

BOOK REVIEW

‘From Nuremberg to Kabuga’

Corporations, Accountability and International Criminal Law: Industry and Atrocity, Joanna Kyriakakis (Edward Elgar Publishing, 2021)

In September 2022, the international criminal trial of Félicien Kabuga for participation in the 1994 Rwandan genocide began in a courtroom in The Hague. Kabuga’s trial is noteworthy, not only as it is probably one of the last international criminal trials arising from the genocidal scheme that saw 800,000 Tutsis murdered, but also because Kabuga is not accused of directly participating in the killings but facilitating and enabling them through his various business enterprises.¹ Kabuga’s trial is a rare moment in the history of international criminal law that sees a businessman being held accountable for his involvement in atrocity crimes.

To understand the 75+ years’ history of international criminal law (ICL) that have led to this point and why having a businessman being tried for international crimes is such a rare occurrence, there is no better book than Joanna Kyriakakis’ *Corporations, Accountability and International Criminal Law: Industry and Atrocity*.

‘There is a problem with the global economy’, Kyriakakis begins, that of a ‘governance gap’ identified by John Ruggie – the lack of effective regulation of transnational corporations. Addressing that problem serves as the framing and impetus for the book. On this basis, Kyriakakis has produced a timely and important contribution to the increasing literature around corporate accountability through hard-law mechanisms for egregious human rights abuses. From Nuremberg to Kabuga, this book provides a comprehensive overview of the key moments when ICL has been used to try and hold companies, and individuals within them, accountable for ‘atrocity crimes’. Kyriakakis weaves legal commentary into each section as well as critical analysis of the key jurisprudential, socio-legal and political debates that surround the core animating question of the book: ‘what is the appropriate role to be played by atrocity law in addressing corporate wrongs?’

The historical review of ICL’s treatment of corporate defendants begins with the post-World War II period (in chapter 2). Both German and Japanese companies were accused of actively participating and abetting in war crimes. The chapter devotes considerable space to the treatment of corporate actors at Nuremberg – widely seen as the founding moment of modern-day ICL. The absence of an industrialist in the primary International Military Tribunal is discussed as well as subsequent trials of corporate leaders in the trials held by each of the Allies in each of their German occupation zones. The inclusion of how Russian and French authorities treated economic actors, as well as the treatment (or lack thereof) of the Japanese *zaibatsu* conglomerates in the Tokyo war crimes trials – are useful

¹ *Prosecutor v Félicien Kabuga*, Prosecution’s Second Amended Indictment, *International Residual Mechanism for Criminal Tribunals*, 1 March 2021, <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Indictment/NotIndexable/MICT-13-38/MRA26499R0000637420.pdf>.

counterpoints to the more well-known US-zone 'Industrialists trials' and British 'Zyklon B trial'.

Kyriakakis' analysis and commentary highlight the vexed relationship between business and ICL, even at its founding moment. Should economic actors be held accountable? If so, how and by whom? Chapter 2 exposes the competing interpretations of this history – including whether the post-World War II war crimes trials stands for or against the notion of corporate (as distinct from individual) accountability for international crimes. Indeed, the book notes that the jurisprudence of the corporate trials during this era is not always consistent, with many of the same conceptual and jurisprudential concerns that arose during this period remaining unresolved.

Chapter 3 continues the historical arc of the book and is dedicated to how the International Criminal Court – the world's first standing international criminal tribunal – treats businesses and economic atrocity crimes. In particular, the crucial debate over whether the ICC would enjoy jurisdiction over corporate entities is laid out. Ultimately, due to politics, differing legal traditions and diplomatic expedience, the ICC's constitutive document, the Rome Statute was finalised in 1998, and the ICC commenced operations in 2002, with jurisdiction solely over natural persons – not legal persons, i.e., companies.

Chapter 4 is devoted to recounting and analysing corporate ICL accountability cases in the seven decades since Nuremberg; not just before international criminal tribunals but domestic and regional fora as well. That this chapter is significantly shorter than chapter 2 is indicative of the paucity of such cases since the post-World War II trials. This perhaps reflects the ill-health of the broader ICL project during the Cold War years, but also the specific challenges to holding economic actors accountable under ICL – challenges that were foretold at Nuremberg and Tokyo (and discussed in this book).

