

BUSINESS AS USUAL?: RECENT DEVELOPMENTS IN CORPORATE LIABILITY FOR INTERNATIONAL CRIMES

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Although the vast majority of conflicts are based on or at least related to economic interests, the international community was reluctant for a long time to hold corporations criminally accountable for international crimes. The article provides a brief overview over the history as well as recent domestic and regional attempts to establish a regime of corporate criminal accountability to address the long-ignored entanglement of atrocity and economy.

I. Addressing root causes of armed conflicts

In times of increasing violence and conflict worldwide, the international community is under the obligation more than ever to rethink methods of both conflict prevention and protection of the civilian population from the devastating effects of atrocities – a goal that can only be achieved by addressing the root causes of conflict.¹

Although root causes for armed conflict are multi-dimensional and complex, it can be stated that the vast majority of armed conflicts are either based on or at least related to financial interests. However, the socio-economic dimensions of conflicts are often underrepresented in debates, reports and judicial proceedings.² While political leaders may have to fear criminal prosecutions for their

contributions, corporations or individual managers are not held accountable in most cases. The list of possible involvements of business in armed conflicts is long. Corporations can, *inter alia*, act as classical arms vendors; directly contribute to torture, extermination or persecutions; employ slave laborers from conflict regions in their supply chains; or fuel conflicts by maintaining business relations with conflict parties such as states, rebel groups or others.³ Conflict parties would often not be able to remain powerful and financially strong without the “help” of businesses.

As a result, business participation creates a “fueling effect” on the cause and duration of conflict. Failing to address the fueling effect through the means of criminal prosecution creates an accountability gap, removing the possibility of any deterrent effects on corporations

concerning their involvement in conflicts around the world. In the following, a brief history of corporate criminal accountability as well as two recent developments in domestic and regional international criminal law will be presented to demonstrate that the relationship between business and atrocity can no longer be ignored.

II. Corporate criminal liability for international crimes

Corporations have not always been immune from prosecutions, evidenced by historical accounts of corporate criminal accountability. The birthplace of modern international criminal law, Nuremberg, dealt with German business leaders who supported the rise of the Nazi party and the Holocaust machinery.⁴ A selection of the most responsible businessmen were

¹ S.C. Pres. Statement 2017/14 (Aug. 9, 2017).

² See, e.g., KAREN BALLENTINE & JAKE SHERMAN, INT’L PEACE ACAD., THE POLITICAL ECON. OF ARMED CONFLICT:

BEYOND GREED AND GRIEVANCE (2003).

³ *Id.*

⁴ Matthew Lippman, War Crimes Trials of German Industrialists: The “Other

Schindlers”, 9 Temp. Int’l & Comp. L.J. 173 (1995).

held accountable during the so-called Nuremberg subsequent trials.⁵ The main Nuremberg trial before the International Military Tribunal had no industrialist in the dock.⁶ The subsequent Nuremberg trials, a series of twelve U.S. military tribunals, took place from 1946 to 1949.⁷ With Telford Taylor as chief prosecutor, the list of defendants of the twelve Nuremberg trials included German doctors, judges, SS officers, politicians and industrialists.⁸ Industrialists in Nuremberg were represented as defendants in *United States v. Krauch*,⁹ better known as the I.G. Farben case, *United States v. Friedrich Flick at al.*,¹⁰ and *United States v. Krupp*,¹¹ leading to the convictions of twenty-seven businessmen for their role in Nazi Germany war crimes and crimes against humanity, such as slave labor programs, plunder and spoliation (collectively, the “Industrialist Trials”). During the preparation stage of the Industrialist Trials, evidence

was discovered implicating many more companies for their extensive involvement in the Third Reich, for instance by funding and benefitting from forced labor programs.¹²

In the aftermath of Nuremberg, international criminal tribunals such as the International Criminal Tribunals for Yugoslavia (herein, “ICTY”)¹³ and Ruanda (herein, “ICTR”)¹⁴ missed the chance to build on Nuremberg’s legacy by addressing the entanglement of economy and atrocity in substantial way.

