

NOTES

CORPORATE COMPLICITY IN ATROCITY CRIMES: A BUSINESS AND HUMAN RIGHTS LAW PROBLEM SET

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ABSTRACT

In recent years, European Union Member States have launched a series of prosecutions for atrocity crimes under national law in domestic judicial fora. These cases have established that domestic courts can play a critical role in advancing the global criminal justice project. Despite the rise in these cases, one actor within the atrocity crimes landscape is frequently overlooked: the corporation. While there have been recent attempts to hold individual executive corporate officers accountable for their complicity in atrocity crimes, prosecutions that hold the corporation accountable as a juridical entity are few and far between. At the same time, European multinational enterprises are increasingly coming under the ambit of new human rights due diligence laws, informed by the United Nations Guiding Principles. However, to date, these human rights due diligence laws have failed to confront whether corporations should face criminal liability for their complicity in the commission of atrocity crimes. This Note places these two developments in conversation. It demonstrates that the current patchwork approach to criminal liability across Europe for atrocity crimes results in a significant “accountability gap” for victim communities. Further, it shows that extant human rights due diligence regimes have proven inadequate to remediate rightsholders victimized by corporate involvement in atrocity crimes, resulting in a significant “remedy gap.” This Note argues that the forthcoming transposition process offered by the Corporate Sustainability Due Diligence Directive is a critical opportunity to harmonize the European approach concerning juridical liability for corporate complicity for the gravest human rights abuses: atrocity crimes.

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I. INTRODUCTION

Over the last decade, there has been a groundswell of domestic atrocity crimes prosecutions across Europe. Operating under various jurisdictional theories, prosecutors in countries such as France, the Netherlands, Belgium, Denmark, Germany, and Sweden have charged alleged perpetrators with atrocity crimes under their respective national laws.¹ While jurisdictional requirements vary, many of these cases bear no nexus to nationals of the given European country operating as the venue.² For example, the German Code of Crimes against International Law, or

1. See generally Brianne McGonigle Leyh, *Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes*, 16 INT'L J. TRANSITIONAL JUST. 363 (2022) (describing the spread of prosecutions for international atrocity crimes in domestic judicial fora across Europe).

2. See Luca Gervasoni, *Enabling jurisdiction: Unravelling the global pursuit of justice for international crimes*, 105 QUESTIONS OF INT' L. 11, 14-5 (2024), https://www.qil-qdi.org/wp-content/uploads/2024/05/02_Universal-Jurisdiction_GERVASONI_FIN.pdf.

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Völkerstrafgesetzbuch (VStGB), enunciates that jurisdiction will attach for atrocity crimes “even when the offense was committed abroad and has no connection to Germany.”³

Scholars have noted that domestic courts willing to claim jurisdiction over atrocity offenses bolster a “wider web of accountability,” a phrase coined by former Deputy U.S. Ambassador for Global Criminal Justice Jane Stromseth in March 2022.⁴ Dr. Stromseth articulated this vision before the House Foreign Affairs Committee’s Tom Lantos Human Rights Commission, arguing that in the case of Russian atrocity crimes against Ukraine, the international community should pursue “mutually reinforcing accountability,” where states, intergovernmental organizations (IGOs), and international courts advance various justice-seeking mechanisms contemporaneously.⁵ As such, Dr. Stromseth argued that national justice proceedings can serve as integral parts of this “wider web of accountability.”⁶

Despite the rise of prosecutions at the national level against *individuals* for atrocity crimes, this emerging “web of accountability” in the domestic sphere often overlooks a critical actor within the atrocity crimes landscape: the corporation. Because the Rome Statute of the International Criminal Court (ICC) only confers jurisdiction over *natural persons*, corporations are barred from ICC prosecution in their corporate personhood (a juridical fiction).⁷ This Note will refer to *juridical* and *legal persons* interchangeably; each will refer to the corporate entity itself as the locus of the prosecution as opposed to the responsible corporate officer(s).

The drafters of the Rome Statute carefully considered the potential for juridical person liability, but its inclusion proved too controversial for the states assembled in 1998.⁸ During the Rome Statute drafting process, plenipotentiaries noted the “deep divergence of views as to the advisability of including criminal responsibility of legal persons in the

3. Völkerstrafgesetzbuch [VStGB] [Code of Crimes against International Law], June 26, 2002, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at 2254, § 1 (Ger.).

4. See *Hearing on Accountability for Russia’s War Crimes and Aggression against Ukraine: Before the Tom Lantos Human Rights Commission*, 117th Cong. 1 (2022) (statement of Dr. Jane Stromseth, Former Deputy to the Ambassador-at-Large for Global Criminal Justice, U.S. Department of State, and Francis Cabell Brown Professor of International Law, Georgetown University Law Center) [hereinafter Statement of Dr. Jane Stromseth].

5. *Id.*

6. *Id.* at 4.

7. See *Made in Europe, bombed in Yemen*, EUR. CTR. FOR CONST. AND HUM. RTS., <https://www.eccchr.eu/en/case/made-in-europe-bombed-in-yemen/> (last visited May 11, 2024).

8. See Int’l L. Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. GAOR 74th Sess., at 81-83, U.N. Doc. A/74/10 (2019), [hereinafter Draft Articles on Crimes Against Humanity].

Statute.⁹ Therefore, while individuals can be prosecuted in their capacity as corporate officers in limited circumstances, the corporation itself is barred from prosecution at the ICC.¹⁰ Former U.S. Ambassador for Global Criminal Justice, David Scheffer, has argued in various contexts¹¹ that corporations as juridical persons are barred from prosecution absent an amendment to Article 25(1) of the Rome Statute.¹² Given the limits on ICC prosecution, the domestic tribunal takes on heightened import as a situs for corporate liability for atrocity crimes.

A. *Emerging Entity Prosecutions Across the Globe*

Criminal trials for corporate involvement in atrocity crimes remain the exception instead of the rule on the European continent, but the slow uptick of European courts pursuing atrocity charges for corporations is not due to a lack of EU legal systems that recognize corporate criminal liability.¹³ In fact, as many as eleven EU Member States recognize some form of corporate criminal liability.¹⁴ Nonetheless, only in recent years have a small number of these European states begun to advance notable corporate criminal *entity* prosecutions for atrocity crimes.

In France, the Court de Cassation (the nation's highest appeals court) recently affirmed that Lafarge S.A. could stand trial for charges that it was complicit in contributing to crimes against humanity in Syria.¹⁵ And after six weeks of hearings before the Paris Criminal Court concerning separate charges that Lafarge financed a terrorist organization, the trial concluded on December 19, 2025, with a verdict expected on April 13, 2026—pending at the time of this writing.¹⁶ Moreover, in

9. *Id.* ¶ 43.

10. See Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 (“The Court shall have jurisdiction over *natural* persons pursuant to this Statute”) (emphasis added).

11. See, e.g., David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT’L. L. J. 35, 35–38 (2016); Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amici Curiae Supporting Petitioners, *Jesner v. Arab Bank, PLC.*, 537 U.S. 418 (2017) (No. 16-499).

12. Scheffer, *supra* note 11, at 35-38.

13. See *Corporate Criminal Liability*, CLIFFORD CHANCE LLP (Apr. 2016), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/corporate-criminal-liability-heat-map.pdf>.

14. See *id.*

15. Nicolas Monnet & Tassilo Hummel, *France: Supreme Court rules cement maker Lafarge can be charged with complicity in crimes against humanity for its activities in Syria*, BUS. HUM. RTS. RES. CTR. (Jan. 16, 2024), <https://www.business-humanrights.org/en/latest-news/france-la-cour-de-cassation-valide-la-mise-en-examen-de-lafarge-pour-complicit%C3%A9-de-crimes-contre-lhumanit%C3%A9-pour-ses-activit%C3%A9s-en-syrie>.

16. These charges are separate from the investigation concerning Lafarge’s alleged involvement in crimes against humanity. *Lafarge Trial Concludes: Prosecutors Request All Defendants to Be Found Guilty*, SHERPA (Jan. 5, 2026), <https://www.asso-sherpa.org/lafarge-trial-concludes-prosecutors-request-all-defendants-to-be-found-guilty>.

U.S. proceedings, Lafarge S.A. pleaded guilty to providing material support to foreign terrorist organizations under 18 U.S.C. § 2339(b), incurring more than \$778 million in fines and forfeitures.¹⁷ The *Lafarge* litigation—both in the United States and in Europe—has generated significant global media attention, galvanizing commentators to question if a new era of corporate criminal accountability is upon us.¹⁸

Although the *Lafarge* case represents a novel development within the global “web of accountability” for corporate perpetrators of atrocity crimes, it also remains a rare instance of such accountability.¹⁹ As domestic criminal prosecutions for atrocity crimes against *individuals* continue to emerge as a situs within the accountability ecosystem, it is critical to examine the factors that have prevented corporate *entity* prosecutions from proceeding more broadly across Europe.²⁰

There have also been notable advancements outside of Europe in pursuing corporate prosecutions for atrocity crimes. In 2014, the African Union (AU) adopted the Malabo Protocol, a series of amendments to operationalize an African Court of Justice and Human Rights, including provisions concerning corporate criminal liability.²¹ In particular, Article 46C of the Malabo Protocol provides for liability over “legal persons,” including provisions to hold corporations liable as *organizations*.²² The Special Tribunal for Lebanon (STL) has also produced case law concerning corporate prosecutions for atrocity crimes. In its *Al Khayat* decision, the STL appeals chamber offered the first significant international criminal law (ICL) holding to maintain a view of entity liability.²³

17. See *Press Release, Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations*, U.S. DEP’T OF JUST. (Oct. 18, 2022), <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>.

