

## Commercial Crime in War

... (A)s corporations have become multinational, and as civil wars increasingly seem ... anything but civil, so too has our notion of what is 'essentially domestic' changed.

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Irregular war economies are well integrated to regional and global economies. One of the principal mechanisms which enables this integration is commerce, the exchange of goods and services through commercial transactions. Commercial transactions – both formal and informal – are necessary to enable the flows of money, commodities, guns, and fighters, which move to and from conflict zones.

The legal-historical record clearly establishes that such transactions are conducted by a variety of individuals and organizations, including soldiers or rebels, their commanders, affiliated businesses, lone businessmen, and corporate entities. At times, such actors wear several hats, for example when military officials are also businessmen. But there is no doubt that companies and individual businesspeople are often integral to the transactions central to the functioning of war economies, including economic activity in war zones. As a result, an increasing number of companies<sup>2</sup> are finding themselves under investigation by national authorities for their involvement in crimes alleged to have taken place in armed conflict.<sup>3</sup>

<sup>1</sup> Franck, *Fairness in International Law and Institutions*, p. 220.

<sup>2</sup> Throughout the chapter the terms companies and corporations are used interchangeably to refer to legal persons, created or registered under municipal law, involved in commerce. The term 'business' is used here to encompass both legal persons and natural persons.

<sup>3</sup> Amnesty International, International Corporate Accountability Roundtable (ICAR), 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases' (Amnesty International, International Corporate Accountability Roundtable [ICAR],

Exploitation of labour and the acquisition or control of property are at the heart of economic activity in – or for – war. Earlier, I have examined the potential for international crimes, such as pillage and forced labour, to regulate these aspects of war economies. In this chapter I ask whether there are crimes beyond those of pillage and forced labour which might create liabilities for commercial activity connected to irregular warfare. The evidence from case law indicates that there is an emerging web of liabilities for business actors involved in irregular war economies, based on accomplice liability in domestic jurisdictions under criminal provisions with extraterritorial reach.

### THE 'TURN' TO CORPORATE CRIMINAL LIABILITY

Attempts by legal researchers, the present author included, to fit existing law to the pathologies of war economies have tended to frame the issue as either one of potential liabilities for multinational corporations,<sup>4</sup> or as relating to the problems arising from the illegal exploitation of natural resources.<sup>5</sup> At times, scholars have focused on some combination of the two, such as crimes committed by extractive industries in armed conflict.<sup>6</sup>

The focus on business in conflict makes sense for international law scholars, in part because business represents one aspect of a topical challenge for international law and international relations: the privatization of international relations and the increasing importance of non-state actors in the international

October 2016), [www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf](http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf); Mark Taylor, Robert C. Thompson, and Anita Ramasastry, 'Overcoming Obstacles to Justice, Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuse' (Fafo Institute for Applied International Studies, 2010), [www.fafono.org/pub/rapp/20165/index.html](http://www.fafono.org/pub/rapp/20165/index.html)

<sup>4</sup> Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations,' *Berkeley Journal of International Law* 20 (2002): 91. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (*New York University Journal of International Law and Politics* 47 (February 2014); Thompson, Ramasastry, and Taylor, 'Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes'.

<sup>5</sup> See Introduction; also Daniëlla Dam-De Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*; James G. Stewart, 'Corporate War Crimes'.

<sup>6</sup> James Stewart examined the role of the crime of pillage as a basis for corporate accountability in Stewart, 'Corporate War Crimes'. See also van den Herik and Dam-De Jong, 'Revitalizing the Antique War Crime of Pillage'.

system, including in armed conflict.<sup>7</sup> As described earlier, the precedent for the argument that corporations may be liable for international crimes lies in the post-war tribunals at Nuremberg, which prosecuted senior managers of German corporations that participated in war crimes and crimes against humanity.<sup>8</sup> Cassese has suggested that these have left a legacy of ‘war crimes of an economic nature’<sup>9</sup> in International Humanitarian Law (IHL) and International Criminal Law (ICL). In fact, prosecutors at the International Criminal Court and Special Court for Sierra Leone have spoken in favour of getting at the economic actors and activities they have come across in their investigations of war crimes and atrocities, in particular the commodity trade and financial aspects of arms provision.<sup>10</sup> As a result, legal scholars have begun to examine corporate involvement in international crimes in more detail.<sup>11</sup>

<sup>7</sup> Clapham, *Human Rights Obligations of Non-State Actors*. Marco Sassoli, ‘International Law and the Use and Conduct of Private Military and Security Companies in Armed Conflict,’ in *Companies in Conflict Situations: Building a Research Network on Business, Conflicts and Human Rights*, ICIP Research 01 (Institut Català Internacional Per La Pau, 2013), [www20.gencat.cat/docs/icip/Continguts/Publicacions/Arxius%20ICIP%20RESEARCH/WEB%20-%20ICIP\\_RESEARCH\\_NUM\\_01.pdf](http://www20.gencat.cat/docs/icip/Continguts/Publicacions/Arxius%20ICIP%20RESEARCH/WEB%20-%20ICIP_RESEARCH_NUM_01.pdf); James Cockayne, ‘Chapter Ten: Crime, Corruption and Violent Economies’, *Adelphi Series* 50, no. 412–13 (1 April 2010), 189–218.

<sup>8</sup> See Chapters 7 and 8; see Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes’, pp. 4–6. Ramasastry has argued that, although individuals were prosecuted at Nuremberg it is possible to read the judgments as indictments of the corporation involved; see Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations’. See also Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*.

<sup>9</sup> Cassese et al., *International Criminal Law, Cases and Commentary*, pp. 121–31. See Chapters 1 and 6.

<sup>10</sup> In September 2016, the Chief Prosecutor of the ICC announced in her policy paper on case selection that she will take ‘illegal exploitation of natural resources’ and other economic impacts into account when assessing the gravity of crimes for investigation by her office; see ‘Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation.’ Previously, ‘the Prosecutor pointed towards the economic actors as being those who might “bear greatest responsibility” and therefore merit his attention’, William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge University Press, 2007), p. 53, citing a ‘Paper on some Policy Issues Before the Office of the Prosecutor’, pp. 2–3, which specifically refers to ‘financial transactions, for example for the purchase of arms used in murder’. See also David M. Crane, ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts’, *Case Western Reserve Journal of International Law* 37 (2005):1, in which Crane, the then Prosecutor at the Special Court for Sierra Leone states that ‘(w)e have also exposed and are assisting in breaking up a multi-million dollar diamonds-for-guns joint criminal enterprise’.

<sup>11</sup> Annika Van Baar, ‘Corporate Involvement in International Crimes in Nazi Germany, Apartheid South Africa, and the Democratic Republic of the Congo’ (Vrije Universiteit, 2019).

Yet, there remains a range of views on the question of corporate criminal liability for international crimes. Bassiouni has stated that '[I]nternational criminal law and domestic criminal law has not proven effective' in regulating the private sector enablers of international crimes, by which he meant the 'lawyers, accountants, financial advisers, bankers and others',<sup>12</sup> who provide material support to the perpetrators of international crimes. Ruggie has found that states have differing standards with respect to responsibility for human rights of business enterprises operating in conflict zones, a fact that led him to conclude that there was a need to clarify those standards.<sup>13</sup> Baars has warned that even if standards could be clarified and the law made effective, such efforts would simply help to perpetuate the system that gives rise to the wrongs it seeks to prohibit: in seeking to use international criminal law norms to hold corporations to account, international jurists are merely 'congealing capitalism'.<sup>14</sup>

Nonetheless, James G. Stewart has suggested that there is evidence of a 'turn to corporate criminal liability' in attempts to ensure corporate responsibility.<sup>15</sup> Stewart has described this turn as resulting from the discovery of the potential for international crimes to be enforced against business entities in national legal systems of many countries.<sup>16</sup> The inspiration for Stewart's identification of a turn to criminal law arose in Switzerland in response to a complaint filed and a criminal investigation launched by Swiss prosecutors into Argor-Hereus, a Swiss gold refining company. The complaint alleged that Argor-Hereus had processed gold pillaged from the Democratic Republic of the Congo (DRC) and in doing so was in violation of Swiss anti-money

<sup>12</sup> M. Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors', *Journal of Criminal Law and Criminology* 98, no. 3 (2008); Symposium: Redefining International Criminal Law; New Interpretations and New Solutions (Spring 2008), pp. 711–810, p. 778.

