

The Role of Civil Society in Promoting Corporate Accountability for International Crimes

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ABSTRACT

This article examines the role that civil society has played in pursuing corporate accountability for international crimes. The article is divided into five main parts. Following a general introduction in Section 1, Section 2 sets forth the definitions used throughout this article and the methodology used to carry out the research. Section 3 covers cases at international tribunals, beginning with an overview of prosecutions of corporate executives at the International Military Tribunal at Nuremberg and proceeding to an examination of civil society engagement with the International Criminal Court in cases involving corporate actors. Section 4 analyses cases brought by civil society actors in domestic courts, focusing on criminal cases filed in France and civil cases filed in the USA. This section of the article reviews cases from the USA that have narrowed corporate liability for international crimes and compares them with similarly situated cases filed in France, which has become a forum of choice for victims seeking corporate criminal accountability. In Section 5, we conclude that civil society's pursuit of corporate accountability in domestic courts has ensured that a greater number and a wider range of actors are held to account, thereby complementing the work of international tribunals, which comparatively can try only a small number of cases, and has offered a ray of hope to victims who wish to see accountability for international crimes.

1. INTRODUCTION

In recent years, the landscape of international criminal law has been marked by an acceleration in cases filed by civil society actors seeking justice and accountability on behalf of

victims of international crimes. In some cases, they have pursued government and military leaders for their direct responsibility for international crimes. In other cases, they have pursued corporations and other business actors for complicity, recognizing that international crimes cannot be committed without corporate backers that finance, facilitate, and provide the equipment, armaments and supplies necessary to commit the crimes.

This article will examine the role that civil society has played in recent years in pursuing corporations and corporate executives for international crimes. It will begin with a historic overview of prosecutions of corporate executives at international tribunals, starting with the International Military Tribunal at Nuremberg (IMT) and continuing into the modern era with the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). It will then offer some explanations as to why ICC prosecutions of corporate actors have been so limited, spurring civil society to increasingly turn to national jurisdictions to seek accountability. The article will then examine the role that civil society has played in bringing criminal and civil cases against corporations and corporate executives in domestic courts. It will focus, in particular, on cases brought in two jurisdictions — France and the USA — and will propose some explanations as to why some cases have succeeded while others have faltered.

2. DEFINITIONS AND METHODOLOGY

The scope of this study is guided by the following definitions, which are used throughout this article:

- ‘civil society actor’ refers to any non-governmental and non-business actor, including but not limited to non-governmental organizations (NGOs), civil society organizations (CSOs), not-for profit organizations, victim groups, human rights defenders and victim advocates;
- ‘corporation’ means any business organization, including but not limited to partnerships, corporations, joint stock companies and limited liability companies;
- ‘corporate actors’ means both corporations and executives;
- ‘executive’ means both directors and officers of corporations and other business organizations;
- ‘international crimes’ refers to both the crimes that traditionally constitute the core international crimes (genocide, crimes against humanity and war crimes) as well as the crimes of torture, slavery, enslavement, forced labour and enforced disappearance.

In preparing this article, the authors canvassed over 140 international and domestic cases brought against corporate actors for alleged liability for international crimes. The authors searched open sources and public databases, such as Amnesty International’s Corporate Crimes Project case map,¹ the Business & Human Rights Resource Centre,² and the Corporate Accountability and Transitional Justice Database,³ in addition to surveying a range of academic publications.

¹ ‘Corporate Crimes Project’, Amnesty International Business, Security and Human Rights Team, available online at <https://corporate-crimes.org/locations> (visited 30 April 2023).

² Companies database, Business & Human Rights Resource Centre, available online at <https://www.business-humanrights.org/en/companies> (visited 6 May 2023).

³ ‘Corporate Accountability and Transitional Justice Database’, Appendix B of L. Payne, G. Pereira and L. Bernal-Bermúdez (eds), *Transitional Justice and Corporate Accountability from Below* (Cambridge University Press, 2022), profiles 101 cases filed in Global South jurisdictions.

The specific role of civil society in the corporate cases surveyed by the authors was not always clear. Often, details on the role of civil society were not available in the public domain. When they were available, they often took the form of a brief press release lacking meaningful detail. To ascertain the specific role that civil society played in building case files, the authors conducted outreach with 12 prosecutors, investigators, and civil society actors. Of the 12, the authors selected seven who were most active in corporate criminal liability cases to conduct interviews. Four of those interviews are cited herein.

In addition, the authors relied on interviews of prosecutorial authorities and civil society actors that had been previously carried out by Ambassador Stephen Rapp as part of a study published by the Oxford Institute for Ethics, Law, and Armed Conflict in 2022 on the permanent support needed to fulfil UN investigative mandates.⁴ Four of the interviews that were conducted offered lessons learned through concrete examples of civil society involvement in international criminal cases brought against corporate actors. The authors cited those interviews herein after procuring the consent of the interviewees to use the interviews for this article.

3. PROSECUTIONS AT INTERNATIONAL TRIBUNALS

A. Historic Overview

Numerous cases were brought in international tribunals against corporate actors for international crimes following World War II. For example, the IMT charged Julius Streicher in 1946 for his role in managing and publishing *Der Stürmer*, a newspaper that enabled the Nazi regime's crimes by distributing anti-Semitic propaganda to more than half a million Germans.⁵ The IMT convicted Streicher of crimes against humanity for inciting violent persecution.⁶

The role of civil society in the IMT's prosecutions of corporate executives was limited. This is due in part to the absence of any provisions in the Charter of the IMT allowing for submissions by CSOs. This changed with the establishment of the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY), whose Rules of Procedure and Evidence allowed civil society actors to file *amicus curiae* submissions, provided the Chamber 'considers it desirable for the proper determination of the case'.⁷ Following the establishment of the ICTR and ICTY, civil society's impact in international criminal cases began to be felt. For example, in the *Akayesu* case before the ICTR, a group of NGOs filed a brief requesting the Prosecutor to amend the indictment to include sexual violence crimes. The fact that the Prosecutor subsequently amended the indictment suggests that the *amicus* brief had 'some influence on that decision'.⁸

Similarly, civil society actors played a role in the convictions of Ferdinand Nahimana and Jean-Bosco Barayagwiza as *de facto* media executives of *Radio Télévision Libre des Mille*

⁴ F. D'Alessandra et al., 'Anchoring Accountability for Mass Atrocities', Oxford Institute for Ethics, Law, and Armed Conflict, May 2022, available online at <https://www.elac.ox.ac.uk/wp-content/uploads/2022/10/Oxford-ELAC-Anchoring-Accountability-for-Mass-Atrocities.pdf> (visited 30 April 2023).

⁵ Judgment, *Trial of German Major War Criminals* (IMT), Trial Chamber, 1 October 1946, Part 22, at 501.

⁶ Other cases were brought against Nazi industrialists for their complicity in international crimes in national jurisdictions. For example, a US military court convicted corporate executives of IG Farben, a German chemicals company that manufactured the gas used to commit genocide, for planning, preparing, initiating, and waging of wars of aggression, war crimes and crimes against humanity. Similarly, in 1946, a British Military Tribunal convicted Bruno Tesch and Karl Weinbacher for aiding and abetting murder through their corporate roles in Tesch & Stabenow, a company that supplied concentration camps with Zyklon B, a pesticide used in Holocaust gas chambers. A US military court convicted industrialists Alfred Krupp and Friedrich Flick for international crimes. Because these cases were brought under domestic legal systems rather than by international tribunals, they are not discussed in this section.

⁷ Rule 74 ICTY and ICTR RPE.

⁸ K. Brimelow et al., 'Shaping the Law: Civil Society Influence at International Criminal Courts', Chatham House (25 January 2016), at 4.

Collins S.A. and Hassan Ngeze as editor-in-chief of *Kangura* newspaper for their roles in directly and publicly inciting genocide in Rwanda. In confirming the Trial Chamber's finding the defendants guilty of incitement to commit genocide, the ICTR Appeals Chamber referenced an *amicus* brief that it had permitted the Open Society Justice Initiative to file.⁹ Both the *amicus* brief and the responses of the parties to the brief are referenced throughout the Appeal Chamber's Judgment.¹⁰ In addition, multiple NGOs and media organizations, including *Reporters sans frontières* and Human Rights Watch, shared evidence with the prosecution, including credible information from the survivors' group IBUKA and other Rwandan CSOs.