18. See *Lafarge Case: A Turning Point for Corporate Responsibility*, REMEDY PROJECT, <https://www.remedyproject.co/news-and-project-announcements/lafarge-case> (last visited May 11, 2024); Philip Kroner, Lea Babucke, & Maxime Neuhaus, *Lunding Leading the Way? A (Re-)Assessment of Corporate Liability for International Crimes*, FRESHFIELDS LLP (Dec. 14, 2023), <https://riskandcompliance.freshfields.com/post/102iv7m/lundin-leading-the-way-a-re-assessment-of-corporate-liability-for-international>.

19. See *IBA War Crimes Committee Shines a Light on Corporate Liability Cases*, INT’L BAR ASS’N (Nov. 25, 2022), <https://www.ibanet.org/IBA-War-Crimes-Committee-shines-a-light-on-corporate-liability-cases>.

20. See generally MICHAEL J. KELLY, PROSECUTING CORPORATIONS FOR GENOCIDE (2016) (describing the landscape of domestic corporate entity prosecutions across Europe).

21. See Jaya Élise Bordeleau-Cass, *The ‘Accountability Gap’: Holding Corporations Liable for International Crimes*, 3 PKI GLOB. JUST. J. 65 (2019), <https://globaljustice.queenslaw.ca/news/the-accountability-gap-holding-corporations-liable-for-international-crimes>.

22. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, AU Doc. No. STC/Legal/Min. 7(1) Rev. 1, art. 46C (1).

23. Prosecutor v. Al Khayat, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 84 (Oct. 2, 2014).

There is also an emerging body of multilateral treaties that have begun to consider new avenues for corporate criminal liability. While currently in draft form, the UN International Law Commission's (ILC) Draft Articles on the Prevention and Punishment of Crimes Against Humanity (Draft CAH Treaty)²⁴ include a provision requiring states to domesticate national law that also criminalizes CAH against *legal persons*.²⁵ Upon entering into force, Article 6(8) of the Draft CAH Treaty would require each State Party to "take measures . . . to establish the liability of legal persons for [crimes against humanity] Subject to the legal principles of the State, such liability may be *criminal, civil, or administrative*" (emphasis added).²⁶

In its official commentary, the ILC acknowledges its novel inclusion of entity liability, stating that the treatment of legal persons for their role in atrocities has been sparse both within international courts and multilateral treaties.²⁷ However, even if not in the atrocity context, there are various treaties that "address the liability of legal persons for criminal offences," including, *inter alia*, "the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; and the 1999 International Convention for the Suppression of the Financing of Terrorism."²⁸ However, across each of these seventeen instruments, the drafters provide considerable flexibility "to determine the appropriate kind of sanctions."²⁹

B. *Business and Human Rights' Hard Law Evolution, New Civil Causes of Action*

At the same time that European domestic courts have been advancing charges for *individual* atrocity crimes, another major legal development

24. See Mark Simonoff, *United States Statement April 2024 Resumed Session of the Sixth Committee: ILC's Draft Articles on the Prevention and Punishment of Crimes Against Humanity ILC Recommendation Intervention*, U.S. DEP'T OF STATE (Apr. 4, 2024), <https://usun.usmission.gov/statement-april-2024-resumed-session-of-the-sixth-committee-ilcs-draft-articles-on-the-prevention-and-punishment-of-crimes-against-humanity>.

25. See Draft Articles on Crimes Against Humanity, *supra* note 8, art. 6(8).

26. *Id.*

27. *Id.*

28. Other treaty bodies include "the 2000 United Nations Convention against Transnational Organized Crime; the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the 2003 United Nations Convention against Corruption." *Id.* ¶ 46.

29. See Carsen Stahn, *Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT. L. 91, 95 (2018).

has been sweeping Europe: the transformation of Business and Human Rights (BHR) into enforceable hard law. The United Nations Guiding Principles (UNGPs), passed unanimously by the United Nations Human Rights Council in 2011, enunciate a tripartite Protect-Respect-Remedy (PRR) model.³⁰ While the UNGPs do not generate new human rights law, they clarify existing duties that states carry, including states' twin obligations to (1) protect against human rights violations within its jurisdiction, irrespective of the juridical identity of the actor³¹ and to (2) ensure victims have access to "prompt and effective remedy."³²

First, the UNGPs clarify that states have a duty, grounded in international human rights law (IHRL),³³ to *protect* individuals within their jurisdiction from human rights abuses committed by businesses or third parties.³⁴ Second, businesses carry a *responsibility* to respect the human rights of others, including all of those who fall within their global value chains (GVCs).³⁵ To operationalize this commitment, UNGP Articles 17-22 describe the process of human rights due diligence (HRDD), whereby businesses must identify, track, mitigate, and, when necessary, remediate their human rights impacts.³⁶ Third, states have a duty to ensure that those harmed by business-related abuses have access to *remedies* through both state-based and nonstate-based adjudicatory mechanisms.³⁷ Businesses should either "provide for or cooperate in" such mechanisms when they have caused or contributed to adverse human rights impacts.³⁸

In order to ensure that companies engage in the process of human rights due diligence, EU Member States, including France, Germany, Switzerland, and the Netherlands, enacted or are considering laws that codify mandatory human rights and environmental due diligence (mHREDD) as prescribed by the UNGPs. These laws differ in their approaches and enforcement mechanisms, but they each mandate that companies within the statute's ambit engage in the process of

30. See generally U.N. Hum. Rts. Off. of the High Comm'r, *U.N. Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011) [hereinafter UNGP] (operationalizing the PRR model into a series of principles applicable to corporations and states).

31. Lisa Laplante, *The Wild West of Company-Level Grievance Mechanisms: Drawing Normative Borders to Patrol the Privatization of Human Rights Remedies*, 64 HARV. INT'L. L. J. 311, 366-67 (2023).

32. *Id.* at 370-71.

33. See *id.* at 366.

34. See UNGP, *supra* note 30, art. 1.

35. See *id.* art. 14.

36. See *id.* arts. 17-22.

37. See *id.* art. 25.

38. See *id.* art. 22.

mHREDD.³⁹ These regimes have largely included multinational enterprises (MNEs) within their scope. The approaches to enforcing mHREDD models have laid bare the juridical fault lines of corporate liability on the continent, with the vast majority of regimes preferring an administrative or regulatory enforcement model to creating a new civil cause of action for rightsholders. To date, none of these regimes have addressed the role that *criminal* prosecutions can play in advancing remedies.

Among mHREDD regimes, only France has formally codified a novel civil liability standard for plaintiff rightsholders to advance their claims against corporations through its Duty of Vigilance Law.⁴⁰ Germany, despite a robust administrative penalty scheme under its Supply Chain Due Diligence Act offers no criminal or civil avenue for rightsholders to advance their grievances against offending companies. Moreover, there is no requirement that such penalties, once obtained, will flow to victims of the abuses themselves.⁴¹ This system creates a real risk that remedy will not reach those harmed by the actions of German corporations. As it concerns criminal law, Germany has no standard for entity liability in its legal code; instead, it relies on regulatory fines.⁴² While Germany has been at the vanguard of advancing domestic atrocity prosecutions against *individuals*, it is foreclosed from proceeding against corporations for the same crime.⁴³

There are also efforts to operationalize the UNGPs at the multilateral level. After its approval by the European Parliament in April 2024, the EU’s Corporate Sustainability Due Diligence Directive (CSDDD) entered into force on July 25, 2024, compelling Member States to domesticate mHREDD into national law.⁴⁴ However, the Omnibus “simplification” process has weakened the content of the CSDDD, especially as it concerns civil liability. As initially identified through the recommendations of the

39. See Nicolas Friedlich, *Tempered Vigilance: Realizing Effective Remedy for Rightsholders Under the French Duty of Vigilance Law*, 64 VA. J. INT’L L. 609, 632 (2024); These laws often only apply to companies above a certain size in terms of employees or gross profit. See GABRIELLE HOLLY ET AL., MANDATORY HUMAN RIGHTS DUE DILIGENCE LAWS 18-36 (Sep. 2025), https://www.humanrights.dk/files/media/document/Guidance%20on%20developing%20a%20mHRDD%20law_web_ENG.pdf (providing an overview of the different legislative approaches of France, Germany, Norway, Switzerland and the EU).

40. See Friedlich, *supra* note 39, at 615.

41. See Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] § 23-24 (Ger.).

42. See Sijad Allahverdiyev & Marvin Othman, “Verbandsanktionengesetz” — *Corporate Liability for Germany?*, 23 GER. L.J. 637, 637-39 (2022).

