

The ‘Accountability Gap’: Holding Corporations Liable for International Crimes

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By: Jaya Élise Bordeleau-Cass

In an era where rapid globalization contributes to the growth, power and influence of trans-national corporations, more robust legal solutions must be advanced to hold corporations liable for gross human rights violations amounting to international crimes. Intimidation tactics deployed against whole communities in resource-rich areas to advance resource-extraction projects (see: *Kiobel v Royal Dutch Petroleum Co.*), the sale of poison gas used as a weapon to fuel civil war (see: *Public Prosecutor v. Van Anraat*), human trafficking, modern slavery, torture, and police-sanctioned violence are all in the realm of human rights violations perpetrated by companies who work internationally. It is thus unsurprising that corporate liability has been labelled “the next frontier of international criminal justice” (Einarsen & Rikhof at 601). Corporate practices have received criticism from human rights

organizations, activists, and international bodies such as the United Nations, which begs the questions: why can international companies still get away with behaviour abroad that would be deemed unacceptable in their home countries? And what can forums like the International Criminal Court do about it?

Corporate liability under international criminal law has struggled to keep up with the quick expansion of multinational corporate entities, leading to several weaknesses in the supervision of corporate activities. The regulation of corporations is difficult because parent companies are often separated from day-to-day operations by a slew of subsidiary companies. Questions of liability are further complicated by the fact that large corporations generate immense revenues, which in turn puts them in positions of power to impact regulatory processes (see: Weikinnis, here). As it is currently framed, the Rome Statute limits criminal liability to 'natural persons' and lacks a structure where corporations – considered 'legal persons' – can be held liable through international criminal law. As such, a significant 'accountability gap' for corporations has emerged. However, advancements in both domestic and international realms recognizing that legal person can be held responsible for crimes reflect a broader international trend towards greater accountability for international crimes committed by corporate actors.

The Context of International Corporate Liability

The ICC is viewed as the court of last resort and addresses the most serious of international crimes (here, para 35). Arguably, crimes perpetrated by trans-national corporations are particularly serious in nature and, given their international character, can be classified under the jurisdiction of the ICC as being "of concern to the international community as a whole", as stipulated in the Rome Statute's preamble. Corporations whose industries revolve around resource extraction, chemical, arms, or surveillance are much more likely to be indirectly involved in human rights violations than other industries. These human rights violations can often be characterised as international crimes insomuch as they have been enabled and exacerbated by corporations who have provided the 'means of abuse' – such as illicit funding, services or resources (see: Weikinnis, here).

Yet "corporate liability" is not included under the Rome Statute. In fact, Article 25(1) on individual criminal responsibility, specifies: "The Court shall have jurisdiction over natural persons pursuant to this Statute". The jurisdiction of the ICC explicitly excludes legal persons – or 'juridical entities' – such as corporations or organizations, despite how a relatively broad majority of those involved in the drafting of the Rome Statute recognized the merits of including 'juridical persons' (legal persons) under Article 25(1) (see conference proceedings here). Yet upon examination of the drafting history, the main point of contention revolved around complementarity implications for nations whose legal systems did not, at the time, provide for corporate criminal liability (Schabas, here at 564-66). Not being able to pursue prosecutions at the domestic level would undermine complementarity at the ICC. Regrettably, because of these disagreements, delegates did not have enough time to come to a consensus on the scope of Article 25(1), and whether legal persons should be included under the ICC's jurisdiction. This left the ICC with only the ability to impute criminal liability to 'natural persons'.

There are also no universal standards of attribution of liability for companies under international law (Ambos, here at 3). Presently, the regulation of corporations is dependent on individual states: the actions of corporations are overseen by states, and states are bound by the international legal obligations they have signed on to. And yet, adequate domestic state regulation is difficult given the financial power of large corporations. International criminal law can arguably serve as a method to support domestic regulatory systems in challenging corporate impunity.

Legal Possibilities

Attributing liability for crimes committed by corporations – or by corporate actors – can be addressed in different ways: either through holding the corporation itself liable, or by prosecuting individuals within a corporate structure. Within the still-youthful discipline of international criminal law, there are two different perspectives on corporate criminal liability. The first school of thought advocates for the creation of a new corporate criminal liability model, pointing to the autonomy of corporations and the flaws of only being able to hold individuals criminally liable for corporate crimes. As part of this, the principle of "juridical entity participation" relates to the potential imposition of criminal liability on corporations and organizations. (see: Einarsen & Rikhof, starting at 110). This approach to criminal liability is often viewed as more effective than going after individuals who act on behalf of corporations, yet the challenges of doing so are linked to the opposition of corporations and other connected interests to this type of legal evolution.