B. The International Criminal Court

1. Overview

Civil society actors, by lobbying states for the establishment of a permanent international court to promote accountability for international crimes, played an important role in the establishment of the ICC. By design, the ICC facilitates civil society engagement. Both the ICC Statute and Rules of Procedure and Evidence allow civil society actors to file submissions.¹¹ To further encourage civil society participation in promoting accountability, the ICC Office of the Prosecutor (OTP) recently issued guidelines for CSOs documenting international crimes.¹²

2. Civil Society Communications Alleging Corporate Criminal Liability

Civil society has actively engaged with the ICC since its inception by submitting communications under Article 15 of the Rome Statute, which allows UN organs, states, NGOs and other reliable sources to submit written testimony to help the ICC OTP determine whether a situation meets the legal criteria laid out by the Rome Statute.¹³ While civil society actors, availing themselves of Article 15, have submitted to the ICC Prosecutor a wide range of Article 15 communications, the authors found only a handful of cases in which civil society submitted communications specifically alleging corporate complicity in international crimes. For reasons discussed below, none of these communications has proceeded past a preliminary examination.

(a) French arms manufacturers for war crimes in Yemen (2019)

In December 2019, a group of NGOs, including the European Center for Constitutional and Human Rights (ECCHR), *Mwatana* for Human Rights, and Amnesty International, submitted a 300-page communication and supporting evidence to the ICC OTP alleging the complicity of 10 European arms manufacturers in war crimes committed in Yemen. The following companies were named in the ICC submission: Airbus Defence and Space S.A. (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (United Kingdom (UK)), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italy), MBDA UK Ltd (UK),

⁹ Appeal Judgment, *Nahimana and others* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, at 3.

¹⁰ However, it is difficult to assess what impact the *amicus* brief had in the convictions since neither the Trial Chamber nor the Appeals Chamber explicitly stated in their Judgments whether the *amicus* brief influenced their deliberations.

¹¹ See, e.g., Art. 15 and Art. 75(3) ICCSt. and Rule 103 ICC RPE.

¹² *Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations*, Office of the Prosecutor, International Criminal Court, and Eurojust (2022), available online at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf> (visited 9 May 2023).

¹³ For further discussion on Article 15 communications, see further, D. Chaikel, P. Pillai and P. Sachithanandan, 'Civil Society and International Accountability: Mapping the Terrain', in this issue.

MBDA France S.A.S. (France), Raytheon Systems Ltd (UK), Rheinmetall AG (Germany) through its subsidiary RWM Italia S.p.A. (Italy) and Thales France.¹⁴

In preparing the Article 15 communication, the NGOs collected evidence during field research in Yemen and collected testimonies of witnesses who were affected by the Coalition airstrikes against civilian objects. *Mwatana* for Human Rights collected evidence from the field, verified the circumstances of victims' deaths, provided contextual information, shared digital material, located witnesses and shared witness statements.¹⁵ The ECCHR conducted research based on open-source intelligence and, in preparing the submission to the OTP, relied on ballistics data and weapons analyses prepared by a forensic expert.¹⁶

The Article 15 communication requested that the OTP open an investigation into the arms manufacturers' complicity in war crimes arising out of airstrikes against civilian objects. The ICC ostensibly holds jurisdiction over the European executives of the arms manufacturers named in the Article 15 communication. However, at the time of writing, the ICC Prosecutor had not requested authorization to open an investigation, perhaps owing to the resource constraints and competing OTP priorities discussed below.

(b) Chiquita executives for crimes in Colombia (2017)

In 2017, a coalition of human rights groups, including the International Human Rights Clinic at Harvard Law School, *Fédération internationale pour les droits humains* (FIDH) and the *Corporación Colectivo de Abogados José Alvear Restrepo* (CAJAR) submitted an Article 15 communication to the OTP alleging that from 1997 through 2004, executives of Chiquita Brands International (Chiquita) approved payments from Chiquita's Colombian branch to the *Autodefensas Unidas de Colombia*, a terrorist group responsible for international crimes in Colombia.¹⁷ The communication revealed internal documents from Chiquita indicating that an executive believed the payments were the '[c]ost of doing business in Colombia'. The communication further showed that when alerted to the mass crimes to which the payments were contributing, one of the executives said: 'Just let them sue us, [let them] come after us.'¹⁸

In its 2018 report on preliminary examinations, the OTP discussed its examination of Colombia and noted the domestic investigation in the country of 13 Chiquita executives. In its 2019 report, the OTP observed that the domestic indictment of 10 out of the 13 Chiquita executives was confirmed. The OTP subsequently found that 'the national authorities of Colombia could not be characterised as being inactive, nor unwilling or unable to genuinely investigate and prosecute relevant Rome Statute crimes'.¹⁹ Therefore, in 2021, the OTP decided to close the preliminary examination, believing that potential cases arising from an investigation would be inadmissible under the Rome Statute.

¹⁴ See 'ICC Must Investigate Arms Company Executives Linked to Yemen War Crimes Allegations', Amnesty International (12 December 2019), available online at <https://www.amnesty.org/en/latest/press-release/2019/12/icc-investigate-arms-companies-yemen-war-crimes-allegations> (visited 30 April 2023).

¹⁵ Interview of human rights expert (name withheld), conducted by Stephen Rapp via Zoom (15 July 2020). Attribution and consent confirmed by email on 24 January 2023.

¹⁶ Interview of Cannelle Lavite, Co-Director of Business and Human Rights at ECCHR, conducted by John Balouziyeh via Signal (26 January 2023).

¹⁷ HLS News Staff, 'Human Rights Clinic Calls on ICC to Investigate Chiquita Brands for Complicity in Crimes Against Humanity', *Harvard Law Today* (23 May 2017), available online at <https://hls.harvard.edu/today/human-rights-clinic-calls-icc-investigate-chiquita-brands-complicity-crimes-humanity> (visited 30 April 2023).

¹⁸ See J. Calderon Meza, 'ICC Personal Jurisdiction on Corporations for Criminal Liability and/or Civil Liability for Reparations', *Harvard International Law Journal*, Content, Online Scholarship, Perspectives (2021), available online at <https://journals.law.harvard.edu/ilj/2021/05/icc-personal-jurisdiction-on-corporations-for-criminal-liability-and-or-civil-liability-for-reparations> (visited 10 February 2024).

¹⁹ 'Preliminary examinations', International Criminal Court, available online at <https://www.icc-cpi.int/situations-preliminary-examinations> (visited 30 April 2023).

(c) Cambodian business leaders for crimes against humanity in Cambodia (2014)

On 7 October 2014, Global Diligence LLP, with the support of FIDH, filed an Article 15 communication with the OTP, alleging widespread and systematic land grabbing perpetrated by the Cambodian government, its security forces and government-connected business leaders. The Article 15 submission argued that the land-grabbing was part of a widespread or systematic attack against the Cambodian civilian population pursuant to a state policy, thereby fulfilling the legal elements of crimes against humanity.²⁰ Relying on evidence of mass human rights violations collected by multiple independent sources, including Cambodian NGOs, international human rights organizations and media,²¹ the communication alleged that private businesses were complicit in a well-organized and recurring pattern of perpetration.²²

In 2015, Global Diligence LLP and FIDH filed a supplementary communication arguing that land-grabbing had a disproportionate negative impact on women, putting them at additional risk of suffering violence.²³ In 2021, FIDH, Global Witness and Climate Counsel sent a letter to the ICC Prosecutor expressing their support for pursuing a preliminary examination into the situation in Cambodia. A representative of Climate Counsel urged the ICC Prosecutor to ‘show that she is willing to play a role in fighting the climate and environmental emergency’ and ‘force governments and businesses to reconsider their kleptocratic policies’.²⁴ Although Cambodia is a state party to the Rome Statute, the ICC Prosecutor has not yet requested authorization from the Pre-Trial Chamber of an investigation.

3. Observations

The ICC’s engagement in pursuing corporate liability for international crimes has been limited. Several reasons can be proposed to explain this. In its current form, the Rome Statute restricts the jurisdiction of the ICC to ‘natural persons’.²⁵ Corporations thus are not subject to the jurisdiction of the ICC. Civil society actors can therefore avail of the ICC to pursue a much smaller pool of corporate actors — corporate executives who may be individually criminally liable for international crimes, but not the corporations that employ them.

This jurisdictional limitation does not, however, explain why the ICC has not been more active in prosecuting corporate executives individually. This prosecutorial choice might be due to resource constraints faced by the ICC. The OTP cannot be everywhere at once, but it is mandated to examine, investigate and prosecute the most serious crimes committed in jurisdictions around the world, sometimes with restricted access to crime scenes. The OTP receives hundreds of Article 15 communications each year, with 920 received between 15 June 2021 and 30 September 2022.²⁶ Due to its limited capacity, the OTP must be selective in choosing which cases to investigate. It is therefore to be expected that the OTP would invest its limited resources in pursuing actors who are directly liable for international crimes

²⁰ ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia’, Global Diligence (2014), available online at https://www.fidh.org/IMG/pdf/executive_summary-2.pdf (visited 6 May 2023), at 3.

²¹ *Ibid.*, at 2.

²² *Ibid.*, at 9.

