

An International Jurisdiction for Corporate Atrocity Crimes

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[W]hen . . . [we] formulated a plan for the establishment of a ‘High Court of Nations,’ we were laughed to scorn as mere theorists and utopians. . . Today we proudly point to the fact that the Hague Tribunal has been established.¹

History attests to corporate actors’ capacity to facilitate or at times even plan “unimaginable atrocities that deeply shock the conscience of humanity”² and human rights abuses. Cases about corporate officials and corporations used as instruments to perpetrate atrocity crimes were once adjudicated under international law at Nuremberg.³ There, industrialists from among the most powerful elites were tried and convicted, and corporations themselves “suffered corporate death under international law.”⁴ Corporations at other times have been accused of complicity with the apartheid regime in South Africa,

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¹ Sir William Randal Cremer, Nobel Lecture: The Progress and Advantages of International Arbitration (Jan. 15, 1905) (“[W]hen . . . [we] formulated a plan for the establishment of a ‘High Court of Nations,’ we were laughed to scorn as mere theorists and utopians, the scoffers emphatically declaring that no two countries in the world would ever agree to take part in the establishment of such a court. Today we proudly point to the fact that the Hague Tribunal has been established; and notwithstanding the unfortunate blow it received in the early stages of its existence by the Boer War, and the attempt on the part of some nations to boycott it, there is now a general consensus of the opinion that it has come to stay.”)

² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, Preamble, *entered into force* July 1, 2002 [hereinafter, “Rome Statute”].

³ *See generally* United States v. Krauch (The I.G. Farben Case), VIII Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 1081 (1948), *available at* http://vmw.loc.gov/ir/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf.

⁴ Brief of Amici Curiae Nuremberg Scholars Omer Bartov et al. at 3, *Kiobel v. Royal Dutch Petroleum Co.* (Nos. 10-1491; 11-88) (Dec. 21, 2011) *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_nuremberg_bartov_et_al.authcheckdam.pdf.

support for abuses against the Ogoni people in Nigeria, and contributions to a paramilitary group that summarily executed union leaders and workers in Colombia, among other crimes and violations.⁵ While corporate liability could not serve as a full substitute for the prosecution of individuals, it may provide an additional tool to reform harmful corporate culture where individual liability is not feasible.

Corporate actors have not only grown in their potential to do harm at a transnational scale, but they have also played an increasingly important role as their contributions to global governance have also increased. The seeming fragmentation and decentralization of international law has thus given corporations the responsibility to shape and implement internationally applicable norms. However, it may seem that the mechanisms to ensure their accountability have not kept pace with these evolving trends—the theoretical separation between the public and private spheres remains an obstacle in international law.⁶

Despite the establishment of international human rights instruments that impose duties on “every individual and every organ of society,”⁷ there remains a gap in corporate accountability at the international level. International human rights courts and monitoring bodies are limited to trying states under specific treaty violations. This approach reflects the traditional presumption of international law that states are the unit-actors on the international sphere. It assumes that governments have the power to control corporate activities within their borders and that international legal obligations on human rights are binding only upon States.⁸ While soft law industry standards exist, they are criticized for their lack of enforceability,⁹ which may disenfranchise victims from seeking actual judicial redress. The International Criminal Court (“ICC”) has not yet tried corporate individuals despite the possibilities offered by the Rome Statute for victims’ reparations.¹⁰

⁵ See, e.g., *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 241–43; *SERAC et al v. Nigeria*, ¶ 58 (African Commission on Human and Peoples’ Rights, Oct. 27, 2001), available at <http://www.achpr.org/communications/decision/155.96/>; *Cardona et al. v. Chiquita*, 760 F.3d 1185 (11th Cir. 2014); *Doe v. Drummond*, 2010 U.S. Dist. LEXIS 145386 (N.D. Ala. Apr. 30, 2010).

⁶ See Benedict Kingsbury et al, *The Emergence of Global Administrative Law*, 68, LAW & CONTEMP. PROBS. 15 (2004-2005); Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4(2) *Review of International Political Economy* 261–285 (2007).

