

BOOK REVIEW

Corporate Liability and International Criminal Law, by Alessandra De Tommaso (London: Routledge, 2024)

The book *Corporate Liability and International Criminal Law* by Alessandra De Tommaso is a must-read for everyone who wants to explore if corporate criminal liability should be incorporated within the scope of international criminal law and, if so, what are some of the main historical developments and issues to take into account. For many decades now, globalisation, state-corporate cooperation and a lack of effective regulation have led to corporate involvement in genocide, crimes against humanity and war crimes in various conflicts and contexts, with only very few corporations being held accountable.¹ De Tommaso's book provides a clear and thoughtful analysis of one part of the puzzle of corporate impunity but also provides a broad and comprehensible reassessment of the role that international criminal law can play in addressing corporate involvement in international crimes.

Ranging from Nuremberg to the future of the International Criminal Court (ICC), the analysis also covers relevant developments in between, such as the drafting of the Code of Offences against Peace and Security of Mankind, the 1951 and 1953 Committees on International Criminal Jurisdiction and 'post-Rome' international and domestic developments around corporate criminal liability. As such, the book also offers insight into how the issue of international criminal liability of corporations has repeatedly shaped discussions on the scope of international (criminal) law.

Chapter 1 discusses the legacy of Nuremberg. Nuremberg is part and parcel of virtually all texts discussing business and human rights (or atrocity crimes) and has been analysed by many scholars. De Tommaso's account of Nuremberg stands out because of its concise and nuanced argument that the idea of criminal liability of legal entities and its legal basis at Nuremberg differ greatly from the rationale underlying the modern concept of corporate criminal liability. This is a valuable contribution to the literature on the value of the Nuremberg precedent—also for non-lawyers—because it warns against an overestimation of its impact on present-day corporate liability under international law.

Chapter 2 covers several initiatives in the aftermath of the Nuremberg trials that discussed the issue of international criminal liability of corporate entities. The author describes, for example, how the 1948 Genocide Convention represents 'a missed opportunity to launch a genuine debate'. The International Law Commission's Draft Code of Offences against Peace and Security of Mankind (starting in 1949) is discussed next. Then, an analysis of the role of the 1951 and 1953 Committees on International Criminal Jurisdiction exposes how, for the first time, the liability of business entities was discussed separately from the responsibility of states. The work of these two committees is presented

¹ Sarah Joseph and Joanna Kyriakakis. 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power.' (2023) *Leiden Journal of International Law* 36:2 335–61. <https://doi.org/10.1017/S0922156522000826>.

as a fundamental prelude to the discussion of corporate liability during the drafting of the Rome Statute.

The book turns to the Rome Statute in chapter 3, hinting in the subtitle that this could be regarded, by some as a ‘corporate criminal liability’s swan song’. The development of the 1998 Rome Statute of the International Criminal Court is traced back to the early 1980s to provide a detailed—but again concise—historical account of the debate on international criminal liability for corporations. The chapter then argues that the withdrawal of the French proposal to include corporate criminal liability into the Statute was primarily due to practical time constraints to solve remaining issues.

Chapter 4 looks at the ‘after Rome’ period and analyses developments that are presented as a potential resurrection of corporate criminal liability in international criminal law, or at least evidence of the evolving nature of the discussion on this issue. The chapter discusses the first attempt of an international criminal tribunal to assert jurisdiction over corporate entities, at the Special Tribunal for Lebanon, the 2014 Malabo Protocol of the (proposed) African Court of Justice and Human Rights and the Draft Articles on Crimes Against Humanity.

Chapter 5 then dives into national developments and the comparative law argument that the trend towards recognition of corporate criminal liability in domestic systems supports the adoption of corporate liability in international criminal law. After a careful and insightful contextualisation of this argument, De Tommaso highlights the positive impact of developments at the domestic level but argues that corporate criminal liability as a general principle of law would have no practical implication.