²³ ‘Supplementary Communication to the Prosecutor of the ICC Under Article 15’, Joint Press Release of Global Diligence LLP and FIDH, 22 July 2015, available online at <https://www.globaldiligence.com/projects-and-news/2020/5/5/supplementary-communication-to-the-prosecutor-of-the-icc-under-article-15> (visited 6 May 2023).

²⁴ ‘Cambodia: International Criminal Court Prosecutor Urged to Prosecute Land Grabbing Crimes’, FIDH, 16 March 2021, available online at <https://www.fidh.org/en/region/asia/cambodia/cambodia-international-criminal-court-prosecutor-urged-to-prosecute#:~:text=%E2%80%9CLand%20grabbing%20and%20the%20associated%20climate%20and%20environmental%20emergency> (visited 6 May 2023).

²⁵ Art. 25.1 ICCSt.

²⁶ *Towards a More Just World*, Annual Report of the Office of the Prosecutor, International Criminal Court, 1 December 2022, available online at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf> (visited 9 May 2023), at 76.

rather than corporate actors who in most cases play only an ancillary role, facilitating international crimes by providing financing, media platforms, weapons or other supplies used to carry out crimes rather than carrying out the crimes themselves.

These factors help explain why civil society engagement in pursuing corporate accountability at the ICC has been limited to a small number of Article 15 communications, none of which have proceeded past a preliminary examination. The fact that the ICC's jurisdiction is narrowly defined might further explain why civil society, in the vast majority of cases brought against corporate actors, has chosen to initiate claims not at the ICC, but rather in domestic courts, which we turn to in the following section.

4. CRIMINAL AND CIVIL CASES IN DOMESTIC COURTS

In recent years, civil society actors have collaborated with national law enforcement authorities and prosecutors in filing criminal cases against corporate actors for their roles in international crimes. In addition, they have filed civil claims against corporations styled as torts, with the underlying liability deriving from violations of international criminal law. This section will examine criminal and civil cases brought against corporate actors in domestic courts.

A. Criminal Cases

1. Introduction

The vast majority of cases brought by civil society actors for international crimes have been filed against corporations rather than against corporate executives acting in their individual capacities. There are, however, some outliers. For example, in April 2018, ECCHR, the Yemeni NGO *Mwatana* for Human Rights and the Italian organization *Rete Italiana Pace e Disarmo*, in cooperation with *Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa*, filed a criminal complaint in Italy against executives of RWM Italia and senior officials of Italy's National Authority for the Export of Armament (UAMA), alleging criminal liability for the export of a weapon used in a 2016 airstrike by the Saudi-led military coalition that allegedly struck a village in northwest Yemen, killing a family of six. The claimants alleged that RWM Italia and UAMA were complicit in airstrikes and other military operations that 'cause[d] significant loss of civilian life'.²⁷ Over the course of the litigation, ECCHR and partner NGOs filed interventions, appealed a request by the prosecutor to dismiss the claim, and shared documentary information, digital material and witness statements.²⁸ Following a dismissal of the case in 2023 by the judge for preliminary investigations in Rome, victims filed a complaint against Italy with the European Court of Human Rights in July 2023. With support from *Mwatana* for Human Rights, *Rete Pace e Disarmo* and the ECCHR, victims argue that the Italian judiciary failed to hold the arms manufacturer and Italian public officials accountable for the supply of weapons used in unlawful airstrikes.²⁹ The case remains pending.

²⁷ 'Case Report: European Responsibility for War Crimes in Yemen — Complicity of RWM Italia and Italian arms export authority?' ECCHR, December 2020, available online at https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_RWMItalia_Dec2020.pdf (visited 30 April 2023).

²⁸ When cooperating with authorities, ECCHR typically offers background information on the suffering that mass crimes inflict upon victims. Public and official recognition of this suffering can be key to achieving the will to proceed with complex and time-consuming prosecutions of cases involving events in distant lands. Interview of international expert (name withheld) conducted by Stephen Rapp via Zoom (22 June 2020).

²⁹ 'Italian-made Bombs in Deadly Airstrike in Yemen: Strasbourg Court has Unprecedented Opportunity to Deliver Justice to Survivors', ECCHR, July 2023, available online at <https://www.ecchr.eu/en/press-release/strasbourg-court-has-unprecedented-opportunity-to-deliver-justice> (visited 10 February 2024).

Another criminal case brought against corporate executives in their individual capacities is the criminal investigation of two executives of the Swedish oil company Lundin Energy AB (Lundin) for their alleged role in international crimes committed in South Sudan. In 2010, the European Coalition on Oil in Sudan (ECOS) published a report entitled ‘Unpaid Debt’ that drew on findings by Human Rights Watch, Operation Lifeline Sudan (OLS) and the Dutch peace movement PAX pointing to corporate responsibility for international crimes committed in Sudan.³⁰ Following its publication, the report was sent to Sweden’s public prosecutor in May 2010. Based in part on the information furnished in ECOS’ report,³¹ Sweden’s public prosecutor opened an investigation in June 2010.³² Civil society played an important role over the course of the investigation by documenting crimes, sharing evidence, facilitating witness interviews and putting Swedish prosecutors in touch with victims.³³ In 2016, two executives of Lundin were notified that they were suspects in the investigation and in 2021, prosecutors indicted the executives for alleged complicity in war crimes in what is now South Sudan. Swedish prosecutors alleged that Lundin funded the Sudanese military and several militias that committed grave breaches of international humanitarian law, including ‘shooting civilians from helicopter gunships, abducting and plundering civilians and burning entire villages’.³⁴

While the RWM Italia and Lundin Energy cases were filed against corporate executives, most of the cases that the authors found were filed against corporations rather than against the individuals who control them. Of the cases filed against corporations, a significant number are seated in France, which has become a forum of choice for civil society actors seeking corporate accountability for international crimes. The Corporate Crimes Project case map profiles 13 cases filed in France, approximately double the number of cases in Germany, the jurisdiction with the second highest number of cases. Other jurisdictions hosting high numbers of corporate accountability cases lodged by civil society actors include Switzerland and the Netherlands.³⁵

Although most corporate liability cases profiled by the Corporate Crimes Project are seated in Western Europe, a number are seated in the Global South. Two cases are profiled in South America, including in Brazil and Colombia, and four are profiled in Africa, including in the Democratic Republic of the Congo. While these cases focus on serious violations of human rights law, many of the violations do not amount to international crimes, as narrowly defined herein and which are the focus on this article.³⁶ Space constraints do not permit this article to enter into a meaningful discussion of these Global South cases, which have already been surveyed in other academic works.³⁷ Rather, the remainder of this section

³⁰ ‘Unpaid Debt: The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan 1997 — 2003’, European Coalition on Oil in Sudan (ECOS), June 2010, available online at https://www.ecosonline.org/reports/2010/UNPAID_DEBT_fullreport_web.pdf (visited 30 April 2023).

³¹ Correspondence of John Balouziyeh with Attorps Henrik, Senior Public Prosecutor, Swedish National Public Prosecution Department, conducted via email (26 April–5 May 2023).

³² J. Crawford, ‘Lundin Faces Prosecution for Sudan Oil War Abuses’, JusticeInfo.net (26 October 2018), available online at <https://www.justiceinfo.net/en/39348-lundin-faces-prosecution-for-sudan-oil-war-abuses.html> (visited 30 April 2023).

³³ Interview of Rev. James Dong, founder and member of the board of directors, Assistance Mission for Africa, conducted by Stephen Rapp via Zoom (18 June 2020).

³⁴ H. Meyer, ‘Swedish Prosecution of Corporate Complicity in Sudanese War Crimes’, *New York University Journal of International Law and Politics* (7 April 2022), available online at <https://www.nyuiljlp.org/swedish-prosecution-of-corporate-complicity-in-sudanese-war-crimes/#:~:text=Prosecutors%20allege%20that%20Ian%20Lundin , a%20life%20sentence%20if%20convicted> (visited 30 April 2023).

³⁵ Eight cases are profiled in Germany. Six are profiled in Switzerland, which has the third highest number, and four are profiled in the Netherlands, which has the fourth highest number. ‘Corporate Crimes Project’, *supra* note 1.

³⁶ For example, the case filed by the public prosecutor of Brazil against Vale SA, *Tiv Súd Bureau de Projetos e Consultoria*, and 16 individuals relates to alleged homicide and environmental crimes in relation to the collapse of a mine that killed over 250 people, not to international crimes.

³⁷ See, e.g., Payne et al., *supra* note 3.

focuses on the criminal cases filed in France, since the high concentration of cases filed in France facilitates the extraction of trends, analysis and lessons learned, as discussed herein.

