

## Genocide and Other International Crimes by Unincorporated Groups

*Will There Be Loopholes for Them in the African Court?*

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Corporate criminal liability may fill a gap in the traditional framework for punishing individual actors to deter mass atrocities. Corporate policies, according to many scholars, reward and coordinate the activities of natural persons who might have acted differently as individuals. The argument of this chapter is that the same may be true of organizations other than corporations, and that closing the many gaps left in the net cast around crimes against humanity and war crimes will require holding noncorporate organizations accountable in court.

At the Nuremberg Trial, US prosecutor Robert Jackson famously compared aggression to assault with bare fists, which was a crime under all “civilized” laws, and he argued that multiplying the offense by a million and adding machine guns and explosives to the mix was no defense.<sup>1</sup> Similarly, the hiring of “hit men” or the inflaming of social tensions to the point of assault or riot is also an offense under civilized laws. The question arises, does crossing national borders and multiplying the scale of the offense by thousands or millions – while adding missiles, mortars, and tanks to the mix – immunize from penal remedies what would otherwise be an offense?

The African Court of Justice and Human and Peoples Rights is poised to exercise the power to punish a plethora of pan-African population-level crimes. This chapter focuses on the modes of liability clause of the amended statute of the court, which extends African court criminal liability to legal persons. A complicating factor is the wording of the relevant article, Article 46C, which refers to “corporation[s],” “corporate personnel,” “corporate intention,” and a “body corporate” without referring in parallel provisions to

<sup>1</sup> R. Houghwout Jackson, Opening Address for the United States of America by Hon. Robert H. Jackson, International Military Tribunal (1946), p. 43, <https://books.google.com/books?id=42bzAAAAMAAJ>.

organizations other than corporations.<sup>2</sup> Such organizations – which include partnerships, political parties, and unincorporated associations in the form of terror groups – are suspected of committing or facilitating a variety of crimes that will be within the jurisdiction of the future African court, and such organizations have been sued in U.S. federal courts for genocide, rape, torture, summary executions, terrorism, and other extrajudicial killings.<sup>3</sup>

Political groups such as parties, armies, and fronts have been guilty of some of the worst atrocities in recent memory – the devastation of Sierra Leone, eastern Angola, eastern Congo (Kinshasa), and northern Uganda, for example. Religious organizations, charities, and foundations probably lie behind some of the most horrific episodes of terrorism and civilian enslavement and massacre by terrorist groups. For example one only needs to recall the African embassy bombings of 1998, the Somali university and other bombings, the Kenyan Westgate shopping mall massacre, the Boko Haram attacks on Christians and pro-government Muslims in northern Nigeria and neighboring states, and the Islamic State massacres of Copts and other Christians in Libya and Tunisia.<sup>4</sup> Religious and gender-related persecution by nonstate actors such as churches and armies has also been a problem, including the sexual abuse of children by Catholic priests rotated from parish to parish, female genital mutilation in northern and eastern Africa, the involvement of Christian churches in exorcisms and violence against albinos and other social groups, the destruction of Tawerga by the Libyan rebel *thuwar*, and violence between Christians and Muslims in the Central African Republic, Egypt, Ethiopia, and Eritrea. In Rwanda, in 1994, the church was a sanctuary for fleeing Tutsis but also a site of many massacres, sometimes with the direct complicity of the church. This led to the war crimes trial of Benedictine nuns, implicated in helping commit genocide.<sup>5</sup> Ethnic, local-territorial, and clan organizations such as tribes are also suspected of playing a major part in widespread atrocities in northern Nigeria, western Sudan (Darfur) Liberia, and elsewhere.

<sup>2</sup> Draft Protocol on Amendments to the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU Doc. No. Exp/Min/IV/Rev. 7 (2012), <https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> [hereinafter "Draft Protocol"].

<sup>3</sup> E.g., *Ellul v. Congregation of Christian Bros.*, 774 F. 3d 791 (2d Cir. 2014); *Sikhs for Justice v. Indian National Congress*, 17 F. Supp. 2d 334 (S.D.N.Y. 2014); *Adhikari v. Daoud & Partners*, 95 F. Supp. 2d 1013 (S.D. Tex. 2015); *Safra v. Palestinian Authority*, 82 F. Supp. 3d 37 (D.D.C. 2015).

<sup>4</sup> E.g., E. Knox, "Note: The slippery slope of material support prosecutions: Social media support to terrorists", 66 *Hastings Law Journal* (2014) 295–330, at 305.

<sup>5</sup> L. Reydams, "Belgium's first application of universal jurisdiction: The Butare Four case", 1 *Journal of International Criminal Justice* (2002–2003) 428–36, at 431.

Other scholars have explored the criminal accountability of noncorporate associations under international law, especially in the context of the “Butare Four” case. Luc Reydamas observes that one innovation in the Belgian disposition of that case was to convict an accused for preparing reports that fomented violence against ethnic Tutsis, in an environment that led to the massacres of thousands of them in the region, but which reports were not distributed as a public incitement, and which did not result in a conspiracy finding under Belgian law either; the charge was accessory or accomplice to murder and assassination.<sup>6</sup> Christopher Harding argues that organizational accountability apart from the accountability of members may be justified when there are organizational dynamics or cultures, independence of organizations from dominant individual personalities, organizational capacity for bilateral or multilateral dealings, and concrete objectives or interests of the organization.<sup>7</sup> Dov Jacobs has proposed that the phrase “or organizations” be added to Article 25(1) of the Rome Statute, governing the persons over whom the ICC has jurisdiction, currently “natural persons.”<sup>8</sup>

Attribution of individual criminal accountability is seen as a key gap in the ICC Elements of Crimes, as is effective enforcement against clandestine groups such as paramilitaries and against groups created or used to sell arms or buy mineral or oil resources to knowingly finance armed attacks, war crimes, and dissolution of nation-states’ integrity. Aiding and abetting is a theory that is thought to fill some of the gaps left by superior responsibility, direct commission, and other theories that focus on the top or bottom of pyramidal or network-like organized criminality requiring cooperative acts.<sup>9</sup>

<sup>6</sup> *Ibid.*, at 429–35. The case is arguably the sole successful use of the Belgian universal jurisdiction law of 2001, which was repealed in 2003, although remnants of it survived in the penal code of Belgium; R. Baker, “Universal jurisdiction and the case of Belgium: A critical assessment,” 16, no. 1 *ILSA Journal of International and Comparative Law* (2009) 141–67, at 154, 157–8.

<sup>7</sup> *Individuals, Organizations and Criminal Responsibility* (Cullompton, UK: Willan Publishing, 2007) 63–4, 226–7.

<sup>8</sup> “The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court,” in C. Burchard, O. Triffterer & J. Vogel (Eds.), *The Review Conference and the Future of the International Criminal Court* (The Hague, the Netherlands: Kluwer Law International, 2010), 131–151, at 147–9.

<sup>9</sup> J. Bischoff, “Reception of Common Law in Substantive International Criminal Law,” in Larissa van den Herik & Carsten Stahn (Eds.), *The Diversification and Fragmentation of International Criminal Law* (Dordrecht, the Netherlands: Martinus Nijhoff, 2012), p. 537; Cecilia Cristina Naddeo, “Praising the region: What might a complementary criminal justice system learn from the Inter-American Court of Human Rights?” in *ibid.* 189–90, 208; Aaron Fichtelberg, “Resource Wars, Environmental Crime, and the Laws of War: Updating War Crimes in a Resource Scarce World,” in Avi Brisman & Nigel South (Eds.), *Environmental Crime and Social Conflict: Contemporary and Emerging Issues* (Abingdon & New York:

However, the theory of joint criminal enterprise leaves a gap for large-scale ethnic cleansing or territorial destruction, and for members of a group who form a common design or plan to commit international crimes where such crimes occur as a natural and foreseeable result of the group enterprise but were outside its original design or plan.<sup>10</sup>

This chapter has three sections. In Section 1, it makes the case that partnerships, trusts, and other unincorporated business associations are not currently covered by Article 46C, and that they should be. In Section 2, it surveys evidence that political and tribal groups, including parties, authorities, statelets, and clan groups are committing crimes within the jurisdiction of the African court and that Article 46C could beneficially apply to them. In Section 3, it concludes with a survey of how religious foundations, trusts, and associations could lead or become complicit in serious crimes, and describes situations in which Article 46C might need to extend to them. The collective crimes that this Section focuses on include genocide, torture, enslavement, recruitment of child soldiers, destruction of sacred sites, corruption, and terrorism, among others less commonly committed or aided by organizations besides corporations.

#### 1. BUSINESS ORGANIZATIONS OTHER THAN CORPORATIONS COULD EXPLOIT LOOPHOLES IN ARTICLE 46C

Article 46C of the Draft Protocol is entitled “Corporate Criminal Liability.” That provision has also been analyzed by Joanna Kyriakakis, in her separate chapter for this volume. However, it refers in its first paragraph or section to the court having “jurisdiction over legal persons, with the exception of States.”<sup>11</sup> This raises the question of whether noncorporate legal persons are included in this category.

It appears from the rest of Article 46C, with the exception of section 6, that only corporations may be criminally liable under the statute, as the title of Article 46C also implies. Section 2, for example, states that “Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.”<sup>12</sup> There

Routledge, 2016), 184–8, 190. See also, Antonio Cassese, Guido Acquaviva, Mary Fan, & Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), p. 381

<sup>10</sup> A.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerpen/Oxford: Intersentia, 2005), 68–69, 728.

<sup>11</sup> Draft Protocol, art. 46C.

<sup>12</sup> *Ibid.*

is no provision made here for assessing the intentions of organizations other than corporations. Sections 3 through 5 and 7 of Article 46C, moreover, refer to attribution of policies and knowledge to a “corporation” or its “conduct” or “culture.”<sup>13</sup> Section 6, by contrast, states that: “The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”<sup>14</sup> The phrase legal persons sweeps more broadly than “corporation,” but as with the preamble, its effect is unclear or arguably nonexistent with it comes to noncorporations, due to the title and sections 2–5, and 7 of Article 46C.

A survey of the other crimes defined in the Draft Protocol provides ample reason to be concerned that organizations other than corporations could exploit loopholes in Article 46C. For example, two or more persons might create a partnership whereby they murder or enslave other persons, but no one individual committed a murder or trafficked in persons with knowledge that multiple such acts had been or were being committed, thereby escaping a crime against humanity charge.<sup>15</sup> Likewise, such partners could plan to unlawfully and wantonly appropriate private property, while no one partner appropriates “extensive” properties; in such a case, only the partnership, but not the individuals, may be culpable under Article 28D(a)(iv).<sup>16</sup> Or they could establish a partnership by which one of them commits an unlawful act dangerous to public or private property or the cultural heritage of a state, and the other foments a general insurrection in a state without necessarily committing a particular unlawful act, in which case the individuals might escape prosecution for terrorism under Article 28B even though the partnership’s activities as a whole satisfy the elements of a crime.<sup>17</sup>

Moreover, if some members of an unincorporated association intend to endanger the lives of persons in order to bring about a general insurrection by engaging in armed conflict, while other members take no part in armed conflict but do intend to endanger lives during the insurrection, all the members might avoid terrorism charges.<sup>18</sup> Finally, if two or more persons associate in a mafia or other corrupt organization to give gifts to government officials in exchange for acts or omissions, but one person gives the gifts, while the other(s) solicit or receive the official acts in exchange for them, none of

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., art. 28C.

