

# Rethinking strategies to combat atrocity crimes in developing states: A case of extractive industry in Africa

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## INTRODUCTION

Corporations in extractive (mining) industries wield greater powers in developing countries – in unparalleled manner – when compared to developed countries<sup>1</sup>. This may be manifested in various ways, i.e., paying royalties, taxes, influencing democracies through bankrolling election processes, impunity for financing terrorism and extremist groups, sponsoring war (financing and provision of training), tax-evasion, corruption, illegal mining, abandoned and unrehabilitated open-pit mines.<sup>2</sup> There are concrete examples where mining corporations have been irked for being involved in commission of atrocity crimes - AngloGold Ashanti, for financially supporting a rebel group called the Nationalist and Integrationist Front;<sup>3</sup> and Anvil Mining in the Democratic Republic of Congo (DRC) for transporting soldiers and facilitating the Kilwa massacre, displacement, pillage, extortion, sexual violence, and torture<sup>4</sup> to mention a few.

Currently the regulatory regime over corporate crimes - be it at domestic or international level - is inadequate and it promotes a *de facto* and *de jure* impunity for extractive corporations. It is important to note that at domestic level the principle of corporate criminal liability is not consistently applied, and further that it is not recognised at international level. These realities create a jurisprudential disjoint between the domestic and international justice system that can delegitimise a call for putting an end to corporate impunity through corporate criminal liability. The lack of harmonised systems enables far reaching consequences, for example it has potential to impede diplomatic relationships, and mutual cooperation in criminal matters among states, to mention a few. The absence of effective mutual cooperation may create a legal grey area or *lacuna* that may enable corporate crimes and proliferate impunity for atrocity crimes.

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<sup>1</sup> McFerson, H.M. (2010). Extractive Industries and African Democracy: Can the "Resource Curse" be Exorcised? *International Studies Perspectives*, 11(4), 335-353

<sup>2</sup> Bryan, S., & Hofman, B. (2007). *Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature*. [https://www.ndi.org/sites/default/files/2191\\_extractive\\_080807.pdf](https://www.ndi.org/sites/default/files/2191_extractive_080807.pdf)

<sup>3</sup> Berman, N., Couttenier, M., Rohner, D., & Thoenig, M. (2017). This Mine is Mine! How Minerals Fuel Conflicts in Africa. *American Economic Review*. Vol 107(6), 1564-1610 at 1565 available at <https://doi.org/10.1257/aer.20150774>

<sup>4</sup> Lah, K., & Collins, A. (2020). The Kilwa Massacre: Critical Analysis for a Southern Criminology. *International Journal for Crime, Justice and Social Democracy*. Vol 9(4): 135-147, at 137. Available at <https://doi.org/10.5204/ijcjsd.v9i2.1397>

The paper presents an argument that mining corporations, given the legal realities<sup>5</sup>, can commit crimes (including atrocity crimes).<sup>6</sup> In essence, the legal personality, wealth, and discursive dilemma (moral agent) that is endowed in mining corporations renders corporations with practical personality.<sup>7</sup> The theoretical assumption is that corporations may be complicit in the commission of atrocity crimes through aiding and abetting provision of essential materials to facilitate the successful commission of atrocities.<sup>8</sup> Therefore, corporate social responsibility through self-regulation/evaluation (soft law compliance) is inadequate for purposes of curbing corporate criminality.<sup>9</sup>

**Key words:** Corporations, corporate criminal responsibility, self-regulation, atrocity crimes, extractive industry, discursive dilemma, legal personality

## METHODOLOGY

The paper adopted qualitative research methodology. A qualitative research approach was most suitable for the study since the objective of the study was to evaluate strategies that may be adopted to combat and deter corporate criminality.<sup>10</sup> The nature of the study required the obtaining of in-depth knowledge and detailed experience from the international criminal law experts, corporate law experts, captains of the extractive industries, and community members who were affected by the activities of extractive industry. The paper adopted a combination of case study and explanatory research techniques<sup>11</sup> – since it intended to provide an explanation as to why corporate criminal liability may be adopted as an effective strategy to combat corporate criminality. Case studies of the Anvil Mining and AngloGold Ashanti in the DRC were critically analysed and applied to test the extent of crimes (atrocities) committed by mining corporations. The paper's setting was selected countries in Africa; among others, the DRC. Data was collected using a combination of empirical approach, namely, interviews with experts in corporate criminal liability, international criminal law experts, captains of extractive industries, and community members who resided alongside the areas where extractive activities took place. The other data collection technique was the review of documents, constitutions, legislations, international conventions, policies, and academic publications for the period 2010 to 2020. To analyse the collected data, the study applied a combination of document and content analysis, thereby reducing the data into themes using selective thematic coding.

## SUMMARY OF RESULTS

Firstly, the study demonstrates that extractive corporations – of which mining companies are not an exception – are legal persons with rights and obligations; thus have capacity to be criminally prosecuted for atrocities committed. Secondly, the paper postulates that a combination of self-regulation and corporate criminal responsibility is an effective strategy to combat the commission of atrocity crimes that are committed by mining corporations. Thirdly, the study demonstrates that criminal prosecution and punishment against extractive corporations may enhance deterrence more effectively than civil liabilities. Fourthly, the paper illustrates that in order to effectively deter corporations from committing gross human rights violations (core crimes/ atrocity crimes), the International Criminal Court must introduce criminal sanctions against corporations.

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<sup>5</sup> Watson, S.M. (2019). The corporate legal person. *Journal of Corporate Law Studies*, 19(1), 137-166, DOI: 10.1080/14735970.2018.1435951

<sup>6</sup> Kaleck, W., & Saage-Maass, M. (2010). Corporate Accountability for Human Rights Violations Amounting to International Crimes. *Journal of International Criminal Justice*, 8, 699-724 doi:10.1093/jicj/mqq043

<sup>7</sup> Watson, S.M. (2019). The corporate legal person. *Journal of Corporate Law Studies*, 19(1), 137-166, DOI: 10.1080/14735970.2018.1435951

<sup>8</sup> Cassel, D. (2008). Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts. *Northwestern Journal of International Human Rights*, 6(2), 304-326.

<sup>9</sup> World Bank. (2011). Corporate Social Responsibility: Private Self-Regulation is Not Enough. *Private Sector Opinion*, 24, <https://openknowledge.worldbank.org/handle/10986/11072>

<sup>10</sup> Mohajan, H.K. (2018). Qualitative Research Methodology in Social Sciences and Related Subjects. *Journal of Economic Development, Environment and People*, 7(1), 23-48.

<sup>11</sup> Reiter, B. (2017). Theory and Methodology of Exploratory Social Science Research. *International Journal on Science and Research Methodology*, 5(4), 129-150. [http://scholarcommons.usf.edu/gia\\_facpub/132](http://scholarcommons.usf.edu/gia_facpub/132)



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