On the other hand, the second group of thinkers would prefer to see a broadening and refining of the already well-established 'individual criminal liability' at the ICC to increase corporate accountability rather than establishing a whole new model. (see discussion in: Stahn, here at 102). Since its early development as a discipline, international criminal law has been focused on the agency of individuals. For instance, under Article 25(3) of the Rome Statute, it is possible to hold corporate officers liable for crimes committed by their companies. Traditionally, corporate criminality has been prosecuted through the indictment of corporate representatives who committed crimes during the course of business in an individual capacity (see: Stewart, here at 75). Still, the complexities of corporate structures – where companies that operate overseas often have multiple subsidiary companies and are therefore implicated in an intricate corporate web and further removed from the crimes – contribute to the difficulty of holding individual corporate actors accountable for gross international crimes.

Furthermore, since the drafting of the Rome Statute, several states have made moves to include various forms of corporate liability into their domestic legal systems: over 40 countries have legislation regulating corporate liability (Einarsen & Rikhof, at 600). In fact, corporate criminal liability is now better developed at the domestic level than at the international one (Stahn, at 96). Yet domestic legal systems have approached corporate liability in divergent ways. In general, most common law jurisdictions recognize corporate criminal liability, while civil law jurisdiction have had different responses: for instance, countries such as Italy, Ukraine and Germany are less convinced about criminal liability and lean towards addressing corporate wrongdoings through administrative law (Stahn, at 95). Many jurisdictions have also codified corporate liability in their criminal codes (Stewart,

here at 75). For example, France's Criminal Code states that: "the criminal responsibility of the corporate entity does not exclude that of natural persons who are perpetrators or accomplices to the same act" (*Code pénal* art 121-2 C pén.). Other countries have interpretation acts which help charge corporations with war crimes, as they are defined in domestic legislations. For instance, section 35 of Canada's *Interpretation Act* states that "[i]n every enactment … 'person', or any word or expression descriptive of a person, includes a corporation." In some countries, reliance on civil proceedings and tort claims is a preferred tactic, as in the recent case of *Nevsun Resources Ltd.*, heard by the Supreme Court of Canada in January 2019, which has put the issue of corporate liability for international human rights violations on the map in Canada. Regardless of the approach, domestic legal changes reflect a broader international trend towards greater accountability for international crimes committed by corporate actors.

Overcoming barriers: the Al-Jadeed case at the STL

A key example of overcoming the 'accountability gap' for crimes committed by corporations can be found in the decision of the Appeals Chamber in the 2014 case of *Prosecutor v. Al Khayat* (the *Al-Jadeed* case) before the Special Tribunal for Lebanon (STL). This decision marks the first time a hybrid criminal tribunal held a corporation criminally liable for the crime of contempt of court (Stahn, at 98). This case is promising when it comes to setting a precedent that broadens the scope of the meaning of 'person' in the context of corporate liability. In the *Al-Jadeed* case, both a company and an individual were charged with contempt and obstruction of justice before the STL. In what has now been recognized as a symbolic decision, the Appeals Chamber reversed the Contempt Judge's decision that the STL did not have jurisdiction over legal persons, and concluded that corporations can indeed be held liable for contempt charges under the STL.

Before arriving at their decision, the Appeals Chamber conducted a thorough review of the relevant laws. This included recognition of "an emerging shared international understanding on the need to address corporate responsibility" (at para 46), including a careful survey of international trends in corporate liability as well as the domestic laws of Lebanon (paras 68-71). The Appeals Chamber's decision in the *Al Jadeed* case is significant, particularly because its impact reaches beyond the narrow mandate of the STL to set an important precedent for international criminal law (for more on this case and a discussion of the STL see: Rikhof, 2018 here). What is more, it provides a useful survey of the current state of both domestic and international laws pertaining to criminal liability of corporations.

Impactful 'Soft laws'

The *Al Jadeed* case is one of several indicators that the international community is beginning to respond to the importance of implementing mechanisms to address the corporate accountability gap. Other indicators of this willingness to address corporate liability are found in the increasing number of 'soft law' legal mechanisms that underscore the importance of corporate accountability for human rights violations and international crimes. Over the past few decades, the international structure for

human rights accountability has developed greatly (Stahn, at 93). Corporate criminal liability is now widely embraced in international law through several multilateral treaties.

