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Bryk, L.; Sluiter, G.

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Why Corporations Should Cease Business Activities with Russia

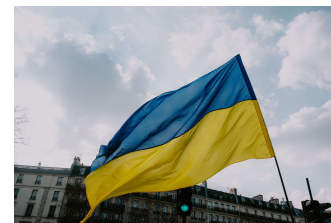
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Linde Bryk, Góran Sluiter

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Introduction

Early morning 24 February, Russian troops invaded Ukraine, with already devastating consequences for civilians. As a response to this flagrant violation of [Article 2\(4\) of the UN Charter](#), the [EU](#), the [UK](#) and the [US](#) have imposed expansive sanctions on Russia.



Even though these sanctions ban certain trade, or freeze assets of Russian banks and individuals, not all EU, UK and US corporations might stop their trade, investment or cooperation with Russia or Russian (largely) state-owned corporations, such as Rosneft. In this blogpost we argue that corporations should consider withdrawing investments or business activities, not only from a moral and ethical perspective, but also to avoid contributing to the commission of international crimes, with the subsequent risk to be held criminally liable.

We will elaborate on criminal liability risks of corporations and their executives for business activities with Russia in the past following the annexation of Crimea, and considering more recent activities following the invasion of Ukraine. Our analysis is based on criminal liability risks under international criminal law (ICL), focusing on the incorporation and application of ICL in the Dutch legal order. This is based on the fact that Dutch courts have shown a willingness to convict businesspersons for complicity in war crimes for their corporate activities.

Corporate complicity

Corporations are often not the direct perpetrators of international crimes, but through their business activities can assist in their commission. Therefore, corporate officials or corporations would most likely be prosecuted for secondary liability, which is labelled in criminal justice systems as complicity or aiding and abetting, in the commission of crimes by others.

Before the International Criminal Court (ICC) only natural persons, not legal persons, can be held criminally liable. Therefore, the Office of the Prosecutor (OTP) of the ICC's focus would be on corporate executives assisting in the commission of international crimes. [Article 25\(3\)\(c\) ICC Statute](#), aiding, abetting or otherwise assisting in the commission or attempted commission of a crime, and [Article 25\(3\)\(d\) ICC Statute](#), contributing in any other way to the commission or attempted commission of a crime, might offer a pathway to corporate criminal

complicity for international crimes committed on Ukrainian territory. However, several problems exist with applying the ICC complicity-regime to corporations: (i) absence of criminal liability for legal persons in the ICC Statute, (ii) Article 25(3)(c) ICC Statute's much debated high mental element standard, (iii) the absence of clarity on Article 25(3)(c) ICC Statute's causal link required for the conduct element, and (iv) the lack of ICC prosecutions of corporate actors and the lack of resources plaguing the Prosecutor's office. Thus, considering prosecutions in national jurisdictions might be more viable.

The Netherlands is a serious option for filing criminal complicity complaints against corporations trading with Russia, because of its relatively solid practice in this area demonstrated by the convictions of businessmen Kouwenhoven and Van Anraat for facilitating war crimes. For complicity under Article 48 Dutch Penal Code (DPC), two elements need to be proven: the conduct and the mental element. In *Kouwenhoven* the Court of Appeal at Q found on the conduct element that Kouwenhoven made an 'essential contribution' to RUF rebel war crimes by among others providing arms, using an almost 'causeless complicity' standard, according to Sluiter and Yau. In *Van Anraat*, the Court of Appeal found that he played an 'important part' in providing Iraq with substances to produce chemical weapons. The Court of Appeal at 12.4 and 12.5 held that it is not needed that the assistance was indispensable or made an adequate causal contribution to the principal crime. It suffices that the accomplice's assistance furthered the crime or facilitated the commission of the crime, more in-depth see Sluiter and Yau. As to the mental element, in *Kouwenhoven* the Court of Appeal at L.2.3 found that he had conditional intent, regarding the war crimes committed, as he knowingly and wilfully exposed himself to the probable chance that there would be a particular consequence of his assistance, namely facilitating the commission of war crimes. Similarly, in *Van Anraat*, the Court of Appeal at 11.12, found that he knew that the substances he provided to Iraq would be used to produce chemical weapons.

Both cases are still widely cited and illustrative of how corporate officials can be held accountable in aiding and abetting mass atrocities. We will refer to these judgments in setting out the criminal liability-risks for companies conducting business activities with the Russians.

Potential complicity for international crimes committed between 2014 – 2022

In February 2014, with what should qualify as a crime of aggression, Russia annexed Crimea. Since then, according to the OTP at 70, there is a reasonable basis to believe that several war crimes under the ICC Statute have been committed in Crimea during the ongoing occupation.