<sup>13</sup> In 2011, the UN Special Representative on Business and Human Rights, John Ruggie, stated that all stakeholder groups had reported a need for greater consistency as to the legal protections afforded victims of business-related human rights abuse in situations of 'armed conflict or other situations of heightened risk'. 'Recommendations on Follow-up of the Mandate, Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (United Nations Human Rights Council, 11 February 2011), <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>

<sup>14</sup> Grietje Baars, 'Law(Yers) Congealing Capitalism: On the (Im)Possibility of Restraining Business in Conflict Through International Criminal Law' (University College London, 2012).

<sup>15</sup> Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute'.

<sup>16</sup> See also Kyriakakis, 'Developments in International Criminal Law and the Case of Business Involvement in International Crimes'; see also in the same edition Simon O'Connor, 'Corporations, International Crimes and National Courts: A Norwegian View.'

laundering (AML) statutes.<sup>17</sup> Stewart correctly identified *Argor-Hereus* as ‘one of the first criminal cases involving corporate responsibility for international crimes, and the first time that a company has ever faced criminal scrutiny for pillaging natural resources from war zones.’<sup>18</sup>

The foundation of this claim lies in the domestic nature of the charges. Since the Second World War cases, no international tribunal has specifically targeted economic actors over whom they might have jurisdiction, such as individual businesspeople or arms brokers.<sup>19</sup> As described in the previous chapters, when prosecuted by international tribunals, war crimes of an economic nature have the potential to create liabilities for individual business people (natural persons). But they have not created liabilities for companies (legal persons) because legal persons have been excluded from the jurisdiction of international criminal tribunals.<sup>20</sup>

Stewart’s point was, in part, that developments in international criminal law subsequent to the Second World War tribunals, in particular the globalisation of international criminal law norms through the negotiation of the Rome Statute, had created liabilities for corporate bodies at the national level. A turn to criminal prosecution of companies at the national level has been encouraged by the 2013 decision by the US Supreme Court to roll back the territorial reach of the Alien Tort Statute (ATS), in effect undermining a principal forum where plaintiffs had, since the 1990s, sought to assert extraterritorial civil claims against companies involved in international crimes. In *Kiobel v. Royal Dutch Shell* the Supreme Court restricted access to US federal courts by asserting a ‘presumption against extraterritoriality’. At the same time, the court stated that foreign victims seeking remedy for harms involving US domiciled corporations might gain access to the US federal courts only where the

<sup>17</sup> Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes’, p. 11; see later in this chapter for a discussion of the case.

<sup>18</sup> Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes’, pp. 6–7.

<sup>19</sup> The principal and perhaps sole exception is the indictment of Rwandan businessman Félicien Kabuga for acts of genocide based on his alleged role in helping to organize and finance the Interhamwe militia KABUGA. See ICTR-99-44B. Kabuga remained at large until detained in France in 2020.

<sup>20</sup> Heller points out that the IMT statutes did not specify jurisdiction with respect to natural persons but the judges did Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*; on attempts to negotiate inclusion of legal persons within the jurisdiction of the ICC, see Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court,’ in *Liability of Multinational Corporations Under International Law*, ed. M. T. Kamminga and S. Zia-Zarifi (Kluwer Law International), [www.academia.edu/24513911/The\\_Question\\_of\\_Jurisdiction\\_Under\\_International\\_Criminal\\_Law\\_Over\\_Legal\\_Persons\\_Lessons\\_from\\_the\\_Rome\\_Conference\\_on\\_an\\_International\\_Criminal\\_Court](http://www.academia.edu/24513911/The_Question_of_Jurisdiction_Under_International_Criminal_Law_Over_Legal_Persons_Lessons_from_the_Rome_Conference_on_an_International_Criminal_Court)

claims 'touch and concern the territory of the United States . . . with sufficient force to displace' the presumption.<sup>21</sup>

The *Kiobel* decision was widely perceived to have ended an era in which the US federal courts had been willing to hear civil actions alleging torts in which corporate abuse amounted to international crimes.<sup>22</sup> Yet, even as they limited the access of plaintiffs to the jurisdiction of the US federal courts, the justices recognized that this did not exclude the possibility that corporations could be held liable for international crimes. In his concurring opinion in *Kiobel*, Justice Breyer pointed to evidence of transnational liabilities in other countries as evidence that substantive jurisdiction in the United States and elsewhere continued to apply international crimes to business entities:

Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages. Certain countries, which find "universal" criminal "jurisdiction" to try perpetrators of particularly heinous crimes such as piracy and genocide . . . also permit private persons injured by that conduct to pursue "actions civiles," seeking civil damages in the criminal proceeding.<sup>23</sup>

By pointing to the *Argor-Hereus* case Stewart was making a similar point. He was not suggesting that somehow the floodgates of international criminal litigation against corporations outside the U.S. had been flung open. Rather his point was to suggest that, in the wake of *Kiobel*, a re-focusing on the options available for holding companies to account was likely, in a context in which the ATS shone much less brightly as an option.

Evidence for this claim could be found in a 2006 comparative survey of sixteen jurisdictions conducted by the Fafo Institute for Labour and Social Research.<sup>24</sup> The project set out to look for evidence of liabilities for business

<sup>21</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1669 (2013).

<sup>22</sup> For a first-hand account of that history, and reflections on the place of *Kiobel* in it, see Peter Weiss, 'Should Corporations Have More Leeway to Kill than People?', in *Companies in Conflict Situations: Building a Research Network on Business, Conflicts and Human Rights*, ICIP Research 01 (Institut Català Internacional Per La Pau, 2013).

<sup>23</sup> Justice J. Breyer, concurring in judgment in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1669 (2013) at p. 11 citing Ramasastry, Thompson, and Taylor (2009).

<sup>24</sup> The project was led by the present author Results were published as Anita Ramasastry and Robert C. Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries. Executive Summary' (Fafo Institute for Applied International Studies, 2006); see also Thompson, Ramasastry, and Taylor, 'Translating Unocal'. For the results of the pilot study see Taylor et al., 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law' (Fafo Institute for Applied International Studies, 2005).

entities under international criminal law as implemented in domestic law. At the time, we could find no conviction of a corporate entity for involvement in war crimes, crimes against humanity, or genocide since the Second World War cases.<sup>25</sup> But we found more evidence of statutory law than had been expected, and suggested a ‘potential web of liability’,<sup>26</sup> both criminal and civil, was emerging.

This web had been built with the help of the incorporation of ICL to the municipal law of a variety of jurisdictions. This had resulted in the statutory collocation of the elements necessary for the prosecution of businesses involved in international crimes. The research indicated that the incorporation of the ICC statute provisions into the criminal law systems of states might interact with pre-existing provisions for accomplice liability and corporate criminal liability. In effect, this ‘potential web of liability’ has emerged from the globalization of international criminal law norms, via the domestic criminal laws of state parties to the Rome Statute.<sup>27</sup> The elements of this web included

- Substantive jurisdiction for international crimes, including war crimes, crimes against humanity, and genocide
- Jurisdiction over both legal and natural persons in the criminal law of the country of the company domicile
- Extraterritorial jurisdiction in cases involving international crimes, on the basis of either nationality or territorial or universal principles
- Accomplice liability as a mode of responsibility applicable to business entities under domestic criminal law

The content of this web of potential liability was confirmed and developed by a series of studies in the decade following the Fafo research. Reflecting on the challenges of corporate criminal liability, the UN Special Representative of the Secretary-General (SRSG) on Business and Human Rights (2005–11), Professor John Ruggie, stated

... corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the

<sup>25</sup> Several cases have since resulted in convictions of businesspeople (not legal entities) for international crimes, in the Netherlands and Argentina. See Table 9.1. In addition, attempts persist: by 2019, there were a handful of cases involving corporate actors under investigation by the judicial systems of at least two European countries. These included the Lafarge case (France), Qosmos case (France), Amesys case (France), and Lundin case (Sweden).