<sup>16</sup> Ibid., art. 28D.

<sup>17</sup> Ibid., art. 28C.

<sup>18</sup> Ibid.

them might be prosecutable under Article 28I, whereas if they were joined in a corporation and their knowledge and conduct was charged to it, then the corporation would have been subject to such a prosecution.<sup>19</sup> Some of the individuals in these hypotheticals might be chargeable as inciters, accomplices, conspirators, or joint criminal enterprise participants, but these forms of liability also leave significant gaps and impose often difficult hurdles in prosecuting enterprises.

Business organizations other than corporations also develop policies, practices, and cultures that transcend individual intentions. For comparative purposes, American courses on the subject often begin with an exploration of fiduciary duties to a venture, which Justice Cardozo described as an onerous burden of good faith and fair dealing, whether the venture was a joint enterprise, a partnership, or a trust.<sup>20</sup> A participant in such a joint project owes the enterprise “undivided loyalty” that is “relentless and supreme,” according to Cardozo’s opinion for the court.<sup>21</sup> Similarly, in civil-law systems it may be said that a partnership is an agreement among several persons to share in the proceeds from some venture – a winery, for example – and that these persons owe duties of care to one another in carrying out “the partnership business.”<sup>22</sup> Partners share the profits of ventures; the default rule is that they share equally, while they can contract for different shares.<sup>23</sup> A trust, at civil law, was a legal relationship in which one person requested another to convey a thing or perform some act – freeing a slave was one prominent example.<sup>24</sup> In modern societies, another kind of trust emerged to handle complex businesses such as railroads, oil companies, and banks. Some trusts combined so many competing companies into one venture that they stood accused of monopolizing a line of trade, and gave rise to anti-trust law.<sup>25</sup> Indeed, the Sherman Anti-Trust Act is said to have been the inspiration for charging the *Schutzstaffel* (the S.S.), the Nazi party, and other substate organizations as criminal actors at Nuremberg.<sup>26</sup> Today, legal persons include corporations, general partnerships, limited partnerships, trusts, joint

<sup>19</sup> *Ibid.*, art. 28I.

<sup>20</sup> *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

<sup>21</sup> *Ibid.*

<sup>22</sup> J. Baron Moyle ed., *The Institutes of Justinian* (Oxford: Clarendon Press, 4th ed. 1906), 148–50.

<sup>23</sup> *Ibid.*, 148–9.

<sup>24</sup> *Ibid.*, 98–100.

<sup>25</sup> D. Dewey, *Monopoly in Economics and Law* (Chicago: Rand McNally & Co., 3rd ed. 1966), 140–7.

<sup>26</sup> S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden: Brill, 2007) 198–202.

stock companies, unincorporated membership associations, syndicates, unions, and other groups.<sup>27</sup>

Like corporations, other forms of companies or entities can obtain knowledge of their representatives' conduct, and develop policies or imputed activities as a consequence.<sup>28</sup> There is no reason why the corporate form would be uniquely capable of committing the crimes often acknowledged as involving organizations – bribery, environmental crimes, and genocide.<sup>29</sup> Indeed, under Canadian law, war crimes and crimes against humanity by “legal persons” – not restricted necessarily to corporations – are subject to actions for international crimes.<sup>30</sup> Pursuant to the doctrine of universal jurisdiction, a state is entitled to define the persons subject to prosecution for international crimes according to its own law and standards.<sup>31</sup>

Moreover, various “legal persons” other than corporations act as complainants-plaintiffs or as defendants-respondents in civil as well as criminal cases.<sup>32</sup> By attempting to shape the legal rights and responsibilities of states and other nonstate actors, they arguably open the door to confronting a similar level of criminal accountability as corporations. In order to maintain parity of treatment among corporations, unincorporated associations, and other legal persons, it makes sense to extend the scope of Article 46C to partnerships, associations, foundations, trusts, armies, fronts, political parties, tribes, and other organizations that are not corporations.

<sup>27</sup> *Carden v. Arkoma Associates*, 494 U.S. 185 (1990); *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149–51 (1965); *Chapman v. Barney*, 129 U.S. 677 (1889); *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F. 3d 1079, 1086–92 (11th Cir. 2010); *Certain Interested Underwriters at Lloyd's, London, England v. Layne*, 26 F.3d 39, 43–44 (6th Cir. 1994); *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1222 (5th Cir. 1969); C. Alan Wright et al., *Federal Practice and Procedure*, vol. 13F (St. Paul, MN: West Group, 3rd ed. 2009), § 3630.

<sup>28</sup> Cf. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909), addressing whether a corporation can commit the crime of bribery.

<sup>29</sup> M. Kelly, “Prosecuting Corporations for Genocide”, 6 *Harvard Law & Policy Review* (2012) 340–367, at 353–4, 366.

<sup>30</sup> L. Cameron & V. Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013), 343. See also, C. Wanless, “Corporate Liability for International Crimes under Canada’s Crimes Against Humanity and War Crimes Act”, 7 *Journal of International Criminal Justice* (2009) 207.

<sup>31</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). Cf. also, *Kadic v. Karadzic*, 70 F. 3d 232, 238–42 (2d Cir. 1995).

<sup>32</sup> E.g., *Vietnamese Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 112–13 (2d Cir. 2008); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Association of Holocaust Victims for Restitution of Artwork and Masterpieces v. Bank Austria Creditanstalt AG, et al.*, 04 Civ. 3600 (S.D.N.Y. August 19, 2005).

## 2. POLITICAL AND CLANDESTINE MILITARY GROUPS, AND THEIR CRIMES AGAINST CIVILIANS

### A. *Social Groups Other Than Corporations Can Commit Organizational Crimes*

It may not be the norm that corporations commit grave crimes of international concern. More commonly, the wealthy and powerful – and sometimes the poor and ambitious – form political movements and their armed wings, variously known as parties, fronts, bases, armies, and states.

Many of the worst atrocities of the twentieth century began in this way. Before World War I, a political movement called the Committee of Union and Progress emerged in the Ottoman Empire, dedicated to the aim of seizing the businesses and properties of the empire's Christian populations, events later known as the Armenian Genocide but actually broader than that. American and British diplomats wrote of the party's scheme to kill, drive away, and plunder the Christian peoples of the empire.<sup>33</sup> The National Socialist Worker's Party of Germany, and elite Death's Head Units of the *Schutzstaffel* (S.S.), began as World War I veterans who had sported the silver "death's head" associated with the aristocratic German cavalry officer prior to the war in order to indicate their trench warfare specialty.<sup>34</sup> In the 1920s, the Nazis evolved out of a veteran-dominated group called the *Freikorps*, some of whom – distinguished by their loyalty to Adolf Hitler – wore the silver Death's Head of the elite trench soldiers.<sup>35</sup> Nationalism and anti-Semitism often motivated these paramilitary thugs, which grew into a militia of 200,000, including sympathizers.<sup>36</sup> Joining the *Sturmabteilung*, the *Freikorps* units

<sup>33</sup> G. Horton, *The Blight of Asia: An Account of the Systematic Extermination of Christian Populations by Mohammedans and of the Culpability of Certain Great Powers; with the True Story of the Burning of Smyrna*, Indianapolis: The Bobbs-Merrill Co., 1926, ch. 3, [www.hri.org/docs/Horton/hb-3.html](http://www.hri.org/docs/Horton/hb-3.html); V. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (New York: Berghahn Books, 2003), 180, 184. Said Halim, a leader of this movement who later rose to high office in the Ottoman Empire, believed in the purification of minorities from Turkey. Dadrian, *History*, p. 404; Ahmet Seyhun, *Said Halim Pasha: An Ottoman Statesman and Islamist Legal Thinker (1865–1921)*, Ph.D. dissertation (McGill University, 2002), 10, 17, 27, 98, 120–21, 138, 142, 155.

<sup>34</sup> T. D. Grant, *Stormtroopers and Crisis in the Nazi Movement: Activism, Ideology and Dissolution* (New York: Psychology Press, 2004) 39–40.

<sup>35</sup> R. M. Spector, *World without Civilization: Mass Murder and the Holocaust, History and Analysis*, vol. 1 (Lanham, MD: University Press of America, 2005), 221.

<sup>36</sup> F. Bajohr, "The 'Folk Community' and the Persecution of the Jews: German Society under National Socialist Dictatorship, 1933–1945", 20 *Holocaust and Genocide Studies* (2006) 184–8.



murdered dozens of the Nazis' political rivals per year, and developed a branch called the S.S. which would take a leading part in the Holocaust.<sup>37</sup> Hitler's right hand, Heinrich Himmler transformed the *Freikorps* into an "organization called the *Totenkopfverbände* (Death's Head Units) to run concentration camps and for other special duties."<sup>38</sup> In 1939, Hitler told his troops that he was sending the Death's Head Units to the east to kill without mercy those of Polish race and language. The Units grew to 40,000 persons by 1945.<sup>39</sup> If the *Freikorps* and *Sturmabteilung* had been banned by some international proceeding or institution in the 1920s, countless lives may have been saved.

Scholars use a variety of terms for such politico-military organizations that may seize part of the state's authority, be deployed by the state, or seek to intimidate or displace the state: death squads, militias, irregular armed groups, vigilantes, civil defense forces, national guards, and paramilitary forces.<sup>40</sup> Famous examples include the Interahamwe of Rwanda, the Janjaweed of Sudan, the ZANU-PF of Zimbabwe, the Basij of Iran, the "Sons of Iraq," the *shabiha* in Syria, and the village guards in Turkey. Moreover, Kenyan women's organizations blamed militias for the post-election killings, tortures, and mutilations of members of ethnic groups during the month of January 2008.<sup>41</sup> The International Commission of Inquiry on Libya blamed the Misrata rebel militia or *thumar* for ethnically cleansing and killing the Tawergas, referred to as slaves (*abid*) or blacks by the Misratans in language evoking the Darfur genocide.<sup>42</sup> Some of the crimes that motivated the creation of the Special Court for Sierra Leone began when Foday Sankoh's Revolutionary United Front seized diamond fields in the Kono region of the country, advancing from there into other areas where child soldiers were conscripted,

<sup>37</sup> P. Johnson, *Modern Times: The World from the Twenties to the Nineties* (New York: HarperCollins, paperback ed. 2001), at 124–5, 278–89; W. Shirer, *The Rise and Fall of the Third Reich* (New York: Fawcett Crest, paperback ed. 1992), at 70, 297, 581–72.

<sup>38</sup> Johnson, *Modern Times*, p. 287.

<sup>39</sup> "SS-Totenkopfverbände," in Samuel Totten & Paul Bartrop (Eds.), *Dictionary of Genocide* vol. 1 (Santa Monica, CA: ABC-CLIO, 2008), p. 407.