Further, following the invasion of Crimea, in April 2014 an armed conflict erupted in the eastern part of Ukraine, in Donetsk and Luhansk, between armed separatists and the Ukrainian armed forces. Also, in this armed conflict, the OTP found in its preliminary

examinations that there was a reasonable basis to believe war crimes were committed.

Against these facts, we can discuss how corporate involvement with Russia, Russian (largely) state owned corporations or armed separatists in Eastern Ukraine, might qualify under Dutch criminal law as complicity to war crimes under respectively Articles 5 and 6 International Crimes Act (ICA), and to the crime of aggression, Article 8b ICA, under which the occupation of Crimea would likely be judged to fall.

Article 48 DPC criminalizes the complicity in a crime. Article 51 DPC provides for corporate criminal liability for such facilitation, for both the company and its 'factual leaders'. The landmark Supreme Court judgment '*Drijfmest*' and subsequent judgments, provide criteria for 'reasonable attribution' of criminal liability to a company and its leading executives. Thus, under these two articles a corporation and its executives might be held criminally liable for facilitating war crimes and, for business activities after 1 August 2018 when Article 8b ICA entered into force, for facilitating the crime of aggression.

The million-dollar question is what type and degree of assistance would amount to corporate aiding and abetting liability during the 2014 – February 2022 period (conduct element) and when it could be considered that a company should have known that its activities facilitated the commission of war crimes by Russia in Ukraine, and to the crime of aggression as of 1 August 2018 (mental element). A strict line is impossible to draw and will depend on many factors. Nevertheless, we wish to offer a few thoughts, based on the *Van Anraat* and *Kouwenhoven* case law.

Firstly, the conduct element. Based on Article 48 DPC and *Kouwenhoven* it can be argued that clear causal effect of trade (assistance) on individual crimes may no longer have to be proven. *Kouwenhoven* was convicted for aiding and abetting the commission of the war crimes of murder and rape by delivering regular weapons (AK47's), without any evidence of *his* weapons having been used in these crimes, see Sluiter and Yau. Thus, it might suffice that business activities assisted a group of perpetrators, or: a regime, which is ostensibly engaged in the commission of international crimes. The more substantial the assistance and more direct in terms of potential use in the Russian war efforts, the greater the chances that the conduct element is met for facilitating war crimes committed in Ukraine, or when carried out after 1 August 2018, for facilitating the crime of aggression (see also the analysis of the period after February 2022).

The delivery of weaponry or any military equipment to the Russians after 2014 is thus by definition problematic, regardless of whether an embargo was in place. Note, even if trade is not sanctioned, one could still be found complicit in international crimes. We also see significant liability-risks for companies that have contributed to maintaining or reinforcing the unlawful occupation of Crimea, by doing business with the Russian government or Russian enterprises in that area. Illustrative is the Dutch prosecution's investigation of Dutch company *Riwal*. *Riwal* had rented equipment to Israel, for construction of the wall and/or settlements in

occupied territories, both of which had been declared unlawful by the ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories. Eventually, the Dutch prosecution did not indict Riwal, because Riwal had terminated all its activities in Israel. However, the Dutch prosecution clearly stated that Dutch companies should not be involved, in any way, in the commission of international crimes.

Corporations might also risk complicity in the war crime of pillage, Article 5(1)(d) ICA, when purchasing natural resources from the Russian occupying power in Crimea or, under Article 6(3)(h) ICA when purchasing from armed groups in Eastern Ukraine, see Stewart on corporate complicity in pillage. Corporations should also refrain from paying armed separatists a bribe or commission to enable such corporations to continue business operations, as this may amount to complicity in the armed groups' crimes. Illustrative is the case of French/Swiss company Lafarge that, to continue its corporate activities in Syria, paid among others ISIL. In June 2018, Lafarge as a corporation and its executives were indicted for complicity in crimes against humanity. Significantly, the French Cour de Cassation held regarding the mental element needed that 'it suffices if the accomplice has knowledge that the principal perpetrators are committing or will commit a crime against humanity, and that, by their aid or assistance, they facilitate its preparation or commission'.

To prove the mental element for complicity under article 48 DPC, it suffices if the corporation knew, or should have known, that its activities would facilitate the commission of war crimes or the crime of aggression. We notice that the aggression and unlawful occupation of Crimea were immediately publicly known. No company can thus claim ignorance about facilitating this crime of aggression under Article 8b ICA, for business activities with the Russian government and companies in Crimea after 1 August 2018, when said article entered into force.