<sup>26</sup> Thompson, Ramasastry, and Taylor, ‘Translating Unocal’.

<sup>27</sup> Ramasastry and Thompson (Fafo, 2006), p. 27; see also Thompson, Ramasastry, and Taylor.

other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.<sup>28</sup>

In 2008, the International Commission of Jurists (ICJ) published a three-volume study on corporate complicity in international crimes.<sup>29</sup> Later that same year, the Red Flags initiative, produced by a group of experts from government and civil society, and based in part on the research by International Alert and Fafo, sought to advise companies about the potential liability risk arising in situations of so-called 'high risk', which amounted to situations of armed conflict or severe state repression.<sup>30</sup>

In 2010, the UN SRSG on Business and Human Rights convened several meetings of member states to discuss home state responses to their businesses in conflict zones. Those meetings resulted in the development of a regulatory approach, reflected in UN Guiding Principle (UNGPs) 7, which recommended that state address business in conflict zones through various tools, from policy engagement to criminal prosecution.<sup>31</sup>

This activity contributed to the recognition in 2011 by the UN Human Rights Council (HRC) of the potential for criminal liability for businesses involved in human rights abuse, particularly in conflict situations. The HRC did this in its unanimous endorsement of the UNGPs, which identified an 'expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility'.<sup>32</sup> This required that businesses "Treat the

<sup>28</sup> A/HRC/4/35 (February 2007).

<sup>29</sup> 'Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, Volumes 1, 2, 3,' 1 January 2008, [www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/](http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/)

<sup>30</sup> 'Red Flags: Liability Risks for Companies Operating in High Risk Zones', [www.redflags.info](http://www.redflags.info), Fafo and International Alert, October 2008.

<sup>31</sup> See Chapter 2; United Nations, 'Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie,' 27 May 2011, [www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf](http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf)

<sup>32</sup> Commentary to GP 23 'Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc HR/PUB/11/04' (United Nations Office of the High Commissioner for Human Rights, 2011). The notion of a 'web' of corporate liability arising from transnational approaches to the prosecution of international criminal law also appears in Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (Geneva:

risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate'.<sup>33</sup> The Commentary to UNGP 23 states

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue ... In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

Ruggie's work at the UN had illustrated what he described as 'divergent interpretations' by national jurisdictions of 'the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes'.<sup>34</sup> At the end of his mandate, Ruggie suggested that states should consult about how business might be liable for international crimes, and might consider harmonizing their approaches through an international instrument.

Subsequent to the Ruggie mandate, the HRC followed up on this recommendation by mandating the Office of the High Commissioner for Human Rights (OHCHR) to conduct studies and develop guidelines on judicial remedy, which included an examination of the obstacles and potential solutions to criminal prosecutions of companies in national jurisdictions.<sup>35</sup> This was, in part, stimulated by other developments at the Council, in particular the interest of some states, supported by a broad coalition of civil society organization, in a business and human rights treaty, which was the subject of an inter-governmental working group from 2013. The OHCHR produced a thorough study of criminal and civil law remedies which, in the appended substantive examples, noted that '... categories of severe human rights abuses that carry the possibility of corporate liability under domestic public law regimes in many jurisdictions include ... participation in acts amounting to international crimes'.<sup>36</sup>

Office of the UN High Commissioner for Human Rights, 2014), [www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf](http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf)

<sup>33</sup> UNGP 23 (c).

<sup>34</sup> 'Recommendations on Follow-Up to the Mandate' (February 2011). See [www.globalgovernancewatch.org/docLib/20110218\\_GGW\\_-\\_Ruggie.pdf](http://www.globalgovernancewatch.org/docLib/20110218_GGW_-_Ruggie.pdf)

<sup>35</sup> Zerk, 'Corporate Liability for Gross Human Rights Abuses'.

<sup>36</sup> See section '1.2 Domestic public law regimes make appropriate provisions for corporate criminal liability, or its functional equivalent, in cases where business-related human rights impacts are severe', in 'The OHCHR Accountability and Remedy Project, Illustrative Examples for Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse, Companion Document to A/HRC/32/19 and A/

While the inter-governmental working group held annual sessions, civil society organizations pursued two tracks specific to the issue of corporate involvement in conflict. One track emphasized self-regulation, based on government advice to companies operating in conflict situations about how to manage risks.<sup>37</sup> A second track attempted to convince policymakers of the importance of pursuing prosecutions based on existing law.<sup>38</sup> Both tracks were concerned to push a more diligent application of existing law and business best practice, regardless of progress (or lack thereof) on treaty discussions, and both would generate responses in the form of policy statements from states and litigation.

#### COMMERCE AS CRIME IN IRREGULAR WARFARE: CORPORATE PERPETRATORS

As Stewart noted, while *Argor-Hereus* was the first case in which a prosecutor had investigated charges directed at a company (as opposed to an individual businessperson), *Argor-Hereus* was not the first domestic case involving business in allegations of war crimes. In 2005, a court in the Netherlands found Dutch businessman Frans van Anraat guilty of aiding and abetting war crimes committed by the Iraqi regime of Saddam Hussein and sentenced van Anraat to seventeen years in prison. In addition to van Anraat, the 2017 conviction of another Dutch businessman<sup>39</sup> on charges related to the war in Liberia, and the 2019 conviction in Argentina of Ford Motor Company executives on charges related to the dictatorship and repression in the 1970s, are the only successful convictions of businesspeople for involvement in international crimes since the post-war tribunals. No company has been convicted for such crimes.

HRC/32/19/Add.1' (United Nations, Office of the High Commissioner for Human Rights, 5 July 2016).

<sup>37</sup> For an example of this approach see discussion of the International Code of Conduct for private security providers in Chapter 5; see also 'From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries' (Institute for Human Rights and Business, 2011), [www.ihrb.org/pdf/from\\_red\\_to\\_green\\_flags/complete\\_report.pdf](http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf)

<sup>38</sup> 'Strategic Litigation Impacts: Insights from Global Experience' (Open Society Justice Initiative, 2018); Amnesty International, International Corporate Accountability Roundtable (ICAR), 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases' (October 2016). See also Mark Taylor and Seema Joshi, 'Simply Criminal: Targeting Rogue Business in Violent Conflict' (Global Witness, 10 January 2010), [www.globalwitness.org/library/simply-criminal-targeting-rogue-business-violent-conflict](http://www.globalwitness.org/library/simply-criminal-targeting-rogue-business-violent-conflict)

<sup>39</sup> See the discussion of the Kouwenhoven case in the text that follows.

In the decade and a half after the entry into force of the Rome Statute of the ICC, the evidence of Stewart's 'turn' to business liability for international crimes has continued to mount. Between 2002 and 2019, at least eighteen separate investigations were launched by national prosecutors into allegations of business involvement in crimes committed in the context of armed conflict, excluding violations of unilateral sanctions. Table 9.1 lists the cases in which formal criminal investigations were launched.

All cases involved armed conflicts characterized by irregular warfare, in that the crime scene was located in the context of civil wars, occupation, or some form of insurgency and counterinsurgency. In all cases, the allegations arose from commercial support to the perpetrators of international crimes – such as financial support, supplying weapons – or from the violation of a prohibition against certain kinds of business activity, such as transactions with a designated terrorist organization, or investments in occupied territory. In each case, the *actus reus* of the alleged crime occurred within the scope of the business activities of the defendant, not as political activism conducted on the margins of business activity. The potential liabilities arose from a variety of statutory sources, including international humanitarian or criminal law incorporated at the national level, as well as domestic criminal laws governing both violent crime and economic crime.