Kyriakakis' recounting and analysis here is typically comprehensive. The International Criminal Tribunal for Rwanda's *Gisovu Tea Factory and Media* cases and Félicien Kabuga's ongoing prosecution are discussed, as is the *Special Court for Sierra Leone's* prosecution of Charles Taylor. Even the *Special Tribunal for Lebanon's* contempt charge against a Lebanese television company is referenced. For the sake of completeness, the chapter also recounts efforts at holding businessmen and companies accountable for atrocity crimes at the domestic and regional levels, including through civil litigation and criminal prosecutions. These discussions are necessarily brief but provide useful context of how the evolution of ICL's treatment of corporations has tracked with other corporate legal accountability efforts. The discussion here of the *Malabo Protocol* (2014) to the *African Court of Justice and Human Rights* and its principles on corporate criminal liability is especially striking in light of the previous chapter's discussion of the Rome Statute's absence of a similar jurisdictional provision.

After exhausting a survey of legal cases involving corporate defendants for atrocity crimes, chapter 5 of the book invites the reader to broaden one's gaze beyond the hard-law of ICL, and contemplate whether other 'transitional justice' mechanisms may be suited to the task of corporate accountability for atrocity crimes. This aligns with Kyriakakis' desire to resist fetishizing ICL to the detriment of other possible corporate accountability pathways.

Some ICL purists may question this chapter's inclusion and even query ICL's characterization as a transitional justice mechanism at all. However, far from being a distraction from the main objectives of the book, chapter 5 is a valuable component of its overall narrative. It situates the pursuit of corporate accountability via ICL through a larger, and more victim-oriented prism. In so doing, this chapter highlights the significance of Latin American and African countries' experiences in the conversation. Kyriakakis reminds the reader that while ICL is often seen as a Euro-centric project, it is in Africa and Latin America where the pursuit of corporate actors for their involvement in atrocities and armed conflict have often played out; whether in the Colombian peace process, and trials in Argentina or

the South African Truth and Reconciliation Commission. These may be far away from courtrooms of The Hague but are vital data-points in our understanding of the promise and limitations of ICL to exact justice, including when it comes to corporate wrongdoers.

Kyriakakis appreciates the indispensability of some form of accountability when companies engage in atrocity crimes, yet she questions whether ICL is fit for that purpose. The book concludes (in chapter 6) by elaborating on the challenges and critiques of holding corporate actors accountable for atrocity crimes under ICL: jurisprudential issues, for example, of the difficulty with satisfying the *mens rea* element of criminal guilt when it comes to corporate personnel and practical ones, such as ICL's susceptibility to political and economic interests that 'may tend to push against corporate accountability for past violence.'

Ultimately though, rather than being a deal-breaker, Kyriakakis views these criticisms of ICL's effectiveness as a spur for greater vigilance and effort. She suggests that they can be overcome through 'contextually specific transitional justice planning, corporate criminal law design and modesty' in approaching how ICL, or any other transitional justice mechanism, can play 'in curbing the excesses of corporate violence.'

Indeed, it is on a hopeful note that Kyriakakis chooses to conclude. She states that the 'persistent challenges and objections to moves towards the business case in international criminal law' can and should be overcome. She reminds the reader of ICL's 'expressive significance' and 'legitimacy' – attributes that make it an attractive and vital option for corporate accountability in post-atrocity settings.

Certainly, as we move into the second decade of the operation of the *UN Guiding Principles on Business and Human Rights* (2011) the calls for stronger accountability mechanisms for corporate human rights abuses – to close Ruggie's governance gap – are only increasing. Kyriakakis' book is a timely contribution that unpacks what ICL's role has been historically to that end, the challenges that confront it and the promise it holds for the future.

The book delves expertly and critically into a prominent, albeit specialized and sometimes prosaic, mechanism of corporate accountability for human rights abuses. It is well-written and accessible. The coupling of succinct case histories with insightful and critical commentary of all major corporate ICL trials and related developments means that this volume should be of interest to a range of audiences, from legal and non-legal backgrounds. It is a wonderful resource for educators, scholars and practitioners alike. Whether or not the reader agrees with Kyriakakis' views, and her optimism, one thing is for sure: we will all be better placed to contemplate the future of corporate accountability under ICL having digested this book.

Jonathan Kolieb 

Senior Lecturer and Peace and Conflict Lead,
Business and Human Rights Centre, RMIT University,
Jonathan.kolieb@rmit.edu.au
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