<sup>40</sup> S. Carey & N. Mitchell, "Pro-Government Militias", *Annual Review of Political Science* 20 (2017): 127–147 Carey and Mitchell, draft at 3, 8–9, 43, [www.sowi.uni-mannheim.de/lspol4/wp-content/uploads/2015/11/Carey-and-Mitchell-ARPS-online.pdf](http://www.sowi.uni-mannheim.de/lspol4/wp-content/uploads/2015/11/Carey-and-Mitchell-ARPS-online.pdf). See also, H. Travis, *Genocide, Ethnonationalism, and the United Nations: Exploring the Causes of Mass Killing Since 1945* (Abingdon & New York: Routledge, 2013), pp. 36–55, 120–131, 153, 157–160; H. Travis, "The United Nations and Genocide Prevention: The Problem of Racial and Religious Bias," *Genocide, Studies International* 8 (2014): 122–153, 129–136.

<sup>41</sup> Kenya: Women's Memorandum to the Mediation Team, All Africa.com (January 31, 2008).

<sup>42</sup> International Commission on Libya Report (March 2, 2012), para. 59.

sex slaves taken, and killings and amputations were committed.<sup>43</sup> Even worse crimes (in terms of overall magnitude) took place in Angola, where Jonas Savimbi's National Union for the Total Independence of Angola won control of the country's major diamond-producing regions as early as 1992, and traded them around the world unhindered until 1999, when Security Council resolutions impacted the rebels' \$500 million per year in sales.<sup>44</sup> In the Democratic Republic of the Congo (DRC), the Rally for Congolese Democracy (RCD-Goma), the National Congress for Defense of the People, and other proxy forces of Rwanda and Uganda have turned the east into a zone of terrible violence and mass rape, alongside the plunder of diamond and mineral resources.<sup>45</sup>

In the 1990s, there were various reports that multinational corporations had acted in concert with local security forces or thugs to commit genocide, torture, and human-rights violations.<sup>46</sup> For example, the Amungme tribal council in Irian Jaya, the Republic of Indonesia, alleged that mining company

<sup>43</sup> M. Kaplan, "Note: Carats and Sticks: Pursuing War and Peace Through the Diamond Trade", 35 *New York University Journal of International Law and Politics* (2003) 559–617, at 567–71. See also, G. Joses Yoroms, "Militia as a Social Phenomenon: Toward a Theoretical Construction", in D. Francis (Ed.), *Civil Militia: Africa's Intractable Security Menace?* (Aldershot: Ashgate, 2005); J. Alie, "The Kamajor Militia in Sierra Leone: Liberators or Nihilists?", in Francis, (Ed.), *Civil Militia*.

<sup>44</sup> Kaplan, "Carats and Sticks," 573–7.

<sup>45</sup> M.E. Baaz, "Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo," *International Studies Quarterly* 53 (2009): 495–518; Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. No. S/2002/1146, ¶ 215 (2002), [www.un.org/News/dh/latest/drcongo.htm](http://www.un.org/News/dh/latest/drcongo.htm). As a U.S. report explained in 2004:

War broke out in 1998 between the Government and rebel forces backed by the Governments of Rwanda and Uganda. . .

In the case of the May 2002 Kisangani massacre committed by the RCD/G, six of the nine defendants were acquitted of involvement; two escaped and only one defendant was still in prison at year's end. The military judicial authorities who handled the inquiry overlooked reprisals that their soldiers took against the civilian population. On August 19, President Kabila promoted the two RCD/G officers charged with leading the massacres, Laurent Nkunda and Gabriel Amisi (also known as Tango Fort), to Brigadier-General. . .

Gang rapes by members of armed groups, which were common in the east, continued to be violent, sometimes involving props such as tree branches, and resulted in vaginal fistula, a rupture of vaginal tissue that leaves women unable to control bodily functions and vulnerable to enduring ostracism.

U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Congo, Democratic Republic of the: Country Reports on Human Rights Practices 2003 (February 25, 2004), [www.state.gov](http://www.state.gov).

<sup>46</sup> D. Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", 6 *Northwestern J. of International Human Rights* (2008) 1, at 8–9; J. Paust, "Human Rights Responsibilities of Private Corporations", 35 *Vanderbilt Journal of Transnational Law* (2002) 801.

Freeport-McMoran Copper & Gold, Inc. acted with local officials to deport his people from their habitat, to destroy this habitat, to commit genocide, and to commit torture and human-rights violations by death threats, surveillance, and other international torts.<sup>47</sup> Similarly, the residents of Bougainville, Papua New Guinea (PNG), alleged that an Australian mining company violated international law by colluding with PNG forces to blockade their community and ensure that war crimes and racial discrimination were perpetrated against them.<sup>48</sup> In a case arising out of Burma, a federal court initially ruled that an oil company could be held liable for international crimes involving a joint venture to use forced labor and violence to build a pipeline.<sup>49</sup> More recently, similar cases have emerged out of Africa.<sup>50</sup> In one of them, the U.S. Court of Appeals for the Second Circuit concluded that multinational corporations could be sued for having aided and abetted a violation of the law of nations, although the case is now likely to be dismissed for insufficient links to the U.S. mainland under the “touch and concern” test.<sup>51</sup>

The continuing struggle for resources, as well as the rise of political and religious extremism, led to widespread atrocities over the past decade or two. By the second term of President Obama, crimes against children, civilians, cultural heritage, established governments, sectarian and tribal groups, and economic infrastructure were seemingly very common. Schools and shelters for children frequently come under attack, notably in Nigeria but also elsewhere.<sup>52</sup> Child soldiers continued to be conscripted in large numbers.<sup>53</sup>

<sup>47</sup> *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

<sup>48</sup> *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1116–1119, 1148–1162 (C.D. Cal. 2002), rev'd in part, 456 F.3d 1069 (9th Cir. 2006), withdrawn and new opinion at 487 F. 3d 1193 (9th Cir. 2007), further proceedings at 671 F. 3d 736 (9th Cir. 2011) (en banc), vacated, — US —, 133 S.Ct. 1995 (2013).

<sup>49</sup> *Doe I v. Unocal Corp.* (“Unocal I”), 963 F.Supp. 880, 890–91 (C.D. Cal.1997), aff'd and portions of opinion adopted by 248 F.3d 915 (9th Cir. 2001).

<sup>50</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F. 3d 244 (2d Cir. 2009); In re South African Apartheid Litigation, 15 F. Supp. 3d 454 (S.D.N.Y. 2014).

<sup>51</sup> *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (citation omitted), *subsequent proceedings at* 15 F. Supp. 3d 454.

<sup>52</sup> CNA/EWTN News, “Nigerian Bishop: Life Here Has Become ‘Cheaper Than Salt,’” North Carolina Register, October 29, 2014, [www.ncregister.com/daily-news/nigerian-bishop-life-here-has-become-cheaper-than-salt](http://www.ncregister.com/daily-news/nigerian-bishop-life-here-has-become-cheaper-than-salt); Zenit Staff, “Worst-hit Nigerian Diocese Reeling From Boko Haram Attacks,” Zenit (October 28, 2014), <https://zenit.org/articles/worst-hit-nigerian-diocese-reeling-from-boko-haram-attacks/>.

<sup>53</sup> Cf. UN Human Rights Council, Human Rights Council Hears Special Representative of the Secretary-General on Children and Armed Conflict (September 10, 2013), <http://reliefweb.int/report/world/human-rights-council-hears-special-representative-secretary-general-children-and-armed>.

Stories of exploitation and enslavement appeared in an alarming number of press and nongovernmental organization (NGO) reports.<sup>54</sup> For example: “In Nigeria, the abduction of more than 250 school girls, and the killing of boys and girls in attacks on schools by Boko Haram, are tragic examples of how radicalized extremist armed groups are targeting children.”<sup>55</sup> Conflicts involving atrocities against civilians spread like wildfire from one nation to another, with Libyans traveling to Afghanistan and Iraq to perpetrate terrorist acts, returning to Libya to wage civil war there, driving other Libyans and Libyan arms into the Sahel, sparking conflagrations in those countries among others, and eventually contributing to the creation of the Islamic State.<sup>56</sup> Enslavement remains distressingly common, for example in Mauritania, Niger, Haiti, India, Pakistan, and the United States.<sup>57</sup>

Churches and mosques were burned to the ground and the traditions of pagan and neo-pagan religions continued to be ground into dust.<sup>58</sup> Many Buddhist, Taoist, Hindu, and Jewish temples and historic sites would also be destroyed if China, India, and Israel were less powerful militarily. Plunder and the wanton destruction of villages, economic assets, and essential

<sup>54</sup> E.g., *ibid.*; “Boko Haram, ISIS Christians Killings,” Newsmax (April 20, 2015), [www.newsmax.com/world/GlobalTalk/boko-haram-isis-christians-killings/2015/04/20/id/639599/](http://www.newsmax.com/world/GlobalTalk/boko-haram-isis-christians-killings/2015/04/20/id/639599/); Patrick Goodenough, “Christians and Yazidis in Iraq Subjected to Savage Rapes, Sexual Slavery,” CNS News.com (2015), <http://cnsnews.com/news/article/patrick-goodenough/christians-and-yazidis-iraq-subjected-savage-rapes-sexual-slavery>; Loveday Morris, “Islamic State Says It Is Buying and Selling Yazidi Women, Using them as Concubines,” *Washington Post*, Oct. 12, 2014; see also, *Prosecutor v. Al Bashir*, ICC-02/05-01/09 (March 4, 2009), at 6, [www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/Court+Records/Chambers/PTCI/i.htm](http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/Court+Records/Chambers/PTCI/i.htm); James Tracy, “Human Costs of War and Violence,” in Mickey Huff & Andy Lee Roth (Eds.), *Censored 2013: Dispatches from the Media Revolution* (Seven Stories Press, 2014) 107–11; U.N. Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Iraq, Mar 5 2015, <http://documents.un.org>; U.N. Security Council, Assessment of the work of the Security Council during the presidency of China, Annex to the letter dated 19 March 2015 from the Permanent Representative of China to the United Nations addressed to the President of the Security Council (February 2015), <http://documents.un.org>.

<sup>55</sup> Special Representative of the Secretary General for Children and Armed Conflict, Report to the U.N. General Assembly, UN Doc. No. A/69/212 (July 31, 2014), para. 8, [documents.un.org](http://documents.un.org).

<sup>56</sup> Tracy, “Human Costs”; H. Travis, “Genocide, Counterinsurgency, and the Self-Defense of UN Member States Before the International Criminal Court,” *U.C. Davis Journal of International Law & Policy* 22 (2016): 139–202, 180–194, 200–201.

<sup>57</sup> H. Duffy, “Human Rights Cases in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation,” in *The Diversification and Fragmentation of International Criminal Law* 163–166; M. Fisher, “This Map Shows Where the World’s 30 Million Slaves Live. There Are 60,000 in the U.S.,” *The Washington Post WorldViews Blog* (October 17, 2013), [www.washingtonpost.com/news/worldviews/wp/2013/10/17/this-map-shows-where-the-worlds-30-million-slaves-live-there-are-60000-in-the-u-s/](http://www.washingtonpost.com/news/worldviews/wp/2013/10/17/this-map-shows-where-the-worlds-30-million-slaves-live-there-are-60000-in-the-u-s/).