Whether companies had sufficient knowledge that in the illegal occupation of Crimea or elsewhere on Ukrainian territory Russia has committed war crimes, remains to be seen. In the absence of direct evidence, one could argue that as of 5 December 2019 when the OTP published its conclusions that there was convincing evidence of war crimes having been committed, a solid case can be made that a company providing relevant assistance to Russian war efforts in Ukraine should have known – *Kouwenhoven* standard – that such assistance contributes to the commission of war crimes. Furthermore, corporate statements, annual reports, and corporate social responsibility reports, together with national and international media reports on crimes committed in Crimea and Eastern Ukraine, can be used to infer knowledge. Especially when having large financial interests in a specific region, at least the – should have known-standard- can be established relatively easily, see *Kouwenhoven*. Also, NGO and UN reports on the situation in Crimea might be used to establish that companies should have known about the commission of war crimes by the Russians in Ukraine; an approach used in the *Taylor* case at the Special Court for Sierra Leone. And corporations' due diligence policies and practices should be assessed. Based on

the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, corporations should avoid ‘causing or contributing to adverse human rights impacts... and address such impacts when they occur’. Further, national and EU initiatives and laws, for example in France, oblige companies to conduct proper due diligence. Upon verifying their supply chains, investments and business partners, corporations should seriously consider ceasing activities that contribute to adverse human rights impacts. If companies do not cease operations regardless of their assessment, or due to a failure to conduct proper due diligence, this can also feed into the mental element required for criminal liability as an indication of intent or willful blindness, as Dam-De Jong argues at 137.

Potential complicity for international crimes committed following the invasion of Ukraine (February 2022 – present)

Russia’s recent invasion of Ukraine raises the question to what degree companies can be held criminally liable for aiding and abetting aggression and war crimes from 24 February 2022 onwards.

We argue that the current invasion clearly qualifies as a crime of aggression under Article 8b ICA. According to Article 8b (2)(a) ICA an act of aggression encompasses among others the invasion by a State’s armed forces of another State’s territory. Also, subsequent occupation or, annexation – of (parts of) Ukrainian territory, would qualify as an act of aggression under Article 8b(2)(a) ICA.

Article 25 (3bis) ICC Statute restricts any liability for the crime of aggression to persons in a position effectively to exercise control over or to direct the political or military action of a State. This rules out aiding and abetting liability for companies, or its executives.

In the Netherlands, the ICA does not rule out aiding and abetting liability for the crime of aggression for Dutch companies, and its executives. The restriction of Article 25 (3bis) does not exist for aiding and abetting liability under Dutch law. We find the Dutch approach to be more in line with a sense of justice that those who facilitate an extremely serious crime, such as aggression, should not benefit from impunity.

Seeing that an invasion, occupation or annexation can cover an extensive time period, corporate activities with the Russians in that period could lead to complicity in this crime of aggression under Article 8b(2)(a) ICA. This risks being the case if companies play an important role in delivering maintenance, essential components, or other goods and services that feed into the war efforts, and/or the occupation of Ukrainian territory. For example, such a role might extend to technological support, cloud services, and hardware sales, especially considering that Russia uses electronic warfare. When assessing the mental element

requirement, given the extensive media coverage and reporting, it is unlikely that a corporation or its executives could successfully claim not knowing that the crime of aggression has been –and continues to be- committed.

Our analysis for the scenario 2014-2022 regarding aiding and abetting war crimes, also applies to war crimes committed after February 2022. However, the scale of war crimes as part of the war against Ukraine appears, at the time of writing, already larger than during the post 2014-period. Further, there has been a clear build up towards this war, which started with intelligence concerning the concentration of troops near Ukraine's borders, including in Belarus. This has consequences for aiding and abetting liability. It could be argued that as of this moment the war and war crimes, considering previous Russian conduct in Ukraine, a foreseeable dimension of such a war could have been expected. As a result, companies that have assisted Russian war efforts as of that moment could risk aiding and abetting liability, per the Kouwenhoven-standard. Additionally, the due diligence responsibilities discussed before, feed into the should have known standard.

Conclusion

There is considerable evidence that Russia has committed war crimes and aggression in Ukraine. Companies cannot turn a blind eye and need to conduct proper due diligence if they consider – or continue – doing business with Russia. We argue that, based on their due diligence, and considering the scope of aiding and abetting-accountability for international crimes as it has developed in the Netherlands, corporations should seriously consider ceasing business activities with Russia, (largely) state owned Russian corporations, and armed groups in Eastern Ukraine. Not only for moral and ethical reasons, but also to avoid investigation and prosecution for facilitating international crimes.