The cases involved different modes of responsibility, both accomplice liability and direct perpetration. With respect to direct perpetration, perhaps the most obvious form of criminal liabilities arises for businesses involved in the use of force, such as private security companies. For example, in October 2014, four Blackwater private security contractors were convicted for murder, manslaughter, and weapons charges in connection with the killing of seventeen Iraqis in Nasour Square Baghdad in 2007. At the time, they were providing security to US diplomats in Iraq as part of the US military operation in the wake of the 2003 invasion of Iraq.<sup>40</sup> The four Blackwater guards were prosecuted on the basis of domestic US criminal law, which was given jurisdiction over the acts by the Military Extraterritorial Jurisdiction Act (MEJA). The MEJA provides US federal courts with jurisdiction over crimes committed overseas by defence contractors that support missions of the Department of Defense.<sup>41</sup>

<sup>40</sup> Kirk Semple, 'In Iraq, Relief after News of Blackwater Convictions', *New York Times*, 23 October 2014, A3, [www.nytimes.com/2014/10/24/world/middleeast/in-iraq-relief-after-news-of-blackwater-convictions.html](http://www.nytimes.com/2014/10/24/world/middleeast/in-iraq-relief-after-news-of-blackwater-convictions.html)

<sup>41</sup> 18 U.S.C. § 3261.

TABLE 9.1 *National Criminal Investigations of Commercial Actors in the Context of Conflict, 2002–19<sup>a</sup>*

| Case Name<br>(Sector)                   | Conflict               | Crimes Investigated                                                      | Defendant | Forum           | Status (12/2019)              |
|-----------------------------------------|------------------------|--------------------------------------------------------------------------|-----------|-----------------|-------------------------------|
| <i>Ford</i><br>(Automotive)             | Argentina<br>(1976–83) | Complicity in torture, crimes against<br>humanity                        | Managers  | Argentina       | Convicted                     |
| <i>Van Anraat</i><br>(Chemical)         | Iraq (1988)            | Complicity in use of chemical weapons<br>(1988)                          | Manager   | NL              | Convicted                     |
| <i>Van Kouwenhoven</i><br>(Timber)      | Liberia                | Complicity in war crimes                                                 | Manager   | NL              | Convicted                     |
| <i>Lundin</i><br>(Oil and Gas)          | Sudan                  | Complicity in war crimes                                                 | Manager   | Sweden          | Pre-trial<br>process          |
| <i>Anvil</i><br>(Mining)                | DRC                    | Complicity in killings                                                   | Manager   | DRC             | Acquitted                     |
| <i>DLH</i><br>(Timber)                  | Liberia                | <i>Recel</i> (handling stolen goods)                                     | Company   | France          | Dismissed                     |
| <i>Viktor Bout</i><br>(Arms, Logistics) | Colombia               | Support to terrorism                                                     | Manager   | USA             | Convicted                     |
| <i>Blackwater</i><br>(Security)         | Iraq (2007)            | Manslaughter, weapons (US Military<br>Extraterritorial Jurisdiction Act) | Employees | USA             | Convicted                     |
| <i>Danzer</i><br>(Timber)               | DRC                    | Complicity in rape, unlawful detention                                   | Managers  | DRC,<br>Germany | Investigation<br>discontinued |
| <i>Chiquita</i><br>(Food)               | Colombia               | Support to terrorism                                                     | Company   | USA             | Convicted                     |
|                                         | DRC                    | Aggravated money laundering (pillage)                                    | Company   | CH              |                               |

(continued)

TABLE 9.1 (*continued*)

| Case Name<br>(Sector)                                                         | Conflict  | Crimes Investigated                               | Defendant              | Forum   | Status (12/2019)           |
|-------------------------------------------------------------------------------|-----------|---------------------------------------------------|------------------------|---------|----------------------------|
| <i>Argor-Hereus</i><br>(Processing)                                           |           |                                                   |                        |         | Investigation<br>Suspended |
| <i>Riwal</i><br>(Construction)                                                | Palestine | Grave breaches of<br>IHL                          | Company                | NL      | Investigation<br>Suspended |
| <i>Amesys</i><br>(Technology)                                                 | Libya     | Complicity in torture (2011–12)                   | Company,<br>Mangers    | France  | Pre-trial<br>process       |
| <i>Qosmos</i><br>(Technology)                                                 | Syria     | Complicity in torture (2011–12)                   | Company,<br>Managers   | France  | Pre-trial<br>process       |
| <i>LafargeHolcim</i><br>(Construction)                                        | Syria     | Complicity in war crimes, support to<br>terrorism | Company                | France  | Pre-trial<br>process       |
| <i>RWM Italia S.p.A</i><br>(Arms)                                             | Yemen     | Arms export control violations                    | Managers               | Italy   | Pre-trial<br>process       |
| <i>A.A.E Chemie Trading, Anex<br/>Customs, Danmar Logistics</i><br>(Chemical) | Syria     | Chemical export control violations                | Managers,<br>Companies | Belgium | Convicted                  |
| <i>Jaume Bagot et al</i><br>(Antiquities)                                     | Libya     | Support to terrorism                              | Managers               | Spain   | Pre-trial<br>process       |

<sup>a</sup> The list includes cases in which prosecutorial authorities have launched preliminary investigations or issued indictments but excludes criminal complaints which were not formally investigated. Sources: Legal Portal, Business and Human Rights Resources Centre; Zerk, ‘Corporate Liability for Gross Human Rights Abuses’.

Unlike the majority of cases in Table 9.1, in which commercial transactions implicated business as accomplices in the violent crimes of others, the *Blackwater* defendants were convicted as perpetrators. Although the killings involved the criminal use of force by civilian commercial contractors in the context of an armed conflict, they were not prosecuted as war crimes.<sup>42</sup> Nor were they prosecuted as economic crimes: manslaughter is not a crime which seeks economic gain, it is a violent crime. Still, those convicted in the *Blackwater* case were alleged to have committed crimes in the course of doing their work, which was based on a commercial contract. Their presence in Iraq was no doubt at least in part motivated by economic gain, but the killings in question do not appear to have had a specific economic motive. The *Blackwater* guards were providing a service. As such their conviction affirms that an otherwise legal commercial activity or transaction, such as providing security, may be criminalized when it is conducted in an illegal manner.

This is reminiscent of the criminal liabilities that arose for business individuals for their participation in pillage and slavery during the Second World War, discussed in the previous chapters. The Nazi industrialists formulated the pillage of factories from France as normal business transactions but the court determined that the nature of the transactions – acquisition of property without consent of the owner – rendered it a crime, the crime of pillage. Similarly, participation by certain companies in Nazi Germany's extensive programme of slave labour was a common way to obtain labour for industries in the Nazi war economy but was criminalized as enslavement and forced labour, including as crimes which carried liabilities for business people who took active advantage of the programme.

#### SUPPORT TO TERRORISM

Beyond crimes such as manslaughter, pillage, and slavery, there are other crimes involving transnational commercial activity, which may give rise to

<sup>42</sup> Similarly, allegations which have arisen from commercial relationships involving security contractors alleged to have participated in torture at the Abu Ghraib prison in Iraq have been pursued through civil (tort) action. 'In June 2004, proceedings were launched in the US courts by a group of Iraqi nationals against two defence contractors alleging grave human rights violations by contractors providing interpretation and interrogation services at Abu Ghraib prison in Iraq. The two defendants (CACI and Titan) were alleged to have participated in torture, war crimes, crimes against humanity, sexual assault and cruel, inhuman and degrading treatment. The claims were based on common law tort and the ATS. 'Abu Ghraib Lawsuits against CACI, Titan (Now L-3), Business & Human Rights Resource Centre,' <https://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-l-3-o>

liability. Financing a criminal organization was the basis for prosecutions of German industrialists at the Nuremberg trials after the Second World War. Several members of a group of businessmen known as the 'Friends of Himmler' were convicted of payments to the Nazi Party. Those convictions were dependent upon the characterization of the Nazi Party as a criminal organization by the post-war International Military Tribunal at Nuremberg.<sup>43</sup>

A similar approach has been taken in the international law of counterterrorism. There is a lack of consensus over the definition of terrorist acts,<sup>44</sup> which has prompted a tendency to simply list groups as designated terrorist groups and criminalize associations with those groups. Despite the moral objections to guilt-by-association (as distinct from findings of guilt based on due process, and evidence of *actus reus* and a *mens rea*), and questions about the effectiveness of such an approach, states have actively sought to coordinate their repression of groups designated as terrorist groups, including support to such groups.