2. Case Profiles

(a) Syria: Case filed against Lafarge in France (2016)

In 2016, ECCHR, in partnership with Sherpa, a French NGO that carries out victim advocacy and strategic litigation to protect human rights, filed a criminal complaint in France against LafargeHolcim SA (Lafarge)³⁸ for alleged abuses committed in Syria by its subsidiary Lafarge Cement Syria. Joined by former Lafarge Syrian employees and Yazidi victims of the Islamic State of Iraq and the Levant (ISIL), the NGOs alleged in that Lafarge made multi-million dollar payoffs to ISIL and other armed groups in Syria and was therefore complicit in crimes committed by these armed groups.

The NGOs prepared applications to grant the victims the formal status of *parties civiles* who can pursue civil damages in the event of a conviction. ECCHR conducted research on the financing and organization of ISIL and on Lafarge's corporate structure and provided the investigating authorities evidentiary sources and recommendations on expert witnesses to provide evidence on corporate structures. In coordination with Sherpa and partner lawyers, ECCHR prepared multiple motions and memoranda, including on the topic of criminal intent in corporate complicity for international crimes.³⁹

In 2017, the Paris Public Prosecutor charged Lafarge with complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, deliberate endangerment of people's lives and forced labour.⁴⁰ Lafarge argued that neither the French parent company nor its executives could be held accountable for acts of the subsidiary in Syria and that none of the payments made were intended to support ISIL's international crimes. Instead, Lafarge purportedly sought to pursue a commercial activity. In 2019, the Paris Court of Appeals agreed in part, dismissing the charges of complicity in crimes against humanity, but upholding the charge of financing terrorism.⁴¹

The Yazidi victims participating as civil parties challenged the 2019 dismissal. In September 2021, the French Supreme Court quashed the annulment of the crimes against humanity charges and found that knowingly paying several million dollars to an organization whose purpose was exclusively criminal sufficed to constitute complicity in the crimes, regardless of whether the accomplice was pursuing a commercial activity. On this basis, the Supreme Court allowed a criminal trial to proceed and referred the matter back to the Court of Appeals. In May 2022, the Court of Appeals, after previously confirming the charge of financing terrorism, held that Lafarge must also face charges of complicity in crimes against humanity over alleged payoffs to ISIL.⁴²

(b) Rwanda: Case filed against BNP Paribas in France (2017)

In 2017, three French NGOs — Sherpa, Ibuka France, which advocates for victims of the Rwanda genocide, and *Collectif des Parties Civiles pour le Rwanda* (CPCR) — filed claims in France accusing BNP Paribas S.A. (BNP Paribas) of complicity in genocide, war crimes and

³⁸ In 2021, Holcim Limited became the successor-in-interest to LafargeHolcim SA.

³⁹ Interview of Cannelle Lavite, *supra* note 16.

⁴⁰ 'Lafarge Lawsuit (Re Complicity in Crimes Against Humanity in Syria)', *Business and Human Rights Resource Centre* (18 May 2022), available online at <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria> (visited 30 April 2023).

⁴¹ L'Arrêt n° 8, Chambre de l'Instruction de la Cour d'Appel de Paris, 2e section (7 novembre 2019).

⁴² 'Paris Court of Appeal Confirms Charges against French Multinational Lafarge for Complicity in Crimes Against Humanity Committed by ISIS', *Doughty Street Chambers* (23 May 2022), available online at <https://www.doughtystreet.co.uk/news/paris-court-appeal-confirms-charges-against-french-multinational-lafarge-complicity-crimes> (visited 30 April 2023).

crimes against humanity committed in Rwanda in 1994.⁴³ The NGOs claim that BNP Paribas was complicit in international crimes by agreeing to transfer USD 1.3 million from the account of the National Rwandan Bank to the Swiss bank account of Willem Ehlers, a South African arms dealer. The NGOs collected and submitted evidence alleging that following the transfer, the arms dealer sold 80 tons of arms to Colonel Bagosora, who played a central role in the genocide.⁴⁴ The complaint alleges that BNP Paribas would have known the ‘destination of the funds and knew it could contribute to the ongoing genocide’.⁴⁵

Following claims filed by the NGOs, three investigating magistrates led a probe into BNP Paribas’ alleged complicity in the Rwandan bloodshed.⁴⁶ At present, the prosecution is investigating BNP Paribas’ alleged complicity in the 1994 Rwandan genocide and alleged role in financing and equipping operations that killed thousands of civilians.

(c) Sudan: Case filed against BNP Paribas in France (2020)

Prosecutors in Paris opened an investigation of BNP Paribas in 2020 over allegations of complicity in genocide, crimes against humanity and torture in Sudan between 2002 and 2008. In March 2022, nine Sudanese victims, assisted by FIDH and the *Ligue des droits de l’Homme*, provided evidence as civil parties to the French War Crimes Unit and Financial Crimes Unit. FIDH is locating witnesses and sharing documentary information, digital material and witness statements.⁴⁷

The investigation focuses on BNP Paribas’ role in financing the Sudanese government’s commission of widespread mass atrocities against civilians in Darfur between 2002 and 2008, when BNP Paribas acted as the primary foreign bank of the Sudanese government and, by some accounts, as Sudan’s de facto central bank.⁴⁸ In March 2022, French investigative judges interviewed four victims who are actively providing contributions to the ongoing judicial investigation. The victims are being assisted by CSOs, including Global Diligence Alliance, a partnership of international lawyers that represents victims of international criminal law violations. Global Diligence Alliance is assisting victims in decision-making, developing strategy, communicating their stories and participating in the investigations.⁴⁹ With the recognition that mass atrocities require funding, the BNP Paribas case marks the ‘first attempt to hold a French financial institution criminally responsible for alleged complicity in international crimes committed in Sudan’.⁵⁰

Like the case against BNP Paribas for alleged international crimes committed in Rwanda, the case against BNP Paribas for alleged international crimes committed in Sudan demonstrates international justice’s multiple centres of gravity. Both cases are marked by parallel

⁴³ ‘BNP Paribas Faces Accusations over the Rwandan Genocide’, *The Economist* (8 July 2017), available online at <https://www.economist.com/finance-and-economics/2017/07/08/bnp-paribas-faces-accusations-over-the-rwandan-genocide> (visited 30 April 2023).

⁴⁴ The ICTR found that Colonel Bagosora was in effective control of the Rwandan military forces that participated in the mass killings and rape and convicted him of genocide and crimes against humanity.

⁴⁵ M. Kennedy, ‘French Bank BNP Paribas Accused of Complicity in Rwandan Genocide’, *National Public Radio* (17 June 2017), available online at <https://www.npr.org/sections/thetwo-way/2017/06/29/534865238/french-bank-BNP-Paribas-accused-of-complicity-in-rwandan-genocide> (visited 30 April 2023).

⁴⁶ M. Arnold, ‘BNP Paribas under Investigation Over Role in Rwanda genocide’, *Financial Times* (25 September 2017), available online at <https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2> (visited 30 April 2023).

⁴⁷ Interview of Clemence Becharte, Litigation Action Group Coordinator of FIDH, conducted by Stephen Rapp via Zoom (25 June 2020).

⁴⁸ See, e.g., Tofe Ayeni, ‘Sudan: France’s BNP Paribas under Investigation by War Crimes Judges’, *The Africa Report* (21 March 2022), available online at <https://www.theafricareport.com/185884/sudan-frances-bnp-paribas-under-investigation-by-war-crimes-judges> (visited 30 April 2023).

⁴⁹ Interview of Kristin Rosella, Partner of Global Diligence Alliance, conducted by John M.B. Balouziyeh via telephone (20 January 2023).

⁵⁰ ‘Victims Provide Testimony on BNP Paribas’ Alleged Role in Mass Atrocities in Sudan’, *Fédération internationale pour les droits humains* (FIDH), 18 March 2022, available online at <https://www.fidh.org/en/region/Africa/sudan/sudanese-victims-provide-testimony-to-french-war-crimes-unit-on-bnp> (visited 30 April 2023).

avenues of accountability at the international level — at the ICC in the case of Sudan⁵¹ and at the ICTR in the case of Rwanda.⁵² Although international criminal forums are available and have been seized of the Sudan and Rwanda matters, civil society actors continue to also pursue accountability in domestic forums. This is due, in part, to the fact that international courts and tribunals can try only a small percentage of suspects, forcing civil society to think creatively and use ‘whatever jurisdictional pathways are available for the pursuit of justice’,⁵³ including seeking accountability in domestic courts and pursuing claims against corporate actors that may be outside the reach of international tribunals.