Today, the greatest source of international criminal law, the International Criminal Court (herein, the “ICC”) in The Hague, has been reluctant to address the issue. The ICC began operating in 2002, after the ratification of the ICC Statute in 1998 in Rome, and became the first permanent international criminal law court. So far, 128 States have ratified the ICC Statute¹⁵ and have therefore submitted to the

jurisdiction of the court on four core international crimes: genocide, war crimes, crimes against humanity and the crime of aggression.¹⁶ Individuals of non-member states can only be subject to the jurisdiction of the court if either the state itself or the U.N. Security Council (unanimously via Security Council Resolution) refers the situation to the court.¹⁷ Corporate criminal liability is not foreseen in the ICC Statute, as Article 25 of the ICC Statute refers to jurisdiction over natural persons. As a result, the individual liability of businessman would fall under the scope of ICC’s jurisdiction and the court would be able to prosecute economic actors for their alleged contributions to international crimes. However, no such cases have been subject to prosecutions of the court so far.

III. National prosecutions of international crimes: Syria, ISIS, and a criminal complaint in France

⁵ Id.

⁶ Id.

⁷ See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford 2012).

⁸ Ben Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 *Pace Int. Law Rev.* 203, 206 (1998).

⁹ *United States v. Krauch*, 7 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 1102 (1953).

¹⁰ *United States v. Friedrich Flick*, 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 11 (1952).

¹¹ *United States v. Krupp*, 9 *Trials of War Criminals Before the Nuremberg Military*

Tribunals Under Control Council Law No. 10 (1050).

¹² See Hans Mommsen & Mit Manfred Grieger, *Das Volkswagenwerk und seine Arbeiter im Dritten Reich* [The Volkswagen and its Workers in the Third Reich] (1996); See also Bernard P. Bellon, *Mercedes in Peace and War: German Automobile Workers, 1903-1945* (1992); Peter Hayes, *From Cooperation to Complicity: Degussa in the Third Reich* (2007).

¹³ S.C. Res. 808 (Feb. 22, 1993).

¹⁴ S.C. Res. 955 (Nov. 8, 1994).

¹⁵ Rome Statute of the International Criminal Court [ICC Statute], U.N. Doc. A/Conf.183/9, Art. 25, 17-18 (1998) [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

[0a655eb30e16/0/rome_statute_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [<http://perma.cc/XZ52-DRU6>].

¹⁶ See ICC Statute, U.N. Doc. A/Conf.183/9, Art. 5, 3 (1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

[0a655eb30e16/0/rome_statute_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [<http://perma.cc/XZ52-DRU6>].

¹⁷ See ICC Statute, U.N. Doc. A/Conf.183/9, Art. 13, 11 (1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

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Apart from the ICC, the four international crimes are implemented in many domestic penal codes, providing a possible forum for prosecutions of corporate criminal misbehavior in domestic courts. A current example of the application to address corporate involvement in international crimes is a complaint filed in France concerning a French cement corporations' business in Syria.¹⁸

After pro-democracy protest in 2011, a bloody civil war arose in Syria causing the death of at least 300,00 Syrians as of March 2017.¹⁹ The U.N. High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, recently called the conflict "the worst man-made disaster the world has seen since World War II."²⁰ The terrorist group of the Islamic State of Iraq and Syria (herein, "ISIS") controls parts of North-East Syria, fighting its opponents in the region to gain territorial and political power. According to an U.N. report, the group committed massive war crimes and crimes against humanity, such as mass slaughters of ethnic and religious groups,

sexual violence, sexual slavery, and summary executions.²¹

In addition to their ideological agenda, the terrorist group is pursuing economic interests in the region.²² To do so, the group must have acquired necessary financial resources to remain a powerful player in the conflict.²³ The French cement company, Lafarge, is allegedly part of the financial support for ISIS.²⁴ According to a criminal complaint filed in France in 2016, Lafarge's Syrian subsidiary was involved in illegal activities and payments to ISIS, that amounted to complicity in war crimes and crimes against humanity, as well as the financing of terrorism and forced labor.²⁵ Despite the rising conflict and political instability in Syria in 2011, Lafarge decided to retain an active corporate presence and continue business in the Jalabiya subsidiary in North East Syria. When ISIS took gradual control over the region and committed large-scale atrocities in the area, Lafarge may have entered, via intermediaries that it hired, into negotiations with ISIS to purchase ISIS-controlled raw

materials such as oil and pozzolana.²⁶ According to the complaint filed against the company, large amounts of monetary fees have been allegedly paid by Lafarge to ISIS, for instance, for the crossing of checkpoints such that it appeared Lafarge had obtained official passes from the terrorist group.²⁷

The complaint serves as one example for corporate involvement in armed conflicts and the possibilities of addressing misbehavior in domestic courts.