⁷ See UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Preamble.

⁸ See International Covenant on Civil and Political Rights, Art. 2(1), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively; American Convention on Human Rights, Art. 1(1), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

⁹ See Kenneth Abbott, *Hard and Soft Law in International Governance*, in INTERNATIONAL ORGANIZATIONS at 422 (“Soft law has been widely criticized and even dismissed as a factor in international affairs. Realists, of course, focus on the absence of an independent judiciary with supporting enforcement powers.”).

¹⁰ See Rome Statute, *supra* note 2, Articles 15.3 (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation”), 15.4 (“If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation”), 75 (on “Reparations to Victims”) entered into force July 1, 2002. See generally Eric Johnson,

At the domestic level, attempts to close the accountability gap have stalled. Under the U.S. Alien Tort Statute (“ATS”), “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹¹ By opening a door for alien victims of atrocities committed abroad to bring their cases under the ATS, the *Filartiga* decision observed that U.S. courts took “a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”¹² In 2013, however, the U.S. Supreme Court limited the extraterritorial application of the ATS in its landmark decision of *Kiobel v. Royal Dutch Petroleum*.¹³ As the promise of *Filartiga* dimmed, human rights advocates have increasingly called for the U.S. Supreme Court to clarify when ATS claims can be brought to U.S. courts, while others have called for an international judicial body in their pursuit of justice.¹⁴

Yet this pursuit of justice is not limited to common law courts and also extends beyond the global North. Countries such as Austria, Brazil, Belgium, Chile, China, Croatia, Cyprus, Czech Republic, France, Guatemala, Hungary, Iceland, Indonesia, Japan, Lebanon, Lithuania, Morocco, Netherlands, Norway, Portugal, Republic of Korea, Romania, Senegal, Spain, Switzerland, Syria, and the United Arab Emirates, have enacted legislation under which corporations could be held liable under criminal law.¹⁵ Likewise, Ecuador and South

“Blood Diamonds” (Stanford University ed.), available at <http://web.stanford.edu/class/e297a/Conflict%20in%20Sierra%20Leone.htm>; Nicholas S. Briggs, Conflict Diamonds in West Africa (Stanford University ed.), available at <http://web.stanford.edu/class/e297a/Conflict%20diamonds%20in%20West%20Africa.htm>.

¹¹ ALIEN’S ACTION FOR TORT, 28 USCS § 1350.

¹² *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

¹³ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013).

¹⁴ Business & Human Rights Resource Centre, Corporate Legal Accountability Annual Briefing, 1 (Jan. 23, 2015), available at <http://business-humanrights.org/sites/default/files/documents/BHRRC-Corp-Legal-Acc-Annual-Briefing-Jan-2015-FINAL%20REV.pdf>. See also Petition for Writ of Certiorari, Cardona v. Chiquita, No. 14-777 (U.S. July 24, 2004) & Petition for Writ of Certiorari, Lungisile Ntsebeza et al v. Ford Motor Company Int’l, (U.S. Feb. 12, 2016), <http://hrp.law.harvard.edu/wp-content/uploads/2016/02/Petition.pdf>.