43. See *id.*

44. See Council Directive 2024/1760, 2024 O.J. (L 1760).

*Draghi Report*⁴⁵ in September 2024, the European Union systematically began to introduce packages of legislative amendments to both eliminate and streamline sustainability rules and reporting obligations “to boost EU competitiveness.”⁴⁶ In order to afford European lawmakers more time to consider these substantive changes, the European Union adopted a so-called “Stop-the-Clock” Directive that postponed the application the requirement for member states to transpose the CSDDD.⁴⁷

On December 16, 2025, the European Parliament voted to approve the provisional Omnibus agreement reached with the European Council concerning the scope, content, and applicability of the CSDDD.⁴⁸ On February 26, 2026, the revised CSDDD was published in the Official Journal of the European Union, entering into force on March 18, 2026 (twenty days after publication).⁴⁹ Beyond reducing the number of companies in scope for CSDDD, the provisional agreement removed the CSDDD’s Article 29 civil liability provision “the EU harmonised liability regime and the requirement for member states to ensure that the liability rules are of overriding mandatory application in cases where the applicable law is not the national law of the member state.”⁵⁰ And while the original CSDDD tied administrative fines to a share of a company’s global revenue and required a *minimum* ceiling of five percent, the provisional Omnibus agreement fixed a *maximum* fine of three percent of global revenue. Moreover, the deadline for Member States to transpose the CSDDD has been extended to July 26, 2028, with companies expected to comply in July 2029.⁵¹ EU Member

45. See *The Draghi Report on EU Competitiveness*, EUR. COMM’N, https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en (last visited Jan. 2, 2026).

46. Council of the EU Press Release 523/25, Simplification: Council agrees position on sustainability reporting and due diligence requirements to boost EU competitiveness (June 23, 2025).

47. Council of the EU Press Release 285/25, Simplification: Council gives final green light on the ‘Stop-the-Clock’ Mechanism to boost EU competitiveness and provide legal certainty to businesses (Apr. 14, 2025).

48. European Parliament Press Release, Simplified sustainability reporting and due diligence rules for businesses (Dec. 12, 2025) <https://www.europarl.europa.eu/news/en/press-room/20251211IPR32164/simplified-sustainability-reporting-and-due-diligence-rules-for-businesses>.

49. Directive (EU) 2026/470, of the European Parliament and of the Council of 24 February 2026 Amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as Regards Certain Corporate Sustainability Reporting Requirements and Certain Corporate Sustainability Due Diligence Requirements, 2026 O.J. (L 470).

50. Council of the EU Press Release, Council and Parliament strike a deal to simplify sustainability reporting and due diligence requirements and boost EU competitiveness (Dec. 9, 2025), <https://www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-requirements-and-boost-eu-competitiveness/>.

51. Council of the EU Press Release, Council Signs Off Simplification of Sustainability Reporting and Due Diligence Requirements to Boost EU Competitiveness (Feb. 24, 2026), <https://www.consilium.europa.eu/en/press/press-releases/2026/02/24/council-signs-off-simplification-of-sustainability->

States will now be under no obligation to domesticate a civil—let alone criminal—liability regime for corporations above a certain size under the CSDDD.

The UN has also been considering a legally binding instrument (LBI) to compel compliance with the UNGPs. Since 2014, the UN Office of the High Commissioner for Human Rights (OHCHR) has designated an “open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” (BHR Working Group or OEIGWG) to consider a Draft Treaty on Business and Human Rights (UN Draft Treaty) that would bind ratifying states to domestically incorporate mHREDD law.⁵² The current version of Article 8(2) of the UN Draft Treaty confers significant latitude, providing that “the liability of *legal* and natural persons referred to in this Article shall be criminal, civil, or administrative, *as appropriate* to the circumstances” (emphasis added).

The corporate liability gaps found within these emerging laws create weaknesses for the BHR project and exacerbate the corporate accountability gap within this “wider web.”⁵³ The web approach holds that international criminal justice should not be viewed as a static, hierarchical structure with rigidly delimited axes.⁵⁴ Rather, various sites of justice—international tribunals, truth commissions, domestic courts, etc.—can serve as mutually reinforcing nodes within a larger global ecosystem to hold perpetrators accountable.⁵⁵ Yet, the literature has seldom considered how BHR law can *fill* the gaps left within the constellation of avenues to try corporations for atrocity crimes.⁵⁶ Put differently, ICL and BHR literature have not harmonized how they can mutually reinforce one another, addressing both the accountability and remedy gaps at once.⁵⁷

reporting-and-due-diligence-requirements-to-boost-eu-competitiveness/; *EU's “Deregulation” agenda claims its first victim: Corporate Sustainability Due Diligence Directive gutted*, EUR. COAL. FOR CORP. JUS. (Dec. 16, 2025), <https://corporatejustice.org/news/press-release-eus-deregulation-agenda-claims-its-first-victim-corporate-sustainability-due-diligence-directive-gutted/>.

52. See U.N. Human Rights Council, Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (July 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>.

53. See Statement of Dr. Jane Stromseth, *supra* note 4, at 4.

54. *Id.*

55. *Id.*

56. See Stahn, *supra* note 29, at 91.

57. See Kindra Mohr, *Close the Remedy Gap*, ESG INVESTOR (Feb. 9, 2024), <https://www.esginvestor.net/close-the-remedy-gap/>; Claire Tixeria, *Will Lafarge be held accountable for alleged links to human rights abuses in Syria?*, BUS. & HUM. RTS. RES. CTR. (Dec. 11, 2019), <https://www.>

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This Note argues that in order for EU Member States to meaningfully operationalize their commitments to the UNGPs into hard law, they must harmonize clear and consistent standards for corporate involvement in atrocity crimes through domestic law. Following the Omnibus process' elimination of mandatory civil liability required under Article 29 of the CSDDD, the potential for regulatory fragmentation and an uncertain operating environment for corporates is significantly heightened.

This Note will proceed in the following sections.

Section II will examine the trends and extant doctrinal limits of prosecuting corporations as entities for the commission of atrocity crimes, traced back to the origins of this doctrinal tension in the mid-twentieth century with the International Military Tribunal at Nuremberg.

Section III will offer the current landscape of corporate atrocity crimes prosecutions in Europe. In so doing, it will examine the French legal regime in close detail given its recent treatment of the landmark *Lafarge* case, bringing out the strengths and weaknesses that have enabled France to bring a number of forward-looking investigations and prosecutions in recent years. It will then argue that the current patchwork approach to corporate liability across Europe, where Member States take divergent approaches, results in a structural accountability gap for rightsholders seeking justice.

Section IV will survey the current landscape of BHR as it concerns companies' responsibilities when involved with or linked to atrocity crimes. This section will detail the BHR literature's treatment of human rights due diligence in the context of conflict-affected areas, arguing that it has only sparsely treated what proper rightsholder remediation should be for atrocity crimes. It will then examine the *Lafarge* case to demonstrate the inadequacy of extant approaches to human rights due diligence to remediate atrocity crime victims and communities.

Section V will argue that mHREDD's current civil enforcement model will continue to pose a series of doctrinal, procedural, and practical barriers that foreclose access to remedies for rightsholders. These limits have resulted in a significant remedy gap. This section will argue that given the limits of a purely civil approach and the current legal patchwork driving significant corporate stakeholder uncertainty, European lawmakers should "gold-plate" their domestic mHREDD laws to clarify standards for corporate *criminal* liability across the continent.

Section VI will conclude by offering a series of recommendations. These recommendations will center on how harmonizing new criminal

business-humanrights.org/en/blog/will-lafarge-be-held-accountable-for-alleged-links-to-human-rights-abuses-in-syria/.

liability standards for corporate entities can address the two longstanding structural defects within both BHR and ICL law: the “remedy” and “accountability” gaps, respectively. It will also offer recommendations concerning how to ensure that emerging mHREDD regimes better account for the practical and procedural barriers that victims face in formal judicial adjudication, whether civil or criminal. Finally, it will argue that the European Union should propose a Remedy Coordination Mechanism to require that financial remedies—both adjudicatory awards and administrative penalties—flow to victim communities.

II. DOCTRINAL FOUNDATIONS AND LIMITS OF CORPORATE JUDICIAL LIABILITY

Persistent doctrinal limits have contributed to the weak state adoption of corporate liability for atrocity crimes. There is no consensus on an international standard for the attribution of criminal liability to corporations.⁵⁸ As described by Professors Michael Kelly and Luis Moreno-Ocampo in *Prosecuting Corporations for Genocide*, the dominant trend has been for courts to pursue “individual criminal liability for corporate officers and civil liability for the corporate entity.”⁵⁹ However, corporate involvement in a range of atrocity crimes since the Holocaust has elevated concerns that civil liability (where it is even jurisdictionally tenable) is inadequate to capture the severity and scope of corporate involvement in the commission of atrocity crimes.⁶⁰

Commentators often point to two approaches when pursuing entity prosecutions for corporate complicity in atrocity crimes.⁶¹ A first school of thought argues that we should expand current pathways under existing theories of *individual* accountability to better capture corporate officers and their wrongdoing. In his taxonomy of these approaches, Professor Carsten Stahn has borrowed Professor George Fletcher’s description of a “liberal approach,” for its desire to see corporate officers held accountable in line with ICL’s traditional treatment of *individuals* as the responsible agents for atrocity crimes.⁶² Rather than view “collectivities” as the locus of criminality, the liberal approach “abstracts individual wrong from collective action.”⁶³ This tradition traces its jurisprudential roots to the international military tribunals conducted by the Allied Forces, where

58. See Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. F. 1, 7 (1999).

59. See KELLY, *supra* note 20, at 3.

60. See *id.* at 4.

61. See Bordeleau-Cass, *supra* note 21.

62. See Stahn, *supra* note 29, at 99.

63. *Id.*

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officials from German companies *IG Farben* and *Flick* were tried for their role in the Holocaust and other war crimes.⁶⁴ Significantly, under Control Council Law No. 10, the post-war tribunals did not try *IG Farben* or *Flick* as corporations.⁶⁵ Rather, the post-war tribunals tried individual corporate officers for their role in the Holocaust and the labor derived from its extermination camps.⁶⁶