<sup>58</sup> Travis, “Why Was Benghazi?”; Travis, “Wargaming,” 121–3.

infrastructure continued unabated.<sup>59</sup> Large populations in diverse contexts lost secure access to food, safe water, sanitation, housing, warm clothing, employment, health, and personal security. Corruption's role in diluting and diverting the wealth of developing nations into private stashes and foreign accounts persisted. Climate change threatened to kill millions of people.

Nonstate armed groups as well as some states perpetrated mass atrocities affecting children and other civilians.<sup>60</sup> The UN special rapporteur on torture and cruel, inhuman, or other degrading treatment or punishment highlighted "the exercise of de facto control or influence over nonstate actors operating in foreign territories," as well as military occupation and more traditional military and law-enforcement operations, as presenting a danger of torture or violations of international humanitarian law, international criminal law or customary international law.<sup>61</sup>

For example, Leila Zerrougui, the Special Representative of the Secretary-General on children and armed conflict, has reported that assaults on schools and hospitals happened in many warzones, and were potentially war crimes. Child soldiers continued to be used, and the impact of war on children was worsening.<sup>62</sup> Ms. Zerrougi commented that children were being revictimized as child soldiers in the Central African Republic even after they had escaped this life once before.<sup>63</sup> During the same discussion, Nigeria pointed to the DRC and Mali as nations that it called upon to abide by their pledges to end the use of children in conflict.<sup>64</sup>

The Russian Federation remarked that in Syria, "rebels, including Al Qaeda groupings, had forced minors into active participation in the conflict."<sup>65</sup> The International Association for Democracy in Africa has observed that despite interventions against it, "Al Qaeda had been victorious since its depredations had fragmented heterogeneous democratic societies on the basis

<sup>59</sup> E.g., E. Watkins, "Sanctions, Saboteurs Take Toll on Syria's Oil Industry", *Oil & Gas Journal*, November 14, 2011, 25.

<sup>60</sup> Special Representative of the Secretary General for Children and Armed Conflict, Report, paras. 8, 53. "Out of the 59 parties cited for grave violations in the annexes to the report of the Secretary-General on children and armed conflict (A/68/878-S/2014/339), 51 are non-State armed groups." *Ibid.*, para. 18.

<sup>61</sup> *Ibid.*

<sup>62</sup> U.N. Human Rights Council, Human Rights Council hears Special Representative of the Secretary-General on Children and Armed Conflict (September 10, 2013), <http://reliefweb.int/report/world/human-rights-council-hears-special-representative-secretary-general-children-and-armed>.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

of religion and color, and set communities against each other.”<sup>66</sup> A US delegate to the General Assembly commented that macabre episodes around the world, “from Syria to the Central African Republic, South Sudan to the Democratic People’s Republic of Korea, were a reminder that the challenge of ending mass atrocities was greater than ever.”<sup>67</sup>

These trends are visible in UN displacement data. The number of internally displaced persons according to estimates went from 1.2 million in 1982 to 24 million in 1992 to 40 million in 2015.<sup>68</sup> In 2011, there were many countries in Africa with large populations of displaced and stateless people according to the Office of the UN High Commissioner for Refugees. Angola, Burundi, CAR, Chad, Cote d’Ivoire, the DRC, Ethiopia, Eritrea, Kenya, Libya, Rwanda, Somalia, Sudan, Uganda, Western Sahara, and Zimbabwe had 100,000 or more persons of concern to UNHCR.<sup>69</sup> By 2013, Mali and South Sudan were suffering insurgencies and had been added to the list of countries with 100,000 or more persons displaced or “of concern” to UNHCR, while the displacement crises in Kenya and Libya had abated somewhat. The number of those displaced from the CAR was nearly six times as large as in 2011.<sup>70</sup> By 2014, Nigeria and perhaps some others such as Kenya and Libya had rejoined the list of countries suffering mass displacement, with 1.2 million internally displaced persons in Nigeria and hundreds of thousands in Kenya and Libya.<sup>71</sup> More recently, Nigeria’s figure has surpassed two million, driven by Boko Haram’s actions such as attacking schools and enslaving boys and girls.<sup>72</sup>

International and domestic criminal tribunals have belatedly begun to turn their attention to political organizations. In 1999, the International Criminal Tribunal for the former Yugoslavia concluded that an individual could be

<sup>66</sup> Ibid.

<sup>67</sup> U.N. General Assembly, International Criminal Tribunals Made “Enormous Contribution” to Ending Impunity, General Assembly Hears in Briefings on Handover of Work to Residual Mechanism (October 13, 2015), <http://reliefweb.int/report/world/international-criminal-tribunals-made-enormous-contribution-ending-impunity-general>.

<sup>68</sup> F. Deng, “Africa’s internally displaced and the development of international norms: Standards versus implementation”, in J. I. Levitt (Ed.), *Africa: Mapping New Boundaries in International Law* (Hart Publishing, 2008), 82; “Number displaced worldwide hits record high – UN report,” BBC News (June 18, 2015), [www.bbc.com/news/world-33178035](http://www.bbc.com/news/world-33178035).

<sup>69</sup> UNHCR Global Trends 2011: A Year of Crises, at 38–45.

<sup>70</sup> UNHCR Global Trends 2013: War’s Human Cost, at 45–9.

<sup>71</sup> UNHCR Global Trends 2014: World at War, at 49–53; Nicholas Crawford et al., Protracted Displacement: Uncertain Paths to Self-reliance in Exile, ODI HPG Report (September 2014), <https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.odi.org%2Fsites%2Fodi.org.uk%2Ffiles%2Fodi-assets%2Fpublications-opinion-files%2F0854.xls>.

<sup>72</sup> “Over 2.1 Million Displaced in Nigeria: IOM,” ReliefWeb (2016), <http://reliefweb.int/report/nigeria/over-21-million-displaced-nigeria-iom>

charged with the likely or foreseeable crimes committed by a plurality of individuals who share a common purpose.<sup>73</sup> Two forms of this “joint criminal enterprise” mode of culpability relax the requirement that the individual intend to commit the underlying crime, requiring instead an intention to further an overall system of criminality, or an intent to carry out a criminal plan along with recklessness as to a crime outside that plan being committed.<sup>74</sup> In 2004, the International Criminal Tribunal for the former Yugoslavia stated that this joint criminal enterprise mode of liability was available in genocide cases.<sup>75</sup> In 2012, the Special Court for Sierra Leone convicted Charles Ghankay Taylor for actions committed as President of Liberia that “assisted or encouraged” the Revolutionary United Front of Sierra Leone, to commit mass atrocities and plunder of resources including diamonds.<sup>76</sup> Revealingly, Libya reportedly funded and supplied forces that committed atrocities, whether affiliated with Taylor, Foday Sankoh, or Omar Hassan al-Bashir.<sup>77</sup> In 2014, the International Crimes Tribunal convicted the leader of a death squad during Pakistan’s 1971 civil war, the Bangladesh War of Independence, sentencing him to death for a massacre of hundreds of persons.<sup>78</sup> The Supreme Court of Bangladesh upheld the death penalty for the leader of the political movement Jamaat-e Islami, which collaborated with the Pakistanis in 1971.<sup>79</sup>

<sup>73</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-T, Appeals Chamber, Judgment (July 15, 1999), reprinted in 38 International Legal Materials 1518 (1999); Michael Newton, “What Is the Significance of the Documents Entered Into Evidence by the Prosecution?”, in Michael Scharf & Gregory McNeal (Eds.), *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Durham, NC: Carolina Academic Press, 2006), 183–4.

<sup>74</sup> *Tadic*, paras. 203–4.

<sup>75</sup> *Prosecutor v. Rwamakuba*, *Decision on Interlocutory Appeal Regarding the Application of Joint Criminal Enterprise to the Crime of Genocide*, Appeals Chamber, 22 Oct. 2004, para. 31; Newton, “What Is the Significance,” 184; *Saddam on Trial* 256–7.

<sup>76</sup> *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-PT, Judgment (26 April 2012), ¶¶ 5–21, [www.refworld.org/docid/4f9a4c762.html](http://www.refworld.org/docid/4f9a4c762.html); Aislinn Laing, “Blood diamond’ trial: the case against Charles Taylor”, *The Telegraph* (U.K.) (June 16, 2011), [www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/8578540/Blood-diamond-trial-the-case-against-Charles-Taylor.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/8578540/Blood-diamond-trial-the-case-against-Charles-Taylor.html);

<sup>77</sup> J. Millard Burr & R. O. Collins, *Darfur: The Long Road to Disaster* (2006) 242–24; D. Brown, “Who is Foday Sankoh?”, *The Guardian* (May 17, 2000), [www.guardian.co.uk/world/2000/may/17/sierraleone](http://www.guardian.co.uk/world/2000/may/17/sierraleone); M. Habboush, “Sudan’s Bashir offers to help form new Libyan army”, *Reuters Alertnet* (January 7, 2012), [www.trust.org/alertnet/news/sudans-bashir-offers-to-help-form-new-libyan-army](http://www.trust.org/alertnet/news/sudans-bashir-offers-to-help-form-new-libyan-army); Liang, “Blood Diamond’ trial”; Gérard Prunier, *Darfur: A 21st Century Genocide* (Penguin, 2008), p. 58.

<sup>78</sup> D. Bergman, “Verdicts Stir Up Controversy over Bangladesh War Crimes Tribunal”, *International Justice Tribune* (November 5, 2014), [www.justicetribune.com/articles/verdicts-stir-controversy-over-bangladesh-war-tribunal](http://www.justicetribune.com/articles/verdicts-stir-controversy-over-bangladesh-war-tribunal).

<sup>79</sup> *Ibid.*

The problems confronting such individualized prosecutions for organizational policies or crimes are manifold. First, most individuals escape prosecution because they are not extradited or their states do not submit to tribunals' jurisdiction, and as natural persons they enjoy due-process rights not to be tried and punished with prison terms in absentia.<sup>80</sup> The accused might even be promoted to high office, as occurred in the DRC, Iraq, and Sudan.<sup>81</sup> The ICC has announced that it will suspend or abandon investigations, even when referred to it by the Security Council, if the accused are protected by the relevant state and its allies.<sup>82</sup> Second, even if jurisdiction over the person and the territory exists, the nature of clandestine death squads and other nonstate actors is that they may act independently of their supporters, feign ignorance, avoid wearing uniforms or accepting public responsibility for atrocities, and intimidate witnesses.<sup>83</sup> Third, as mentioned at the outset of this chapter, an individual accused might well lack knowledge of all elements of the crime, even when the organization would know or intend the remaining elements. Lacking knowledge of an element might preclude Rome Statute culpability.<sup>84</sup> Finally, a tribunal may find that joint criminal enterprise culpability is not consistent with the principle of legality or *nullum crimen sine lege*.<sup>85</sup>

Statelets, or regions seeking autonomous governance or being subjected against their will to insurgencies or secessions against the state, can commit

<sup>80</sup> Cf. Draft Protocol, art. 46Ebis. Thus, the International Criminal Court convicted only one person in more than 10 years out of a population of more than seven billion on earth. For example, the United States famously "unsigned" the Rome Statute and passed legislation to protect its service members from standing trial in The Hague, by force if necessary.

