious crimes impacting Africa. In light of the enduring nature of the proposal that international criminal institutions should directly engage with the problem of commercial corporations implicated in atrocity, this article explores the possible implications for the international criminal justice project were its institutions empowered to address corporate defendants and prosecutors emboldened to pursue cases against them. Drawing on the expressive goals of international criminal justice and concepts of sociological legitimacy, as well as insights from Third World Approaches to International Law, the article suggests that corporate prosecutions, where appropriate, may have a redeeming effect upon the esteem in which some constituent audiences hold international criminal law, as a system of global justice. The article's thesis is then qualified by cautionary thoughts on the redemptive potential of corporate prosecutions.

Keywords
Corporations; International Criminal Court; Legitimacy; Selectivity; Third World Approaches to International Law

I. Introduction

When the International Criminal Court (the ICC) was established, states considered whether it should have jurisdiction over legal persons. In their final iteration, the proposed draft articles envisaged ICC competence over corporations committing

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or complicit in international crimes, ‘whose concrete, real or dominant objective is seeking private profit or benefit’. Ultimately the proposal, while laudable, was dropped on the basis that there were numerous state concerns that would not be resolved in the time available. As a result, the ICC, like most international criminal institutions to date, has jurisdiction ratione personae limited to natural persons.

Since that time, there has been a persistent murmur that the idea of an international criminal court with jurisdiction over corporations has merit and should still be pursued (referred to herein as ‘the corporation proposal’). The case is most often made to expand the jurisdiction of the ICC, given its existing institutional framework, broad geographical coverage, and future-oriented mandate, though a special tribunal for international corporate liability has also been mooted. The most recent possibility is the proposed new international criminal law section of the African Court of Justice and Human and Peoples’ Rights (ACJHPR), which would have jurisdiction over international and certain transnational crimes, as well as competence to hear cases against corporations. Should it come into operation, the new criminal chambers of the ACJHPR would have the potential to hear cases against corporations doing business in Africa, whether or not they are also headquartered or incorporated in states that are a party to the Court.

The reasons animating calls for international criminal jurisdiction over corporations vary, though in substance often overlap. Much like the development of domestic corporate criminal liability, the drivers are often pragmatic rather than doctrinal, emphasizing the most efficacious ways of dealing with the realities of corporate crime in an unequal, globalized world. Contemporary conflict studies demonstrate that many wars today are rooted in competition over resources and in

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6 Statute of the African Court of Justice and Human and Peoples’ Rights (Proposed ACJHPR Statute), contained as an Annex to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 27 June 2014 (Malabo Protocol). See in particular Art. 28A (international criminal jurisdiction of the Court) and Art. 46C (corporate criminal liability). The former extends the Court’s jurisdiction to the following crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and aggression.
7 According to Art. 46E bis, the criminal division of the ACJHPR would exercise jurisdiction over conduct committed on the territory of a state party, where the victim or offender is a national of a state party, or where the conduct in question threatens a vital interest of a state party; Proposed ACJHPR Statute, supra note 6. Practically, however, there are enforcement challenges should the Court attempt to proceed with a case against a corporation without a presence in a state party’s territory; see, e.g., J. Gobert and M. Punch, Rethinking Corporate Crime (2003), 146–78 (discussing legal and practical considerations in prosecuting transnational corporate groups).
economic under-development, with the result that calls for a new generation of international criminal law addressing economic actors and economic crimes are being made.\textsuperscript{9} Relatedly, there is the argument that if a goal of international criminal law is to support durable peace, then addressing economic networks that sustain local conflicts should be a crucial feature of international criminal practice.\textsuperscript{10} Human rights scholars point to the current lacuna in governance, which sees transnational corporations\textsuperscript{11} in particular enjoying de facto impunity from accountability for human rights abuses related to their global activities, particularly business activities in the global South.\textsuperscript{12} From an international criminal law perspective, where abuses overlap with violations of international criminal norms, such systemic impunity ought to be significant.\textsuperscript{13} Indeed, such cases exhibit dual overlapping sources of impunity: those related to the accountability challenges surrounding transnational corporate activity and those that inhere to international crimes.\textsuperscript{14} Some advance a legal claim to support calls for institutional competence over corporations committing international crimes: that customary international criminal norms apply equally to corporations as they do to natural persons, the only distinction lying in the jurisdictional limits of international courts to date; separate issues too often conflated.\textsuperscript{15} Others point to Allied prosecutions of industrialists after the Second World War to claim that contemporary corporate responsibility for international crimes would honour the legacy of Nuremberg.\textsuperscript{16} All operate on the premise that corporations can, and do, commit or assist in international crimes and that individual criminal responsibility alone is insufficient to address this reality.\textsuperscript{17}


\textsuperscript{11} A transnational corporation is a corporation that operates in one or more countries other than its place of incorporation: P. Muchlinski, Multinational Enterprises and the Law (2007), 5–8.


\textsuperscript{14} Describing the factors that render atrocity crimes peculiarly resistant to state-based justice frameworks, see A. Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality’, in C. Romano et al. (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia (2004), 3 at 4–6. Noting similar arguments are relevant to corporate impunity for atrocity, see Ezeudu, supra note 13, at 48–9.