The second school, described by Professor Stahn as “the romantic approach” given its desire for novel, innovative liability theories to punish corporations as legal beings,⁶⁷ argues for theories of corporate liability that focus on the unique form of the corporation instead of its individual agents.⁶⁸ This view, often called “juridical entity participation,” carries criminal sanctions against corporations and other business organizations *as entities*.⁶⁹ While these theories vary—ranging from vicarious liability to theories that punish a guilty corporate culture itself—they converge in that their focal point is the organization.⁷⁰ Practitioners who adopt this romantic approach argue that atrocity crimes are “by their very nature committed in collectivities” and that “the blameworthiness of the behavior of corporations may exceed the responsibility of the individual.”⁷¹ As such, to ascribe liability to an individual officer is both potentially legally inaccurate as well as misleading to victim communities concerning where proper attribution for the commission of the atrocities should ultimately lie.⁷²

The romantic view, elevating the need to hold corporate entities liable, as opposed to their individual officers, better responds to critiques of the limited existing paths to justice for victim communities for several reasons.⁷³ First, the romantic view addresses the critique that individual liability for corporate officers is unsatisfactory for victims.⁷⁴ Frequently, the convictions of individual corporate officers occlude a more fulsome understanding of the “collective dynamics” that led to

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.* at 102.

68. *Id.*

69. *See* TERJE EINARSEN & JOSEPH RIKHOF, A THEORY OF PUNISHABLE PARTICIPATION IN UNIVERSAL CRIMES 110 (2018).

70. *Id.* at 110-11.

71. *See* Stahn, *supra* note 29, at 99, 102.

72. *Id.* at 119.

73. *See* W. Cory Wanless, *Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. INT'L CRIM. JUST. 201, 202 (2009); Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L. L. 955, 955 (2008).

74. *See* Stahn, *supra* note 29, at 119.

the corporation's role in the atrocity crime.⁷⁵ As Professor Stahn argues, corporate decision-making involves several interdependent actors; to place individual agents as responsible for an overarching policy may “produce judgments that exceed the share and guilt of individuals.”⁷⁶ The evidence required to prove that individual corporate officers had the necessary level of responsibility for liability to attach is qualitatively different than that would be required to prove that the corporate entity, as a whole, was complicit.⁷⁷ Professor Stahn concisely describes the dilemma: “Individuals may bear symbolic responsibility, while corporations are allowed to retain the profits gained.”⁷⁸

Second, these Romantic scholars account for the immense power that MNEs exert on the world economy and state governance. Large MNEs operate across diffuse global regions with multi-layered, intricate GVCs.⁷⁹ Given their immense economic power, scholars have reasoned that the same corpus of law concerning state responsibility for wrongful actions should be transposed to the corporate context.⁸⁰

Third, scholars point to a lacuna in the development of legal doctrine. Namely, many within the academy argue that international human rights law and international criminal law's growth in past decades has not been met with parallel recognition that juridical entities, such as corporations, maintain the capacity to commit such flagrant abuses.⁸¹ Professors David Weissbrodt and Muria Kruger posit that “the creators of this ever-larger web of human rights obligations, however, failed to pay . . . attention to some of the most powerful nonstate actors . . . transnational corporations.”⁸² These scholars seek to address that lacuna by asserting that corporations should be similarly treated as human rights duty-bearers within an increasingly globalized economy.

Fourth, many romantic scholars argue that the *culture* of civil law traditions forecloses corporate criminal liability.⁸³ Over the twentieth

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 120.

79. See Chang-hsien Tsai & Ching-Fu Lin, *Shedding New Light on Multinational Corporations and Human Rights: Promises and Limits of “Blockchainizing” the Global Supply Chain*, 44 MICH. J. INT'L L. 117, 119 (2023).

80. See KELLY, *supra* note 20, at 5.

81. *Id.*; Slye, *supra* note 73, at 955.

82. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003).

83. See KELLY, *supra* note 20, at 191.

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century, common law countries have begun to impose criminal liability on corporate entities. In the United States, the watershed 1908 U.S. Supreme Court case *New York Central & Hudson River Railroad Co. v. United States* catalyzed a new cascade of corporate criminal liability prosecutions across common law jurisdictions.⁸⁴ In many of these common law cases, prosecutors have relied upon a theory of *respondeat superior*, wherein a corporate agent's crime can attach to the corporate entity "when the agent acted within his authority for the benefit of the firm."⁸⁵ This view of vicarious liability has been progressively developed at common law within the United States since *New York Central & Hudson*.⁸⁶ In fact, scholars have suggested that even the U.S. Title 18 statute criminalizing genocide, 18 U.S.C. § 1091, provides that "a corporation can be prosecuted for genocide."⁸⁷ Therefore, some scholars view the common-civil divide as the most helpful shorthand to explain the global divergence.⁸⁸

However, in many civil law countries, such as Germany, there is a refusal to adopt theories of *respondeat superior* and attribute "criminal liability from the person to the organization."⁸⁹ The German position has proven staunch. In fact, Germany refused to sign the European Council's Criminal Law Convention on Corruption despite forty-three other European states electing to become party to its criminalization of a range of bribery provisions.⁹⁰ Yet, even within this domain, civil law jurisdictions are inching toward adopting criminal liability for legal persons.⁹¹ Professors Kelly and Moreno-Ocampo have described this trend by meticulously cataloging those civil law countries that have begun to move toward prosecuting corporations for a range of offenses.⁹² Significantly, traditionally civil law EU countries, such as France, Denmark, and the Netherlands, have each moved toward prosecuting corporate entities for their involvement in atrocities.⁹³ However, hold-outs, like Germany and Italy, remain in moving toward entity liability,

84. See *id.* at 189; see generally *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909) (holding that the doctrine of respondeat superior applies in cases of federal criminal litigation).

85. See KELLY, *supra* note 20, at 189.

86. See *id.* at 187-88. It is beyond the scope of this Note to describe the progression of the federal U.S. criminal law doctrine concerning liability for corporate entities.

87. *Id.* at 187.

88. *Id.*

89. *Id.* at 191-92.

90. *Id.* at 191.

91. See *id.*

92. See *id.* at 193-206, 495-96 (cataloging how various countries have approached prosecuting corporations for atrocity crimes).

93. *Id.* at 191.

with persistent political opposition to new proposals. Notably, in 2019 and 2021, the German Parliament considered, but failed to pass, two bills providing for a fledgling version of criminal entity liability in limited white-collar cases.⁹⁴

This Note does not take a definitive position on either school. Rather, it argues that, in line with Dr. Stromseth’s “web approach,” multiple avenues of corporate accountability should be pursued concurrently, including for individual officers.⁹⁵ However, it cautions that an approach to liability that *only* focuses on individual responsible officers precludes legal and financial remedies from flowing to victims. Put differently, prosecutions that center on individual officers need not capture the totality of the corporate complicity in the atrocity, as the standard of proof is fundamentally different.⁹⁶ For victims, this can mean the denial of a holistic portrait of the corporate activity concerning the commission of the crime.⁹⁷ Moreover, individual prosecutions fail to erect pathways to large criminal fines and forfeitures, discussed *infra*.⁹⁸

Any prosecutorial approach that only focuses on individual corporate officers denies a “corrective” from both a retributive *and* restorative justice perspective.⁹⁹ From a retributive perspective, the individual officer may have only played a small, contributory role within the corporate scheme. This “symbolic” punishment is limited for victims, who would prefer to see the violative entity itself held responsible.¹⁰⁰ From a restorative perspective, individual prosecutions deny victim communities the testimonial participation that has been a hallmark of international criminal fora in the past.¹⁰¹ Therefore, while this Note does not foreclose the value of bringing individual responsible officer cases when that is the best path forward based on the evidence, it highlights the weaknesses of *solely* relying on this approach for victims.

III. THE LANDSCAPE OF CORPORATE LIABILITY FOR ATROCITY CRIMES IN EUROPE

European state practice is sparse when pursuing charges against corporations as legal persons for substantive atrocity crimes. According to

94. See Allahverdiyev & Othman, *supra* note 42, at 639-40, 648-49.

95. See Statement of Dr. Jane Stromseth, *supra* note 4, at 4.

96. See Stahn, *supra* note 29, at 119.

97. See *id.* at 120-21.

98. See *id.*

99. *Id.*

100. *Id.*

101. *Id.*

the International Bar Association's (IBA) War Crimes Committee, there have only been a handful of criminal cases against corporate entities for atrocity crimes since World War II.¹⁰² Nonetheless, there have been prosecutions in recent years, like *Lafarge*, which have renewed attention to juridical entity liability for atrocity crimes. Many of these cases arise from atrocities within the past decade, including the Syrian Civil War, the Islamic State of Iraq and Syria's (ISIS) commission of genocide against the Yazidi religious minority, and the ongoing civil conflict in Sudan.¹⁰³

A. Current Approaches to the Prosecution of Corporate Entities for Atrocities

Despite its civil law origins, France has proven an early mover in bringing corporate atrocity cases, initiating investigations and prosecutions against several corporate entities in recent years.¹⁰⁴ The French model is instructive in determining how to harmonize Member States' approaches to entity liability; it has marshaled a number of innovative doctrinal and procedural features that have enabled the prosecution of corporate entities for atrocity crimes.