<sup>81</sup> Saddam and the Nazis, The History Channel, cable television transmission, 2005; Said Aburish, *Saddam Hussein: The Politics of Revenge*, London, Bloomsbury, paperback ed. 2001 22–23, 54–58, 72–100. See also, Mark Fritz, "Ex-CIA Official James Critchfield Dies," *Associated Press*, April 23, 2003.

<sup>82</sup> Reuters, "Sudan's Bashir claims victory over ICC after court shelves Darfur probe," December 13, 2014, [www.reuters.com/article/us-sudan-icc-bashir-idUSKBN0JR0K520141213](http://www.reuters.com/article/us-sudan-icc-bashir-idUSKBN0JR0K520141213).

<sup>83</sup> "Death squads," in Dinah Shelton (Ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 1 (Farmington Hills, MI: Thomson Gale, 2005) 229–30.

<sup>84</sup> As one court stated: "Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. . . . [But] it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission. . . ." *United States v. Krupp*, Case No. 10, Trial Transcript (Nuremberg Trib. 1948), reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10*, Vol. 9 (U.S. Government Printing Office, 1950), 1448.

<sup>85</sup> Khmer Rouge leader Ieng Sary made this argument, unsuccessfully, in 2008. Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 0002, ECC Doc. No. D97/13 (December 8, 2009), para. 1.



international crimes without necessarily being subject to traditional restraints such as World Court jurisdiction or responsible state institutions that might cooperate with the ICC or other tribunal and extradite individuals to it. Yet these statelets can be larger, richer, and more powerful than some states. The Palestinian Authority, for example, had institutions potentially larger and with more resources than those of East Timor (2008 budget of less than \$800 million) or Liberia (less than \$300 million).<sup>86</sup> The Islamic State in 2015 grew larger than Scotland or Jordan and had more revenue from oil and antiquities trafficking, as well as donations from persons in Qatar, Saudi Arabia, etc. than East Timor or Liberia, using those estimates from 2008.<sup>87</sup> The RCD in the DRC may have been larger than the armies of the CAR or Malian governments.<sup>88</sup> Terrorist movements like the Taliban insurgency in Afghanistan of 1992–1996, the Chechen insurgency in Russia of 1994–1996, and the Kosovo Liberation Army insurgency in Yugoslavia of 1994–1999 were nearly as large as the RCD and larger than the CAR military, for example.<sup>89</sup> An enormous gap in international law may exist if these territories escape most international judicial proceedings due to not being “states.” A window for clandestine international crimes may be opened for states desiring to undermine or destroy their neighbors, such as Pakistan in Afghanistan, Albania in Yugoslavia, etc.<sup>90</sup>

Other than terrorism evolving into genocide as with the Nazis and the Islamic State, or corruption as defined in 28I, the extension of Article 46C could have implications for the fight against impunity for enslavement, recruitment of child soldiers, destruction of sacred sites, and torture. For example, the nation-states and their officials that perpetrate enslavement as a crime against humanity may be immune from accountability under various

<sup>86</sup> CIA. *The World Factbook* 2010, p. 676; CIA. *The World Factbook* 2008, at 330 (2008), “Fiscal Year 2008 East Timor Budget” East Timor Legal Blog (April 2009), <http://easttimorlegal.blogspot.com/2009/04/fiscal-year-2008-east-timor-budget.html>; Liberia 2007–08 Budget Fact Sheet (2008), [http://docs.google.com/viewer?a=v&q=cache:w5N7fSf8gocJ:www.emansion.gov.lr/doc/200708budget\\_fact\\_sheet.pdf](http://docs.google.com/viewer?a=v&q=cache:w5N7fSf8gocJ:www.emansion.gov.lr/doc/200708budget_fact_sheet.pdf).

<sup>87</sup> Travis, “Why Was Benghazi Saved.”

<sup>88</sup> J. Friedman, “Manpower and Counterinsurgency Data Set, to accompany J. A. Friedman, ‘Manpower and Counterinsurgency,’ *Security Studies* 20(4) (2011): 1–36” [http://scholar.harvard.edu/files/friedman/files/friedman-manpower\\_and\\_counterinsurgency\\_data.xlsx](http://scholar.harvard.edu/files/friedman/files/friedman-manpower_and_counterinsurgency_data.xlsx).

<sup>89</sup> *Ibid.*

<sup>90</sup> Cf. C. Hedges, “Serbs Using Land Mines in Effort to Seal Kosovo-Albania Border,” *The New York Times*, June 12, 1998, [www.nytimes.com/1998/06/12/world/conflict-balkans-albania-serbs-using-land-mines-effort-seal-kosovo-albania.html](http://www.nytimes.com/1998/06/12/world/conflict-balkans-albania-serbs-using-land-mines-effort-seal-kosovo-albania.html) (Yugoslav officials believed that Kosovo Liberation Army was using Albania as sanctuary from which to attack Yugoslav territory); A. Waheed Wafa, “U.N. Deputy Urges Pakistan to Curb Taliban,” *The New York Times*, January 9, 2007, p. A9 (Afghanistan charged Pakistan with harboring Taliban, which it blamed for 124 suicide bombings in 2006).

doctrines, while private organizations would enjoy no such immunity in some cases.<sup>91</sup> Government officials who support terrorist groups such as Boko Haram and the Islamic State that recruit child soldiers and destroy sacred sites might also enjoy immunity under limiting doctrines of international and domestic law, for example.<sup>92</sup> Alleged torturers might make similar arguments, although there is an emerging trend to reject such a ploy.<sup>93</sup> The persons perhaps least likely to fall into the custody of the African court or the ICC would theoretically be accountable, while officials in league with them would be immune. It may help to recognize the accountability of the group that includes officials or governmental agencies, and nonimmune suspects on the ground, but other persons as well.

### B. How Article 46C Could Cover Political and Other Groups

Given these challenges, it would not be that difficult to clarify Article 46C's application to noncorporate organizations.

A political party, like a partnership or other noncorporate business, could be defined as a legal person. Its policies, knowledge, and conduct could be aggregated or inferred from the statements or decisions of its leaders, or from the repeated actions of its followers. This is already permissible for

<sup>91</sup> E.g., *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173–75 (DC Cir. 1994) (refusing to find that Germany waived sovereign immunity for jus cogens violations such as enslavement of civilians as a crime against humanity during wartime); *Joo et al. v. Japan*, 172 F Supp. 2d 52 (D.D.C. 2003), *aff'd*, 332 F.3d 679 (D.C. Cir. 2003) (sexual enslavement of Korean and other civilian women in territories occupied by Empire of Japan during World War II).

<sup>92</sup> E.g., Arrest Warrant of April 11, 2000 (*Dem. Rep. of Congo v. Belg.*), 2002 I.C.J. 3 (February 14) at §§ 70–75; *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009); *In re Terrorist Attacks of September 11, 2001*, 538 F.3d 71 (2d Cir. 2008); *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008); *Plaintiffs A, B, C, D, E, F v. Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003); *Fotso v. Republic of Cameroon*, No. 12-cv-1415, 2013 WL 3006338 (D. Or. June 11, 2013); *Yousuf v. Samantar*, 1:04cv1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. February 15, 2011). These cases are cited in Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill, 2015), 107, 156–64. See also Peter Burns & Sean McBurney, “Impunity and the United Nations Convention Against Torture: A shadow play without an ending,” in Craig Scott (Ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001), 277–8; Lorna McGregor, “Addressing the relationship between state immunity and jus cogens norms: A comparative perspective,” in Wolfgang Kaleck et al. (Eds.), *International Prosecution of Human Rights Crimes* (London: Springer, 2006), 69–84.

<sup>93</sup> E.g., *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012); *United States v. Emmanuel*, No. 06–20758, 2007 WL 2002452 (S.D. Fla. Nov. 8, 2007); *Regine v. Bartle*, Ex Parte Pinochet, 38 I.L.M. 581, 593–5 (H.L. 1999); Pedretti, *Immunity*, p. 110; Burns & McBurney, “Impunity,” 282–6.

corporations under 46C, as well as for conspirators, aiders and abettors, and joint criminal enterprise participants under international law and domestic counterparts like the Rome Statute and the U.S. Code. The Rome Statute established criminal responsibility for aiders and abettors and joint criminal enterprises (common purpose/known contribution) as well as conspirators.<sup>94</sup> The U.S. Code includes the War Crimes Act defining grave violations of the Geneva Conventions a U.S. offense, as well as sections making conspiracy and aiding and abetting crimes.<sup>95</sup> Civil-law systems such as the Netherlands may also recognize the culpability of those who aid states or other actors who commit international crimes.<sup>96</sup> The Allied Control Council Law No. 10, Article II(a), presumably developed with the participation of civil-law France or even with German legal principles in mind, imposed responsibility on anyone who, while not being accessories or abettors or inciters, “was a member of any organization or group connected with the commission of any such crime . . .”<sup>97</sup>

There are precedents for creating new remedies for victims of criminal organizations. In the 1960s, the US Congress devoted renewed attention to the problem of La Cosa Nostra, the “Mafia,” and other “mobsters” and organized criminals who engage in “planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.”<sup>98</sup> The problem addressed was that “large amounts of cash coupled with threats of violence, extortion, and similar techniques were utilized by mobsters to achieve their desired objectives: monopoly control of these enterprises.”<sup>99</sup> The “power of organized crime to establish a monopoly within numerous business fields” was repeatedly raised.<sup>100</sup> The law Congress passed, the Racketeer Influenced and Corrupt

<sup>94</sup> Rome Statute of the International Criminal Court, art. 25, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, UN Doc. No. A/Conf. 183/9, *reprinted in* 37 I.L.M. 999 (1998).

<sup>95</sup> M. John Garcia, Cong. Research Serv., RL 32438, U.N. Convention against Torture (CAT): Overview and Application to Interrogation Techniques 10 (January 25, 2008), available at [fpc.state.gov/documents/organization/101750.pdf](http://fpc.state.gov/documents/organization/101750.pdf); *see also*, Charles Doyle, Cong. Research Serv., R41223, Federal Conspiracy Law: A Brief Overview (April 30, 2010), p. 13, available at [www.fas.org/sgp/crs/misc/R41223.pdf](http://www.fas.org/sgp/crs/misc/R41223.pdf).

<sup>96</sup> Kelly, “Prosecuting Corporations for Genocide,” 340.

<sup>97</sup> Quoted in S. Darcy, *Collective Responsibility and Accountability under International Law* (Ardley, NY: Transnational, 2007), p. 279.

<sup>98</sup> Sedima, *SP RL v. Imrex Co.*, 473 U.S. 479, 526 (1985) (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, *Banking and Business Law* (1985) 71–2).

<sup>99</sup> Congressional Record 113 (1967), p. 17998.

<sup>100</sup> Congressional Record 115 (1969), p. 6993.