(d) Yemen: Case filed against Dassault Aviation in France (2022)

In 2022, Sherpa, ECCHR and *Mwatana* for Human Rights filed a criminal complaint in France against French defence contractors Dassault Aviation, Thales and MBDA France for alleged complicity for war crimes committed in Yemen.⁵⁴ In preparing the complaint, the NGOs collected evidence during field research in Yemen, including visits to sites affected by airstrikes, and collected testimonies of witnesses who were affected by the Coalition airstrikes against civilian objects. The NGOs supplemented the testimonies with photos, satellite imagery, and public documents and reports, including government reports.⁵⁵ Following their investigation, the NGOs alleged that weapons manufactured by the named companies were used in 26 separate military coalition airstrikes that killed or injured Yemeni civilians and destroyed or damaged schools, hospitals and other civilian objects in Yemen, in violation of international humanitarian law.⁵⁶

(e) Other cases

The foregoing cases represent only a small sampling of cases brought by NGOs in France on behalf of victims against corporations. A multitude of other cases exist. For example, the Ukrainian human rights group *Razom We Stand* (Together We Stand) and the French organization Darwin Climax Coalition filed a complaint in France in 2022 alleging that TotalEnergies was complicit in Russian war crimes, including the targeting of civilians in Ukraine.⁵⁷ One year earlier, in 2021, *Institut Ouighour d’Europe*, Sherpa and *Collectif Ethique sur l’Etiquette* filed a claim in France against Inditex, France Uniqlo, France SMCP and Skechers USA France alleging forced labour, modern slavery, genocide and crimes against humanity committed against the Uyghurs through the defendants’ business relations in the Xinjiang Autonomous Region of China. Due to space constraints, this article is unable to

⁵¹ The UN Security Council referred the situation in Sudan to the ICC in 2005. Seven arrest warrants were issued, including two against former President Omar Al-Bashir. The trial of one of the accused, former militia chief Ali Muhammad Abd-Al-Rahman, is ongoing.

⁵² International crimes that took place in Rwanda have been tried by the ICTR, which indicted 93 individuals and concluded proceedings for 82 accused, 61 of whom were convicted and sentenced. ‘Key Figures of ICTR Cases’, United Nations International Residual Mechanism for Criminal Tribunals, External Relations Office (updated March 2021), available online at <https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf> (visited 30 April 2023).

⁵³ B. Van Schaack, *Imagining Justice in Syria: Water Always Finds Its Way*, Vol. 4 (Oxford University Press, 2020), at 449.

⁵⁴ See ‘Aiding and Abetting War Crimes in Yemen’, European Center for Constitutional and Human Rights, 2 June 2022, available online at <https://www.ecchr.eu/en/press-release/aiding-and-abetting-war-crimes-in-yemen> (visited 30 April 2023).

⁵⁵ Amnesty International, Sherpa, ECCHR, *Mwatana* for Human Rights, ‘Criminal Complaint against French Arms Manufacturers for the Export of War Materials in the Context of the Yemen Conflict: Questions and Answers’, September 2022, available online at <https://mwatana.org/wp-content/uploads/2022/09/QA-%E2%80%93-September-2022-Criminal-complaint-against-French-arms-manufacturers-pdf> (visited 30 April 2023), at 6–7.

⁵⁶ ‘Aiding and Abetting War Crimes in Yemen’, ECCHR, 2 June 2022, available online at <https://www.ecchr.eu/en/press-release/aiding-and-abetting-war-crimes-in-yemen> (visited 30 April 2023).

⁵⁷ J. Bouissou, ‘Guerre en Ukraine: TotalEnergies, accusé d’avoir fourni du carburant aux avions russes’, *Le Monde* (14 October 2022), available online at https://www.lemonde.fr/international/article/2022/10/14/guerre-en-ukraine-accuse-d-avoir-fourni-du-carburant-aux-avions-russes-totalenergies-est-visee-par-une-plainte-pour-complicite-de-crime-de-guerre_6145728_3210.html (visited 30 April 2023).

discuss these and other cases in detail, but case overviews are available on various corporate accountability databases.⁵⁸

3. France as a Forum of Choice for Criminal Cases against Corporations

As mentioned briefly above, the French criminal legal system has become a forum of choice for cases filed against corporations on behalf of victims of international crimes. This is likely due, at least in part, to the fact that the Penal Code permits victims and their advocates to become certified in criminal actions as *parties civiles* (civil parties), imbuing criminal actions with a hybrid civil-criminal dimension leading to a ‘certain amount of blending between the two actions’⁵⁹ and opening the door for victim advocates and human rights defenders to participate in criminal proceedings against corporate actors. The certification of *parties civiles* opens a door for civil society actors to join criminal actions against corporate actors. The French system provides an incentive to international NGOs operating with limited resources to ‘join a criminal matter in order to get the benefit of evidence assembled by the prosecution or the investigating magistrate’.⁶⁰ In France, NGOs can leverage the work being undertaken by the French public prosecutor for the benefit of victims.

However, the certification of *parties civiles* in French criminal actions does not fully explain why France has become a centre of gravity for cases alleging corporate complicity in international crimes. For one thing, French law is not unique in its certification of civil parties. Other jurisdictions, such as Germany,⁶¹ have similar legal provisions. It is the intersection of multiple factors that have made France a forum of choice. One of these is a feature of French law that allows the prosecution of corporations as *personnes morales* for international crimes. This can be contrasted with jurisdictions such as Germany and Russia, which have no concept of corporate criminal liability.⁶²

Another factor that weighs in favour of France as a choice of forum is a feature of French law that compels an investigative judge to open a judicial enquiry whenever a complaint is filed by a *partie civile*. The certification of a *partie civile* in France thus serves as an impetus to ensure that criminal cases for corporate liability for international crimes move forward. Without a complaint lodged in France by a *partie civile*, a prosecutor can decide not to press charges. In contrast, filing a complaint with a *partie civile* overcomes prosecutorial opportunism.⁶³

In addition, the existence of a specialized war crimes unit with the expertise to investigate and prosecute international crimes contributes to the viability of international criminal cases in France, thereby making France an attractive forum for cases alleging corporate complicity for international crimes.⁶⁴ France domesticated genocide, crimes against humanity and war crimes into national law in 2010 and soon after assigned a team of specialized police officers to investigate these crimes. Specialized units of prosecutors and investigative judges and a formal police unit became operational between 2012 and 2014. ‘The formation of these

⁵⁸ See, e.g., ‘Corporate Crimes Project’, *supra* note 1.

⁵⁹ P. Lapie, ‘The *Partie Civile* in the Criminal Law of France’, 10 *Journal of Comparative Legislation and International Law* (1928) 33–45, at 37.

⁶⁰ A. Bisch, ‘France’, in N. Bourtin (ed.), *The International Investigations Review* (The Law Reviews, 2022).

⁶¹ German law allows for the certification of civil parties, but with rights, obligations and conditions distinct from those of the French legal system. Correspondence of John Balouziyeh with Cannelle Lavite, Co-Director of Business and Human Rights at ECCHR, conducted via Signal (23 April 2023).

⁶² J. Zerk, ‘Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and more Effective System of Domestic Law Remedies’, Office of the UN High Commissioner for Human Rights (2013), at 70–71.

⁶³ Correspondence of John Balouziyeh with Cannelle Lavite, Co-Director of Business and Human Rights at ECCHR, conducted via Signal (12 February 2023).

⁶⁴ According to the ‘Corporate Crimes Project’, *supra* note 3, France, Switzerland, the Netherlands, and Germany have the highest number of cases alleging corporate liability for international crimes. Unsurprisingly, all these countries have a specialized war crimes units.

specialized units marked a breakthrough in the application of universal jurisdiction in France⁶⁵ and contribute to the significant number of corporate liability cases lodged in France — the largest number of international criminal cases pending of any country in Europe.⁶⁶

A final feature of the French criminal legal system that likely plays a role in driving civil society participation is the ability of victims to collect money damages. Certainly, not all victims are motivated by a desire to collect damages; some may wish to set a historical record or simply have their voices heard. However, it cannot be denied that the award of an enforceable judgment ‘can greatly assist in the process of rehabilitation’, while also contributing to a multifaceted system of justice and accountability.⁶⁷

4. Comparison with the US System

This is not to suggest that jurisdictions that, unlike France, do not certify civil parties in criminal actions or that do not have specialized war crimes units are not also pursuing accountability for international crimes. However, these other jurisdictions pursue justice in ways that look markedly different from the French model. One can consider the USA, for example, which does not permit the certification of civil parties in criminal cases. As in France, Lafarge, BNP Paribas and other companies have been charged in the USA for acts that constitute complicity in international crimes. However, in the US system, charges are often filed for sanctions violations or terrorist financing rather than for international crimes against victims. As a result, cases in the USA against corporations tend to be driven almost exclusively by the government, with victims and other civil society actors relegated to a much more limited role.