In 2004, France widened the scope of Article 121-2 of its Criminal Code, establishing that corporate criminal liability will no longer be circumscribed to particular offenses and can attach to the full suite of criminal offenses.¹⁰⁵ In 2010, the French Parliament again amended the Criminal Code by adopting Article 689(11), allowing for domestic jurisdiction over Rome Statute atrocity crimes.¹⁰⁶ Empowered by these amendments, France has initiated several different investigations into potential corporate involvement in atrocity crimes in the last decade.

However, the French regime also carves out procedural differences for initiating a criminal case for a Rome Statute offense.¹⁰⁷ Traditionally, France's criminal system enables NGOs and victims to file criminal complaints with an investigating judge to initiate criminal proceedings.¹⁰⁸

102. See INT'L BAR ASS'N, *supra* note 19.

103. See *id.*

104. See *id.*

105. Sandra Cossart & Lucie Chatelain, *Human Rights Litigation Against Multinational Companies in France*, in HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE 230, 235 (Richard Meeran & Jahan Meeran eds., 2021).

106. Loi du 9 aout 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale [Law No. 2010-930 of 9 August 2010 adapting criminal law to the institution of the International Criminal Court] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Aug. 10, 2021.

107. See Cossart & Chatelain, *supra* note 105, at 234.

108. See HUM. RTS. WATCH, THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN FRANCE 4 (2014), https://www.hrw.org/sites/default/files/related_material/IJ0914France_0.pdf.

However, fearing that providing this mechanism to third parties for atrocity offenses would lead to “frivolous . . . or ill-founded complaints and could create diplomatic tensions,” France modified this pathway for most atrocity offenses.¹⁰⁹ However, unlike other criminal and civil offenses, NGOs and victims cannot initiate *suo motu* formal criminal proceedings through judicial investigation for certain Rome Statute crimes.¹¹⁰

In France, only an investigative judge can issue the actual indictment, or *mise en examen*, once “sufficiently serious elements (*indices graves et concordants*) have been found against them in the investigation.”¹¹¹ As a result, NGOs and civil parties will often file creative criminal complaints alleging *other* non-atrocity crimes to compel the opening of a judicial investigation in the first instance when the desired charge is for a Rome Statute offense.¹¹² NGOs and victims may still formally join proceedings once the court has issued its *mise en examen* as civil parties, affording victims a procedural pathway to access evidence, provide testimony, and otherwise meaningfully engage in the trial process.¹¹³ This civil party feature is critical for victims who seek a formal legal role within the adjudicatory process.

Until recently, there had been competing views as to what evidentiary standards would govern corporate complicity in atrocity crimes in France, even once an investigative judge has issued their *mise en examen*. Namely, it was unclear what evidence prosecutors would need to furnish to prove that the corporate entity had the necessary mental element (or *mens rea*) for complicity in the atrocity.¹¹⁴ The *Lafarge* litigation has given the French judiciary occasion to clarify its approach to *mens rea* for accessory liability to atrocity crimes (i.e., complicity or aiding and abetting).¹¹⁵ Discussed at length below, the prosecution derives from the French MNE

109. *See id.* at 5.

110. *Id.*

111. Jurisdiction over these offenses is limited by whether the ICC or another country has sought the defendants extradition. In addition, for war crimes or CAH, jurisdiction will only attach when “the crime is punishable in the State where it was committed, the State is a Party to the Rome Statute, or if the suspect is a national of a State Party.” *See* Cossart & Chatelain, *supra* note 105, at 234-35 n. 21.

112. *See* HUM. RTS. WATCH, *supra* note 108, at 5-6.

113. *See* Cossart & Chatelain, *supra* note 105, at 232; Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sep. 7, 2021, Bull. Crim. No. 19-87.367 (Fr.).

114. *See* JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES, OFF. OF THE HIGH COMM’R FOR HUM. RTS. 38 (2012).

115. *See* Sandra Cossart, *Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights into the French Court Decisions*, OPINIO JURIS (May 11, 2022), <https://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions/>.

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Lafarge's activities in Syria during the civil war in 2011-2014, where it made payments upward of thirteen million EUR to ISIS and the al-Nusra front to keep its cement factory open.¹¹⁶ Following a judicial inquiry, prosecutors charged Lafarge with endangering its Syrian workers, with financing a terrorist organization, and for complicity in crimes against humanity.¹¹⁷ In September 2021, after a long procedural battle, the French Supreme Court found that French courts could hear the complicity charges. The Court found that both the *mens rea* and *actus reus* were sufficiently alleged for the crimes against humanity charge to attach.¹¹⁸

First, concerning *mens rea*, the French Supreme Court found that Lafarge and its subsidiaries did not need to share the same intent as the main perpetrators for the underlying atrocity crime.¹¹⁹ Rather, the Court found that Lafarge's mere *knowledge* that their financial pay-outs would directly flow to ISIS and al-Nusra's criminal enterprises was sufficient to meet *mens rea*.¹²⁰ Therefore, the complicity charge could attach because "[i]t is sufficient that he or she has knowledge that the principal perpetrators are committing or about to commit such a crime against humanity and that by his or her aid or assistance he or she facilitates its preparation or commission."¹²¹ Any legitimate "commercial or business interest"¹²² that Lafarge had in making the payments fails to negate the terrorism that it *knew* would result from such payments.¹²³

Second, the Court found the *actus reus* satisfied because knowingly making such payments "facilitated and assisted" the crime even if it was not indispensable to its commission.¹²⁴ The terrorist groups were able to use the funds as a fungible asset to promote their criminal acts and carry on their operations. The Court stopped short of announcing a

116. *Lafarge in Syria: French Supreme Court issues decisive ruling on charges faced by the multinational*, SHERPA (Jan. 16, 2024), <https://www.asso-sherpa.org/lafarge-in-syria-french-supreme-court-issues-decisive-ruling-on-charges-faced-by-the-multinational>.

117. *See Landmark decision: company Lafarge indicted - complicity in crimes against humanity included*, SHERPA (June 28, 2018), <https://www.asso-sherpa.org/landmark-decision-company-lafarge-indicted-complicity-in-crimes-against-humanity-included>.

118. Cossart, *supra* note 115.

119. *See id.*

120. *Id.*

121. *Id.*

122. *See Anne Bagamery, French High-Court Ruling Affirms Companies' Liability for Complicity in Crimes Against Humanity*, LAW.COM (Jan. 22, 2024), <https://www.law.com/international-edition/2024/01/22/french-high-court-ruling-affirms-companies-liability-for-complicity-in-crimes-against-humanity/>.

123. *Id.*

124. *Id.*

broader rule for these elements, holding that these determinations must be made case-by-case.¹²⁵

The procedural *Lafarge* opinions have clarified important legal standards and paved the way for a new generation of corporate atrocity prosecutions in France. The French judiciary has now allowed several atrocity investigations against corporate entities to go forward in recent years.¹²⁶ On January 16, 2024, the French Supreme Court affirmed that Lafarge can rightly be charged with complicity in crimes against humanity following the protracted procedural battle contesting whether French courts had jurisdiction over Lafarge's extraterritorial activities.¹²⁷ With the doctrinal footing now secure, Lafarge may soon be the first corporation in the world to stand trial for crimes against humanity.¹²⁸

B. *Alternative Approaches Across the European Union*

Despite the novel approach taken in the *Lafarge* case, the prevailing approach to accountability for corporate involvement in atrocity crimes across Europe has been to pursue cases against responsible corporate officers—often executives at the C-Suite level who bear responsibility for the operations of the enterprise. For the procedural, evidentiary, and policy reasons outlined below, these cases are far more numerous than those against corporate entities. In the last few years alone, a number of EU Member States have proceeded against corporate officers. For example, in September 2023, Sweden brought charges against executives of the oil and gas company Lundin Group for aiding and abetting war crimes in Sudan between 1999 and 2002.¹²⁹

125. *Id.*

126. See INT'L BAR ASS'N, *supra* note 19.

127. See *Lafarge in Syria: French Supreme Court issues decisive ruling on charges faced by the multinational*, SHERPA (Jan. 16, 2024), <https://www.asso-sherpa.org/lafarge-in-syria-french-supreme-court-issues-decisive-ruling-on-charges-faced-by-the-multinational>.

128. *Id.*; see Monnet & Hummel, *supra* note 15.

129. See Sruthi Rao, *Lundin Corporate Executives Face Prosecution for Aiding and Abetting War Crimes*, CORP. ACC. ROUNDTABLE (Dec. 18, 2023), <https://corpaccountabilitylab.org/calblog/2023/12/18/unprecedented-corporate-executives-of-anbsp-company-face-prosecution-for-aiding-and-abetting-war-crimes>; Victoria Riello & Larissa Furtwengler, *Corporate Criminal Liability for International Crimes: France and Sweden are Poised to Take Historic Steps Forward*, JUST SEC. (Sep. 6, 2021), <https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/>; Reed Brody, *The 'Pinchet Precedent' at 25: Supporting Justice for Victims with 'Universal Jurisdiction'*, JUST SEC. (Oct. 16, 2023), <https://www.justsecurity.org/89474/the-pinchet-precedent-at-25-supporting-justice-for-victims-with-universal-jurisdiction/>; See EUR. COAL. ON OIL IN SUDAN, THE LEGACY OF LUNDIN, PETRONAS, AND OMF IN BLOCK 5A, SUDAN 1997-2003 (June 2010), <https://www.ecosonline.org/publications-ecos/>.