The idea of criminalizing support to terrorist acts under domestic law finds extensive authority under the treaty instruments that have populated the international law of counterterrorism in the decades prior to the Al-Qaida attacks on the United States on 11 September 2001. Many of these conventions have clauses requiring state parties to repress support to terrorism.<sup>45</sup> In addition, counterterrorism conventions also require state parties to prohibit various forms of economic activity, such as the production or trade in unmarked explosives or the trade in nuclear material. The International Convention for the Suppression of Financing for Terrorism requires state parties to criminalize both the provision or collection of funds for terrorist acts<sup>46</sup> and participation as an accomplice or as part of a common plan or conspiracy to finance such acts.<sup>47</sup>

Since 11 September 2001, the central reference point to the international legal authority for states to criminalize support to terrorism stems from Security Council 1323 (2001). Under Article 2, the Council, acting under

<sup>43</sup> *United States of America v. Friedrich Flick et al.* (Case V) 3 March 1947–22 December 1947.

<sup>44</sup> van den Herik and Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order*.

<sup>45</sup> See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft (1970) Article 1 (b); International Convention for the Suppression of Terrorist Bombings, Article 2 (a), (b), (c); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation Article 3 (2) (b).

<sup>46</sup> International Convention for the Suppression of Financing for Terrorism, Article 2.

<sup>47</sup> *Ibid.*, Article 2.5.

Chapter VII, decided states should, among other things, implement the following;

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; . . .
- (b) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (c) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (d) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice . . .

The widespread adherence to counterterrorism treaties and the accompanying criminalization under national law, has resulted in an increasing risk for businesses operating in conflict zones where terrorist organizations may also be operating. For example, in late 2016, a criminal complaint was filed in a French court against LafargeHolcim, the world's largest cement company, alleging the company had made payments to the Islamic States (IS) to ensure freedom of movement in the areas around its plant near Raqqa in Syria and had purchased raw materials used in the operation of the plant from a IS controlled source.<sup>48</sup> The complaint, filed by lawyers representing former employees of the Syrian subsidiary of LafargeHolcim, alleged complicity in war crimes and crimes against humanity as well as financing of terrorism.<sup>49</sup> Charges relating to similar facts but alleging violations of EU sanctions which banned commercial ties to IS entities were filed separately by the French Ministry of the Economy (Bercy).<sup>50</sup>

<sup>48</sup> 'Communiqués de Presse: Lafarge Poursuivi Pour Financement Présumé de Terrorisme,' SHERPA (blog), 15 November 2016, [www.asso-sherpa.org/lafarge-poursuivi-financement-presume-de-terrorisme-2](http://www.asso-sherpa.org/lafarge-poursuivi-financement-presume-de-terrorisme-2)

<sup>49</sup> 'Communiqués de Presse: Lafarge Poursuivi Pour Financement Présumé de Terrorisme'.

<sup>50</sup> 'Activités Du Cimentier Lafarge En Syrie: Bercy a Saisi La Justice,' L'Express.fr, 19 January 2017, [www.lexpress.fr/actualites/1/societe/activites-du-cimentier-lafarge-en-syrie-bercy-a-saisi-la-justice\\_1870730.html](http://www.lexpress.fr/actualites/1/societe/activites-du-cimentier-lafarge-en-syrie-bercy-a-saisi-la-justice_1870730.html). In early 2017, LafargeHolcim admitted the facts after an internal investigation. 'LafargeHolcim Admits to 'Unacceptable' Activity in Syria', *Financial Times*, [www.ft.com/content/ddb29388-ffb-11e6-8d8e-a5e3738f9ae4](http://www.ft.com/content/ddb29388-ffb-11e6-8d8e-a5e3738f9ae4). At the time of writing, the cases had yet to be concluded.

The charge of support to terrorism presents certain advantages to prosecutors over those offered by international crimes. Establishing complicity in international crimes committed by IS will involve establishing the provision of material support to the group with respect to particular crimes committed by that group and establishing that the defendant was in possession of the requisite knowledge or intent required under domestic statutes for international crimes. However, by purchasing material from the group, the company is alleged to have breached laws against the financing of terrorist organizations, a provision with a less complicated subjective element (*mens rea*): rather than intent specific to a crime or knowledge of the likelihood that a crime might be committed, the subjective element in a terrorism charge may involve a lower threshold, such as awareness of the identity of the recipient of the transaction, or simply a failure of a duty of care to take measures against the financing of terrorism.

This perhaps explains why counterterrorism statutes have become the option of choice for prosecutors in the United States. For example, in 2007 Chiquita Brands International Inc. pleaded guilty in a US District Court to engaging in transactions with a terrorist organization. The conviction arose from payments that Chiquita allegedly made over a period of several years to the violent paramilitary organization United Self-Defense Forces of Colombia (AUC). The AUC had been designated by the US government as a terrorist organization in 2001. This designation made it a federal crime for Chiquita, as a US corporation, to provide money to the AUC.<sup>51</sup>

In 2008, notorious arms trafficker Viktor Bout was arrested in Thailand as part of a sting operation launched by US law enforcement in which Bout was led to believe he was making a deal with representatives of the FARC, a Colombian insurgent group which the United States has designated as a terrorist organization. Court documents show that Bout's commitments to the FARC included 700–800 surface-to-air missiles (SAMs), 20,000–30,000 AK–47s, 5 tons of C4 explosives, ZU–23 anti-aircraft cannons, night-vision equipped sniper rifles, land mines, ultralight aircraft outfitted with grenade launchers, and unmanned aerial vehicles. On the basis of conversations, in which Bout supported the idea of the FARC shooting down US-staffed counter-narcotics surveillance aircraft, Bout was charged with conspiracy to

<sup>51</sup> In April 2003, Chiquita made a voluntary self-disclosure to the US government of its payments to the AUC, giving rise to the investigation. During this period, human rights organizations identified the AUC as one of several organizations involved in killings and torture of civilians. 'Chiquita Lawsuits (Re Colombia), Business & Human Rights Resource Centre,' <http://business-humanrights.org/en/chiquita-lawsuits-re-colombia>. <http://business-humanrights.org/en/chiquita-lawsuits-re-colombia>

kill US nationals and conspiracy to provide material support to a designated foreign terrorist organization. Bout was sentenced to twenty-five years in prison.<sup>52</sup>

#### COMMERCIAL CRIME

As noted earlier, the November 2013 complaint against Argor-Heraeus involved allegations of violations of Swiss AML law. The specific allegation was that the company had refined gold that had been pillaged by an illegal armed group in the DRC. The complaint alleged that the armed group used the proceeds from the sale of the gold to finance its operations and purchase weapons in a conflict that led to human rights abuses throughout eastern DRC.