IV. Regional legislative attempts: The African Court of Justice and Human Rights

Apart from litigation efforts, a notable recent legislative development can be reported from the African Union (AU). In 2014, the AU General Assembly surprised the international community with its proposal for the creation of an integrated African Court of Justice and Human Rights (herein, "ACJHR"), adopted through

¹⁸ French-Swiss Company LafargeHolcim Sued for Grave Crimes in Syria, European Cent. for Constitutional and Human Rights, <https://www.ecchr.eu/en/business-and-human-rights/lafarge-syria.html> [<https://perma.cc/99K9-4L890>].

¹⁹ Jack Moore, Syria War Death Toll Hits 321,000 with Further 145,000 Missing: Monitor, Newsweek (Mar. 13, 2017, 1:14 PM), <http://www.newsweek.com/sixth-anniversary-syrian-conflict-looms-war-monitor-says-465000-killed-or-567181> [<https://perma.cc/TB3V-PKQY>].

²⁰ Zeid Ra'ad Al Hussein, Syria Worst Man-Made Disaster Since World War II, United Nations Human Rights Office of the High Comm'r (Mar. 14, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21373&LangID=E> [<https://perma.cc/NN3W-8T8E>].

²¹ U.N. HRCOR, 34th Sess., U.N. Doc. A/HRC/34/64 (March 24, 2017).

²² European Cent. for Constitutional and Human Rights, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

²⁵ See Dorotheé Myriam Kellou, Le jeu dangereux de Lafarge en Syrie [The Dangerous Game of Lafarge in Syria], *Le Monde.fr* (Nov. 12, 2016), http://www.lemonde.fr/international/article/2016/11/12/le-jeu-dangereux-de-lafarge-en-syrie_5030048_3210.html [<https://perma.cc/DD7B-TCB3>].

²⁶ European Ctr. for Constitutional and Human Rights, *supra* note 18.

²⁷ Kellou, *supra* note 25.

the Malabo Protocol.²⁸ The protocol has not yet reached the number of necessary ratifications, but the planned criminal law chamber already stirs scholars and practitioners, who questioned the compatibility with the ICC Statute, and even the legality of the establishment of the criminal chamber.²⁹ Critical voices view it as an attempt to undermine ICC investigations on the African continent.³⁰

Apart from that, the Malabo protocol adds a so far new perspective to international criminal law: jurisdiction *ratione personae* over legal persons together with an extended list of economically related crimes such as corruption (Art. 28 I), illicit exploitation of natural resources (Art. 28 L) or money laundering (Art. 28 I *bis*).

Consequently, the criminal chamber of the planned ACJHR would have jurisdiction over corporations for their criminally relevant misbehavior exceeding their alleged involvement in international (core) crimes. This development is particularly interesting as it points to inequalities in the prosecution of business and political leaders and sets a new framework for targeting

economic contributions to international crimes and should be taken seriously by the international community.

V. Conclusion

The short overview is intended to demonstrate that corporate complicity to international crimes is an emerging field of international and national criminal law prosecutions and that awareness of the problem has increased recently.

While criminal prosecutions are necessary to address the full scope of economy and atrocity, awareness and public debate on economy as a root cause for conflict must also be increased to address the issue. The Syrian case as well as the Malabo Protocol demonstrate that national and regional criminal proceedings have the potential to address corporate involvement in international crimes, hopefully leading to an end of the tradition of corporate impunity and helping to deter armed conflict in the future.

²⁸ African Union, Protocol on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union to the African Court of Justice and Human Rights, Annex at p. 9 et seq., O.A.U. Doc. Assembly/AU/23 (June 27, 2014).

²⁹ See Chacha Bhoke Murungu, Towards a Criminal Chamber in the African Court

of Justice and Human Rights, 9 J. Int'l Crim. Just. 1067 (2011). Ademola Abass, Historical and Political Background to the Malabo Protocol, in 10 International Criminal Justice Series 21 (Gerhard Werle & Moritz Vormbaum eds., 1st ed. 2017).

³⁰ See, e.g., Max du Plessis, A Case of Negative Regional Complementarity? Giving the African Court of Justice and

Human Rights Jurisdiction over International Crimes, Blog of the European Journal of International Law (Aug. 27, 2012) <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> [<https://perma.cc/A2P2-DAUL>].