In contrast, in the French case against Lafarge, multiple NGOs and victim groups have played an active role as certified civil parties. This is because in France, Lafarge was charged with not only terrorist financing but also with crimes against victims, including war crimes and crimes against humanity, thereby opening a door for victim groups and NGOs to become certified as civil parties. In the US case, in contrast, victim groups played no active role, in part owing to the fact that Lafarge was charged with conspiring to provide material support to ISIL and other foreign terrorist organizations, not with crimes against victims.⁶⁸

The same is true for the US investigation into BNP Paribas for its illegal transactions in Sudan that funded the Sudanese government’s commission of atrocities against civilians. In France, the case is being brought by NGOs and Sudanese victims for alleged complicity in genocide, crimes against humanity and other crimes against victims. In the USA, the same conduct was charged as conspiracy to violate economic sanctions, not as a crime against victims. The US investigation was led by the Internal Revenue Service, the Federal Bureau of Investigation and the Department of Justice,⁶⁹ with no participation from victim groups.

Another feature of the US system that distinguishes it from the French system is that victims in the US system are not afforded the opportunity to collect civil damages in criminal legal actions, nor are they afforded a share of criminal fines imposed upon criminal defendants, unlike certified civil parties in the French system. For example, a penalty of nearly USD

⁶⁵ ‘The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands’, Amnesty International, 16 September 2014, at 69.

⁶⁶ *Ibid.*

⁶⁷ Van Schaack, *supra* note 51, at 337.

⁶⁸ ‘Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations’, US Department of Justice (18 October 2022), available online at <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations> (visited 30 April 2023).

⁶⁹ ‘BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act’, Office of Public Affairs, Department of Justice (1 May 2015).

9 billion was imposed upon BNP Paribas in the USA,⁷⁰ but none of these funds were distributed to victims in Sudan.⁷¹ The US action against Lafarge resulted in a historic USD 778,000,000 in fines and forfeitures imposed upon Lafarge, but it is unlikely that these funds will be distributed to ISIL's victims, though some efforts are underway to make this possible.⁷²

B. Civil Cases

1. Introduction

In addition to pursuing corporate accountability in criminal courts, civil society actors have turned to civil courts, which can provide real prospects of rehabilitative redress and restitution that are absent in criminal cases. In surveying civil suits filed by civil society against corporate actors, the authors found a sizeable number of cases (over 30) filed in US federal courts. They also found cases filed in other jurisdictions, ranging from Canada to Colombia and beyond, but the authors found that the number of cases filed in each of those jurisdictions was insufficient to reliably extract and analyse trends. The authors therefore opted to focus on the claims filed in the USA, with a selection of key cases whose judgments swayed the course of litigation in the years to come.

2. Case Profiles

(a) Sudan: Case filed against Talisman Energy in New York (2001)

In 2001, Nuer Community Development Services in U.S.A., a Minnesota-based non-profit corporation whose mission is to assist refugees of Sudan's Nuer ethnic community, joined by the Presbyterian Church of Sudan and individuals claiming to be victims of genocide, war crimes and crimes against humanity, filed suit against Talisman Energy, Inc. (Talisman), a Canadian oil and gas producer. The plaintiffs filed suit in the US District Court for the Southern District of New York against Talisman on behalf of Nuer and other non-Muslim, Sudanese Africans residing within or adjacent to Talisman's oil concessions in southern Sudan. Like most cases brought by civil society against corporate actors for international crimes, the *Talisman Energy* case was brought under the US Alien Tort Claims Act (ATCA),⁷³ which provides US federal courts jurisdiction to hear claims brought by aliens for torts committed in violation of the law of nations or a treaty of the USA. The plaintiffs claimed that by working with the Sudanese government to create buffer zones around oil fields, Talisman displaced local populations and aided and abetted the Sudanese government's international crimes.⁷⁴

Following a 2006 dismissal by the trial court, the US Court of Appeals for the Second Circuit held in 2009 that purposefully intending the violations, rather than mere knowledge of the violations, was the applicable standard in determining liability under the ATCA.⁷⁵ The plaintiffs were required to show that Talisman acted with the purpose of advancing the

⁷⁰ *Ibid.*

⁷¹ Neimat Ahmadi, Head of Darfur Women's Group, comments made at Meeting at ICC Assembly of State Parties, The Hague, 6 December 2022.

⁷² The US Department of Justice is searching for a path to share with victims of ISIL part of the asset forfeiture recovery, which constitutes approximately USD 70,000,000 of the total USD 778,000,000 fines and forfeitures imposed upon Lafarge. This could possibly be done under asset forfeiture equitable distribution principles via the 'restoration process', which would be unprecedented. Meeting of Stephen Rapp with Beth Van Schaack, US Ambassador-at-Large for Global Criminal Justice, Washington, DC, 3 February 2023.

⁷³ 28 US Code § 1350.

⁷⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (SDNY 2003). See also *Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc. and Republic of the Sudan*, Docket no. 07-0016 (2d Cir. 2009).

⁷⁵ 28 USC § 1350 (1948).

Sudanese government's violations of international law, which the plaintiffs failed to do.⁷⁶ The Court of Appeals thus affirmed the trial court's dismissal.

The case is particularly important in that it narrowed corporate liability by defining an ATCA *mens rea* standard that requires purpose rather than mere knowledge of human rights abuses committed abroad, raising the bar for civil society claims brought against corporations under the ATCA.

(b) Iraq: Case filed against Titan Corporation in California (2004)

In 2004, the Center for Constitutional Rights (CCR) filed a complaint in the US District Court for the Southern District of California on behalf of over 250 Iraqi victims who were tortured at Abu Ghraib prison in Iraq. The case was an ATCA federal class action lawsuit against defence contractors CACI International, Inc. and Titan Corporation for their role in international crimes committed at Abu Ghraib prison in Iraq, where they were hired by the US government to provide interrogation and translation services. The complaint charged the defendants with violations of international and US law, including torture, war crimes, crimes against humanity, negligent hiring and supervision, and sexual assault and battery. The case, after being transferred to the US District Court for the District of Columbia, was dismissed in 2009. The Court of Appeals for the District of Columbia held that the ATCA claims could not be brought against contractors because they were not state actors,⁷⁷ further narrowing the scope of ATCA.

CCR filed two other cases on behalf of victims of torture and other international crimes against corporate actors in US federal court. The first case is *Al Shimari v. CACI International, Inc. et al.*, a federal ATCA claim filed on behalf of Iraqi torture victims against US defence contractors CACI International Inc. and CACI Premier Technology, Inc. In 2021, the defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that plaintiffs' claims of aiding and abetting and conspiracy to commit torture, war crimes and cruel treatment are impermissible domestic applications of the ATCA. As of the date of this writing, the decision on that motion remains pending.⁷⁸ The second case is *Al-Quraishi, et al. v. Nakhla and L-3 Services*, a federal ATCA action brought by 72 former Iraqi detainees,⁷⁹ which settled in 2012 with a USD 5,000,000 settlement.⁸⁰

(c) South Africa: Case filed against Daimler, IBM and UBA in New York (2009)

*In re South African Apartheid Litigation*⁸¹ is another federal case that narrowed the application of ATCA. A group of victims of the South African apartheid regime, aided by the International Human Rights Clinic of Harvard Law School, alleged that International Business Machines Corp., General Motors Corp. and Daimler AG, among other corporate defendants, aided and abetted human rights abuses committed by the apartheid regime by supplying vehicles, weapons and computer systems designed to implement a racist passport system. The Court agreed with the plaintiffs concerning the supply of goods of the apartheid regime and rejected defendants' motion to dismiss. However, the Court did not affirm the

⁷⁶ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009).

⁷⁷ *Haidar Muhsin Saleh, et al. v. Titan Corporation*, 580 F.3d 1 (D.C. Cir. 2009).

⁷⁸ For a synopsis of the case history and filings, see 'Al Shimari, et al. v. CACI: At a Glance', Center for Constitutional Rights, available online at <https://ccrjustice.org/AlShimari> (visited 6 May 2023).

⁷⁹ For a synopsis of the case history and filings, see Center for Constitutional Rights, *Al-Quraishi, et al. v. Nakhla and L-3 Services*, available online <https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services> (visited 6 May 2023).

⁸⁰ International Crimes Database, 'Wissam Abdullateff Sa'eed Al-Quraishi, Plaintiff-Appellee v. L-3 Services, Defendant-Appellant', T.M.C. Asser Institut, available online at [https://www.internationalcrimesdatabase.org/Case/3265/Al-Quraishi-v-Nakhla-\(Appeal\)](https://www.internationalcrimesdatabase.org/Case/3265/Al-Quraishi-v-Nakhla-(Appeal)) (visited 6 May 2023).

⁸¹ 02 MDL 1499 (S.D.N.Y. 2009).

allegation that ‘supplying regular cars and “normal” computer systems to the security forces also constituted a relevant support of the regime’s human rights abuses’.⁸² The Court held that the plaintiffs failed to adequately establish a link between the provision of goods and the crimes.

