

Analysis: Towards Greater Accountability for Corporate Involvement in International Crimes

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This article addresses the issue of the involvement of corporations in international crimes and the recent efforts and trends in international criminal law to develop this area of accountability.

Introduction

No corporation, however powerful, should get away with gross human rights abuses amounting to international crimes. Why then are governments unable or unwilling to meet their obligations under international law to investigate and prosecute grave human rights abuses? The existing international legal system is structured in a way that corporations are governed only through states, which, in turn, are bound by their international legal obligations.[1] According to the United Nations Guiding Principles on Businesses and Human Rights (UNGPs), states have the "duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication of human rights due diligence."[2] The regulation of corporations by the international legal system that is centered on states is difficult because some corporations generate revenues that easily exceed the economies of many small countries in comparison, thus they may wield almost as much power as states and are able to influence the regulatory process.[3] This article describes how corporations have been involved in international crimes, discusses the concept of corporate criminal

liability, presents arguments for and against international prosecution of corporations and highlights the overall international trend toward increasing the accountability of corporations for human rights violations amounting to international crimes.

Corporate Involvement in International Crimes

International crimes have been defined as “the most serious crimes of concern to the international community as a whole,” such as genocide, crimes against humanity and war crimes.[4] According to a research study, corporations working in certain industries, such as the extractive industry, surveillance/intelligence, arms industry, and chemical industry, are allegedly more prone to being involved in human rights abuses that might amount to international crimes than in other industries.[5]

Corporations have enabled, exacerbated and facilitated international crimes by providing the means of abuse, such as goods, services or illicit funds. Corporations in the surveillance/intelligence industry may provide surveillance software that lead to the torture and killing of political opponents and other unwanted regime-critical groups of people. Corporations within the extractive industry may offer mining, oil or gas extractive services through which at times local warlords generate funds that are used to purchase arms to fuel a bloody civil war. A little less obvious may be the potential risk of corporate involvement in international crimes in the chemical industry, because they might supply certain chemical components to a regime that uses them as chemical weapons.

According to the International Commission of Jurists, if a corporation enables, facilitates, or exacerbates gross human rights violations amounting to international crimes, the corporation or its officials “enter a zone in which they could be held legally liable, under criminal law as an aider or abettor of a crime or as a participant in a common criminal plan […].”[6]However, even though legal persons, including corporations, have been found to commit violations, there is no international forum that has the power to prosecute corporations for international crimes.

Corporations, International Criminal Law and the International Criminal Court

International criminal law is a relatively young discipline and draws on both international law and criminal law theories.[7]There are two distinct schools of thought on the criminal liability of corporations. One is in favor of strengthening the existing concept of individual criminal liability rather than establishing a separate concept of corporate criminal liability.[8]The other highlights the need for separate concept of corporate criminal liability and the weakness of just relying on criminal liability of individuals.[9]

The concept of individual criminal liability is well established in national and international criminal law, whereas the concept of corporate criminal liability, especially at the international level, is still developing and highly controversial. The concept of corporate criminal liability was discussed during the negotiations of the International Criminal Court (ICC) Statute; however, in the end, States rejected the proposal to include corporate criminal liability within the court’s jurisdiction. At the Kampala Review Conference in 2010, further attempts to clearly extend criminal liability to include corporations within

the jurisdiction of the ICC were made, but were “overshadowed by the preoccupation with the crime of aggression and hence not properly discussed.”[10]

Thus, at this point in time, the ICC jurisdiction is still limited to natural persons and holding corporations accountable translates in most cases to holding individual corporate officials accountable. Many years have past since this issue was last discussed and many voices, especially in academia, have been raised to bring this issue back to the agenda and to broaden the Court’s jurisdiction to include legal persons to close the existing accountability gap.

Arguments for and Against International Prosecution of Corporations

There are a number of arguments against the international prosecution of corporations for international crimes, most of which emphasize either that individual criminal liability for corporate officials provides for sufficient accountability at the international level or that domestic courts are well equipped to adjudicate criminal liability for corporations at the domestic level, though it may not be perfect.

In response to either argument, there are a number of shortcomings of holding only natural persons accountable and prosecuting corporations at the domestic level alone. First, not all domestic jurisdictions hold corporations criminally liable for international crimes. If a state has not included corporate liability for international crimes in its domestic criminal code then corporations cannot be held accountable for genocide, crimes against humanity or war crimes.[11] Second, those states that can hold corporations accountable are often unable or unwilling to prosecute them for crimes committed in another jurisdiction. This is because governments are often not able or willing to ‘pierce the corporate veil.’ The inability to pierce the corporate veil prevents authorities from investigating shareholders, officers of subsidiaries, which have their own personhood. A corporation is a separate legal person from its subsidiary corporations, which makes it very difficult to establish a sufficient link between the parent corporations based within their own jurisdiction and the subsidiary that has allegedly been involved in the commission of the international crime abroad.[12] In addition, there are a number of economic and political considerations that domestic authorities take into account before opening an investigation against powerful corporations. This can be true for both home and host states. According to FAFO and the International Peace Institute (“IPI”), the record of individual government holding corporations criminally accountable for international crimes “as opposed to financial or environmental transgressions […] is sparse.”[13] The reasons for this are complex and sometimes not directly related to the case at hand. One reason for this might be that “[i]nvestigative judges, state prosecutors, and attorneys-general all operate in different environments of political accountability[,]” thus their investigative priorities may be influenced by the fact that the corporation or the corporation’s subsidiary in question has significant political influence and economic might.[14] Third, individual criminal liability cannot account for the criminal harm that has only been possible as part of a collective effort, reflected in the collective nature of corporate crime. Human rights violations amounting to international crimes by corporations are often the product of collective action of corporate officials within their corporate structure. Thus, “the individual actions of each corporate

employee may be insufficient to hold any one of them liable under international law."[15]