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In some cases, EU prosecutors have pursued charges against corporate officers where their criminal code would have actually permitted indicting the corporate entity itself. For example, Dutch prosecutors chose to indict Gous Kouwenhoven, a Dutch national, for furnishing weapons, arms, and other materiel to Charles Taylor's Liberian armed forces between 1999 and 2003.¹³⁰ Rather than proceed against Kouwenhoven's two logging companies, in which Charles Taylor had a direct interest, Dutch prosecutors proceeded against Kouwenhoven individually.¹³¹

In addition to cases against individual officers, Member States have decided to pursue other criminal charges (i.e., non-Rome Statute offenses) for corporations linked to the commission of atrocities, including charges for sanctions violations and material support for terrorism. While there are several rationales for this approach, some commentators argue that the decision to pursue non-atrocity-related charges stems from prosecutorial discretion, evidentiary challenges, and heightened legal standards to prove that the corporate entity had the requisite *mens rea* concerning the atrocity charge.¹³²

In certain cases, prosecutors have filed charges for non-atrocity offenses against corporate entities even where their criminal code *would* permit filing atrocity offense charges against the corporate entity itself. The recent *Dan-Bunkering* case in Denmark proves an instructive example of the choices that prosecutors face when proceeding against a corporate entity.¹³³ There, Danish authorities charged Dan-Bunkering Ltd. and its parent corporation with criminal sanctions violations for having aided and abetted the criminal Assad regime in Syria through thirty-three separate sales of jet fuel.¹³⁴ Rather than charge Dan-Bunkering and its parent with aiding and abetting the Assad regime's war crimes, prosecutors pursued charges based on the violation of an EU sanctions regulation

130. See *The Public Prosecutor v. Guus Kouwenhoven*, INT'L CRIMES DATABASE, <https://www.internationalcrimesdatabase.org/Case/3308> (last visited May 11, 2024); See Emma van Gelder & Cedric Ryngaert, *Dutch Report on Prosecuting Corporations for Violations of International Criminal Law*, 88 REV. INT'L DR. PEN. 113 (2017).

131. See *The Public Prosecutor v. Guus Kouwenhoven*, INT'L CRIMES DATABASE, <https://www.internationalcrimesdatabase.org/Case/3308> (last visited May 11, 2024).

132. See INT'L BAR ASS'N, *supra* note 19.

133. See *id.*; see also *Prosecutor seeks prison sentence and fine of DKK 400 million in Dan-Bunkering case*, SHIPPINGWATCH (Nov. 30, 2021) [hereinafter SHIPPINGWATCH], <https://shippingwatch.com/suppliers/article13513188.ece>.

134. See SHIPPINGWATCH, *supra* note 133; see also THE GENOCIDE NETWORK, ADDENDUM: PROSECUTION OF SANCTIONS (RESTRICTIVE MEASURES) VIOLATIONS IN NATIONAL JURISDICTIONS, A COMPARATIVE ANALYSIS (Jan. 2022), https://www.eurojust.europa.eu/sites/default/files/assets/gns_addendum_prosecution_sanctions_violations_national_jurisdictions_01_2022.pdf.

proscribing the sale of weapons or dual-use materials to Syria.¹³⁵ Following Dan-Bunkering's conviction, Danish authorities collected more than seven million USD in criminal fines and forfeitures.¹³⁶ Notably, there is no requirement that these forfeited funds must flow to Syrian victims, despite several calls from civil society to stand up such a "Syrian Victim's Fund," discussed *infra* Section VI.¹³⁷

The wide divergence in approaches to criminal liability for corporate entities across Europe has resulted in an accountability gap for victims. As it stands, there are countries that pursue criminal entity liability, criminal liability for individual officers, and no corporate liability whatsoever. Even among those that pursue criminal entity liability, there are significant differences in the mechanics of trial procedure, including whether civil parties and victims can be attached as formal civil parties.¹³⁸ To date, only France, Belgium, and Ukraine provide for such civil party status in criminal proceedings.¹³⁹ Several EU Member States have resisted adopting schemes for corporate criminal liability altogether, including Sweden and Germany.¹⁴⁰

For example, Germany does not recognize any form of corporate criminal liability under the principle of *societas delinquere non potest*,¹⁴¹ although responsible officers can be subject to prosecution in limited circumstances.¹⁴² As a result of Germany's position on this issue, civil litigation take on greater import for rightsholders. However, Germany's approach to civil litigation, namely, transnational tort litigation, also presents structural challenges for plaintiffs. The German judiciary has treated vicarious liability narrowly in tort law,¹⁴³ and there has been no case law for corporations breaching their duty of care as it relates to human rights within their value chains.¹⁴⁴ Further, because there is no

135. See SHIPPINGWATCH, *supra* note 133; see also THE GENOCIDE NETWORK, *supra* note 134.

136. See Elise Baker & Nushin Sarkarati, *No State Should Profit from Violations in Syria. Instead, Direct Monetary Recovery to Victims*, JUST SEC. (Feb. 18, 2024), <https://www.justsecurity.org/92480/no-state-should-profit-from-violations-in-syria-instead-direct-monetary-recovery-to-victims/>.

137. See *id.*

138. See ZERK, *supra* note 114, at 75; ROBERT C. THOMPSON & ANITA RAMASASTRY, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, RESEARCH 19 (Fafo, Report No. 536, 2006).

139. See THOMPSON & RAMASASTRY, *supra* note 138, at 23.

140. See KELLY, *supra* note 20, at 193.

141. See POL'Y DEP'T, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, ACCESS TO LEGAL REMEDIES FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSES IN THIRD-COUNTRIES 36 (2019).

142. See *id.*; ZERK, *supra* note 114, at 70.

143. See Miriam Saage-Maaß, *Human Rights Litigation Against Multinational Corporations in Germany*, in HUMAN RIGHTS LITIGATION AGAINST MULTINATIONAL COMPANIES IN PRACTICE 254, 269 (Richard Meeran & Jahan Meeran eds., 2021).

144. *Id.* at 265.

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“general duty of disclosure for a party not bearing the burden of proof,” plaintiffs must rely on filing petitions requesting the court to compel their disclosure by providing a “description of the document,” as well as the “facts to be proven.”¹⁴⁵ Unless a rightsholder has intimate knowledge of the inner mechanics of the corporation, drafting such petitions can be challenging. German law also typically does not countenance class action suits, and courts are conservative when issuing damage awards.¹⁴⁶

IV. BUSINESS AND HUMAN RIGHTS LAW’S TREATMENT OF ATROCITY LIABILITY

The BHR project has only sparsely addressed how to operationalize its legal principles within the context of atrocity crimes. Principle 7 of the United Nations Guiding Principles (UNGPs) enunciates that states have a particular duty to ensure that corporations operating in conflict-affected areas “are not involved with [severe human rights] abuses” and that they should engage in heightened human rights due diligence given the severe risks involved.¹⁴⁷ Yet, beyond cursory references to the need for corporations to respect international humanitarian law (IHL)¹⁴⁸ and the potential to become enmeshed in “gross human rights abuses,”¹⁴⁹ the UNGPs are silent on the atrocity context specifically. Instead, the UNGPs take a sliding-scale approach, where the “severity” of a given impact should inform a business’s course of action concerning, *inter alia*, terminating a relationship with a contractor, remediating a rightsholder, or reporting on due diligence.¹⁵⁰

Since the promulgation of the UNGPs in 2011, the Office of the High Commissioner on Human Rights (OHCHR) has commissioned the BHR Working Group to crystallize companies’ responsibilities when operating in conflict-affected areas.¹⁵¹ In 2022, the BHR Working Group authored a report, “Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts,” which endeavored to help companies operationalize “heightened human rights due diligence” in these severe risk locales.¹⁵²

145. *Id.* at 270.

146. *Id.* at 272-74.

147. *See* UNGP, *supra* note 30, art. 7.

148. *See id.* art. 12.

149. *See id.* art. 23.

150. *See id.* arts. 19-24.

151. *See* GERALD PARCHOUD & SINIŠA MILATOVIĆ, UNITED NATIONS DEVELOPMENT PROGRAM, HEIGHTENED HUMAN RIGHTS DUE DILIGENCE FOR BUSINESS IN CONFLICT-AFFECTED CONTEXTS: A GUIDE 2 (2022), https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf.

152. *See id.* at 4.

In the report, the BHR Working Group highlighted triggers for when corporations should consider engaging in heightened human rights due diligence, including conventional armed conflict, military occupation, mass atrocities, and nonstate actors engaging in violence.¹⁵³ The report, since supplemented,¹⁵⁴ describes how companies must conduct “conflict analysis” concerning their risk of contributing to the conflict or being complicit in violations of IHL or human rights.¹⁵⁵ However, the report and other subsequent guidance on heightened human rights due diligence are silent on how states, through their Pillar 1 “Duty to Respect” human rights, should operationalize this “heightened” standard into hard law at the national level with concomitant procedural steps companies can take in conflict-affected areas.