\textsuperscript{17} For a discussion of the limits of methodological individualism when dealing with crime in complex corporate contexts, see B. Fisse and J. Braithwaite, Corporations, Crime and Accountability (1993), 17–58.
It is beyond the scope of this article to further rehearse such claims, some of which are, of course, contested. The purpose instead is to explore the implications of extending the competence of international criminal courts to include corporate defendants from the perspective of the impact this may have on the legitimacy of such institutions and their capacity to successfully communicate normative messages to certain audiences. The question of institutional legitimacy, although related to, is distinct from the sociological, moral and legal claims that are used to justify expanding court jurisdiction. Legitimacy is a ‘complex, multidimensional concept’. It can be understood in legal, moral and sociological terms. Drawing particularly on sociological understandings of legitimacy, which consider the regard in which particular constituent audiences hold a legal institution and its work, this article speculates on the possible implications of institutional criminal competence over corporations for international crimes, keeping in mind differences that may lie among relevant audiences. Sociological legitimacy is prioritized given its link to the pre-eminent justification for international criminal justice in contemporary discourse: its expressive function.

The article is structured as follows: Section 2 considers criticisms that the ICC is inappropriately targeting Africa as a kind of contemporary legitimacy crisis in international criminal justice suggestive of a devolution of the esteem in which the ICC is held by some of its constituent audiences. After considering the contours of the critique, it explores some of the implications of this kind of loss of faith in the project, as it were, in terms of the animating goals of the Court. Section 3 then sketches some possible positive implications of the corporation proposal in light of dynamics raised in the preceding section. It speculates that select corporate prosecutions may serve as a partial antidote to the contemporary selectivity critiques emanating from some quarters of Africa, or at least would operate to undercut the veracity of such critiques. It does so by drawing on the insights that might be gleaned from Third World Approaches to International Law (TWAIL) scholarship and its invitation to take seriously concerns as to the ways in which international criminal practice sustains or reinforces neo-colonial narratives. Section 4 then invites a measure of caution regarding the potential implications of the corporation proposal, considering how distinct enforcement practices are likely to have different implications, some of which may replicate a hegemonic narrative of conflict that serves to ‘other’ the peoples of the global South.

2. A CONTEMPORARY CRISIS OF FAITH

In 2013, a number of eminent scholars were invited to reflect on the proposition that, ‘the momentum for international criminal law seems to be gone and its success
story . . . has come to a close’.21 A theme cutting across the expert essays was the significance to that proposition of the African Union’s (AU) loss of faith in the ICC. The criticism to which the essays refer is one of the most visible challenges facing the ICC in recent years, namely the perception of an anti-African bias, demonstrated by the preponderance of open situations focused on the African continent and with all defendants thus far being African nationals.22 The principal sources of criticism have been some African national governments and the AU, with the latter passing a series of resolutions not only critical of the ICC, but openly hostile to certain types of co-operation with the Court.23 African victim groups and civil society have also been critical of situation and case selections by the ICC, though this has not led to the degree of disillusionment with the ICC that has been expressed by some African states.24

While African state criticisms of the ICC are varied and complex, a core sentiment is that the ‘ICC is rapidly turning into a Western court to try African crimes against humanity’.25 The Court is deemed to have failed in its original promise to transcend, so far as possible, the influence of power politics in determinations as to the situations and cases in which it intervenes. This independence was what had originally promised to set the Court apart from its predecessors. The claim is that the Court has, instead, become an instrument of powerful states that one-sidedly targets only individuals from politically and economically weak states, with insufficient regard for the sovereignty of such states. Some describe the Court’s interventions in Africa as a form of neo-colonialism.26 This language demonstrates the historicism that underpins the critique and the idea that the global North is replicating through international criminal law the kind of improper intervention into domestic African affairs aimed at serving the North’s agenda that was previously achieved through colonial occupation.

Criticism of selectivity in international criminal law enforcement, in the sense that it is invoked unevenly in the aftermath of conflict to reflect the politics of power, has been described as ‘the classic critique of international criminal justice’27 and, given the potential to be self-serving, should be viewed with some cynicism.

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22 Notably, the ICC Office of the Prosecutor (OTP) has recently acted on events in other parts of the world, including opening a situation into crimes allegedly committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008. Preliminary examinations are also underway with respect to Afghanistan, UK conduct in Iraq, Colombia, Palestine and Ukraine.
The double standards argument has long been raised by defendants and their legal counsel as a basis on which to challenge the legitimacy of international criminal trials. Indeed, there is a reasonable consensus that AU bias claims are over-blown and that, in legal terms, the situational choices of the ICC to date are defensible on a combination of factors. Nevertheless, concern regarding the politics of the ICC’s focus of attention to date has found some traction among international experts, though it is in its more nuanced forms that it is most compelling. Such forms look beyond the mere statistical dominance of African defendants before the Court to consider the politics of what is ignored. They highlight the significance of the narratives of conflict that are constructed by international institutions through their work. Failures of the ICC to engage with serious atrocities in other parts of the world, such as Israel’s 2008–2009 ‘Operation Cast Lead’, British atrocities in Iraq, and the ongoing construction of settlements in the West Bank, have led some scholars to criticize the ICC as demonstrating too great a fealty to the interests of powerful states and the established order. Others have challenged the choice of cases within situations on the basis that they reinforce the problematic dynamics of the North-South divide. For example, Mbokani and Eberechi separately critique the Court’s failure to look at non-African actors contributing to armed conflicts within Africa and question the narratives of African violence, in which Africa is implicitly depicted as uniquely savage, that these selection decisions create. Some scholarship also points to the ways in which Southern states themselves co-opt the language and mechanisms of international criminal justice to perpetuate existing patterns of power within the global South. For example, Menon describes a dynamic of ‘internal othering’ whereby, through self-referrals to the ICC, Southern states have continued a political and military strategy against internal political opponents by seeking to label those enemies as international criminals.

