

An International Jurisdiction For Corporate Atrocities: Observations of a former Nuremberg War Crimes Prosecutor

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The U.S. Representative at the International Military Tribunal (IMT), created by the four victorious Allies after World War II, was Robert H. Jackson, our most distinguished jurist on leave from the Supreme Court. I always admired his resolution in using the law as a powerful tool against injustice. On June 6, 1945, Jackson reported to President Harry Truman that the legal position in prosecuting German war criminals would be “based on the common sense of justice.” He noted, particularly, that it should not be “obscured by sterile legalisms developed in the age of imperialism to make war acceptable.”¹ This underlying principle has stayed with me as a major source of inspiration as I progressed through my legal career and later on in my life. The quadripartite trial against German Field Marshal Goering and cohorts had not yet started when I was transferred out of a gun battalion and ordered to report to the headquarters of General George Patton in preparation for military commission trials to be conducted by the U.S. Army. In that capacity, I disinterred the battered bodies of downed Allied flyers beaten to death by enraged German mobs, and I joined liberating forces as the American army uncovered Nazi concentration camps. I peered into Hell. The traumatic effects of digging up bodies with my bare hands, and walking into concentration camps to witness human skeletons lying on the ground, not

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¹ ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INT’L CONF. ON MIL. TRIALS (1945), http://avalon.law.yale.edu/subject_menus/jackson.asp.

being able to tell whether people were dead or alive, remain with me nowadays.² My reports served as a basis for trials by now forgotten U.S. Military Commissions that tried camp commanders and guards for violations of the laws of war. As the IMT was drawing to a close, a decision was reached in Washington to conduct twelve subsequent trials in Nuremberg. It was hoped that by expanding the net of justice one might better understand how the German public came to embrace the murderous Nazi racial doctrines. Deterring the repetition of such crimes in the future remained indeed the basic objective. General Telford Taylor, a fellow Harvard Law graduate and assistant to Jackson was appointed Chief of Counsel. On the day after Christmas 1945, I returned home to New York, was discharged from the U.S. Army as a sergeant, and awarded five battle stars for not having been killed or wounded in any of the five major battles of the war. Shortly thereafter, I was recruited by Telford Taylor to join his staff in Nuremberg.

As I began preparing as the Chief Prosecutor for the Einsatzgruppen Trial,³ Justice Jackson's words continued to resonate with me. Particularly, what became the I Nuremberg Principle,⁴ that crimes are committed by individuals, continues to move me in my 97th year of life, as I write for this special issue of the *Harvard International Law Journal* on Responsibility for Corporate Atrocity Crimes. Unless individual liability of corporate executives for atrocity crimes can coexist with and is not superseded by corporate liability for such crimes, to speak of "Corporate Atrocities" can be dangerous, as the term might evoke the idea that crimes can be committed by independent non-human actors. Corporate accountability has evolved much since its conception at the subsequent Nuremberg trials.⁵

² You can hear Prosecutor Ferencz's accounts of his war crimes investigations in his interview by Federica D'Alessandra as part of the International Bar Association's interview series, *Human Rights in the 21st Century* (2014) (from minute 0:30' to 06:07'), http://www.ibanet.org/PPID/Constituent/Human_Rights_Law/Film.aspx#ferencz.

³ Officially: Military Tribunal of Nuremberg II, The United States of America vs. Otto Ohlendorf, et al., Control Council Law No. 10, Case No. 9, 1946.

⁴ 5 U.N. G.A.O.R. Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950); 1950 ILC Yb 374, vol. II; 44 AJIL 126 (1950).