The final chapter—chapter 6—discusses some of the issues that negotiators of an amendment to the Rome Statute should consider in order to develop a framework to hold corporations liable under international criminal law. Three elements are highlighted in particular: the definition of a model of attribution, the applicability of fundamental procedural rights and the presumption of innocence. The first part of this chapter contrasts the model proposed during the negotiations of the ICC Statute in the late 1990s with the more recent Malabo Protocol. A convincing argument is made that the latter may be a better fit for the ways complex, modern corporations operate and become involved in international crimes because it is rooted in organisational theory, relies on corporate policies and ‘collective corporate knowledge’ and shifts the focus from individual behaviour to the company’s ethos and policies. At the same time, however, while the ‘Rome Model’ is the outcome of lengthy deliberations and is consistent with other international instruments, the ‘Malabo Model’ contains many elements that still need to be clarified to avoid infringing the principle of legality and legal certainty. This insightful and balanced analysis is completed by a presentation of the idea to explore the Australian model for corporate accountability, which merges elements of the two different models.

The book has a strong focus on the most relevant legal issues on corporate liability under international criminal law. As such, it perhaps does not pay enough attention to some important practical and strategic issues. For example, the book does not address the issue of the ICC’s limited capacity and resources. Prosecution of corporate actors would require reallocation of such resources from other cases or additional funding. The ICC will likely remain under ‘high demands and expectations to show results across situations and cases’² for the foreseeable future and the prosecution of complex cases against corporations—as collectives playing a role in collective crimes³—may complicate the ICC’s fulfilment of such

² International Criminal Court, Office of the Prosecutor Strategic Plan 2023–2025 (The Hague: ICC, 2023), 4.

³ Wim Huisman, Susanne Karstedt and Annika van Baar, ‘The involvement of Corporations in Atrocity Crimes’ in Barbora Hola, Hollie Nyseth Nizatira and Maartje Weerdesteijn, *The Oxford Handbook on Atrocity Crimes* (New York: Oxford University Press, 2022), 387–8. <https://doi.org/10.1093/oxfordhb/9780190915629.013.17>,

demands and expectations. Moreover, my own empirical criminological research has established that corporations tend to be involved in international crimes indirectly, rather than as principal perpetrators often through close state-corporate cooperation.⁴ Therefore, it is worth discussing whether and when corporations would fit into the case selection and prioritization policy of prosecuting ‘those most responsible’⁵ for the most serious crimes of concern to the international community as a whole. But the book does not go into this.

Nevertheless, the book offers useful starting points for not only lawyers but also criminologists and other business and human rights scholars with an interest in corporate liability, for further research that might contribute to more effective regulation of corporate involvement in international crimes. For instance, the discussion on various models of attribution could be usefully developed through a combination of legal analysis with additional insights from organisational and criminology on the regulation of corporate deviance,⁶ and criminological research on corporate involvement in atrocity crimes.⁷ Further research could also investigate how legal obstacles relate to political obstacles to increase corporate accountability in international (criminal) law, especially given the close relationships that states tend to keep with ‘their’ corporations. Socio-legal investigations of the interplay between legal and political obstacles can potentially provide a way forward in countering the existing corporate impunity under international criminal law.

Corporate Liability and International Criminal Law will be valuable to both students and scholars in various disciplines including not only law or business and human rights but also criminology, economic and development studies and political science. Its value lies mostly in its in-depth yet compact analysis of the key developments of corporate liability in international criminal law and the most relevant legal issues for those who would want to extend the current legal framework. The book makes these complex events and discussions accessible to readers of all levels of expertise.

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⁴ Ibid, 393; Annika van Baar, *Corporate involvement in international crimes in Nazi Germany, Apartheid South Africa and the Democratic Republic of Congo* (PhD thesis, Vrije Universiteit Amsterdam, 2019) retrieved from <https://research.vu.nl/en/publications/corporate-involvement-in-international-crimes-in-nazi-germany-apa> (accessed 13 May 2024).

⁵ The Office of the Prosecutor, Policy paper on case selection and prioritization (The Hague: ICC, 2016), 14.

⁶ See, for example, Nina Tobsch, Benjamin van Rooij and Marieke Kluin, ‘A Criminological perspective on organizational integrity’ in Muel Kaptein *Research Handbook on Organizational Integrity* (Cheltenham/Northampton: Edward Elgar, 2024), 111. <https://doi.org/10.4337/9781803927930.00015>; Melissa Rorie and Benjamin van Rooij, *Measuring Compliance: Assessing corporate crime and misconduct prevention*. (Cambridge: Cambridge University Press, 2002).

⁷ See, for example, Huisman, note 3; van Baar, note 4.