In its various guises, what unifies such strands of critique is the attention that is given to ways in which ICC situation and case selections manifest a collusion, rather than a confrontation, by the Court with existing hierarchies of state power. This collusion may reflect, among other things, the dependence of the ICC on state co-operation and state funders in its enforcement practices. Such critiques

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29 These include the jurisdictional limits of the Court, the early self-referrals by African states, and the sheer scale of violence plaguing Africa since the creation of the Court. See further Ambos, supra note 24.
32 Eberechi, supra note 9; J. Mbokani, ‘La cour pénale internationale: Une cour contre les africains ou une cour attentive À la souffrance des victimes Africaines?’. (2013) 26(2) *Quebec Journal of International Law* 47.
34 Menon, supra note 33.
also illuminate, to use Mégret’s language, the representational effects of selectivity and its role in constructing official narratives of law, power and responsibility. These critiques can be further understood through the perspective of TWAIL, which engages seriously with ways in which international law reproduces neo-colonial narratives. While there is no singular TWAIL position in respect of international law, there are some foundational ideas that tend to characterize the TWAIL perspective. TWAIL is a body of critical scholarship that unpacks the ways in which international law ‘legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West’ and that seeks to ‘present an alternative normative legal edifice for international governance’.

While deeply critical of international law, TWAIL scholarship tends not to entirely reject modern international law but rather ‘seeks to transform international law from being a language of oppression to a language of emancipation – a body of rules and practices that reflect and embody the struggles and aspirations of Third-World peoples and which, thereby, promotes truly global justice’. It demands that international law be understood in the context of the lived history of the peoples of the Third World and be assessed against the ways in which international law continues the civilizing mission of colonialism.

To date, very little TWAIL scholarship engages specifically with international criminal law. One exception is the work of Anghie and Chimni, whose reflections on the implications of TWAIL scholarship for international criminal justice articulate some of the same concerns animating selectivity critiques of the ICC today. As they describe it, TWAIL scholarship points to the ways in which ‘violence has been displaced in part from the first to the Third World’ through the global economic order.

Accountability practices that divorce individual accountability (in, for example, internal armed conflicts) from the wider North-South relationships that structure local conditions of violence implicitly posit that violence is endogenous to the Third World and render invisible the external actors and frameworks that contribute to local conditions of violence.

International criminal law is less legitimate (or in TWAIL terms, reproduces the civilizing mission) where it projects a false, or at least misleadingly incomplete, narrative of atrocity that continues to ‘other’ Third-World peoples. Anghie and Chimni’s recommendations regarding the reform of international criminal accountability practices are taken up further in Section 3 below, to demonstrate how select corporate prosecutions could press against this tendency in international criminal law to present a distorted picture of conflict in the global South.

Before doing so, it is useful to reflect briefly on some of the implications of this current crisis of faith in the ICC. Among other things, it invites us to interrogate

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36 Mégret, supra note 27, at 227
39 Ibid., at 78–9 and 84–6.
40 Ibid., at 89.
41 Ibid., at 96–7.
the kind of global justice that international criminal institutions engage in through their practices of distributing stigma. More directly, the criticism has implications for the legitimacy of international criminal institutions and thus their likely efficacy in achieving certain goals. Selectivity in terms of cases and the individuals against whom prosecutions are brought is inevitable in all criminal justice systems and is not inherently wrong. However, enforcement selectivity can bear on the legitimacy of international criminal justice institutions significantly more than their national counterparts for a number of reasons. Among other things, international criminal institutions cannot avoid radical selectivity, in the sense that the actual cases pursued constitute an extremely small portion of the crimes committed and individuals and groups implicated. Furthermore, international criminal institutions suffer from a lack of clarity regarding their constituent communities and have tenuous links to those communities. As a result, the international criminal justice system relies substantially upon the rhetoric of universalism and the idea that all persons and states, weak or powerful, are subject to its tenets to justify its function in world affairs. Selectivity that points to systemic bias contrary to that rhetoric undermines a core justification of the project and its claim to deference.

The link between selectivity and legitimacy is further illuminated via the principle of rule of law. The rule of law, as an ideal towards which legitimate law strives, is based in part upon law’s generality, both in its terms and implementation. As Cryer states:

Criminal law’s claims to legitimacy is [sic] undermined when the law is neither general, nor applied evenhandedly. When a law, general on its face, is in practice enforced only against a group or groups, the effect is the same as if it were targeted at those groups by its terms.