⁵ The Nuremberg subsidiary trials against IG Farben, Flick and Krupp, along with the Council Laws, have lately been cited in arguments for many cases against corporations under the US Alien Tort Statute: "[e]ven before the first Nuremberg trial began, the Allied Control Council had already dissolved a number of German corporations, including most prominently the world's largest chemical corporation Interessengemeinschaft Farbenindustrie Aktiengesellschaft ("I.G. Farben"), and seized their assets. As a result, when the international trial of the Farben defendants took place pursuant to Control Council Law No. 10, I.G. Farben had already suffered corporate death under international law." *Kiobel v. Royal Dutch Petroleum Co.*, Brief of Amici Curiae Nuremberg Scholars Omer Bartov et al. at 3, Nos. 10-1491; 11-88 (Dec. 21, 2011), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_nuremberg_bartov_et.al.authcheckdam.pdf; see also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 760, 765 (9th Cir. 2011) (holding that avoiding liability merely by incorporating would be inconsistent with the prohibition against genocide and war crimes, which is universal and applicable to all actors, including corporations); *Doe v. Nestle*, 766 F.3d 1017, 1022 ("conclude[ing] that the prohibition against slavery is universal and may be asserted against the corporate defendants in this case," where former child slaves filed a class action against Nestle USA, Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa for aiding and abetting child slavery in the cocoa industry of Ivory Coast.); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 2 introductory note (AM. LAW INST. 1987) ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."); see also *Prosecutor v. New TV S.A.L. & Karma Mohamed Tahsin al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in

Such creative conceptions, however, should not become a diversion from holding accountable the real, live persons primarily responsible for the harm. In my first year at Harvard, in 1940, I learned in torts that he who does the harm should be held accountable for the injury. The victim is entitled to fair compensation and efforts to remedy the wounds. The same principles of law and equity should apply to corporations and other non-state actors. This was the idea behind some of the subsequent Nuremberg Trials. It was well known that as part of the German war effort thousands of German companies employed concentration camp inmates. The conditions of work included kidnapping, torture, starvation, beatings, and outright murder. Nazi organizers aptly described the forced labor program as “Vernichtung durch Arbeit”—extermination through work. Both the IMT and the subsequent proceedings indicted several corporate executives of I.G. Farben, Krupp, Siemens and other leading firms and accused them of personal responsibility for war crimes and crimes against humanity.

It was common sense that the Nuremberg trials could not be carried out against hundreds of thousands of Germans who participated in the commission of war crimes and crimes against humanity. In order to broaden the scope and sweep of justice, a general charge was added to many of the indictments. If it could be shown that the accused was aware that the Gestapo, the SS or similar Nazi organizations (previously declared ‘criminal organizations’ by the International Military Tribunal) had, as a primary purpose, the elimination of opposition by legal or illegal means, the offender could be charged with a separate crime called “membership in a criminal organization.”⁶ Seventy years after those trials, “mere

Contempt Proceedings, ¶ 33-74 (Special Tribunal for Lebanon, Appeals Panel, Oct. 2, 2014) (a corporation can be held liable for contempt), <https://www.stl-tsl.org/en/decision-on-interlocutory-appeal-concerning-personal-jurisdiction-in-contempt-proceedings>. Another development is the one of the African Court of Justice and Human Rights, where corporations will be criminally liable of atrocity crimes among others, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights:

“Article 46C: Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”

⁶ It had been established common international law for centuries that all those who set sail on a pirate ship could be left hanging from the yardarm wherever they were apprehended. The same principle of universal jurisdiction was applied at Nuremberg to convict members of organizations like the SS and Gestapo whose primary purpose was to murder their presumed adversaries. Protocol on Amendments to the Protocol on the Statute of the Africa Court of Justice and Human Rights, art. 22 (June 27, 2014) (inserting art. 46), <http://lawyersofafrica.org/wp-content/uploads/2014/10/PROTOCOL-ON-AMENDMENTS-TO-THE-PROTOCOL-ON-THE-STATUTE-OF-THE-AFRICAN-COURT-OF-JUSTICE-AND-HUMAN-RIGHTS-EN.pdf>.

membership in a given criminal organization would not be sufficient to establish individual criminal responsibility.”⁷ Yet, members of criminal gangs or non-state actors engaged in terroristic activities may still today be brought to justice on several modes of liability. It is conceivable then that corporations or other legal entities engaged in such activities as international drug smuggling, counterfeiting, prostitution or similar crimes may have their leaders stand personal trial on charges of conspiracy, complicity, command responsibility, indirect perpetration, and co-perpetration under the Rome Statute,⁸ as well as being part of a joint criminal enterprise in other tribunals.⁹ This is because, as noted by Jackson and many others, the law cannot remain static. It must be interpreted broadly when necessary to meet the changing needs of the society it is designed to protect. Yet, this might not always be easy to do. Even at Nuremberg, the results of three trials specifically against industrialists were disappointing to the Prosecutors. It was difficult to prove that the accused had personal knowledge of atrocities or the intended murderous use of products such as poison gas. Furthermore, the American judges were unaccustomed to seeing prominent and wealthy defendants being charged with complicity in mass murder. Many of the accused were acquitted or given light sentences. A few years later, all convicted war criminals were released. It was purportedly based solely on humanitarian considerations, but surely there was also an element of political pressure.