Organizations Act, focuses on criminal organizations which perpetrate a pattern of interstate criminal activities as an enterprise.<sup>101</sup> Its scope extends to “any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity,” or “who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”<sup>102</sup> In cases of murder, arson, and fraud, among others, the law “makes it unlawful to invest, in an enterprise engaged in interstate commerce, funds ‘derived . . . from a pattern of racketeering activity,’ to acquire or operate an interest in any such enterprise through ‘a pattern of racketeering activity,’ or to conduct or participate in the conduct of that enterprise ‘through a pattern of racketeering activity.’”<sup>103</sup>

### 3. RELIGIOUS GROUPS AND THE PERPETRATION OF CRIMES BY LEGAL PERSONS OTHER THAN CORPORATIONS

Religious foundations or endowments are legal persons that may have policies, whether in writing or inferred as the most reasonable explanation of their adherents’ conduct.<sup>104</sup> Such a foundation’s knowledge that an offense is to be committed could be proven with evidence that the foundation or institution had knowledge of the crime being certain or likely, and that the foundation’s culture “caused or encouraged” it.<sup>105</sup> An institution’s culture could be an “attitude, . . . course of conduct or practice existing within the . . . area of the [institution] in which the relevant activities take place.”<sup>106</sup>

International terrorism is an obvious case in which policies, cultures, and practices may make crimes likely because of a religious group’s actions. Article 28G of the Draft Protocol defines “terrorism” to include dangerous crimes “calculated or intended” to intimidate government officials, the public, or a public institution, or to disrupt public services such as schools, or to cause a general insurrection or revolution, or to incite or promote such intimidation,

<sup>101</sup> Sedima, *op cit.*, 487–8, 495–6.

<sup>102</sup> *Ibid.*, 483.

<sup>103</sup> *Ibid.*, 508 (Marshall, J., dissenting). See also, Congressional Record 116 (1970), p. 35295.

<sup>104</sup> Draft Protocol, art. 46C(1)–(2).

<sup>105</sup> *Ibid.*, art. 46C(4).

<sup>106</sup> *Ibid.*, art. 46C(7).

disruption, or insurrection.<sup>107</sup> There is a loophole, however, for actions by “organized armed groups” that are “covered by” international humanitarian law.<sup>108</sup> If terrorism rises to the level of civil war, it might cease to be terrorism under this provision, because murder, destruction of public property, kidnapping without trial, torture, rape, and starvation are “covered by” humanitarian law.<sup>109</sup>

One example of terrorism by a religious group that has outraged the conscience of many and led to multinational efforts at suppression and accountability is the campaign by the Lord’s Resistance Army of Uganda (the LRA). Accused of waging 18 years of uninterrupted warfare by 2005, leading to possibly hundreds of thousands of deaths as well as the displacement of 400,000 people across three countries, the LRA is a religious group as its name suggests, and operates as an insurgency and terrorist organization with Sudan’s sponsorship.<sup>110</sup>

Other notable examples of terrorism include the National Islamic Front (NIF), Boko Haram, Al Qaeda Islamic Army, the Al-Nusra Front, Ahrar al-Sham, the Army of Conquest, the Army of Islam, and the Islamic State. Al Qaeda emerged at the confluence of the NIF, the Muslim Brotherhood, and the Wahhabi *takfiri* movement from Saudi Arabia. The NIF of Sudan grew out of the Sudanese Muslim Brotherhood until it gained power from a more secular government in 1989.<sup>111</sup> The Brotherhood’s plan was to clean out the non-Arabs from a “belt” of territory adjoining the majority-Arab populations of northern Sudan, from the region of the Fur and Masalit in the west through the Nuba in the center to the Dinka and Beja further east.<sup>112</sup> The NIF preached “Salvation” for the nation and called its critics the enemies of Islam, a crime punishable by death.<sup>113</sup> In 1991, a global congress of Brotherhood-linked terrorist groups took place in Khartoum; its leader proclaimed the goal of erasing national borders and imposing Islamic law across

<sup>107</sup> Ibid., art. 28G(A)-(B).

<sup>108</sup> Ibid., art. 28G(D).

<sup>109</sup> E.g., *ibid.*, art. 28E.

<sup>110</sup> E.g., Republic of Uganda, Ministry of Health, Internally displaced persons health and mortality survey, Uganda, 2005 ii, 1, 19–20; C. Blattman and J. Annan, “Child combatants in northern Uganda: Reintegration myths and realities”, in R. Muggah (Ed.), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge, 2008) 103–26, 103–8; Peter Eichstaedt, *First Kill Your Family: Child Soldiers of Uganda and the Lord’s Resistance Army* (2009), p. xix, 9; E. Mendes, *Peace and Justice at the International Criminal Court* (2010), p. 65; Dep’t of State, African Affairs Remarks, U.S. Efforts to Counter the Lord’s Resistance Army (December 17, 2011), available at [www.state.gov/p/af/rls/rm/2011/178501.htm](http://www.state.gov/p/af/rls/rm/2011/178501.htm).

<sup>111</sup> Burr & O’Collins, *Darfur* 39, 67–71, 202–4, 244–9.

<sup>112</sup> Ibid., 202–5.

<sup>113</sup> K. Maluil Jok, *Conflict of National Identity in Sudan* (Frankfurt: Peter Lang, 2013) 54–6.

the region.<sup>114</sup> In 1994, some in the NIF had welcomed Al Qaeda, Hamas, and similar groups from North Africa to Sudan.<sup>115</sup> Over the next decade, Islamic concepts such as *jihad* and *mujahideen* shaped the NIF's ethnic cleansing of non-Arab populations, even finding a place in the constitution of 1998,<sup>116</sup> leading one scholar to conclude: "The raison d'être of the atrocities committed by government-supported Arab militias is the racist, fundamentalist, and undemocratic Sudanese state. . . Khartoum's genocidal policy in Darfur and the south is also a grab for resources."<sup>117</sup> Sudanese training camps allegedly dispatched assassins and saboteurs to Egypt, Ethiopia, and Saudi Arabia.<sup>118</sup> "Trainees included Egyptians, Sudanese, Eritreans, Palestinians, Yemenis, and Saudis."<sup>119</sup> Hamas became the template for turning Muslim Brotherhood branches into terror groups region-wide.<sup>120</sup> At the same time, the Popular Defense Forces grew in size, later to take key roles in Sudan's southern and Darfur genocides.<sup>121</sup> An NIF ideologue reportedly contacted Rashid al-Ghannouchi, whose Al-Nahdah or Ennahda party later took a leading role in the "Arab Spring."<sup>122</sup> Western Europe as well as the more secular regimes in Egypt, Libya, and Tunisia were suspected to be the targets of all this.<sup>123</sup>

The path from the NIF's Sudan to Al Qaeda and Boko Haram is not difficult to trace. Sudan and Iran supported the Bosnian secession from Yugoslavia, opening up a base of operations for the Afghan and Arab mujahideen to operate in Europe, North Africa, and Western Asia.<sup>124</sup> In the 1980s and

<sup>114</sup> Y. Bodansky, "Iran's Pincer Movement Gives It a Strong Say in the Gulf and the Red Sea," *Defense & Foreign Affairs' Strategic Policy*, March 1992, 10 ff.; H. Travis, "Teaching People to Commit Genocide", Assyrian International News Agency, April 2015, [www.aina.org](http://www.aina.org).

<sup>115</sup> Jok, *Conflict*, p. 232.

<sup>116</sup> *Ibid.*, 54–251.

<sup>117</sup> M. Mutua, "Racism at root of Sudan's Darfur crisis," *Christian Sci. Monitor*, July 14, 2004, [www.csmonitor.com/2004/0714/p09s02-coop.html](http://www.csmonitor.com/2004/0714/p09s02-coop.html).

<sup>118</sup> Bodansky, "Iran's Pincer Movement," 10 ff.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.* See also, Nsongurua J. Udombana, "When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan," 1153.

<sup>122</sup> Bodansky, "Iran's Pincer Movement"; Charles Richards, "Soft Words in Sudan Conceal Face of Terror," *The Independent (U.K.)* (9 June 1993), <https://www.independent.co.uk/news/world/soft-words-in-sudan-conceal-face-of-terror-hassan-al-turabi-wears-his-notoriety-lightly-charles-1490494.html>.

<sup>123</sup> Bodansky, "Iran's Pincer Movement."

<sup>124</sup> M. S. Beelman, "In Bosnia, Arms Embargo Looks Like a Sieve", *Associated Press/The Daily Courier*, July 31, 1994, A12; Millard Burr & Robert O. Collins, *Revolutionary Sudan: Hassan al-Turabi and the Islamist State, 1989–2000* (Leiden, the Netherlands: Brill, 2003), 142–3; Netherlands Institute for War Documentation, Final Report on "Srebrenica, a 'safe' area - Reconstruction, background, consequences and analyses of the fall of a safe area" (2002), *quoted in* Cees Wiebes, *Intelligence and the War in Bosnia, 1992–1995* (Munster: LIT Verlag, 2003), x pp. 196–7; Craig Unger, *House of Bush, House of Saud* (2003), 111–13.

1990s, from bases in Afghanistan and Bosnia, Al Qaeda Islamic Army was formed out of various extremist social groups in Arab League countries, notably Egypt and Saudi Arabia.<sup>125</sup> Litigation attorneys offered to represent 2,000 families of victims of the September 11 massacre by Al Qaeda in New York City and Washington DC. They alleged that the “Saudi interests accused of having knowingly facilitated transfers of money to Al Qaeda were named as the principal defendants [and]... include[d] three Saudi princes, seven banks, and several international charities...”<sup>126</sup> In 2003, Arabic television networks such as Al-Jazeera carried the Al Qaeda message to kill the Jews and Americans around the world.<sup>127</sup> In 2008, the United States recognized al-Shabaab as a foreign terrorist organization; the next year, Al Qaeda announced that all Muslims should join its side in the Somali regional civil war.<sup>128</sup> The Somali capital of Mogadishu had fallen into the hands of Al Qaeda fighters and other jihadists and militias.<sup>129</sup> Reports surfaced in 2001 of bin Laden profiting from the Sierra Leone rebel diamonds.<sup>130</sup> Boko Haram began in 2003 and grew powerful in 2009–2010, after members allegedly traveled to Sudan and Somalia and made contact with Al Qaeda, and Boko Haram later launched an uprising that killed 700 in days.<sup>131</sup>

In 2011 and early 2012, Al Qaeda and allied rebels in Syria obtained arms and men from Sudan, Qatar, Saudi Arabia, Tunisia, Libya, Turkey, and other Persian Gulf, North African, or NATO-member countries.<sup>132</sup> It did not take

<sup>125</sup> J. O. Tamayo, “Experts Had Rejected Possibility of Suicide Hijackings as “Too Weird,” *Miami Herald*, September 13, 2001.

<sup>126</sup> A. Gerson, “Terrorism and Genocide: Determining Accountability and Liability”, 28 *Thomas Jefferson Law Review* (2005) 79 (Proceedings of the Conference on Law and the Humanities’ Representation of the Holocaust, Genocide and Other Human Rights Violations) (citing *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2002); *Barrera v. al Qaida Islamic Army* (S.D.N.Y. 2003); *Federal Ins. v. al Qaida* (S.D.N.Y. 2003); *Vigilant Ins. v. Kingdom of Saudi Arabia*, No. 03 Civ. 8591 (S.D.N.Y. 2003); *Ashton v. al Qaeda Islamic Army*, No. 02 Civ. 6977 (S.D.N.Y. 2002); *Salvo v. al Qaeda Islamic Army*, No. 03 Civ. 5071 (S.D.N.Y. 2003); *Tremsky v. Osama bin Laden*, No. 02 Civ. 7300 (S.D.N.Y. 2002)).