Equality of application matters if we are to appreciate the social reality of the criminal law. Where law is not applied in a coherent and consistent manner in respect of like-situated offenders and where external politics determine enforcement decisions, criminal law’s legitimacy falters. This links also to the impact of the social reality of the practice of criminal law upon constituent audiences. As deGuzman argues, depending on their authenticity, enforcement selectivity critiques can demonstrate devolution of the esteem in which an institution is held by relevant audiences. This poses a genuine challenge to the legitimacy of legal institutions such as the ICC in a sociological sense, in so much as legitimacy can be understood to mean

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44 Cryer, supra note 28, at 192; deGuzman, supra note 19, at 276.
45 Cryer, supra note 28, at 198; deGuzman, supra note 19, at 276–8.
47 Cryer, supra note 28, at 198.
48 Ibid., at 195 (drawing on Lon Fuller’s definition of rule of law).
49 Ibid.
50 Ibid., at 194–7.
51 deGuzman, supra note 19, at 273 (noting, however, that criticisms from ‘leaders with little personal legitimacy … are widely discounted’).
the perception among legitimate audiences that the ICC’s actions are worthy of respect.

Relevant audiences evaluate the worth of an institution based on its capacity to successfully embody and pursue purposes and goals consistent with its community’s norms and values. Failure to act consistently with those values will undermine an institution’s legitimacy over time in terms of the esteem in which it is held. Such a loss of faith can in turn have consequences of different kinds, depending on the relationship of the audience to the institution. In the case of the ICC, for example, states, victim groups, international organizations, and non-governmental organizations in whose eyes the Court loses worth may withdraw support, deepening challenges created by practical constraints. Victim and perpetrator communities may reject legal outcomes and norms promulgated by the ICC, with implications for restorative and expressive goals of the Court.

Indeed, the latter risk strikes close to the heart of international criminal law. It is now appreciated that international criminal institutions suffer from an over-abundance of goals. Increasingly, however, international criminal law is justified in terms of its expressive function to communicate core values reflective of, and perhaps even themselves constitutive of, the international community. The expressive function of international criminal law refers to the unique positioning of institutions such as the ICC to communicate and express norms to audiences at both the global and local levels. Through select prosecutions, the ICC demonstrates the meanings and valuations of actions and victims that international criminal law represents. In Mégret’s terms, it is the unique role of international criminal institutions in the assignation of international stigma to certain types of behaviour (distributing social opprobrium) that best accounts for their activity. However phrased, the expressive function of international criminal justice is a teleological goal involving successful communication of core standards.

To date, case selection decisions at the ICC are primarily justified in terms of the comparative gravity of wrongs, in terms of the scale, nature, manner of commission and impact of the crimes. The problem with this approach, however, includes the incommensurability of the diverse ways in which gravity can be measured and a lack of consensus regarding the content of such measures. Both deGuzman and Mégret have instead recommended that the ICC adopt an expressivist perspective in determining case selections. This might involve, for example, considering how case

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52 Ibid., at 268.
53 Ibid., at 276.
54 Ibid., at 268.
57 Mégret, supra note 56.
selections can produce narratives of atrocity that alternatively reproduce or counter the existing international distribution of power or how case selections might be designed to shine a spotlight on norms that have not been the subject of sufficient attention in international prosecutions to date.\footnote{Mégret, supra note 43, at 94–6; deGuzman, supra note 19, at 312–19.}

Two points flow from linking the expressive goal of international criminal justice to selection decisions in international criminal practice. First, as a sociological function of the Court, successful norm promulgation relies substantially on a relevant audience’s esteem of the Court. In other words, sociological legitimacy matters in respect of a sociological goal of this kind. Each is related to the other, in a circular way. Second, this approach begs the question of what norms international criminal law seeks to instantiate through its practice and in which relevant communities. Despite the challenges this question poses, deGuzman suggests that it might be addressed via the dialogue among the various stakeholders in the Court that would occur if the Court transparently justified selection decisions in terms of expressive goals.\footnote{deGuzman, supra note 19, at 316–19.} Corporate prosecutions might be an example of a kind of ‘thematic’ prosecutorial focus that could be justified as a way of expressing norms regarding the seriousness in which the international community holds commercial participation in atrocity and may be pursued in ways that consciously aim to construct narratives that counter the structural injustices that persist at an international level. The dialogue that such practices would then engage would illuminate the ways in which they have been received by relevant audience groups. It is to this latter point that the remaining sections turn.

3. SELECT CORPORATE PROSECUTIONS AS A PARTIAL CORRECTIVE

While it is easy to speculate on the possible impacts of particular international criminal law enforcement practices on different audiences, it is difficult to demonstrate the empirical veracity of such claims. This is not least because of the various audiences to which international criminal law is directed and the unlikelihood of any uniform position among and within them. Nonetheless, in this Section I attempt to sketch potential readings of an international criminal court applying international criminal law to corporations, using existing experiences to support such claims. Furthermore, the insights of Anghie and Chimni into the ways in which international criminal accountability practices would be more or less legitimate from a TWAIL perspective are considered. As noted earlier, the TWAIL perspective is instructive because it seeks to assess international law from the perspective of Third-World peoples, upon whose lives current international criminal practice bears most directly.