Whereas the strict requirements of criminal law might impose a heavy burden on the system of justice trying to provide remedy for corporate crimes, history teaches us that other ways have been attempted to bring corporations to account. Human rights violations can indeed be deterred by criminal punishment of perpetrators as well as civil liability of the companies responsible. I dealt with the issue of corporate financial responsibility for atrocities long after the Nuremberg trials were over. The Directors of some of Germany’s most respected corporations, including some who had gotten off easily at Nuremberg, were

⁷ Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, May 21, 2003). The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) further found that “[c]riminal liability pursuant to joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.” *Id.*, ¶ 26. A few years after this decision of the ICTY, the International Criminal Court (“ICC”) departed from the joint criminal enterprise mode of liability on the basis of a different wording contained in the Rome Statute. *See, e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 335 (Pre-Trial Chamber I, Jan. 29, 2007) (“The Chamber considers that this latter concept – which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a), had the drafters of the Rome Statute opted for subjected approach for distinguishing between principals and accessories.” (emphasis added)). *See* Antonio Cassese, INTERNATIONAL CRIMINAL LAW 212 (2001) (arguing that the wording “committing jointly” of art. 25(3)(a) of the Rome Statute covers joint criminal enterprise).

⁸ Rome Statute of the International Criminal Court, art. 25(3), U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998) (*entered into force* July 1, 2002).

⁹ *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 185-234 (ICTY, Appeals Chamber, July 15, 1999); Case 002, Case No. 002/19-09-2007-ECCC-OCIJ (PTC37), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), D97/17/6, ¶ 100 (Extraordinary Chambers in the courts of Cambodia, Pre-Trial Chamber, May 20, 2010) (restricting its applicability to international crimes); Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Judgment, ¶ 485 (Special Court for Sierra Leone, Appeals Chamber, Oct. 26 2009).

asked to have the company compensate concentration camp survivors for their unpaid, grueling services. At the behest of leading Jewish charities, I headed a team of highly competent German refugee lawyers and tried to reach amicable settlements. The corporate responses were uniformly unreceptive. They argued that they did not employ such laborers. When presented with the contrary evidence, they said they were forced to do so. They maintained that working conditions were fine, and even German workers had to suffer in time of war. Some even noted that giving the inmates employment saved them from going directly to the gas chambers, thereby implying that survivors should be grateful to their saviors.¹⁰ Unfortunately, ethics and morality seem too often to be sacrificed on the altar of chicanery and greed. If a high official of a corporation is accused of such crimes as fraud, misfeasance, malfeasance, or nonfeasance, it is the responsible officer who should be held to personal account. Instead, the current practice allows criminal actions against a large company to be settled by a cash payment penalty coupled with a commitment that there will be no criminal prosecutions. Those who caused or benefitted from the crimes go scot-free and it is the innocent shareholders who have to foot the bill. Those who suffered harm are not precluded from suing the company for money damages based on the theory that the company was negligent in hiring such corrupt or incompetent agents.

Corporations reflect the mores of the society in which they function. A lawless society does not deter crime. It is doubtful whether those who oppose accountability will be receptive to new legal interpretations or institutions that might bring unlawful corporate officers before the bar of justice. It will require patience and determination to bring about the necessary change of hearts and minds. The rewards of relying on law rather than other unbalanced forms of power are immediate and incalculable. It will be some time before new institutions to end corporate misdeeds will become operational, but with patience and determination it can be done. In the meanwhile, we should attempt to use every tool in our legal toolbox to send the strong and unequivocal message that corporate impunity will not be tolerated. My guiding advice to all who seek a more humane world is to Never Give Up: It is up to YOU!

¹⁰ Details of the efforts to obtain compensation can be found in: BENJAMIN B. FERENCZ, *LESS THAN SLAVES* (1979); see also Martin Gilbert, *Working For Farben: A Review of Less Than Slaves*, NEW YORK TIMES, Dec. 1979, http://www.benferencz.org/assets/reviewslaves_gilbert.pdf.