¹⁵ See, e.g., Law on the Responsibility of Associations (*Verbandsverantwortlichkeitsgesetz*) of 2005 (Austria); Brazilian Federal Law 9.605/98, Article 3 (Brazil); Belgian Criminal Code, Article 5 (Belgium); Law 20.393 (2009) (Chile); Chinese Criminal Code, Article 30 (China); Act No. 151/03 on the Responsibility of Legal Persons for Criminal Offences (Croatia); Criminal Code of Cyprus, Section 4 (Cyprus); Criminal Procedure Law, Sections 46 (1) (b), 72, 95 (Cyprus); Act No. 418/2011 Coll., on Corporate Criminal Liability, §§ 2-3 (Czech Republic); French Criminal Code, Article 121-2 (France); Guatemalan Criminal Code, Article 38 (Guatemala); Hungarian Criminal Code, Section 70(1)(8), (3) (Hungary); Act CIV of 2001 on Criminal Measures Applicable to Legal Persons (Hungary); General Criminal Code of Iceland, Article 19 a-c (Iceland); Law No. 23 of 1997 (Law Concerning Environmental Management), Articles I (24) and 41-48 (Indonesia); Law 31 of 1999 (Eradication of the Criminal Act of Corruption), Article I (3) (Indonesia); Act Preventing Escape of Capital to Foreign Countries (1932) (Japan); Securities and Exchange Act of 2002, Article 207 (Japan); Corporation Tax Act of 2013, Article 163 (1) (Japan); Unfair Competition Prevention Act 2005, Article 22(I) (Japan); Lebanese Criminal Code, Article 210 (Lebanon); Lithuanian Criminal Code, Art. 20 (Lithuania); Moroccan Criminal Code, Article 127 (Morocco); Dutch Criminal Code, Article 51 (Netherlands); Norwegian Civil Penal Code, Chapter 3 a, Article 48 a-b (Norway); Portuguese Criminal Code, Article 11(2) (Portugal); Act on Preventing Bribery of Foreign Public Officials in International Business Transactions of 1998, Art. 4 (Republic of Korea); Romanian Criminal Code, Article 45 (1) (Romania); Senegalese Penal Code (Senegal), Article 163 *bis*; Spanish Criminal Code, Article 31 (Spain); Swiss Criminal Code, Article 102 (Switzerland); Syrian Criminal Code (Syria), Article 209 (2); United Arab Emirates Penal Code, Article 65 (United Arab Emirates).

Africa have proposed a treaty regulating the operation of transnational corporations.¹⁶ The African Union has recently issued a Protocol expanding the jurisdiction of the recently merged African Court of Justice and Human Rights “over legal persons”¹⁷ for crimes defined in the Rome Statute and other crimes.¹⁸ Lastly, the Special Tribunal for Lebanon provided one of the clearest statements that corporate liability is possible under international law by holding that a corporation could be accused for contempt.¹⁹ “[I]n a majority of the legal systems in the world,” the tribunal wrote, “corporations are not immune from accountability merely because they are a legal - and not a natural - person.”²⁰

At the same time, consensus on corporations’ legal obligations is only beginning to emerge. After the rejection of the Draft Articles proposed by the International Law Commission, the U.N. Guiding Principles on Business and Human Rights has emerged as the only form of consensus guidelines to govern corporations.²¹ In the emerging field of “global private law,” corporations and industries have issued their own codes of conduct

¹⁶ See United Nations General Assembly, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/26/L.22/Rev.1 (June 24, 2014); United Nations General Assembly, Human rights and transnational corporations and other business enterprises, A/HRC/26/L.1 (June 23, 2014).

¹⁷ African Union, PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, Art. 22 adding Art. 46, 27 June 2014, available at <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>. See also African Union, PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, Art. 2, July 1, 2008, available at http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf.

¹⁸ These include including “mercenarism, corruption, 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.” See PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, *supra* note 25, Art. 14 adding Art. 28A. See also Douglass Cassel and Anita Ramasastry, White Paper: Options for a Treaty on Business and Human Rights, Legal Studies Research Paper No. 2015-38, 6 NOTRE DAME J. INT’L & COMP. L. i-x at 36, <http://scholarship.law.nd.edu/ndjicl/vol6/iss1/1/> (last visited: Feb. 22, 2016).

¹⁹ See Special Tribunal for Lebanon, Appeals Panel, Case No. STL-14-05/PT/AP/AR126.1 (a corporation can be held liable for contempt), *Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶¶ 33-74, 93 (Special Tribunal for Lebanon, 2 Oct. 2014), available at <https://www.stl-tsl.org/en/decision-on-interlocutory-appeal-concerning-personal-jurisdiction-in-contempt-proceedings>.

²⁰ *Id.*, ¶ 58.