Anghie and Chimni begin their assessment of international criminal accountability practices by criticizing the distorted narratives that are produced by international criminal law through its practice of individuating criminal responsibility for internal conflicts in such a way that it is divorced from the global economic forces that
structure local conditions of violence. To rectify this they argue that more legitimate accountability practices would link to other areas of law that govern global economic inter-dependencies and would inquire into the roles that international institutions, economic actors, and powerful states play in promoting and exacerbating local conflicts. There are obvious limits to the way in which international criminal law in itself can engage such wider economic structures. Indeed, given its limitations, international criminal law cannot nor should it serve as the panacea for justice outcomes in the wake of atrocity in the absence of other mechanisms. However, court competence that enables prosecutions in particular of transnational corporations involved in local conflict steps in this direction. As pointed to in the Introduction, many of the claims used to justify the application of international criminal law to corporations point precisely to issues of structural context to which Anghie and Chimni refer. These are either drawn from conflict studies that demonstrate the relationship between global commerce and modern conflicts or from human rights discourse that illustrates the North–South qualities of corporate impunity for human rights abuses in the context of a globalized economy. Importantly, it is the phenomenon of transnationality that is particularly pertinent here. Transnational corporations continue to be primarily headquartered in the global North, while the dynamics that press against corporate accountability for business-related human rights abuses, and where these tend to be most egregious, are most pronounced in the global South. An international criminal court indirectly addressing this phenomenon in its practices through appropriate prosecutions provides the opportunity for international criminal jurisprudence to construct more complete narratives of power, law and responsibility for otherwise apparently localized conflicts.

Admittedly, the nod to global economic structural forces through corporate prosecutions would only ever be partial. For example, the corporation proposal says nothing about the role of international financial institutions in creating conditions that may be causatively linked to conflict and that often lay the groundwork for the injection of foreign direct investment into host states. However, prosecutions trained on corporate entities that demonstrate the capacity to operate un-moored to national boundaries, such as the parent of a transnational corporate group that is implicated in violence on foreign soil, brings into partial relief the dynamic of the global economic system that enabled the abuse of such agency. Moreover, such prosecutions draw the behaviour of global corporations into the normative order constructed by international criminal justice.

62 Anghie and Chimni, supra note 38, at 89–90.
Given the ways in which such a move may serve to problematize narratives of violence as endogenous to certain parts of the world and may serve to point towards the way in which external actors and systems are implicated in the perpetuation of local conflicts, corporate prosecutions may tend to have a redeeming influence on perceptions among Southern audiences regarding the legitimacy of international criminal justice. For example, Sundell notes:

... [L]ocal populations, if they notice the proceedings at all, often view international tribunals’ brand of justice as distinctly Western. In the case of corporate offenses, however, the target audience is not the local population, but rather multinational corporations. An international trial in such a situation would not go unnoticed by the relevant actors. Nor would it generally be perceived as Occidental bias or victor’s justice since a large percentage of multinational corporations come from the developed world.64

As Sundell here intimates, prosecutions of transnational corporations in appropriate cases may be said to speak particularly tangibly both to international and local audiences. Prosecution of transnational corporate involvement in atrocity begins the difficult task of demarcating where otherwise apparently legitimate global business transactions become criminal, thus delivering normative messages to relevant actors with the capacity to operate within that sphere. The local audience is also a recipient of norm promulgation, given that proceedings relate to local victims and harms. Where the nature of the conflict demonstrates crucial links between certain local and foreign commercial networks, addressing this may better align an institution’s work with victim community expectations for post-conflict justice efforts.

Indeed, it is noteworthy that Southern institutions, individuals and states often drive efforts to create and strengthen international fora for pursuing both local and foreign corporations implicated in atrocity and human rights abuses. For example, the Liberian Truth and Reconciliation Commission dedicated a chapter of its 2009 Final Report to the impact of economic activities in prolonging and intensifying the Liberian civil war. After detailing the ways in which domestic and foreign corporations participated in atrocities, the Commission urged the aggressive pursuit of proceedings against individuals and corporations found to be implicated in the violence. Recognizing the problem of limited fora for corporate accountability, the Commission recommended the inclusion of legal entities in the jurisdiction of a proposed ‘Extraordinary Criminal Court for Liberia’ and that foreign jurisdictions apply universal jurisdiction to pursue corporate offenders.65

Similarly, there is the phenomenon of ‘foreign direct liability’ suits that have multiplied over recent years and that are driven by victim groups from the South seeking ways to litigate egregious corporate human rights abuses. These are tort claims against the parent corporation of a multinational group brought in the civil courts of developed countries, generally the parent company’s home state, that test...
the extraterritorial limits of civil litigation rules. The term is intended to reflect the flip side of foreign direct investment. There is also the current discourse over renewed efforts towards a treaty on business and human rights at the United Nations which, as with previous efforts, is demonstrating a split among states along North–South lines. It is governments from the South that are leading the effort to strengthen formal frameworks of corporate human rights accountability. Notably, it is also in Africa that a regional criminal court with capacity to deal not only with corporations but also with a far wider range of crimes, including economic crimes such as corruption and the illicit exploitation of natural resources, is being proposed. All of this is to say that in so much as one can speak to a position among Southern audiences on the subject of the corporation proposal, there are indicators that a reasonable degree of support might be found there.

The way in which audiences view the legitimacy of international criminal institutions confronting corporate defendants might also be influenced by the way in which this legal development is achieved. TWAIL scholars have argued that international law has historically created and perpetuated racialized hierarchies, often in hidden and unconscious ways. As a result, Anghie and Chimni argue that TWAIL insights recommend a system of international law that is as democratic and participatory as possible, laying great emphasis on principles of sovereign equality and non-intervention. From this perspective, developments in international criminal norms are more legitimate where they result from traditional processes of international law making with equal participation of interested states rather than from judicial discovery. For that reason, the ICC is an improvement on the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), due to the greater role of states in negotiating the terms of the Court’s operation.

