Fighting on the Business Front

On Corporate Criminal Liability and the War in Ukraine

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Since 24th February 2022, international criminal justice has moved to 'warp speed': Russia's flagrant aggression against the sovereignty and territorial integrity of Ukraine as well as the ensuing (and continuing) war has spawned a plurality of transformative developments across the whole realm of international criminal law, stretching from a substantive increase in (extraordinary) spending or budgetary boosting of existing adjudicative structures, over the secondment of national experts by international organisations, towards an overall strengthening of the role of the International Criminal Court (ICC), the (academic) discussions on a 'Special Tribunal for Aggression' or the 'Ukraine Accountability Conference': the degree of substantive, procedural, as well as institutional and political progress has been remarkable and is likely to generate a plethora of ensuing (academic) discussions in weeks and months to follow.

Last week, on 26th June 2022, these developments were further amplified by a statement issued by the Ukrainian government, which called for bringing war crimes charges against leaders and chairpersons of major international banks, including JPMorgan Chase, Citigroup, or HSBC. The charges were hence conceived to pertain to said financial institutions' alleged and sustained (indirect) financing of both the Russian state in general as well as President Putin's war of aggression against Ukraine.

Lawfare at the Business Front - Widening the Applicatory Purport of International Justice?

In the original interview with CNBC, the Economic Advisor to Ukrainian President Volodymyr Zelenskyy, Oleg Ustenko, was quoted saying that 'there [was] no doubt that Russia [was] committing war crimes in Ukraine, against Ukrainians'. While, in light of numerous reports that have documented wide-spread atrocities and human rights violations across Ukraine in recent months, said passage did not come as a surprise, Ustenko added another, yet previously unheeded, layer to the broader question of accountability for war crimes by stating that '[i]n our logic, everybody who is financing these war criminals who are doing these terrible things in Ukraine are also committing war crimes'.

This interpretation offered by Ustenko was not unprecedented: earlier in July 2022, Ustenko had reportedly written to the CEOs of JPMorgan Chase, Jamie Dimon, as well as HSBC, Noel Quinn, urging them to discontinue business relations with Russia and stop to finance companies that trade in Russian oil or sell shares in state-backed oil and gas enterprises, including Gazprom or Rosneft. In the same FT interview, Ustenko underlined that in his view, these companies were committing war crimes since they were "helping the Putin regime in this specific way and they are supporting the regime", arguing that Russian oil and gas revenues would directly fund the war economy.

Whether or not this may be true – and regardless of ensuing (legal) questions this might trigger, including the notion of indirectly financing the war economy through the continuous purchase of Russian natural resources by Western states – a major obstacle to this approach stems directly from the Rome Statute, the legal document on which the International Criminal Court has been build: in its Article 1, the Rome Statute stipulates that the Court should 'be a permanent institution and shall have the power to exercise its jurisdiction **over persons** for the most serious crimes of international concern, as referred to in this Statute, and

shall be complementary to national criminal jurisdictions.' (my emphasis)

Ukraine as the Watershed Case for Corporate Criminal Responsibility?

Seemingly aware of these persisting limitations, Ustenko noted that the Ukrainian government was contemplating to 'pursue, not maybe companies, but managers of these companies'. In the same statement, however, Ustenko also underlined that Ukraine had 'different options' at its disposal, the first one 'definitely' being to bring charges before the ICC. The question now remains what it is that the Ukrainian government attempts to achieve by these announcements as well as the fact that its justice and security services were constantly gathering information about the concerned banks, ready to be later forwarded to the International Criminal Court.

As for the moment, it seems as if Ustenko's statement is queuing in a longer row of attempts to steer public discourse and to 'muddy the waters' as well as to gently leave a mark on ongoing discussions about corporate criminal responsibility for international crimes. The contingency to charge international corporations as well as their leaders or chairpersons for crimes under international law, such as genocide or war crimes, is anything but a novelty in both academic and diplomatic deliberations in recent years. Most recently, this debate has been re-vitalized following the presentation of a novel definition of a proposed crime of ecocide: arguing that 'severe and either widespread or long-term damage to the environment' would frequently be caused by private companies rather than States or their leaders, the question of standing for private companies as well as their leaders, thus corporate responsibility, attained renewed traction. As of now, however, the architecture of international criminal justice does not allow for the prosecution of corporations as legal entities; while leaders of such corporations, as natural persons, might theoretically be prosecuted by adjudicative entities such as the ICC, considerations of inter alia accountability and attribution have thus far barred the prosecution of such individuals for international crimes for which their corporations are allegedly responsible. Hence, to effectively widen the applicatory purport of international criminal law to also extend to private corporations has thus far not been widely appreciated or advocated for by States.

On a related note, the question of corporate responsibility also comes with considerable evidentiary challenges: with regard to the banks' activities, as claimed by Ustenko, it would be required to proof that their operations have immediately prolonged the war: as was also reported by FT, JPMorgan Chase, for example, provided financial assets to Vitol, a company engaged in trading Russian oil, while also holding assets within its portfolio that pertained to the state security sector, including shares in Rosneft, Sberbank, or Gazprom; similarly, the asset management of HSBC maintained stakes in Gazprom and Rosneft, whereas Citigroup had handed out credits to Vitol and also Lukoil, another major Russian energy company. While this is not meant to argue against principal corporate criminal responsibility in the event of international crimes, it should hence be borne in mind that evidentiary standards for determining a potential responsibility for any given corporation might be rather complex and need to be analysed thoroughly.

Does Constant Dripping Wears Away the Stone?

Against this background, what insight are to be taken away from Ustenko's statement(s)? The purpose of his contributions seems to be at least twofold: on the one side, Ustenko's statement can be seen as part of a broader agenda or strategy that could be described as 'international justice lawfare', in that the Ukrainian government – as well as its allies – continue to exhibit the whole set of international criminal justice instruments and mechanisms at their avail, regardless of whether or not these bear prospects for immediate implementation. Similar to the debates surrounding yet another international criminal tribunal, it seems to be about mooting legal contingencies, 'international criminal what-ifs', that are substantively backed by the fact that broad-based fact-finding operations and preservation of evidence missions are carried out. On the other side, thereby also echoing the discussion on

a new crime of ecocide, it appears that the overall discourse on (re-)conceptualizing corporate criminal responsibility may be gradually shifted, hence mirroring a given momentum stemming from the ongoing hostilities with all its ramifications. In other words: if it were to be proven that financial activities by major financial institution have an immediate effect on prolonging the war, the overall debate on increasing responsibility for private corporations in light of international crimes would be lastingly re-enforced.

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