<sup>127</sup> Daily Trust, “PanAfrica; Uganda Arrests Nigerians over Terror Suspicion,” *Africa News*, May 22, 2003. Tal Samuel-Azran, *Al-Jazeera and U.S. War Coverage* (Peter Lang, 2010), 31–34, 109, 150, <http://books.google.com/books?id=Ay8FckfL5vAC&pg=PA31>.

<sup>128</sup> Violent Islamist Extremism; Hearing of the Senate Committee on Homeland Security and Governmental Affairs, Federal News Service, March 11, 2009.

<sup>129</sup> “Somalia,” in Guy Arnold (Ed.), *The A and Z of Civil Wars in Africa* (Scarecrow Press, 2009), p. 341.

<sup>130</sup> Kaplan, “Carats and Sticks,” 608–9.

<sup>131</sup> D. Smith, “In the Shadow of Nigeria’s Taliban”, *The Mail & Guardian (South Africa)*, January 24, 2011.

<sup>132</sup> J. Schanzer, “Saudi Arabia Is Arming the Syrian Opposition: What Could Possibly Go Wrong?”, *Foreign Policy*, February 27, 2012, [www.foreignpolicy.com/articles/2012/02/27/saudi\\_arabia\\_is\\_arming\\_the\\_syrian\\_opposition](http://www.foreignpolicy.com/articles/2012/02/27/saudi_arabia_is_arming_the_syrian_opposition); “Sudan becomes the newest player in Syria’s protracted conflict: NYT,” *Sudan Tribune* (August 13, 2013), [www.sudantribune.com/spip.php?](http://www.sudantribune.com/spip.php?)

long for the rebels to declare a jihad against Syria, a U.N. member state, which they often waged by cleansing Christian populations, destroying churches, executing people without trial, abducting women and other hostages, setting off bombs, looting oil and antiquities and selling them in Turkey and elsewhere, and destroying civilian infrastructure while imposing mass poverty.<sup>133</sup> Having crossed into Syria from Iraq, the Islamic State of Iraq (and Syria) crossed back into Iraq, cleansing Assyrian Christians, Kurds, and Yezidis from Mosul and the roads to Erbil, Kirkuk, and Baghdad, and enslaving Assyrian Christians and Yezidis as a matter of policy.<sup>134</sup> This displaced more than 1.4 million people in Iraq, leaving zero out of the 35,000 to 50,000 Christians and few of the 50,000 to 70,000 Kurds and Yezidis who had lived in Mosul.<sup>135</sup> Radical Sunni clerics who allegedly arrived in northern Iraq from the Persian Gulf countries urged ISIS to cut off water and electricity to Christian villages across the front line, which it did.<sup>136</sup> The total decline in Iraq's Christian population – on an indefinite basis – is expected to reach 95%, from 1.4 million at its peak to 50,000 or so. This parallels the expected disappearance

iframe&page=imprimable&id\_article=47635; Hannibal Travis, "Why Was Benghazi Saved, But Sinjar Allowed to Be Destroyed?" 10(1) *Genocide Studies International* (2016) 139–182.

- <sup>133</sup> "Commending American Christian Leaders for Standing in Solidarity with Christians and Other Small Religious Communities in Egypt, Iraq and Syria," *Congressional Record* 160 (2014): E769–03, 2014 WL 2050391; "Condemning Kessab Attacks," *Congressional Record*, vol. 160 (2014): E489–03, 2014 WL 1315782; Human Rights Watch, *Syria: Executions, Hostage Taking by Rebels* (October 11, 2013), [www.hrw.org/news/2013/10/10/syria-executions-hostage-taking-rebels](http://www.hrw.org/news/2013/10/10/syria-executions-hostage-taking-rebels); International Crisis Group, *The Rising Costs of Turkey's Syrian Quagmire*, Crisis Group Europe Report N°230, April 30, 2014 10–13, 20–39; L. Morris, "Syrian Armenians, Who Had Been Insulated from War, Forced to Flee After Rebel Offensive," *Washington Post*, April 2, 2014, reproduced in *Congressional Record* 160 (2014): E517; Peace Association of Turkey and Lawyers for Justice, *War Crimes Committed Against the People of Syria: Report* (Dec. 2013/January 9, 2014), [http://pwasowa.blogspot.fr/2014\\_01\\_09\\_archive.html](http://pwasowa.blogspot.fr/2014_01_09_archive.html); K. Sengupta, "We Left Homs Because They Were Trying to Kill Us", *The Independent (U.K.)*, Nov. 2, 2012, p. 42; Society for Threatened Peoples, *Written Statement to Human Rights Council*, UN Doc. No. A/HRC/22/NGO/143 (February 22, 2013), p. 3; UN Secretary-General Ban Ki-Moon, *Situation of Human Rights in the Syrian Arab Republic: Implementation of Human Rights Council Resolution 19/22*, UN Doc. No. A/HRC/20/37 (June 22, 2012), p. 5.
- <sup>134</sup> S. Res. 530 – 113th Congress (2013–2014): A resolution expressing the sense of the Senate on the current situation in Iraq and the urgent need to protect religious minorities from persecution from the terrorist group the Islamic State of Iraq and the Levant (ISIL); Nina Shea, "Only America Can Save Iraq's Last Christians," *Fox News* (July 29, 2014), [www.foxnews.com/opinion/2014/07/29/only-america-can-save-iraq-last-christians.html](http://www.foxnews.com/opinion/2014/07/29/only-america-can-save-iraq-last-christians.html).
- <sup>135</sup> Shea, "Only America"; "Iraq: 'All the Christians Have Fled Mosul,'" *Catholic World Report*, June 12, 2014, [www.catholicworldreport.com/Blog/3185/iraq\\_all\\_the\\_christians\\_have\\_fled\\_mosul.aspx](http://www.catholicworldreport.com/Blog/3185/iraq_all_the_christians_have_fled_mosul.aspx).
- <sup>136</sup> Shea, "Only America"; Alex McIntock & Scott Spark, "The Last Christians Flee Mosul in Iraq," *Australian Broadcasting Corporation* (July 24, 2014), [www.abc.net.au/radionational/programs/religionandethicsreport/the-last-christians-flee-mosul-in-iraq/5620674](http://www.abc.net.au/radionational/programs/religionandethicsreport/the-last-christians-flee-mosul-in-iraq/5620674).



of Christianity from the territory of the Palestine Liberation Organization, another alleged participant in the 1993 NIF religious conference, and Christianity's near-disappearance from Turkey after 1924.<sup>137</sup> The Islamic State of Iraq inflicted more violence against civilians in 2011, or "one-sided violence," than the government of Cote d'Ivoire, and more than Libya and Nigeria combined.<sup>138</sup> It perpetrated more such killings in 2010 than the government of Myanmar and the Janjaweed (part of the government of Sudan), combined.<sup>139</sup> Its crimes were on a par with those of the LRA.<sup>140</sup> In 2015, the Committee on the Rights of the Child reported that "children and families belonging to minority groups, in particular Turkmen, Shabak, Christians, Yazidi, Sabian-Mandaeans, Kaka'e, Faili Kurds, Arab Shia, Assyrians, Baha'i, Alawites, who are systematically killed, tortured, raped, forced to convert to Islam and cut off from humanitarian assistance by the so-called ISIL in a reported attempt by its members to suppress, permanently cleanse or expel, or in some instances, destroy these minority communities."<sup>141</sup> This campaign was well underway in 2007.<sup>142</sup>

Instead of insisting that all those contributing to jihad in Syria be punished, some persons in Turkey and the territories of the Arab League aided them. Fighters poured in from Qaeda-held area of Libya,<sup>143</sup> as veterans of Qaeda operations there and in Afghanistan, Pakistan, Bosnia, Chechnya, and Iraq joined the insurgency.<sup>144</sup> Weapons for the terrorists often were paid for by

<sup>137</sup> Mclinktock & Spark, "The Last Christians"; "Iraq: 'All the Christians.'" See also, H. Travis, "Wargaming the 'Arab Spring': Predicting Likely Outcomes and Planning U.N. Responses", 46 *Cornell Journal of International Law* (2013) 75–143, at 79.

<sup>138</sup> Uppsala Conflict Data Project, One-sided violence data set, version 1.4–2012.

<sup>139</sup> Ibid. See also, Udombana, "When Neutrality Is a Sin," 1154–5.

<sup>140</sup> Uppsala Conflict Data Project, One-sided violence data set. The data set refers to about 732 LRA killings in 2008, 1,300 in 2009, and 145 in 2010, versus 510 for the Islamic State in 2008, 518 in 2009, and 571 in 2010. The latter's high point was in 2007 with 1,436, when LRA was blamed for 62, much fewer than in 2008.

<sup>141</sup> U.N. Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Iraq, Mar 5 2015, [www.un.org/crc](http://www.un.org/crc).

<sup>142</sup> U.S. Department of State, International Religious Freedom Report 2006 (March 2007), [www.state.gov/g/drl/rls/irf](http://www.state.gov/g/drl/rls/irf).

<sup>143</sup> *Asia Times* (2012), [www.atimes.com/atimes/Middle\\_East/ML02Ako1.html](http://www.atimes.com/atimes/Middle_East/ML02Ako1.html); D. Sherwood, "Syria Will Be Bloodiest Yet", *The Daily Star*, January 1, 2012, [www.dailystar.co.uk/news/view/227911/Syria-will-be-bloodiest-yet/](http://www.dailystar.co.uk/news/view/227911/Syria-will-be-bloodiest-yet/).

<sup>144</sup> N. Kazimi, "Handing Jihadis Cause", *Newsweek* (International Edition), May 9, 2011 (lexisnexis.com "Magazine Stories, Combined" database) (declaring that veterans of al Qaeda's operations in Pakistan/Afghanistan, Iraq, "Chechnya, Bosnia, and a bunch of other jihadist hotspots" were "working between Syria and Baghdad."); Reuters, "Russia Says 15,000 Foreign Terrorists in Syria" (March 8, 2012), [www.reuters.com/article/2012/03/08/us-syria-russia-idUSBRE82714E20120308](http://www.reuters.com/article/2012/03/08/us-syria-russia-idUSBRE82714E20120308); J. Rosenthal, "Al-Qaeda in Rebel Syria", *The National Review*

donors from Saudi Arabia.<sup>145</sup> Instead of targeting that flow, the United States asked Russia to disarm Syria, contrary to its policy on the Iraqi government, its Kurdish region, and the Syrian Kurds.<sup>146</sup> The death toll may rise from an expected 5,400 or 15,000 from a government victory in 2011 or 2012, to a million or more from decades of terror and response as in Angola, Iraq, and the DRC.<sup>147</sup>

Meanwhile, the Popular Front for the Liberation of Eritrea (EPLF) itself emerged in “1970 in a camp of the Palestinian Fatah movement in Amman, Jordan,” and by 1989 conquered Asmara.<sup>148</sup>

In addition to Sudan and the Palestinian Authority, Eritrea, the CAR, the DRC, and Nigeria have become among the most unfree and persecution-prone places in the world. According to the State Department, Sudan, the CAR, the DRC, and Nigeria merited a 5 on the “Political Terror Scale” in

(March 8, 2012), [www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal?page=2](http://www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal?page=2) & [www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal/page/0/1?pg=2&splash=](http://www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal/page/0/1?pg=2&splash=); J. Steele, “Diary”, 34, No. 6 *London Review of Books* (2012) 44–7, [www.lrb.co.uk/v34/n06/jonathan-steele/diary](http://www.lrb.co.uk/v34/n06/jonathan-steele/diary); Watkins, “Sanctions, Saboteurs.”