The complaint did not allege that Argor pillaged the gold directly but argued that its purchase and use of pillaged gold constitutes a violation of Switzerland's AML law. As noted earlier, money laundering involves the handling of stolen or otherwise illicit property, as defined by a series of predicate offenses. In this case, the complaint argued pillage as the predicate offence. The Swiss prosecutor's office opened a criminal investigation into the complaint.<sup>53</sup> The specific charge alleged was 'aggravated laundering' under article 305bis of the Swiss Penal Code, which in essence involves laundering (i.e. transacting in a manner designed to frustrate identification of origin) assets which originate from a felony. The complaint alleged that the company knew or should have known that the DRC gold it was refining had been obtained through pillage, which is a war crime. After considering the case, in June 2015 the Swiss prosecutor reported that the company had processed DRC gold but nonetheless decided not to prosecute. The decision not to prosecute was reportedly based on the prosecutor's conclusion that the company had no reason to know of the criminal origin of the gold.<sup>54</sup>

<sup>52</sup> *United States v. Viktor Bout*, US 2nd Circ., No. 12-1487-cr. 27 September 2013.

<sup>53</sup> Press Release, Argor-Heraeus Firmly Refuses Any Accusation (4 November 2013), [www.argor.com/var/ezwebin\\_site/storage/original/application/ba149dafb34503613d1a688ccaa89cab.pdf](http://www.argor.com/var/ezwebin_site/storage/original/application/ba149dafb34503613d1a688ccaa89cab.pdf)

<sup>54</sup> 'Swiss Decision Undermines Efforts to End Conflict Resource Trade, Open Society Foundations (OSF)', 2 June 2015, [www.opensocietyfoundations.org/press-releases/swiss-decision-undermines-efforts-end-conflict-resource-trade](http://www.opensocietyfoundations.org/press-releases/swiss-decision-undermines-efforts-end-conflict-resource-trade). 'Swiss Gold Refinery's Role in Pillage Goes Unpunished, Press Release. Berne Declaration' (Berne Declaration, 2 June 2015), <http://business-humanrights.org/sites/default/files/documents/Press%20Release.%20Berne%20Declaration.pdf>

There are a number of international conventions requiring domestic regulatory authorities to criminalize a range of offenses relating to misappropriation and hiding of assets. The United Nations Convention Against Corruption requires states parties to criminalize, prevent and detect money-laundering.<sup>55</sup> The Transnational Organized Crime Convention, Article 6, requires states parties to criminalize the laundering of the proceeds of crime and defines the elements of the crime of money laundering as follows:

- (a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of the particular legal system:
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
  - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

When financial or other forms of property are suspected of association with criminal activities, it can be a crime to receive, hold, manage, hide or otherwise engage in financial transactions where the funds involved are the proceeds of criminal activities. Predicate offences in standard AML statutes often include financial crime (e.g. fraud, tax evasion), corruption and bribery, human trafficking and sexual slavery, smuggling of commodities (e.g. illegal logging), and drug trafficking. Terrorist financing is also a key focus of AML prosecutions. In certain countries, such as the United States, Britain, and Canada, predicate offences may also include sanctions violations. The evolution of AML enforcement has been coordinated through the efforts of the Financial Action Task Force (FATF), which has served as the global administrative focal point for the developments of new standards and their

<sup>55</sup> UNCAC Article 23, Article 14; as well as criminalize embezzlement or misappropriation of public funds, influence peddling, abuse of functions and illicit enrichment (Articles 17 through 19).

harmonization across national jurisdictions.<sup>56</sup> This process has not been without its contradictions, but the result today is an AML regime that in important ways spans ‘the full crime-war spectrum’.<sup>57</sup>

In most jurisdictions, AML laws have been structured to require companies that provide financial services – such as banks, money transfer bureaus, and other financial institutions – to comply with these laws through the implementation of due diligence as technique of compliance. Most national regulators apply customer identification as the basis of due diligence, whereby financial service providers must adhere to ‘know your customer’ (KYC) rules. In some regulatory contexts the KYC rule is sometimes referred to as ‘customer due diligence’ (CDD) and often includes requirements to monitor transactions and submit suspicious transactions reports. In many jurisdictions, failure to submit a suspicious transactions report in cases of non-compliance with CDD standards can give rise to liability. Central to the AML infrastructure are the Financial Intelligence Units (FIUs) attached to regulatory or law enforcement agencies in most jurisdictions. These collect and analyse financial transaction reporting (KYC) data that banks and financial service providers are required by law to make available. On the basis of FIU intelligence, law enforcement is able to target suspicious transactions for a closer look.<sup>58</sup>

As a result, banks and individuals are regularly prosecuted with respect to money laundering. In the United States, AML statutes have been used by prosecutors in recent years to pursue certain large banks for allowing the laundering of drug money or for assisting in the evasion of US sanctions against Iran. In the largest settlement, reached in 2012, HSBC Holdings plc agreed to pay \$1.92 billion in fines and forfeitures (of illicit financial gains) for its involvement in the laundering of what press reports described as ‘a river of drug money flowing out of Mexico’.<sup>59</sup> This was at a time when Mexico was suffering the worst ravages of a drug war that had taken the lives of 35,000 people by 2011 (and would claim at least 10,000 lives each year to 2015). While not necessarily an armed conflict, the levels of violence clearly rose to levels

<sup>56</sup> For a detailed examination of the role of the FATF in the development of AML rules, see J. C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011); Christine Jojarth, *Crimes, War and Global Trafficking: Designing International Cooperation* (Cambridge University Press, 2009), chapter 5.

<sup>57</sup> Jojarth, *Crimes, War and Global Trafficking*, pp. 139–45.

<sup>58</sup> Bruce Broomhall, ‘Illicit Conflict Economies: Enhancing the Role of Law Enforcement and Financial Machinery,’ 28 April 2010, <http://Ssm.Com/Abstract=1590345> or <http://Dx.Doi.Org/10.2139/SSm.1590345>

<sup>59</sup> ‘HSBC to Pay \$1.9 Billion U.S. Fine in Money-Laundering Case | Reuters,’ 11 December 2012, <http://uk.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211>

comparable to internal armed conflicts. It is important to note that in this campaign by US prosecutors to clamp down on money laundering via the large financial institutions, no indictments have been made against bank executives or the banks themselves. Instead, prosecutors have opted to use deferred prosecution agreements: under prosecutorial guidelines for US federal prosecutors, criminal charges may be set aside if a firm agrees to pay fines, to be monitored by regulators, and to change its behaviour.

A similar pattern is discernible with respect to the enforcement of UN financial sanctions. The United Kingdom's Serious Fraud Office has on one occasion prosecuted companies and their representatives who have traded with persons designated by UN sanctions.<sup>60</sup> In 2014, Canada conducted its first corporate prosecution of UN sanctions involving a company exporting to Iran.<sup>61</sup> That same year, a Swedish court acquitted a company with respect to UN sanctions on Iraq.<sup>62</sup> However, these cases appear to be the exceptions which prove a rather depressing rule: despite widespread integration of UN sanctions into the domestic criminal laws of countries around the world, there is relatively little evidence of criminal prosecutions actually being pursued against those who violated them.

Still other commercial crime statutes have been used to criminalize commercial dealings in situations of armed conflict. For example, a criminal complaint filed by non-governmental organizations in France in 2014 against the timber company Dalhoff, Larsen and Horneman (DLH) in which DLH was accused of purchasing illegal timber from Liberian companies during that country's civil war (2000–2) and thereby providing support to the regime of Charles Taylor.<sup>63</sup> Like *Lafarge*, the *DLH* complaint attempted to link the company to crimes via its participation in a war economy of a particular participant in the conflict. However, unlike *Lafarge*, the *DLH* complaint did not rely on accomplice liability with respect to international crimes but

<sup>60</sup> Richard L. Cassin, *Jail For Mabey & Johnson Execs*, The FCPA blog, 24 February 2011, [www.fcpablog.com/blog/2011/2/24/jail-for-mabey-johnson-execs.html](http://www.fcpablog.com/blog/2011/2/24/jail-for-mabey-johnson-execs.html)

<sup>61</sup> Christine Duhaime, 'Canada Makes Its First Corporate Prosecution for Economic Sanctions Violations,' Duhaime's Anti-Money Laundering Law in Canada, 24 April 2014, [www.antimoneylaunderinglaw.com/2014/04/canada-makes-its-first-prosecution-for-economic-sanctions-violations.html](http://www.antimoneylaunderinglaw.com/2014/04/canada-makes-its-first-prosecution-for-economic-sanctions-violations.html)

<sup>62</sup> Press Release, Scania Group, 'Scania Acquitted of Suspected Violation of UN's Sanctions', 13 February 2014, [www.scania.com/group/en/scania-acquitted-of-suspected-violation-of-un-sanctions-2/](http://www.scania.com/group/en/scania-acquitted-of-suspected-violation-of-un-sanctions-2/)

<sup>63</sup> 'Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War, Global Witness,' 13 March 2014, [www.globalwitness.org/library/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-o](http://www.globalwitness.org/library/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-o)

alleged that the company's products were produced in violation of the French law criminalizing *recel*, the French equivalent of handling stolen goods.