²¹ See Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1 (for comments until January 15, 2003, and for discussion in July/August 2003). See also U.N. Human Rights Council, *United Nations Guiding Principles on Business and Human Rights*, Resolution 17/4 of June 16, 2011, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

under self-regulation,²² though these initiatives have been criticized for their legal softness and ambiguity, as well as their lack of enforceability.²³

The current state of affairs thus presents us with two legal vacuums for which there is still no consensus: the lack of precise binding norms regulating corporate acts and the absence of an international jurisdiction for corporate atrocity crimes. Given the status quo, this special issue of the *Harvard International Law Journal Online* aims to explore the idea of an international jurisdiction for corporate atrocity crimes. Are international forums to pursue such cases even appropriate or feasible? And if so, what form or forms might such tribunals take? This feature series presents authors' contributions in five different thematic groups.

The first section compiles features that address the problem of having—or currently not having—binding norms for corporate actors and explores the creation and enforcement of such obligations. Ambassador Luis Gallegos and Daniel Uribe recount the lessons from previous attempts to establish international tribunals for human rights abuses by private actors and encourage efforts to establish a legally binding international agreement on business and human rights. Sara McBrearty offers a private sector perspective in describing the primary challenges facing the business and human rights treaty proposed by Ecuador in the U.N. Human Rights Council. Benjamin Ferencz and Federica D'Alessandra write on the need to hold private enterprises accountable through criminal punishment and civil liability as deterrent factors. Finally, Caroline Kaeb explores the feasibility and role of monitorships within a comprehensive regime of criminal penalties.

The second section offers a critique by questioning the feasibility and appropriateness of resorting to international forums for corporate atrocities. Angel Cabrera Silva explores the effectiveness of creating new international bodies and laws to address corporate atrocities. Gabriela Quijano recommends focusing at the moment on the domestic criminal systems of the home and host states of corporations.

The third section then presents a contrasting viewpoint that analyzes how the ICC might serve in addressing corporate atrocities. Ambassador David Scheffer finds that corporate atrocities can be investigated and prosecuted before the ICC, albeit with complex amendments to the Rome Statute. Jelena Aparac believes that the amendment of the Rome Statute to include corporations, rather than international arbitration, would be the most opportune solution for international justice. Finally, in an interview with Luis Moreno-Ocampo, the first prosecutor of the ICC describes his views on the limits of the ICC's role in addressing corporate atrocities.

The fourth group of features explores the possibility of providing international jurisdiction for corporate crimes in regional forums. ICC Judge Chang-ho Chung surveys the existing approaches of regional courts toward corporate human rights violations, and discusses the need to establish an Asian Pacific Court of Human Rights. Commissioner Jesús Orozco-Henríquez finds it likely that the Inter-American System will be increasingly open to address the liability of corporations. In light of the promise of the Inter-American

²² Larry Backer, *Economic Globalization and the Rise Of Efficient Systems Of Global Private Lawmaking*, 39(4) UNIVERSITY OF CONNECTICUT LAW REVIEW (2007). See also University of Minnesota Human Rights Library, HUMAN RIGHTS GUIDELINES FOR BUSINESS (compiling corporate self-regulations) available at <http://www1.umn.edu/humanrts/links/conduct.html> (last visited: Nov. 25, 2015).

²³ See Kenneth Abbott, *supra* note 11 at 422 (“Soft law has been widely criticized and even dismissed as a factor in international affairs. Realists, of course, focus on the absence of an independent judiciary with supporting enforcement powers.”).

System, Ana María Mondragón argues for the Inter-American System of Human Rights to take steps toward enshrining standards of protections against corporate human rights abuses.

The fifth group of features explores the creation of an entirely new international forum to adjudicate corporate atrocities, with Juan Pablo Calderón-Meza proposing alternatives to an international court via arbitration rules driven by civil society. Likewise, Claes Cronstedt and Robert Thompson propose broadening the reach of existing international arbitration framework into an International Arbitration Tribunal on Business and Human Rights that would include human rights disputes involving multinational businesses and victims. In contrast, Maya Steinitz argues that given democratic legitimacy reasons, public adjudication of mass torts is preferable to private sector arbitrations.

We thank our contributors for participating in this issue and hope that the articles contained in this volume will offer another step forward in the pursuit of international justice.