<sup>145</sup> J. Schanzer, “Saudi Arabia Is Arming the Syrian Opposition: What Could Possibly Go Wrong?”, *Foreign Policy*, February 27, 2012, [www.foreignpolicy.com/articles/2012/02/27/saudi\\_arabia\\_is\\_arming\\_the\\_syrian\\_opposition](http://www.foreignpolicy.com/articles/2012/02/27/saudi_arabia_is_arming_the_syrian_opposition). See also, As’ad AbuKhalil, “How the Saudi-Qatari Rivalry Has Fueled the War in Syria,” *The Intercept* (June 2018), <https://theintercept.com/2018/06/29/syria-war-saudi-arabia-qatar/>; Seymour Hersh, “The Red Line and the Rat Line,” *The London Review of Books* 36 (April 17, 2014), pp. 21–4, [www.lrb.co.uk/v36/n08/seymour-m-hersh/the-red-line-and-the-rat-line](http://www.lrb.co.uk/v36/n08/seymour-m-hersh/the-red-line-and-the-rat-line); “Jihadis in Syria use Turkish safe house network,” *The Times of Israel* (December 7, 2013), [www.timesofisrael.com/jihadis-in-syria-use-turkish-safe-house-network/](http://www.timesofisrael.com/jihadis-in-syria-use-turkish-safe-house-network/); Christina Lin, “Chinese stratagems and Syrian buffer zone for Turkey-Qatar pipeline,” *The Times of Israel Blogs* (August 1, 2015), <https://blogs.timesofisrael.com/chinese-stratagems-and-syrian-buffer-zone-for-turkey-qatar-pipeline/>; Roula Khalaf and Abigail Fielding-Smith, “How Qatar seized control of the Syrian revolution,” *Financial Times*, May 17, 2013, [www.ft.com/content/f2d9bbe8-bdbc-11e2-890a-00144feab7de](http://www.ft.com/content/f2d9bbe8-bdbc-11e2-890a-00144feab7de); David Phillips, Research Paper: Isis-Turkey Links, HuffPost (2015), [www.huffingtonpost.com/david-l-phillips/research-paper-isis-turke\\_b\\_6128950.html](http://www.huffingtonpost.com/david-l-phillips/research-paper-isis-turke_b_6128950.html); Lale Sariibrahimoglu, “On the Borderline – Turkey’s Ambiguous Approach to Islamic State,” *Jane’s Intelligence Review* (2014), [www.janes.com/images/assets/804/44804/On\\_the\\_borderline\\_-\\_Turkey\\_s\\_ambiguous\\_approach\\_to\\_Islamic\\_State.pdf](http://www.janes.com/images/assets/804/44804/On_the_borderline_-_Turkey_s_ambiguous_approach_to_Islamic_State.pdf).

<sup>146</sup> E. Demy, “Russia to Keep up Syria Arms Sales”, A. France-Presse, August 17, 2011; C. Brauchli, Arms and the World, Common Dreams (January 7, 2012), [www.commondreams.org/view/2012/01/07-4](http://www.commondreams.org/view/2012/01/07-4).

<sup>147</sup> Associated Press, “UN Security Council Discusses Crisis in Syria”, (2012); Reuters, “Syrian Rebel Leader Threatens to Escalate Attacks,” Reuters, January 3, 2012. See also, A. France-Presse, “DR Congo calls on world court to ‘stop Rwandan war of aggression,’” June 14, 2002, [www.namibian.com.na/2002/june/africa/0268BCEAFc.html](http://www.namibian.com.na/2002/june/africa/0268BCEAFc.html); G. Burnham, et al., “Mortality after the 2003 Invasion of Iraq: A Cross-sectional Cluster Sample Survey”, *The Lancet* (October 11, 2006) 1–8 (study covering first three years of post-2003 war in Iraq)

<sup>148</sup> H. Erlich, “Eritrea’s Double Identity,” *The Jerusalem Report*, October 31, 1991, p. 31.

2010, indicating extreme levels of persecution on a par with Myanmar or North Korea.<sup>149</sup> Eritrea joined Afghanistan, Chad, Brazil, Burundi, China, Colombia, Egypt, Ethiopia, Iran, Iraq, India, Israel and occupied territories, Kenya, Mexico, Russia, Somalia, Sri Lanka, Syria, Uganda, and some other countries as warranting a 4 on the scale in 2010.<sup>150</sup> Eritrea also had one of the worst levels of malnourishment in the world, at 65% of the total population in 2006–2008.<sup>151</sup>

The rise of warlords, rebel armies, terrorist organizations, statelets, and other nonstate threats to population security and economic growth has arguably driven mass exoduses of civilians. Table 10.1 illustrates this phenomenon as of 2010; I discuss above some estimates published since then.

If entire communities affected by these exoduses at the hands of terrorist groups proved to be unable to reconstitute themselves, this would be a completed genocide according to a broad, originalist reading of the Genocide Convention's Article II, subsections II(b)–II(d).<sup>152</sup> Next to Sierra Leone, Somalia, Mali, the DRC, Chad, and the CAR had the worst rate of under-five mortality in the world, each over 164 deaths per 1,000 births, or 16%.<sup>153</sup>

These events led to widespread terrorist massacres in Africa, ranging from the African embassy bombings of 1998 to the Somali university and other bombings, the Kenyan shopping mall massacre, the Boko Haram attacks on Christians and pro-government Muslims in northern Nigeria and neighboring states, and the Islamic State massacres of Copts and other Christians in Libya and Tunisia. In Nigeria, Boko Haram reported receiving support from persons in Saudi Arabia and Sudan.<sup>154</sup> In Mali, France believed that jihadists such as Ansar al-Dine had received cash from persons in Qatar, who also supported the jihadists in Syria according to the French government. In Afghanistan, the

<sup>149</sup> Political Terror Scale (2011), [www.politicalterror scale.com](http://www.politicalterror scale.com) (filename PTS\_2010\_oct\_25\_2011.xls).

<sup>150</sup> *Ibid.*

<sup>151</sup> FAO Statistics Division, Prevalence of undernourishment in total population (percentage) (2008).

<sup>152</sup> *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-T, Trial Chamber, Judgment (January 17, 2005), §§ 666, 675). See also, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgment (September 2, 1998). [www.un.org/ict/english/judgements/akayesu.html](http://www.un.org/ict/english/judgements/akayesu.html); Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1943), [www.preventgenocide.org/lemkin/AxisRule1944-1.htm](http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm). See also, H. Travis, "On the Original Understanding of the Crime of Genocide," *Genocide Studies & Prevention: An International Journal* 7 (2012): 30–55, 35–9.

<sup>153</sup> The UN Inter-Agency Group for Child Mortality Estimation, 2012; Maternal, newborn and child health data by country (most recent year to 2011 with some trend data included).

<sup>154</sup> Smith, "In the Shadow."

TABLE 10.1 *Refugee Flows by Country of Origin at End of 2010*

Afghanistan	3,054,709
Iraq	1,683,575
Somalia	770,148
DRC	476,693
Sudan	379,067
Vietnam	338,698
Myanmar	215,644
Eritrea	205,458
China	184,602
Serbia (and Kosovo)	182,955
Central African Republic	162,755
Turkey	146,793

Source: U.N. High Commissioner for Refugees<sup>155</sup>

Taliban was receiving arms and money from similar sources as Boko Haram and Ansar al-Dine. The Seleka of the CAR as well as Ansar al-Dine procured weapons released by government stockpiles by the Libyan rebels, which included Al Qaeda members.<sup>156</sup> In South Sudan, the horrific atrocities of the White Army insurgents against the newly independent and desperately poor state were supercharged by arms shipments from the NIF regime in Khartoum.<sup>157</sup> Millions are homeless and starving as a result.<sup>158</sup> The country already has more child soldiers conscripted into fighting than Sierra Leone did at the end of its conflict, or 11,000 children separated from their families and almost 1,500 dead, possibly triggering Article II(e) of the Genocide Convention.<sup>159</sup>

<sup>155</sup> UNHCR, *Global Trends 2010* (2011), p. 42, [www.unhcr.org/4dfan1499.html](http://www.unhcr.org/4dfan1499.html).

<sup>156</sup> Travis, "Genocide, Counterinsurgency," pp. 190–94; Tracy, "Human Costs."

<sup>157</sup> "Genocide, Counterinsurgency," pp. 194–6; see also, S. Paterno and S. Morgan, "The White Army factor in South Sudan's conflict", *Sudan Tribune* (January 27, 2014), <http://a.next.westlaw.com>; Hereward Holland "In South Sudan, tribal militias exact revenge (+video)," *Christian Science Monitor* (January 17, 2012), 2012 WLNR 1142994.

<sup>158</sup> U.N. Mission in South Sudan, *Hunger Could Threaten over Four Million in South Sudan* (February 8, 2012), <http://webcache.googleusercontent.com/search?q=cache:VJs15qXyr3gJ:unmiss.unmissions.org/Default.aspx%3Ftabid%3D3481%26ctl%3DDetails%26mid%3D6047%26ItemID%3D52935%26language%3Den-US+sudan+%22four+million%22+hunger+2012&cd=1&hl=en&ct=clnk&gl=us>.

<sup>159</sup> U.N. Children's Fund, Press Release, UNICEF Advocate Ishmael Beah Witnesses Impact of Conflict on Children in South Sudan (2015), <http://reliefweb.int/report/south-sudan/unicef-advocate-ishmael-beah-witnesses-impact-conflict-children-south-sudan>.

#### 4. CONCLUSION

Imposing corporate criminal liability will not solve many of the atrocity-related problems confronting the African continent, because nonstate groups other than corporations may be responsible for a preponderance of these crimes. Armies, parties, fronts, and the like came to the fore in the DRC, Sierra Leone, and Uganda, for example. Religiously inspired groups linked to Sudan and Somalia have perpetrated serious crimes in Nigeria, among other places, while groups linked to persons in Sudan, Qatar, Saudi Arabia, Tunisia, Libya, Turkey have perpetrated similar crimes in Iraq and Syria, among other places. Such groups can form knowledge of their members' acts and adopt policies that may violate international norms, just as corporations do. Culpability for noncorporate organizations is necessary to ensure that perpetrators of population-level crimes such as enslavement, child soldiering, forcible transfer, destruction of essential infrastructure or government institutions, or genocide do not enjoy impunity. Moreover, recognizing broader associational responsibility may avoid impediments to the fight against impunity posed by doctrines of intent, immunity, and effects-based tests for crimes such as corruption, enslavement, murder, or terrorism.