#### COMMERCE AS CRIME IN IRREGULAR WARFARE: CORPORATE ACCOMPLICES

If the list of cases in Table 9.1 is any indication, commercial transactions may create relationships of complicity between companies and the perpetrators of crimes. A number of cases of commercial involvement in international crimes arise from allegations of companies aiding and abetting crimes committed by security forces. For example, in 2013, former Ford Motor Company executives were charged by an Argentine court with complicity in the kidnapping and torture of union workers during Argentina's 'Dirty War' during the 1970s. In 2018, the accused were found guilty of having provided information – workers' names, identity numbers, pictures, and home addresses – to security forces, resulting in the detention, torture, and imprisonment of more than twenty union members, including in a facility on the premises of the Ford plant.<sup>64</sup>

In another case, a Swedish prosecutor investigated a complaint that the Swedish oil company *Lundin* lent support in the form of logistics for aircraft and the construction of infrastructure that enabled war crimes by Sudanese armed forces and allied armed groups in south Sudan during 1997–2003. The facilities were allegedly used in the government's counterinsurgency campaign and supported air attacks by government forces against villages in the south of the country, which resulted in thousands of deaths and an estimated 200,000 people displaced, as well as rape; child abduction; torture; the destruction of schools, markets, and clinics; and the burning of food, huts, and animal shelters.<sup>65</sup>

In the case of *Anvil*, a Congolese court heard allegations that the manager of Anvil's mine near Kilwa, DRC, requested government support in response to protests near the mine. The company was alleged to have provided transport of government troops to the area in company vehicles, the forces allegedly used those vehicles while in the area and received food and payment from the company during the action. While in the area, government forces were alleged to have committed killings, torture, and arbitrary

<sup>64</sup> 'Ex-Ford Execs Charged in Argentine Tortures,' AP, 21 May 2013, [www.usatoday.com/story/news/world/2013/05/21/ford-execs-argentine-torture/2347861/](http://www.usatoday.com/story/news/world/2013/05/21/ford-execs-argentine-torture/2347861/) USA Today, 21 May 2013, [www.usatoday.com/story/news/world/2013/05/21/ford-execs-argentine-torture/2347861/](http://www.usatoday.com/story/news/world/2013/05/21/ford-execs-argentine-torture/2347861/)

<sup>65</sup> 'Peace Organisation PAX: The Role of Lundin Petroleum, OMV and Petronas in Sudan's Oil War 1997–2003,' pp. 78–83, [www.paxforpeace.nl/stay-informed/news/the-role-of-lundin-petroleum-omv-and-petronas-in-sudans-oil-war-1997-2003](http://www.paxforpeace.nl/stay-informed/news/the-role-of-lundin-petroleum-omv-and-petronas-in-sudans-oil-war-1997-2003)

detentions. Soldiers and three company employees were tried by a military court in DRC and acquitted.<sup>66</sup>

Also in the DRC, a criminal complaint was filed in Germany in 2013 against a senior manager of Danzer Group, a Swiss and German timber manufacturer. The complaint arose out of an attack by security forces on a village in DRC, in which villagers were abused, raped, and arbitrarily detained. The attack occurred during a conflict between a logging company subsidiary of Danzer and villagers. The complaint alleged that the company provided financial and logistic support to the security forces. The investigation was discontinued by the German prosecutor.<sup>67</sup>

In the Netherlands, prosecutors investigated a 2010 complaint against Lima Holding B.V., the parent company of the Riwal construction company in Israel, for involvement in construction by Israel of the Annexation Wall and settlements in the Occupied Palestinian Territory (OPT). In 2013, after three years of investigation, the prosecutor chose not to proceed, noting that 'Dutch companies are required to refrain from any involvement in violations of the International Crimes Act or the Geneva Conventions' but that the company had ended its involvement.<sup>68</sup> That same year a Dutch engineering company, Royal Haskoning DHV, announced it was withdrawing from a sewage treatment plant project in occupied East Jerusalem after 'the company came to understand that future involvement in the project could be in violation of international law'.<sup>69</sup>

In addition to the provision of logistical support to security forces, or various sub-contracting relationships that may give rise to liability, the case law indicates that transactions involving dual-use equipment to the perpetrators of international crimes can also give rise to liability. The conviction of Dutch

<sup>66</sup> Proceedings began in December 2006 in the Lubumbashi military high court. Towards the end of the trial, the military prosecutor indicated that there was insufficient evidence of intent to establish that Anvil Mining or its employees had been complicit in war crimes. The court acquitted twelve defendants, including the three employees of Anvil Mining in 2007. 'Anvil Mining Lawsuit (Re Dem. Rep. of Congo), Business & Human Rights Resource Centre,' <https://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo>

<sup>67</sup> 'In March 2015, the public prosecutor's office in Tübingen discontinued the investigations.' 'Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community,' 25 April 2013, [www.ecchr.de/index.php/danzer-en.html](http://www.ecchr.de/index.php/danzer-en.html)

<sup>68</sup> Openbaar Ministerie, 'No further investigation into crane rental company,' Nieuwsbericht, Openbaar Ministerie, [www.om.nl/actueel/nieuwsberichten/@31796/no-further/](http://www.om.nl/actueel/nieuwsberichten/@31796/no-further/)

<sup>69</sup> Royal Haskoning DHV, 'Royal Haskoning DHV Terminates Its Involvement in the Wastewater Treatment Plant in East Jerusalem', 6 September 2013, [www.royalhaskoningdhv.com/en-gb/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727](http://www.royalhaskoningdhv.com/en-gb/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727). See also United Nations News Centre, 'Deals Linked to Settlements in Occupied Territories Could Be 'Criminal', UN Expert Warns', 30 October 2013, [www.un.org/apps/news/story.asp?NewsID=46379&Cr=&Crn=#](http://www.un.org/apps/news/story.asp?NewsID=46379&Cr=&Crn=#)

businessman Frans van Anraat for the provision of chemicals to the regime of Saddam Hussein in Iraq was based on transactions which at trial van Anraat insisted were merely commercial in nature. The court accepted that the chemicals sold by van Anraat were dual purpose goods but ruled van Anraat knew of the ultimate purpose of the products he sold to the Iraqi regime. The court relied in part on evidence from UN weapons inspectors, who determined that the transactions between Iraq and van Anraat had been an important source of materials for the chemical weapons that were used against Kurds in northern Iraq in 1988.<sup>70</sup> The van Anraat case displays facts similar to cases prosecuted in the wake of the Second World War, such as the *Zyklon B Case* in which businessman Bruno Tesch was convicted and executed for supplying the chemical used to kill millions of people in Nazi gas chambers. The composition of Zyklon B was based on chemical components used in the pest control industry.<sup>71</sup>

In France, a criminal complaint was filed in 2011 against Amesys, a French company, over its provision of communication and Internet surveillance equipment to the Gaddafi government in Libya. The complaint alleged that, with the help of the company, the Libyan authorities used the equipment to identify opponents of Gaddafi, who were then detained and tortured.<sup>72</sup> A similar case involving surveillance technology provision to the regime in Syria by Qosmos, also a French company, was filed in 2012.<sup>73</sup> In both cases prosecutors launched investigations. In both cases, the online surveillance systems were allegedly used to target activists and other opposition elements for arrest and ultimately torture. In both cases, the systems were purchased in 2011 and 2012 as those two countries descended rapidly into civil war in the wake of the Arab revolutions.<sup>74</sup>

<sup>70</sup> Court of Appeal, The Hague, 9 May 2007; *Public Prosecutor v. Van Anraat*, LJN: BA4676, ILDC 753 (NL 2007). See the case summary for the trial of Frans van Anraat at *Providing the Means to Kill*, Red Flags, [www.redflags.info/index.php?topic=meanstokill&style\\_id=0](http://www.redflags.info/index.php?topic=meanstokill&style_id=0)

<sup>71</sup> *The Zyklon B Case*. Law reports of trials of war criminals by United Nations War Crimes Commission.