(d) Côte d’Ivoire: Cases filed against Nestlé and Cargill in the USA (2021)

*Nestlé USA Inc. v. Doe et al*⁸³ is yet another case brought by plaintiffs alleging to be victims of international crimes. Like the *Talisman* case, the Nestlé case narrowed the application of the ATCA, expanded corporate rights and restricted the liability of corporate defendants in the USA. In *Nestlé*, six Malian plaintiffs claiming that they were formerly child slaves filed suit against Nestlé USA, Inc. (Nestlé) and Cargill, Inc. (Cargill), alleging that the defendants aided and abetted forced labour on cocoa plantations in Côte d’Ivoire, were complicit in human rights abuses, and maintained a system of child slavery. The plaintiffs also alleged that they were trafficked from Mali into forced labour camps on cocoa farms across Côte d’Ivoire. The case, which was consolidated with *Cargill, Inc. v. Doe*, sought judgment against the defendants under the ATCA.

After the case reached the US Supreme Court, the Center for Justice and Accountability (CJA), a San Francisco-based not-for-profit law firm, and Human Rights First, a human rights NGO, joined in support of the plaintiffs. CJA and Human Rights First filed an *amicus* brief in 2020 arguing that failure to recognize aiding and abetting and other forms of secondary liability under the ATCA ‘would deprive victims of the most serious rights abuses of a remedy in US courts, and would upend the long-standing policy of the United States to deny safe haven to human rights abusers’.⁸⁴ In 2021, the US Supreme Court decided the case, holding that the federal judiciary lacked jurisdiction over the case because neither corporate defendant had sufficient nexus to the USA. The opinion concluded that the complaint impermissibly sought extraterritorial application of the ATCA and that a ‘plaintiff does not plead facts sufficient to support domestic application of the ATCA simply by alleging “mere corporate presence” of a defendant’ in the USA,⁸⁵ further restricting the application of the ATCA in cases where international crimes were committed abroad.

(e) Myanmar: Case filed against Meta Platforms in California (2021)

*Jane Doe v. Meta Platforms, Inc. (f/k/a Facebook, Inc.)*⁸⁶ is yet another case that restricted corporate liability. In 2021, Rohingya refugees from Myanmar filed a class action lawsuit in California against Meta Platforms Inc., the owner of Facebook, seeking a USD 150 billion judgment for the social media giant’s alleged ‘inaction and support of hate speech, misinformation, and incitement of violence fostered the 10-year genocide of the Rohingya Muslims’.⁸⁷ The plaintiffs relied on findings, interviews and investigations conducted by civil society groups, including Fortify Rights and the Institute for War and Peace Reporting.⁸⁸ In

⁸² W. Kaleck and M. Saage-Maaß, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes’, *Journal of International Criminal Justice* 8 (2010) 699–724, at 706.

⁸³ *Nestlé USA Inc. v. Doe et al.*, Docket no. 19-416 (U.S. 2021), available online at https://www.supremecourt.gov/opinion/20pdf/19-416_i4dj.pdf (visited 30 April 2023).

⁸⁴ *Nestlé USA Inc. v. Doe et al.*, and *Cargill, Inc. v. John Doe I, et al.*, Brief for Amici Curiae, Center for Justice & Accountability and Human Rights First in Support of Respondents (21 October 2020), available online at <http://cja.org/wp-content/uploads/2020/10/19-416-and-19-453-Center-for-Justice-Amicus.pdf> (visited 30 April 2023), at 5.

⁸⁵ *Nestlé USA Inc. v. Doe et al.*, supra note 81, at 5.

⁸⁶ *Jane Doe et al. v. Meta Platforms, Inc. (f/k/a Facebook, Inc.)*, Docket no. 4:22-cv-00051-YGR (N.D. Cal. 2022).

⁸⁷ R. Eachambadi, ‘US and UK Rohingya Refugees Sue Facebook Alleging Dissemination of “hateful and dangerous misinformation”’, *Jurist* (7 December 2021), available online at <https://www.jurist.org/news/2021/12/us-and-uk-rohingya-refugees-sue-facebook-alleging-dissemination-of-hateful-and-dangerous-misinformation> (visited 30 April 2023).

⁸⁸ Complaint, *Jane Doe et al. v. Meta Platforms, Inc. (f/k/a Facebook, Inc.)*, Case No. 21-CIV-06465 (Cal. Sup. Ct., County of San Mateo, 6 December 2021), at 48–51.

making their statement of claim, the plaintiffs cited efforts by Harvard University's Berkman Klein Center for Internet & Society to warn Facebook that its platform was being used by the Burmese authorities to incite violence.⁸⁹ The Plaintiffs argued that although Facebook was put on notice, it ignored the warnings.

On 14 December 2022, the US Federal District Court issued an Order Granting Motion to Dismiss with Leave to Amend. The Court held that the claim failed to connect Facebook's platform with the alleged injury that the plaintiffs experienced due to an attack by the Myanmar military. The Court declined to address every issue raised in the papers, including determining whether Facebook was immune under the US Communications Decency Act.⁹⁰

3. Challenges in Bringing Corporate Claims in the USA

As the foregoing cases demonstrate, civil society groups have faced formidable legal barriers when filing corporate claims in the USA for international crimes. This might be attributed in part to a pro-business approach of US law, due to US Supreme Court jurisprudence that has 'expanded corporate rights while narrowing liability or access to justice against corporate defendants'.⁹¹ Supreme Court jurisprudence has limited the extraterritorial application of US law, established a high *mens rea* bar for corporate complicity, and restricted the reach of US legislation in the pursuit of corporate accountability for international crimes. One commentator has suggested that the Supreme Court has used 'overbroad generalizations to empower corporations and limit their accountability'.⁹² A pro-business approach in Supreme Court jurisprudence might help explain the plethora of cases brought against corporations for international crimes that were dismissed, with the *Talisman*, *Titan*, *Nestlé*, *Cargill* and *Meta* cases being just a few recent examples. Many other cases, such as *Kiobel v. Royal Dutch Petroleum*,⁹³ where the US Supreme Court held that there is a presumption against extraterritorial application of the ATCA and denied a demand for relief filed by a group of Nigerians alleging the defendant's complicity in torture and murder, can also be cited.

This is not to suggest that all cases brought in the US seeking corporate liability for international crimes have failed. *Kashef v. BNP Paribas*⁹⁴ is an outlier whose surprising record of success to date offers victims a ray of hope. The case is a putative federal class action against BNP Paribas that was brought by US-resident victims of Sudan's alleged campaign of atrocities against the civilian population from 1997 to 2009. In 2019, a unanimous panel of the US Court of Appeals for the Second Circuit dismissed multiple legal defences and ruled that the plaintiffs were entitled to proceed to trial. More recently, a defence motion to remove the case to Switzerland was denied and venue was confirmed in the Southern District of New York.⁹⁵

4. Civil Claims Filed in the USA with Parallel Criminal Prosecutions

The *Kashef* case suggests that civil cases brought by civil society actors in the US might benefit from parallel criminal prosecutions, even though civil society actors are not afforded the opportunity to participate directly in such prosecutions. *Kashef* appears to have benefited from the facts established in the US federal sanctions prosecution and the resulting guilty

⁸⁹ *Ibid.*, at 52–56.

⁹⁰ Order Granting Motion to Dismiss with Leave to Amend, *Jane Doe et al. v. Meta Platforms, Inc. (f/k/a Facebook, Inc.)*, Docket no. 4:22-cv-00051-YGR (N.D. Cal., 14 December 2022), at 1.

⁹¹ E. Pollman, 'The Supreme Court and the Pro-Business Paradox', 135 *Harvard Law Review* (2021) 220–266, at 225.

⁹² *Ibid.*

⁹³ 569 U.S. 108 (U.S. 2013).

⁹⁴ *Kashef v. BNP Paribas SA*, 925 F 3d 53 (2d Circuit 2019).