The process by which a court comes to be vested with international criminal jurisdiction over corporations is likely to be important to how certain audiences would evaluate the legitimacy of the court’s exercise of such power, particularly states and corporations themselves. This is true beyond states of the global South, for whom sovereign equality has been a key concern since decolonization. For example,

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67 Renewed efforts at the UN towards a binding treaty on corporations and human rights were initiated by a resolution, drafted by Ecuador and South Africa and tabled at the 26th Session of the Human Rights Council, strongly in favour of the creation of such a treaty. This resolution prompted a counter-resolution, drafted by Norway, that was equivocal on the value of such an instrument. These processes resulted in a resolution of the HRC creating an open-ended inter-governmental working group to progress the issue, voting on which demonstrates a broad North–South split among state positions: UNHRC, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, UN Doc. A/HRC/RES/26/9 (14 July 2014). For the background to these renewed treaty efforts and access to documents, see ‘Binding Treaty’, Business and Human Rights Resource Centre, at business-humanrights.org/en/binding-treaty (accessed 30 March 2016).

68 Mutua, supra note 37, at 31


70 Anghie and Chimni, supra note 38, at 92–5
some of the controversy over the exercise of universal jurisdiction by US federal courts over corporations under the US *Alien Tort Statute* was born out of the source of that power. Some (predominantly Northern) states and corporations considered the legal claims regarding the state of customary international law underlying the US exercise of jurisdiction over corporations illegitimate. Recent decisions of the Special Tribunal for Lebanon, that legal persons are liable before the Tribunal for the crime of contempt, have also been criticized as being based upon strained textual analyses of the Tribunal’s Statute and Rules, and inconsistent teleological reasoning.

To some extent, these controversies are linked to the continuing disputation over the status of corporate duties under customary international law and the contours of universal jurisdiction. Some states continue to reject the concept of corporate criminal capacity and, in any event, attribution principles differ among states that do recognize this concept. As a result, attempts to extend a court’s international criminal jurisdiction pursuant to general principles of international law or custom are more susceptible to diplomatic and legal claims of legal overreach, particularly where the claim to jurisdiction is not based on territoriality or nationality grounds.

There are a number of ways in which the legitimacy of international courts has been tied to the degree of participation of those states, peoples and communities that will be subject to them or, put differently, to their democratic legitimacy. Apart from the role of states in positively constructing rules, a particularly strong form of democratic legitimacy claim is that the imposition of duties on non-state actors without their direct participation in the making of those rules strains the legitimacy of the system. This kind of argument has been raised against the imposition of international duties on corporations on the basis that this presupposes that corporations must also enjoy an enhanced legal position in international decision-making processes.

It is beyond the scope of this article to delve into the various forms of democratic legitimacy claims, but a few brief points are made. First, when dealing with the

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73 See, e.g., Glasius, *supra* note 46.


enforcement of international crimes, the argument that legitimacy is premised on the non-state actors’ prior consent and direct participation is weak. As Ryngaert notes, when dealing with such norms, substantive justice substitutes claims for a priori formal consent, not least because consent to observe these norms is implicit.76 Were it to be otherwise, there would be implications for the entire international criminal justice project, as it would imply that natural persons must also have the right to a priori consent. Second, critiques of institutional competence over corporations are particularly weak where such jurisdiction is based on a corporation’s link to a consenting state on territorial or nationality grounds. There can be no argument that states (unilaterally or collectively) cannot dictate the conditions under which local and foreign corporations operate on their territories nor the way in which their corporate nationals behave abroad, again unless a different standard is set for corporations relative to natural persons. Indeed, some would argue that such a restriction, while pragmatic, is unduly restrictive given that international crimes enliven universal jurisdiction.

Against such measures noted above, both the ICC and ACJHPR approaches to the corporation proposal are less open to critique. At the ICC, the inclusion of corporations in the Court’s jurisdiction could only be achieved through the support of a two-thirds majority of states at a meeting of the Assembly of States Parties, followed by ratification of the amendment by seven-eighths of all state parties to the Court.77 The prospective ACJHPR international criminal chamber will only come into operation where it is ratified by 15 member states.78 Furthermore, under both models court jurisdiction over corporations would be enlivened only through a tangible link to a consenting state and would extend only to crimes recognized in international law (though in this respect the wider scope of crimes at the ACJHPR may be a complicating factor). Finally, in both instances the principles for attributing criminal responsibility to corporate defendants would be relatively codified, undercutting any claims that prosecutions would involve a breach of natural justice to such defendants on the basis of a lack of clarity regarding the scope of their responsibility.