The BHR Working Group report is clear that corporations should engage in heightened human rights due diligence and provide remedies to adversely impacted rightsholders.¹⁵⁶ Yet, it fails to explain what this looks like operationally when the crime is arguably irremediable, as many scholars have asserted is the case in the atrocity context.¹⁵⁷ Further, the report does not include what effective remedy looks like when corporations determine that they have caused or contributed to such human rights violations. The Commentary to Principle 25 of the UNGPs explains that in order for remedy to be effective, it must “counteract or make good any human rights harms that have occurred,” with procedures for distributing remedy always being “impartial, protected from corruption, and free from . . . attempts to influence the outcome.”¹⁵⁸ While UNGP-prescribed effective remedy can be challenging to obtain in formal, state-based adjudication under the best circumstances, it is all the more challenging for rightsholders when remedy is privatized within the corporate setting, particularly where few companies have created effective operational-level grievance mechanisms (OGMs).

153. *Id.* at 17-19.

154. *See generally* EVA GERRITSE ET AL., FUNDING CONFLICT: HEIGHTENED HUMAN RIGHTS DUE DILIGENCE IN CONFLICT-AFFECTED AREAS, WITH A CASE STUDY ON LAFARGE AND ITS INVESTORS (Dorothy van Schooneveld ed., 2023) [*Hereinafter* ECCHR Report] (describing the responsibility that corporations face when operating in CAHRA jurisdictions), https://www.ecchr.eu/fileadmin/user_upload/PAX_ECCHR_Rapport_Lafarge_2023.pdf.

155. *See* PARCHOUD & MILATOVIĆ, *supra* note 151, at 11.

156. *See id.* at 9.

157. *See generally* David Birchall, *Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts*, 25 AUSTL. J. HUM. RTS. 428 (2019) (describing the unique challenges of channeling remedy to victims of atrocity crimes).

158. *See* UNGP, *supra* note 30, at 27.

OGMs are company-led mechanisms intended to provide for private remedy and include a wide range of approaches.¹⁵⁹ The report argues that corporations should also set up OGMs that are particularly tailored to the conflict setting to remediate rightsholders adversely impacted by corporate activities.¹⁶⁰ The Commentary to Principle 27 explains that “non-judicial mechanisms can play an essential role in complementing and supplementing judicial mechanisms.”¹⁶¹ Therefore, the UNGPs envisaged OGMs as complementary tools to proactively mitigate impacts and provide short-term remedy, acknowledging that litigation is often costly and protracted.¹⁶²

Corporate practice around OGMs has been piecemeal, with a constellation of different approaches. Many OGMs lack procedural rigor, resources, or standardized adjudicatory processes that are communicated to rightsholders throughout the full scope of GVCs.¹⁶³ While some companies have built out solid adjudicatory processes within OGMs, many MNEs only provide for “ethics hotlines” on factory floors and human rights ombudsmen.¹⁶⁴ Further, mHREDD regimes in Europe do not provide prescriptive models for OGMs or otherwise insist on baseline levels of procedural rigor when remediating particular claims.¹⁶⁵

Given the limits of OGMs to date, with some scholars referring to the current landscape of these private remediation bodies as the “Wild West,”¹⁶⁶ it is critical to determine how they would be operationalized in the atrocity context. What would an effective¹⁶⁷ OGM look like when a corporation has determined it has directly contributed to genocide, war crimes, or crimes against humanity? Given the challenges that even international and hybrid tribunals face when engaging with communities impacted by atrocities, it is unclear if the BHR Working Group should be encouraging corporations—ill-equipped to take a trauma-informed approach to community outreach—to stand up private remedial mechanisms for these gravest of crimes. In order for companies to operationalize OGMs in the atrocity context, the BHR Working Group

159. *See id.* at 31-32.

160. *Id.* at 25-26.

161. *Id.* at 27.

162. *See* Laplante, *supra* note 31, at 382.

163. *See id.*

164. *Id.* at 339.

165. *See id.*

166. *Id.*

167. *See* UNGP, *supra* note 30, arts. 29-31.

should issue sophisticated guidance, integrating the best practices derived from ICL concerning victim outreach.¹⁶⁸

The *Lafarge* cases—both those in the United States and France—have catalyzed renewed interest among BHR scholars and practitioners in the role of the corporation when operating in conflict-afflicted areas. In 2007, Lafarge, a French multinational corporation, acquired an Egyptian subsidiary and invested more than 680 million USD¹⁶⁹ to develop a cement factory in northeastern Syria.¹⁷⁰ While most other MNEs, such as Shell and Total, shuttered their Syrian operations at the outbreak of the civil war in 2011, Lafarge pressed on, requiring its employees to continue reporting to work despite being encircled by conflict on all sides.¹⁷¹ Lafarge insisted on continuing operations even after employees endured “regular kidnappings, death threats, and the presence of armed checkpoints.”¹⁷² Despite having to pay the ransom for nine kidnapped employees, corporate leadership remained undeterred.¹⁷³ The situation came to a head on September 19, 2014, when ISIS terrorists overran the cement factory, causing employees to flee in panic without “any managing personnel present” or “evacuation plan.”¹⁷⁴

After a series of investigative reports, France launched a judicial inquiry into Lafarge’s actions in June 2017.¹⁷⁵ French investigators revealed that Lafarge’s wholly-owned Syrian subsidiary had transferred up to thirteen million EUR to ISIS and the al-Nusra Front to retain operational access to their cement factory during the conflict.¹⁷⁶ These revelations spurred criminal prosecutions against Lafarge and its subsidiary in both France and the United States.

168. See Jane Stromseth, *Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE L. 87, 93 (2009); John D. Giorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT’L L. 369, 420 (2014).

169. At the time, this was the largest non-oil foreign investment made in Syria’s history. See ECCHR Report, *supra* note 154, at 7.

170. *Id.* at 7-9.

171. *Id.* at 7-8.

172. *Id.* at 7.

173. *See id.*

174. *Id.* at 8.

175. See EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, LAFARGE IN SYRIA: TRIAL AGAINST THE COMPANY AND SEVERAL FORMER EXECUTIVES FOR FINANCING TERRORIST ORGANIZATIONS 4-5 (2025), https://www.ecchr.eu/fileadmin/Q_As/Nov-2025-QA-Lafarge-EN_layout.pdf (last visited Feb. 24, 2026).

176. See ECCHR REPORT, *supra* note 154, at 8, 23.

CORPORATE COMPLICITY

Although the verdict is still pending in France,¹⁷⁷ Lafarge pleaded guilty to federal criminal charges in the United States on conspiracy to provide material support to two designated foreign terrorist organizations (FTOs) under 18 U.S.C. § 2339B, amounting to 777.8 million USD in criminal fines and forfeitures.¹⁷⁸ Lafarge's U.S. conviction represents the first time that the United States convicted a corporate entity under the Title 18 material support for terrorism statutes.¹⁷⁹ As in the *Dan-Bunkering* (Den.) case discussed above, there is no requirement that these hundreds of millions in forfeited funds will flow to the affected victim communities in Iraq and Syria, still rebuilding following ISIS's devastation.¹⁸⁰ Many scholars and public officials have argued that, given the Attorney General's significant discretion in this area, the United States should channel these funds to impacted victims in Iraq and Syria.¹⁸¹ This issue will be taken up in Section V.

In the wake of these prosecutions, reports have attempted to articulate, *post hoc*, how Lafarge could have properly engaged in heightened human rights due diligence across their Syrian operations both before and during the conflict.¹⁸² However, these reports lay bare how the UNGPs and subsequent official UN guidance have failed to provide specific prescriptions for companies to disburse effective remedies per Principles 29-31 within the context of atrocity crimes. As such, the human rights due diligence framework alone is ill-equipped to guide companies' remedial actions when they have caused or contributed to atrocity crimes.

The European Center for Constitutional and Human Rights (ECCHR) issued a report in 2023 analyzing what retroactive heightened human rights

177. *Lafarge in Syria: French Supreme Court issues decisive ruling on charges faced by the multinational*, SHERPA (Jan. 16, 2024), <https://www.asso-sherpa.org/lafarge-in-syria-french-supreme-court-issues-decisive-ruling-on-charges-faced-by-the-multinational>.

178. See Amy Jeffress et al., *Takeaways from First Anti-Terrorism Act Prosecution of a Co.*, ARNOLD & PORTER (Jan. 30, 2023), https://www.arnoldporter.com/-/media/files/perspectives/publications/2023/02/takeaways-from-first-antiterrorism-act-prosecution.pdf?rev=d290956b1e904ba69ab4a5fe5b7aaa4c&sc_lang=en&hash=F2B944812A6F5A76F5688CE06133A154.

179. See U.S. DEP'T OF JUST., *supra* note 17, at 2.

180. See Celeste Kmiotek & Sameer Saboungi, *The US Recovered Over \$600 Million in ISIS-Linked Funds—They Should Go to Syrian and Iraqi Victims*, JUST SEC. (Feb. 20, 2024), <https://www.justsecurity.org/92486/us-recovered-isis-funds-should-go-to-syria-and-iraqi-victims/>; See also Baker & Sarkarati, *supra* note 136.

181. See Stephen J. Rapp & Alyssa Yamamoto, *Applying Ukraine Precedent, DOJ Should Use Funds Forfeited from Lawbreakers in Syria to Assist Victims*, JUST SEC. (Mar. 6, 2024), <https://www.justsecurity.org/93082/applying-ukraine-precedent-doj-should-use-funds-forfeited-from-lawbreakers-in-syria-to-assist-victims/>.