⁹⁵ *Kashef v. BNP Paribas SA*, 16 Civ. 3228 (S.D.N.Y. 2022).

plea of BNP Paribas for its clandestine assistance to the government of Sudan in evading sanctions, based in part on a determination by the US Secretary of State that genocide was being committed in Darfur. The recognition of the relationship between the victims' civil case and the US sanctions prosecution is most explicit in the Second Circuit's holding that the civil case was not time barred because the statute of limitations was tolled during the pendency of the criminal case. As governments deploy large scale resources to investigate and prosecute corporations that evade sanctions, civil society actors will be able to follow successful sanctions prosecutions with civil actions like the one initiated by the plaintiffs in *Kashef*.⁹⁶

In this same vein, plaintiffs in a civil claim brought against Chiquita Brands International for complicity in international crimes appear to have benefited from an admission by the defendant in a previous criminal prosecution. On 19 March 2007, Chiquita pled guilty to engaging in transactions with and making payments to the *Autodefensas Unidas de Colombia* (AUC), a paramilitary organization that the US government designated as a terrorist group. Chiquita was sentenced to pay a USD 25 million criminal fine. On 19 July 2007, family members of Colombian trade unionists, laborers, political organizers and human rights defenders who were killed by the AUC filed an ATCA lawsuit against Chiquita in US federal court.⁹⁷ The plaintiffs, whose counsel included EarthRights International and the Colombian Institute of International Law, alleged that Chiquita made payments to Colombian paramilitary organizations and was thereby complicit in crimes against humanity, war crimes and other international crimes committed by those organizations in Colombia. In their Complaint, they relied on Chiquita's guilty plea to one count of engaging in transactions with a specially designated global terrorist.⁹⁸ A subsequent Complaint filed by EarthRights International in March 2020 alleging new claims against Chiquita also relied on the 2007 guilty plea.⁹⁹ This was also the case of an amicus brief filed by CJA, the Harvard International Human Rights Clinic and other amici curiae in June 2020, which cited the guilty plea and related press coverage.¹⁰⁰

While civil society actors did not play a visible role in the criminal prosecution of Chiquita, the 2007 guilty plea that arose out of the prosecution served as an admission that civil society actors relied upon when filing subsequent civil actions. The same is true of the recent guilty plea entered by Lafarge for conspiring to provide material support to ISIL. Following the prosecution of Lafarge by the US Department of Justice, families of American soldiers killed by ISIL filed a civil claim seeking monetary damages from Lafarge. Relying on Lafarge's guilty plea, plaintiffs allege that Lafarge's financing enabled ISIL to transform into an organized armed group capable of killing American service members.¹⁰¹

⁹⁶ The authorization of human rights sanctions in the US Global Magnitsky Act in 2016 (22 USC § 1261–1265) is opening additional avenues for civil society to act on behalf of victims against corporations that have enabled human rights violators to evade sanctions. For further discussion on how civil society is using sanctions legislation to pursue corporate accountability for international crimes, see further, N. Lucas, A. Prezanti, M. Smith, and A. Strayer, 'Civil Society Perspectives on Engaging with Governments on Targeted Sanctions', in this issue.

⁹⁷ *John Doe 1, et al. v. Chiquita Brands International, Inc., et al.*, Docket no. 2:07-cv-03406-JAG-MCA (D.N.J. 2007).

⁹⁸ *John Doe 1, et al. v. Chiquita Brands International, Inc.*, Class Action Complaint for Damages, Docket no. 2:07-cv-03406-JAG-MCA (D.N.J. 2007), at 11.

⁹⁹ *John Doe 8, et al. v. Chiquita Brands International, Inc.*, Complaint and Demand for Jury Trial, Docket no. 2:20-cv-03244 (D.N.J. 2020), at 52, 140.

¹⁰⁰ *Doe, et al. v. Chiquita Brands International, Inc.*, Brief of Amici Curiae Human Rights Practitioners and Scholars in Support of Plaintiffs-Appellants and Supporting Reversal, Docket no. 19-13926 (11th Cir. 2020), at 52–53.

¹⁰¹ A. Katersky, 'US Military Families Sue after French Company LaFarge Pleads Guilty to Supporting Terrorism', ABC News (25 December 2022), available online at <https://abcnews.com/US/us-military-families-sue-after-french-company-lafarge/story?id=95757248> (visited 9 May 2023).

5. Enforcement

An additional challenge that civil society faces in pursuing corporate actors for violations of international criminal law relates to the enforcement of legal judgments. Navigating the minefield of litigation and winning a judgment are not the same thing as collecting damages. This can be seen perhaps most clearly in the case filed on behalf of Ecuadorian farmers and indigenous people against Chevron Corporation in Ecuador. The case concluded with a USD 18 billion judgment (later reduced to \$9.5 billion) for alleged environmental and social harms committed in the Amazon region of Ecuador. Following the judgment, Chevron filed a federal lawsuit in New York and obtained a decision holding that the Ecuadorian judgment was unenforceable in the USA, where Chevron Corporation is headquartered.¹⁰²

Civil society actors have faced similar challenges in enforcing judgments won in the US courts against government actors for violations of international criminal law. Family members of slain journalist Marie Colvin have been unable to collect on the USD 302 million judgment that was awarded against the Syrian state for the killing of Colvin in a targeted attack by government forces in 2012,¹⁰³ given the absence of non-immune Syrian assets within the USA. Similarly, victims in the case brought against Field Marshal Haftar, who was ordered to compensate victim family members for indiscriminate bombings of civilians during his 2019 campaign to take Tripoli,¹⁰⁴ will face challenges in enforcing their judgment. Shortly after a judgment was issued finding Haftar liable for committing war crimes, Haftar's family reportedly began selling his homes and liquidating his other assets in the USA.¹⁰⁵

6. Strategic Litigation

While plaintiffs in US civil cases have faced a range of challenges in both litigating claims and enforcing judgments, the issuance of and collection on legal judgments are not always the ultimate objective. Certainly, it cannot be questioned that enforcing legal judgments helps rehabilitate and make victims whole. However, for some victims, success is not measured by a court judgment. For some, justice might be served by shining a spotlight on corporate abuses, regardless of the outcome of litigation. Sometimes, the details of litigation fall out of public view long after a complaint is filed, and social or political change might take place before a case ever comes to a final judgment. For many victims and their advocates, impact analysis looks to establishing a historical record of wrongs, regardless of whether money damages can ever be collected.

Some CSOs engage in strategic litigation with a view to generate press coverage and mobilize public support for a policy cause. In such cases, the outcome of litigation is irrelevant to whether a public policy was changed, provided the litigation spurred the political change. In other cases, strategic litigation could sway corporate decisions to invest in certain jurisdictions or to do business with certain governments or armed groups. Regardless of whether a case is successful in court, a case might be successful if it pressures a corporate boardroom to divest from a particular jurisdiction in order to protect its image and reputation. Finally, when filing cases, some NGOs assess not only their chances of winning in court but also whether a claim constitutes an emblematic case concerning a systematic corporate problem

¹⁰² See H. Erichson, 'The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy', 1 *Stanford Journal of Complex Litigation* (2013) 417–428, available online at: https://ir.lawnet.fordham.edu/faculty_scholarship/553 (visited 30 April 2023).

¹⁰³ See 'War Crimes against Journalists: Colvin v. Syria', The Center for Justice and Accountability, available online at <https://cja.org/what-we-do/litigation/colvin-v-syria> (visited 30 April 2023).

¹⁰⁴ 'US Judge Orders Libya's Haftar to Compensate Families of Victims of Tripoli Campaign', *France 24*, 30 July 2022, available online at <https://www.france24.com/en/africa/20220730-us-judge-orders-libya-s-haftar-to-compensate-victims-families> (visited 30 April 2023).

¹⁰⁵ 'Libya: Haftar's Family Liquidates Assets in US', *Middle East Monitor*, 11 August 2022, available online at <https://www.middleeastmonitor.com/20220811-libya-haftars-family-liquidates-assets-in-us>.

that must be addressed. In such cases, filing a claim could trigger public scrutiny and ultimately policy change and legal reform.¹⁰⁶

5. CONCLUSION

The limited engagement of civil society in pursuing corporate accountability in international tribunals can be contrasted with the proliferation of cases filed by civil society against corporate actors in domestic courts. This active engagement by civil society in national jurisdictions can also be contrasted with the inaction of the UN Security Council, which has failed to refer situations in jurisdictions such as Syria and Ukraine to the ICC or whose responses to requests for assistance from the ICC Prosecutor in jurisdictions such as Sudan and Libya have been limited or non-existent. In light of this inaction, civil society's pursuit of claims against corporate actors in domestic courts offers a ray of hope to victims who wish to see accountability for international crimes.

In jurisdictions where the international community has been seized of international crimes, civil society continues to promote justice and accountability. For example, despite action by the ICTR and the ICC to try international crimes committed in Rwanda and Sudan, respectively, civil society actors continue to file criminal and civil claims in domestic courts for international crimes committed in both jurisdictions. One thus finds in the international arena a flood of activity by civil society actors pursuing justice and accountability, both in cases where the international community is actively engaged and in cases where it is paralyzed. This approach by civil society to seek justice ensures that a greater number of actors responsible for international crimes are held to account, thereby overcoming the constraints facing international tribunals, which can try only a small number of cases. Civil society's efforts in promoting corporate accountability demonstrate the energy, imagination, and entrepreneurialism of civil society actors and their determination to seek justice wherever it may be found.

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¹⁰⁶ For a detailed discussion, see H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing, 2018); and J. Lobel, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America* (New York University Press, 2004).