The question of state support to actualize the extension of an international criminal court’s jurisdiction to include corporations is, of course, the great political challenge. In that regard, the growing convergence towards corporate criminal liability across domestic systems in response to the pragmatic need for such laws and the diminishing influence of individualism in criminal law theory make this prospect increasingly viable.79 Indeed, the proposed jurisdiction of the international criminal chamber of the ACJHPR over corporations suggests an amenability among African states to this development. There is also the potential potency of arguments that the corporation proposal would strengthen the capacity of states to address corporate actors whose transnationality renders them difficult targets of domestic
control. Furthermore, international criminal court competence over corporations is (despite a contrary intuition) less confrontational to state sovereignty than proposals for corporate accountability at an international level that are premised upon the comparison of corporations to states, as opposed to individuals. Through the extension of international criminal law to the corporation, such entities are rendered equivalent to individuals in the global normative order and thus subject to state (collective) social control mechanisms. The ways in which corporate prosecutions may strengthen the esteem in which international criminal institutions are held by certain audiences and the implications of targeting corporate defendants in terms of certain goals of international criminal institutions may, in themselves, be a prompt to political will. For example, the ability to seize corporate assets gained through a corporation’s participation in atrocity has significant implications for funding the ICC’s reparative aims. While this article has not delved into the limitations of prosecuting only individuals in the business world when responding to crimes committed through complex corporate structures, access to the proceeds of corporate crime is but one example. Growing public and civil society demand for action may also have a motivating effect for states.

In terms of the ways in which the pursuit of corporate offenders may be desirous from the perspective of achieving certain goals of international criminal law, another example is the implications for achieving deterrence, understood both in the traditional and expressive sense.\(^8\) In traditional terms, deterrence operates on the assumption that a rational actor is influenced to act in certain ways by the risk of prosecution and, most importantly, of punishment.\(^8\) The deterrent effect of international criminal prosecutions is routinely criticized on the basis that, among other things, it presupposes a psychologically rational and self-possessed actor where such may not exist. While criminal law’s notion of the ‘responsible subject’ has been criticized even in domestic contexts,\(^8\) the peculiarities of international crime and its enforcement magnify the unlikelihood of a deterrent effect flowing from the risk of punishment. However, as critical theorists have noted, the ideological presuppositions of criminal law’s rational actor may in fact be more accommodating to corporate persons than to human beings. Grear writes:

> At the ideological level, the construction of the archetypal liberal actor, law’s privileged insider, the acquisitive, rational, narcissistic, will-driven, self-interested, possessive, quasi-disembodied individual is an almost precise match for the corporation as the acquisitive persona of capital.\(^8\)

In other words, in direct contrast to the usual contention that criminal law is necessarily most effective when responsibility is atomized to the human agent, the

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\(^8\) On these variants of the deterrence claim in international criminal law, see K. Cronin-Furman and A. Taub, ‘Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice’, in Schabas, McDermott and Hayes, supra note 24, at 435.

\(^8\) Ibid., at 435.


proposition is that it is potentially more so when directed at legal entities that are constitutionally designed to behave rationally in terms of engaging in emotionally and socially disengaged cost-benefit analysis.

With expressive deterrence, the idea is that what animates changes of behaviour is not the prospective punishment per se, but the potential secondary effects of stigma that flow from criminal prosecution. Put differently, it is the fear of the social implications of criminal conviction that influences behaviour.\(^84\) Cronin-Furman and Taub explore this concept and its application in the context of international criminal law and reach a couple of pertinent conclusions. First, they note that deterrence in its expressive mode is undermined where the relevant international criminal institution is perceived as illegitimate (for example, for demonstrating systemic bias against the global South) or where there is widespread confusion about what such institutions do.\(^85\) Moreover, Cronin-Furman and Taub argue that, given the kinds of expected stigmatic consequences that the risk of international prosecution entails, such as being unable to travel freely, asset freezes, targeted sanctions, and even remedies applied to associated persons, expressive deterrence is most likely to be efficacious when directed against high-profile elites; those for whom high standing, international profiles, capacity to travel, etc., are genuinely implicated.\(^86\) Applied to prospective corporate prosecutions, this invites reflection on the obvious influence that the stigmatic risks of prosecution might exert on transnational corporate behaviour by generating risks to international reputation, to accessing global markets, and to the accessibility and movability of corporate assets.

Despite these kinds of arguments, continued opposition by some states to the corporation proposal is likely. For those few states that remain philosophically, constitutionally or doctrinally opposed to the concept of corporate capacity to violate criminal law, international criminal institutions that allow for corporate prosecutions may be seen to lack legitimacy and thus lose support. The recent furore over the ATS and current debates at the UN regarding a prospective treaty on business and human rights are cautionary tales, suggestive of continued opposition to the corporation proposal by some Northern states given the risks it generates as to their corporate nationals being brought before international courts or the domestic courts of other states. While such concerns are, in principle, vitiated by complementarity and the capacity for states to avoid the forfeiture of corporate nationals to international institutions by acting themselves, there is ample record of the lengths to which states able to do so will go in order to protect their nationals from international criminal prosecutions.\(^87\) Indeed, such concerns may be more pronounced with regard to protecting corporate nationals, which may be viewed as agents of a state’s economic policies and goals.

