



# BOFAXE

## INTERNATIONAL CRIMES IN THE AGE OF SOCIAL MEDIA

### Why Corporate Criminal Liability is unsuitable to combat Impunity

“Social media platforms such as Facebook are important for the dissemination of information. The platform can be a powerful tool for Sharing text messages, pictures, and videos via, and it is technically simple to use. Thus, Facebook receives a multitude of digital media content. Some of these depict the commission of heinous and abhorrent criminal acts, bringing into question the legal responsibility of social media platforms for the management of digital information under its control in international criminal proceedings.

The current dispute between [The Gambia and Myanmar](#) could prove emblematic in this regard. Nicholas Koumjian, head of the Independent Investigative Mechanism on Myanmar (IIMM) which was established by the UN Human Rights Council, emphasized that [Facebook holds most of the relevant material](#) on the commission of international crimes, complaining about a lack of cooperation from the platform. Indeed, a [recent study](#) shows that Facebook deleted highly probative material in the past; what The Economist refers to as “[accidental cover-up](#)”. Besides the specific question whether Facebook is obliged to preserve potential evidence and hand it over to international courts and tribunals, the developments have also triggered a more general discussion around the usefulness of criminal liability of corporations under international law. With a possibility of incurring criminal charges, Facebook might not have to safeguard and provide evidence due to the principle of *nemo tenetur se ipsum accusare*. Yet, this piece argues that Facebook should not have to fear corporate criminal liability as the latter is unsuitable to combat corporate involvement in international crimes.

#### Corporations and the Commission of Crimes: A Case for International Law?

It is trite to say that private companies are usually seen as not bound by international law (cf. [Wouters/Chané](#), p. 18), including in the areas of human rights and international criminal law. At the same time, companies may grow to an immense size and accrete tremendous power. Throughout history, corporations have played important roles in the commission of international crimes. They supplied goods, provided information and services, or made other investments that finally contributed to the commitment of those crimes. The modern companies that offer online services provide an even easier opportunity for instrumentalization. It is doubtful, however, whether international criminal law is the right tool to pursue private companies for involvement in international crimes.

Several points can be made to elaborate on this hypothesis:

It must first be conceded that under international law, it is conceivable to establish an international corporate criminal legal regime. As [Rosalyn Higgins](#) pointedly puts it, international law’s state-centrism is simply an “intellectual prison of our own choosing” (p. 49). International criminal law is not by its nature restricted to dealing with natural persons. The fact that Article 25(1) Rome Statute stipulates that the International Criminal Court’s (ICC) jurisdiction only includes “natural persons” does not mean that it is not possible to amend the wording of the provision or adopt an additional protocol. In fact, the Special Tribunal for Lebanon (STL) has interpreted its Rules of Procedure and Evidence (STL Rules) to include criminal liability of legal persons in the [Al Khayat Decision](#). The Appeals Chamber stated that “*corporate liability for serious harms is a feature of most of the world’s legal systems [...] Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that [...] corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law*” (para. 67). Consequently, when the court interpreted the notion of personhood within the STL Rules, it construed “*the word ‘person’ so as to include legal persons as well as natural persons*” (para. 74). Accordingly, scholars speak of an ongoing shift (e.g. [Caroline Kaeb](#), “[The Shifting Sands of Corporate Liability under International Criminal Law](#)”) towards establishing international criminal liability for companies.

Elsewhere, there is more hesitation on the issue of corporate international criminal liability. The International Law Commission (ILC) stipulates in Article 6(8) of its [Draft Articles on Crimes against Humanity](#): “*Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.*” This provision leaves it up to states to adopt corporate criminal law and, more importantly, explicitly refers to legal frameworks beyond criminal law as possible reactions to companies’ involvement in the most heinous crimes.

#### Why Corporate Criminal Liability won’t achieve the desired Results

In spite of these developments, not much speaks in favor of characterizing corporations as perpetrators of or participants in international crimes. Apart from the question of whether a legal entity can commit any criminal action with subjective intent (*mens rea*), establishing the corporation as a separate criminal legal subject is more of a symbolic idea than a legal necessity. First, leaving corporations out of reach of criminal liability does not lead to impunity. A legal entity cannot consciously act on its own but only by virtue of its human leaders. It is them that need to be held accountable as they are the brains of the company, lead the operations, and hence must bear the responsibility for acts committed under their aegis. Second, punishing corporations alone does not adequately serve the aim of crime prevention. Extremist ideologies often underlying crimes against humanity do not originate from legal persons but from the natural persons in charge. Penalizing legal entities does not prevent natural persons from realizing their ideological (political) agendas through other means. Third, as [Lord Chancellor](#) Thurlow of Great Britain already emphasized in the late 18<sup>th</sup> Century, “[c]orporations have neither bodies to be punished, nor souls to be condemned”. Punishment, such as imprisonment, would be only a symbolic act for corporations. As far as the freezing of assets or the financial compensation of victims is concerned, these aims may well be achieved through means of civil liability and tort law. The latter may provide for restrictions on assets as well as naming and shaming corporations. Moreover, the harsh punishments or the full dissolution of a corporation could de facto punish all persons working for that private legal entity regardless of their actual involvement in any crime.

#### Conclusion and Way Forward

In conclusion, extending the reach of international criminal law onto legal persons may be a strong symbolic act, but does not have convincing legal merits. The more appropriate way to go is broadening individual criminal liability of natural persons involved in relevant corporate activities. As [Carsten Stahn](#) puts it “*corporations are not the masterminds of international crimes, but rather benefit from a given situation*” (p. 122). International criminal law as ultima ratio does not need to be extended to corporations. In fact, it has been already pointed out well in the Judgement of Nuremberg that “*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced*” (as referenced by Judge Philippe Kirsch Applying the Principles of Nuremberg in the ICC, p. 3). Coming back to the case of Facebook, the company ought not to be criminally responsible for a potential contribution to mass atrocities. Any involvement should instead be sanctioned in virtue of tort law or the use of administrative fines. At the same time, this approach takes away a potential ground from the company for justifying any denial of cooperation. Still, the exact scope of positive obligations on corporations for the protection and supply of evidence remains an open question and requires further elaboration and establishment of an international legal framework.