<sup>72</sup> For a case summary and links to the complaint and company response see 'Amesys Lawsuit (Re Libya), Business & Human Rights Resource Centre,' 18 February 2014, <http://business-humanrights.org/en/amesys-lawsuit-re-libya-o#c18496>

<sup>73</sup> 'Amesys and Qosmos Targeted by the Judiciary: Is There a New Law on the Horizon? FIDH,' 18 June 2013, [www.fidh.org/en/europe/france/amesys-and-qosmos-targeted-by-the-judiciary-is-there-a-new-law-on-the-13966](http://www.fidh.org/en/europe/france/amesys-and-qosmos-targeted-by-the-judiciary-is-there-a-new-law-on-the-13966)

<sup>74</sup> After a judicial inquiry was opened into the Amesys case, prosecutors requested that the matter be dropped, arguing that the alleged facts did not amount to criminal acts under French law. This request was rejected by a Paris court in January 2013. Zerk, 'Corporate Liability for Gross Human Rights Abuses'.

The case of Guus Kouwenhoven involved logistical support, but prosecutors also alleged a relationship which is qualitatively closer to the actual perpetrators of crimes. Kouwenhoven was the Dutch head of the two companies, the Oriental Timber Company and Royal Timber Company, both of Liberia, which were accused of providing weapons and ammunition to Liberian fighters loyal to former president Charles Taylor. The prosecution alleged that Kouwenhoven's companies provided weapons, ammunition, meeting places, and other support to Taylor's armed forces, who committed atrocities. That support included the importation of weapons in violation of a UN arms embargo and financial contributions. The court heard that, in return, Kouwenhoven's companies were given access to timber concessions, which they used to sell timber abroad. Kouwenhoven was tried on charges of violations of UN sanctions as well as complicity in war crimes and originally convicted and sentenced to eight years. On appeal, the war crimes conviction was overturned. The prosecution appealed to the Supreme Court of the Netherlands, which then overturned the acquittal and referred the case to a different lower appeals court, which convicted Kouwenhoven in early 2017 for complicity in war crimes and sentenced him to nineteen years.<sup>75</sup>

The relationship between Kouwenhoven and Taylor is reminiscent of the role of Felicien Kabuga in the Rwandan genocide. Kabuga was an influential Rwandan businessman indicted for Conspiracy to Commit Genocide and Extermination, a Crime Against Humanity. The allegations suggest Kabuga used his company to purchase large stocks of machetes, weapons, and uniforms, as well as provide transportation, for the Interahamwe militia which carried out the Rwandan genocide in 1994. Kabuga is also alleged to have helped create the National Defence Fund in order to buy weapons, vehicles, and uniforms for the Interahamwe. Kabuga was arrested in early 2020 after many years as a fugitive.<sup>76</sup>

The majority of the cases investigated over the past two decades have involved allegations of company complicity in the crimes of parties to the conflict. In many cases, company activities and relationships have involved the company in the war economy of parties to a conflict, usually through the provision of logistical or other support. This involvement may reflect a political engagement, but it may also be merely commercial in nature. Complicity

<sup>75</sup> Court of Appeal's-Hertogenbosch, 21 April 2017, *Public Prosecutor v. van Kouwenhoven*, 20-001906-10 ECLI:NL:GHSHE:2017:1760. See also 'Guus Van Kouwenhoven – TRIAL International,' <https://trialinternational.org/latest-post/guus-van-kouwenhoven/>

<sup>76</sup> *Prosecutor v. Félicien Kabuga*, ICTR-98-44B-I, Amended indictment, 1 October 2004. "Fugitive Félicien Kabuga Arrested Today," United Nations International Residual Mechanism for Criminal Tribunals, 16 May 2020, [www.irmct.org/en/news/20-05-16-mechanism-fugitive-f%C3%A9licien-kabuga-arrested-today](http://www.irmct.org/en/news/20-05-16-mechanism-fugitive-f%C3%A9licien-kabuga-arrested-today)

has been alleged where transactions connect the company to particular crimes committed by belligerents in the conflict. Where governments or armed groups purchase goods or services that are then used to commit atrocities, the businesses that supplied those goods and services may face liability for their complicity in the crimes committed. The same also applies in cases where business actors facilitate crimes through the provision of finance or other goods or services to perpetrators of international crimes. The implication from the case law is that commercial transactions which form a part of the war economies of perpetrators of international crimes may give rise to liabilities for the business actors responsible for such transactions. Those liabilities increasingly arise at the level of national courts, in countries where international criminal law has been integrated to domestic criminal statutes.

## CONCLUSION

Business activity in war can create liabilities under international law. This chapter has shown that many decades after that principle was first established, it is in the process of being reaffirmed in the criminal courts of states that have international crimes in their statutes.

In previous chapters, it became clear that important norms such as pillage and enslavement, which protect labour and property from exploitation and appropriation in situations of violent conflict, were reclaimed by international tribunals after a half-century of little use. Similarly, notions of accomplice liability, in particular aiding and abetting, were applied to economic actors who supported the perpetration of crimes. These war crimes of an economic nature have been shown to be applicable to predatory behaviour in contemporary conflicts. From the case law, both new and old, it would appear that liabilities may arise when businesses kill, torture, pillage property, or exploit forced labour or provide support to those who do.

Those are perhaps unsurprising findings. Perhaps the more important finding is that a commercial relationship – the provision or purchase of a good or a service – can amount to participation as an accomplice in the crimes of others. This raises the possibility of the criminalization of a business transaction in connection to war economies, where those transactions form a nexus with international crimes. While legal persons may not find themselves indicted by international tribunals, due to the tribunals' lack of jurisdiction over legal persons, it is arguable that individual businesspeople are increasingly likely to face charges at the international or national level. In addition, companies domiciled in countries with national criminal statutes governing international crimes, and which operate in, invest in, partner with,

buy from or supply commercial or political actors in situations of armed conflict expose themselves and their managers to the risk of liability for participating in war crimes.

Providing logistical or financial support, whether through a political contribution or commercial transaction, may place companies in a position of complicity when crimes are committed by the armed forces or groups they deal with. In connection with an international crime, providing equipment, finance, or other forms of material support to security services, whether public or private, appears to fall well within most legal definitions of complicity. The potential for liability rests on the tests applied in different jurisdictions and under different legal regimes. For example, the acts and state of mind required in order to attach responsibility will be different depending on whether the prosecutor is pursuing a charge of international crimes, terrorism, commercial crimes (stolen goods, money laundering), or sanctions violations. It may also vary by national jurisdiction, depending on legal culture and precedent with respect to modes of liability in each country.

The case law indicates that litigation in recent years has tended to revolve around the core norms of international humanitarian and criminal law, which in turn suggests the evolution of state practice in dialogue with international norms. The turn to corporate criminal liability identified by Stewart has been gradual and fragmented across jurisdictions. But it is undeniable that the first twenty years of this century have seen more attempts to prosecute businesses implicated in crimes associated with armed conflict than the preceding fifty years, after the trials of the industrialists at Nuremberg.