\(^{84}\) Cronin-Furman and Taub, supra note 80, at 440.
\(^{85}\) Ibid., at 448–50
4. A WORD OF CAUTION

To a significant degree, the propositions advanced in this article are largely in the vein of what Schwöbel describes as ‘effectiveness arguments’.\(^8\) They implicitly posit that it is possible for international criminal justice to become ‘better’; to increasingly approximate its ideals of justice. The propositions are premised on a view that hegemony is not endemic to the international criminal justice system and that more law (extended to the corporation) and better enforcement practices may serve to partially correct the ways in which it has, to date, sidelined the economic dimensions of war and thus been complicit with existing hierarchies of power in the global economic order. However, it is important to acknowledge the ways in which so-called ‘progressive’ developments in international criminal law may in fact serve to strengthen the legitimacy of a system that nonetheless continues to perpetuate exclusions and injustices.\(^8\)

To a certain degree, the adoption of the corporation proposal ‘on the books’ of an international criminal court alone would in itself be a radical moment in international criminal law. One of the foundational principles of international criminal law is a commitment to methodological individualism, namely the reduction of all criminal responsibility to individual human agency. The political implications of this commitment are considerable. Among other things, individualism serves to de-emphasize the role that structural conditions play in producing conflict, many of which may themselves be remnants of colonialism.\(^9\) Extending the competence of international criminal institutions to include corporations moves away from this attachment to the individual and would demonstrate that certain collective formations are considered amenable to international criminal justice processes, albeit in a way that is not so deeply radical as to break with the outer normative boundaries of most criminal justice systems around the world. Moreover, adoption of the corporation proposal could serve to validate the efforts of states that have begun to move towards corporate accountability for international crimes in their domestic laws and practices, and would strengthen existing claims that the scope of customary norms extends to all persons, natural and legal. Having said this, without actual prosecutions, the transformative implications of formal competence itself are surely limited. A lack of corporate prosecutions where they are possible may in itself send a normative message; for example, that the role of corporations in atrocity falls short of the gravity that animates international intervention. Furthermore, it is only through enforcement that the contours of corporate criminal responsibility for international crimes will begin to be fleshed out.

The ways in which international criminal law is enforced against corporations by international criminal institutions may also engage normative narratives that

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89 Ibid., at 7–8.

operate more or less in concert with hegemony. Transnational corporate activities are general enabled through corporate groups and affiliations. Legal arrangements have developed to maximize the immunity of parent corporations from risks associated with their global operations.91 Tiers of distinct corporate entities insulate the parent company from liability through the doctrines of separate corporate juridical personality92 and limited liability93 in corporation law. While prosecutions that focus upon local agents or subsidiaries in atrocities may be simpler, in terms of linking the entity to the wrong, this approach may fare no better in exposing the influence of external actors and structures in conflict than current practices, and may likewise collude to convey that violence is endogenous to certain parts of the world.94 Indeed this could be said to remain an atomized form of international criminal justice, but simply of a different order. By contrast, prosecutions that target the parent corporation necessarily direct attention to the modes of integration that operate in our global economic order. This, however, may raise the legal challenge of penetrating the formally disaggregated corporate entities so that the actions of agents or subsidiaries can be attributed to the parent company. An enterprise approach to this challenge, whereby courts focus on the reality of economic integration within a corporate group rather than strictly upholding distinct legal forms, has the greatest potential to expose structural forces at play.95 An entirely distinct issue is the discursive narratives that might in fact be generated by international criminal prosecutions of corporations, which may well tend to justify or ameliorate the role of business in atrocity, though this is a risk and reality of any international prosecution.96

5. Conclusion

In its recent policy paper on case selection and prioritization, the OTP identified as a goal to represent, so far as is possible, ‘the true extent of the criminality which has

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93 The principle of limited liability ‘limits the liability of shareholders, including corporate shareholders, to the unpaid amount of their investment’: Clough, supra note 91, at 9. For a discussion of the development of this principle, see Blumberg, supra note 92.
occurred within a given situation’.\(^\text{97}\) To do so, it proposes to choose cases that are a representative sample of the main types of victimization and to give particular attention to crimes that are traditionally under-prosecuted.\(^\text{98}\) In respect of the latter, there is an argument that the behaviour of commercial actors has been largely ignored in international prosecutions and thus warrants a conscious effort to bring it to the fore. Notably, the Policy also commits the OTP to prioritizing crimes involving environmental destruction, illegal resource exploitation and illegal land acquisitions, which suggests such a move may be forthcoming. This article has sought to explore how institutional competence over corporations and particular forms of select corporate prosecutions might serve to improve the representational effects of the work of such institutions and thus strengthen the esteem in which certain audiences hold them. Even if one does not wholly accept AU criticisms of the ICC, given the strong link between the history of the colonial project in Africa and contemporary conflicts, sensitivity to North–South dynamics within the current international criminal justice project seems eminently sensible.\(^\text{99}\) TWAIL scholarship highlights the importance of economic structures in displacing, to some extent, violence to the global South. This is enabled in part through the structures and dynamics of globalization that press against the accountability of transnational corporations, particularly for their contributions to rights violations in the South. This same awareness is driving efforts at an international level to find solutions to the human rights governance gap in respect of transnational corporations, which impacts disproportionately on the peoples of the global South. International criminal law is no panacea to that broader challenge, but it has a unique potential by virtue of its own discursive terms and justifying functions. Through engaging with the relationship between commerce and atrocity, in the context of a contemporary global economy dominated by transnational corporations, international criminal institutions may invite a re-investment of faith in the international criminal justice project.

\(^{97}\) Policy Paper on Case Selection and Prioritisation, ICC-OTP (15 September 2016), para. 45

\(^{98}\) Ibid., paras. 45–6.