As of 2018, there are 17 multilateral international mechanisms in place that include provisions related to corporate criminal liability (Stahn, at 95). Some of the international law instruments that impose criminal liability or other forms of accountability on corporations include: the *United Nations Convention against Corruption* (article 26), the *United Nations Convention against Transnational Organized Crime*, (article 10), and the International Convention for the Suppression of the Financing of Terrorism (article 5). Corporate criminal liability has also been recognized within international human rights law, such as through the United Nations Human Rights Council's Guiding Principles on Business and Human Rights. Many of these international instruments urge states to adhere to the principles to uphold better business practices and human rights. They recognize that legal persons can be held responsible for crimes. However, since they are non-binding, it is mostly left up to states to sanction these wrongdoings and the criminal behaviour of corporations. Shareholders and consumers also have a role to play: financial pressures can help push companies to act in accordance with human rights standards.

In stride with the international trend: the Malabo Protocol

The African Union's *Malabo Protocol*, adopted to implement the African Court of Justice and Human Rights, has included an innovative expansion of criminal liability to corporations. If ratified, this will be the first time corporate criminal liability is included in an international criminal court (This is notwithstanding the prosecutions of corporations in domestic courts or regional human rights tribunals such as the European Court of Human Rights) (Open Society Justice Initiative, at 137).

In 2014, the African Union's Assembly Heads of State and Government met in Malabo (Equatorial Guinea) and adopted the '*Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights'* (the *Malabo Protocol*). The *Malabo Protocol* will come into force 30 days after it is ratified by 15 AU member states. As of February 2019, 32 states had signed the *Malabo Protocol* and 7 had ratified it (see the list, here). Once created, the African Court of Justice and Human Rights will be the African Union's main judicial organ, taking on the responsibility of general legal affairs and the prosecution of 14 crimes different categories of crimes: genocide, crimes against humanity, war crimes, the crime of 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 the crime of aggression. Some of these crimes are entirely new to criminal tribunals, such as "crimes relating to the environment" (here).

Article 46C of the *Malabo Protocol* also provides for a novel expansion of criminal liability to corporations, noting that "For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States." Through this provision, corporate intention to commit an offence can be established through proving that the corporation's policy allowed the offending act to occur (art. 46C (2)), or that "actual or constructive knowledge" of the relevant information about the

offence was present within the corporation – even if it was divided between different individuals (art. 46C (4) & (5)). Corporate criminal responsibility complements the individual criminal responsibility outlined in Article 46B of the *Malabo Protocol*.

Although limited to the crimes committed within the territories of state parties, the *Malabo Protocol*'s ambitious jurisdiction is significant, particularly given that Africa is riddled with conflicts over natural resources which are often fueled by international corporations' actions (Open Society Justice Initiative, at 137). It also has the potential of impacting similar regional efforts, or perhaps even effect changes at the ICC level to improve the culture of corporate accountability. However, critics of the *Malabo Protocol* are skeptical of creating a court with such a large jurisdiction. They raise concerns regarding the capacity of the court, particularly in light of how cases at the ICC and other international tribunals can take many years to resolve. If the *Malabo Protocol* is ratified, it will be interesting to see how the court deals with these concerns and the practical application of corporate criminal liability.

Moving Forward

Arguably, international criminal law and the ICC should take greater steps to respond to corporate crimes. This could be done through a few different approaches: either through broadening and refining the meaning of individual criminal liability and the definition of a 'person' under the Rome Statute to include corporate entities; through creating an international forum with enough teeth to recognize corporate criminal liability; or through expanding corporate liability for international crimes within domestic laws, where it is currently most developed. Although some legal scholars believe that the role of corporate criminal responsibility will remain modest in the international arena (see discussion in: Stahn, at 91), ideally, each of these approaches can continue to develop simultaneously in order to create a more robust potential of corporate liability for international crimes where a focus is placed on liability both for the company itself, and the directing minds (individuals) behind the crime. More tools for tackling impunity for corporations in international criminal law's toolbox can only be a benefit to international justice as a whole.

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About the author

Jaya Bordeleau-Cass**Jaya Bordeleau-Cass** is a recent graduate of the JD program at the University of Ottawa. She has developed her legal skills through enriching learning experiences with the Refugee Hub's Sponsorship Support Program, the University of Ottawa Community Legal Clinic, and the Community Law Centre in Wellington, New-Zealand. Striving to work in solidarity as an advocate for Indigenous and migrant rights, she will be one of the 2019-2020 Public Interest Articling Fellows at Amnesty International Canada.

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