In short, individual criminal liability cannot fully cover the actual complexity of the responsibility that leads to the commission of international crimes. Corporate criminal liability at the domestic level alone is insufficient and does not exist in every jurisdiction. Adding international corporate criminal liability to the 'tool box' from which the international court and the international tribunals are able to draw from to hold corporations accountable for their involvement in international crimes would significantly advance international criminal law and promote international criminal justice. Criminal sanctions on companies could "include orders to change internal policies and processes and reporting requirements, which may go to the heart of the company's wrongdoing."[16] In addition, a criminal conviction of a corporation, and "the public attention of such a conviction may give rise to, can also provide incentives to improve business culture."[17] Other penalties could include the confiscation of all of corporation's assets, rather than those assets that are associated with the criminal offense, as well as the extreme measure of dissolving the corporation, which is often referred to as the 'corporate death penalty.'[18] All these measures would contribute to greater accountability of corporations for their involvement in international crimes and promote international criminal justice.

Trend Towards Corporate Criminal Liability

A trend towards greater accountability for corporate involvement in international crimes is reflected in the growing number of legal systems that have included corporate liability for international crimes in their criminal codes and are well equipped to adjudicate such liability before their domestic courts. Furthermore, some courts and international tribunals have discussed whether to prosecute legal persons in addition to natural persons in the context of international crimes.

An infamous case of corporate involvement in international crimes is the *United States vs Carl Krauch et al.* case, also known as IG Farben Trial, at the International Military Tribunal in Nuremberg, Germany. The German corporation, IG Farben, supplied the poisonous gas Zyklon B to Holocaust extermination camps, where hundreds of thousands of Jews, gypsies and other 'unwanted persons' were killed during the Second World War.[19] IG Farben's role in providing the chemicals to the extermination camps enabled authorities in Nazi-Germany to commit the most serious crimes on a mass scale. Corporate criminal liability was intensely discussed, but in then end, the tribunal found that natural persons could be held accountable, but did not expand the liability to legal persons.[20]

Another more recent case is the *Van Anraat* case. Frans van Anraat, a Dutch businessman, was allegedly involved during the 1980s in war crimes and genocide in Iraq. The chemical that Anraat delivered to Saddam Hussein's regime was a key component in the manufacturing of mustard gas used in the attacks against the Iranian army, the civilians in the Iran-Iraq war and the Kurdish population in northern Iraq.[21] In *Public Prosecutor v Van Anraat,* the District Court of The Hague held that van Anraat "consciously and solely acting in pursuit of gain, […] made an essential contribution to the chemical warfare program of Iraq […] which enabled, or at least facilitated, a great number of attacks with mustard gas on defenseless civilians."[22] Van Anraat was convicted of complicity in war crimes and sentenced to 16 years and 6 months imprisonment.[23] Even though only van Anraat as a

natural person was held accountable, it can be argued that since his company had no employees besides himself and a secretary, prosecuting him equalled punishing the company since it led to its dissolution.[24] Moreover, the Court of Appeal in the *van Anraat* case also discussed corporate criminal liability by highlighting the potential deterrence effect of its decision to prosecuting not just corporate officials, but also corporations, which reflects the idea of establishing both individual and corporate criminal liability in order to prevent grave human rights abuses amounting to international crimes from re-occurring in the future. The court stated that: “People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that […] they can become involved in most serious criminal offences. It should be made clear to them that they will have to face prosecution and long-term prison sentences, in accordance with the seriousness of the crimes they committed.”[25]

Other developments indicating a trend toward greater accountability for corporate involvement in international crimes is the increase in the number of ‘soft law’ instruments and codes of conducts concerning corporate behaviour that have been adopted in recent years. Examples are the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises[26] and the International Labor Organization (ILO) Tripartite Declaration of Principles on Multinational Enterprises and Social Policy.[27] The rise in demand for corporate accountability also led to the creation of the Draft UN Code of Conduct on Transnational Corporations and the UNGPs. The UNGPs consist of 31 principles implementing the UN ‘Project, Respect and Remedy’ framework on the issue of human rights and transnational corporations.[28] These Guiding Principles provided for “the first global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity, and continue to provide the internationally accepted framework for enhancing standards and practice regarding business and human rights.”[29] These ‘soft law’ instruments and codes of conducts have strenghtened standards of corproate behaviour in terms of compliance with international law and illustrate the growing concern of the international community about contentious corporate practices worldwide. However, their effectiveness and ability to deter corporations from enabling, facilitating, or exacerbating gross human rights violations amounting to international crimes are somewhat limited. Nevertheless, it confirms the existence of an overall trend towards greater accountability for corporations at the international level.

Conclusion

This article presents some of the shortcomings of relying only on domestic prosecution of corporation for international crimes. It argues that for the purpose of ending corporate impunity for international crimes the establishment of international corporate criminal liability is essential. Domestic courts play an important role in prosecuting their own national corporations; however, prosecuting corporations for crimes committed outside their jurisdiction remains challenging mainly because it requires the initiative of home States to include corporate liability for international crimes in their criminal codes in order to comply with their international obligations. If this is not in place or States view that corporate involvement in international crimes is sufficiently covered by individual criminal liability, the consequences are detrimental to international criminal justice. The accountability gap can only be

closed by establishing corporate criminal liability at the international level, which would limit the options of corporations taking advantage of differences between the home and host States' legal systems, deter corporations and their officials from engaging in risky practices that might lead to their involvement in international crimes, and end impunity. However, at this point in time, international prosecution of corporations is still not possible and it is for States to push for greater accountability of corporations for their involvement in international crimes and meet their obligations under international treaties to regulate corporate behaviour for achieving the overarching goal of a strong international legal system.

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