182. See e.g., ECCHR Report, *supra* note 154.

due diligence for Lafarge should have looked like.¹⁸³ ECCHR concluded that Lafarge should have determined the human rights risk to its stakeholders was far too grave once the civil war broke out and, per its conflict analysis, should have “exited” from the region altogether.¹⁸⁴ Given that such did not come to pass, the report argues that Lafarge “remains responsible for providing or cooperating in remedy for the adverse impacts it has caused or contributed to” as prescribed by the UNGPs.¹⁸⁵ It states that Lafarge should consider the suite or “bouquet of remedies” per Principle 25¹⁸⁶ and reflect the “four core pillars: truth, justice, reparations, and guarantees of non-recurrence.”¹⁸⁷

To operationalize these four pillars, the report gestures to a range of remedial avenues, including, *inter alia*, cooperation with judicial investigations, public apologies, participation in transitional justice processes, financial reparations, or participation in reparations funds.¹⁸⁸ There has been recent momentum concerning the latter approach, with commentators calling upon countries to ensure that any judicially-derived pecuniary awards from atrocity-related settlements or convictions flow to the communities impacted by the corporate activities in question.¹⁸⁹

Former U.S. Ambassador at Large for Global Criminal Justice, Stephen Rapp, has called upon the United States to standardize a “coherent, transparent approach” when it obtains “atrocity-linked assets,” like the hundreds of millions acquired in the *Lafarge* criminal fines and forfeitures.¹⁹⁰ Moreover, the European Parliament has recently recommended an “intergovernmental Syria Victims Fund,”¹⁹¹ which would enable all EU Member States to pool funds derived from civil or administrative enforcement against atrocity violators under a common legal framework, which would then disburse such funds to “families of the victims.”¹⁹² Given these encouraging developments, the forthcoming transposition process for the CSDDD represents an

183. *Id.*

184. *See id.* at 23.

185. *Id.* at 25.

186. *See* UNGP, *supra* note 30, art. 25.

187. *See* ECCHR Report, *supra* note 154, at 25.

188. *See id.*

189. *See* Rapp & Yamamoto, *supra* note 181.

190. *Id.*

191. *Id.*

192. *See Report on a European Parliament Recommendation to the Council, the Commission and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on the Situation in Syria*, 2023/2052 (INI) (Feb. 19, 2024), https://www.europarl.europa.eu/doceo/document/A-9-2024-0041_EN.html.

opportunity for European lawmakers to stand up a centralized mechanism, coordinated by Eurojust and the Genocide Network, on how to channel funds directly to victim communities. Yet, despite the recommendation adopted by the European Parliament concerning a Syria Victim's Fund, there is still no such framework in place.

The proliferation of mHREDD regimes is a positive step toward ensuring that MNEs account for their human rights impacts. However, current mHREDD regimes are ill-suited to guide corporations when they have caused or contributed to the most severe of human rights impacts: atrocity crimes. Without instructive guidance and oversight, operational-level remedy is particularly insufficient to remediate rightsholders suffering from such grave abuses.

V. CORPORATE CRIMINAL LIABILITY AS LEGAL IMPERATIVE

Supply chain laws and mHREDD regimes have proven inadequate in remediating rightsholders for human rights violations, especially for atrocity crimes. Although mHREDD laws have compelled certain MNEs to report on—and enact—human rights due diligence processes, they have failed to channel effective remedies to rightsholders and victim communities.

A. *Extant Human Rights Due Diligence Regimes and Foreclosed Access to Liability*

As of this writing, only France maintains an active mHREDD civil liability provision that is derived from corporations' responsibility to engage in human rights due diligence. Nonetheless, under the French model, only one case has proceeded to the merits after seven years in operation, with the Paris Civil Court yet to enforce *any* damages awards to injured rightsholders.¹⁹³ Other countries, such as Germany, Norway, and Switzerland, that have also codified mHREDD legislation, have expressly chosen not to stand up a civil cause of action as part of their schemes.¹⁹⁴ Rather, enforcement falls to an administrative agency that can assess penalties for non-compliance. This means that there is no mechanism to ensure that penalty awards flow to the victim communities impacted by a given corporation's non-compliance with its human rights due diligence obligations.

193. See Fabrice Fages & Elise Auvray, *French Court Reaches Precedent Decision on the Duty of Vigilance Law*, LATHAM & WATKINS (Jan. 26, 2024), <https://www.lw.com/admin/upload/SiteAttachments/French-Court-Reaches-Precedent-Decision-on-the-Duty-of-Vigilance-Law.pdf>.

194. See Nicolas Bueno & Christine Kaufmann, *The Swiss Human Rights Due Diligence Legislation: Between Law and Politics*, 6 BUS. & HUM. RTS J. 542, 548 (2021).

Outside of mHREDD laws, rightsholders across GVCs have also struggled to access transnational tort litigation for a host of practical and procedural reasons. These barriers to traditional tort litigation are well-documented.¹⁹⁵ They include, *inter alia*, obtaining access to evidence, shouldering the burden of proof in the majority of civil law systems, finding counsel specialized in human rights litigation, navigating foreign judicial systems, and joining claims with similarly situated rightsholders.¹⁹⁶

B. *The Limits of the CSDDD’s Approach to Civil Liability and Administrative Enforcement for Atrocity Crimes*

Before the Omnibus process eliminated it, the CSDDD’s requirement for Member States to stand up a civil cause of action was a significant development within the broader BHR project. As it currently stands, the post-Omnibus CSDDD will *not* compel Member States to domesticate any civil liability regime under Article 29, increasing the chance that the current fragmented approach to liability across the EU will persist.¹⁹⁷ This fragmentation has real, empirically demonstrated effects on corporate behavior.¹⁹⁸ Writing in the context of corporate misconduct in the realm of bribery, money laundering, and competition law, Professors Auriol, Hjelmeng, and Søreide reviewed fifty cases of corporate liability across five EU Member States to argue that “competition law enforcement, governed by a unified legal regime, is more efficient than enforcement in bribery and money laundering cases, governed by disparate criminal law regimes.”¹⁹⁹ Extending this theory to the atrocity realm, this Note argues that the fragmentation of corporate liability fails to deter corporate misconduct and generates uncertainty amid an uneven playing field. This fragmentation is further exacerbated by a singular focus on civil liability. There are three structural issues with any approach that solely focuses on expanding the

195. See generally Hassan M. Ahmad, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*, 70 AM. J. OF COMPAR. L. 227 (2022) (describing the various obstacles the host state rightsholders face in advancing transnational claims).

196. See *id.* at 14.

197. See European Parliament resolution of 16 December 2025 on the proposal for a directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, 2025 O.J. (P10_TA(2025)0324), https://www.europarl.europa.eu/doceo/document/TA-10-2025-0324_EN.html.

198. See Emmanuelle Auriol et al., *Corporate criminals in a market context: enforcement and optimal sanctions*, 56 EUR. J. OF L. AND ECON. 255, 256 (Aug. 18, 2023).

199. *Id.* at 256.

aperture of civil enforcement—both civil litigation and administrative penalties.

First, civil liability and administrative enforcement are inadequate for victims of grave human rights abuses.²⁰⁰ Even before the Omnibus reforms, the CSDDD did not compel Member States to address the “access to justice” issues that plague civil litigation for rightsholders, including access to pre-trial evidence, acquiring civil party status, finding adequate legal representation, mounting claims in foreign jurisdictions, choice of law dilemmas, and a host of other doctrinal and practical barriers.²⁰¹

While the pre-Omnibus CSDDD had encouraged Member States to take certain plaintiff-friendly measures, such as empowering NGOs or trade unions to bring cases, it did so by allocating considerable discretion to Member States in its transposition process, with language that such measures shall be “without prejudice to national rules of civil procedure.”²⁰² In addition, the CSDDD allotted significant discretion to Member States’ national courts in determining when evidentiary disclosures are appropriate, providing that courts “shall limit the disclosure of the evidence sought to that which is necessary and proportionate to support a potential claim.”²⁰³ Given the evidentiary barriers that rightsholders already face, this provision would have only entrenched national rules of civil procedure that have foreclosed access to date.

There is increasing evidence that civil liability and enforcement alone fail to serve as an effective deterrent for corporate crime.²⁰⁴ In the U.S. context, Professor Kelly argues that decades of civil enforcement under the Foreign Corrupt Practices Act (FCPA) have demonstrated that corporations will “shrug[] off” these fines, as the “profit reaped by the dilatory corporate activity” will dwarf monetary penalties incurred.²⁰⁵ Increasingly, financial institutions and other commercial enterprises have come to view paying the fines associated with civil enforcement as a “cost of doing business.”²⁰⁶ In making this argument, Professor Kelly invokes the remarks of a British delegate to the 1948 Genocide Convention: “The [Genocide Convention] would be

200. See POL’YDEP’T, *supra* note 141, at 7.

201. *Id.*

202. See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, art. 22(d) (Mar. 15, 2024) [hereinafter *EU CSDDD*], <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf>.

203. *Id.* art 22(e).

204. See KELLY, *supra* note 20, at 7.

205. *Id.*

206. *Id.*

rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation.”²⁰⁷ For deterrence to be meaningful, it must rise above civil enforcement that companies can dismiss relative to their bottom line.

Second, the CSDDD fails to sensitize its provisions to the unique nature of atrocity crimes. Even before the Omnibus process, the CSDDD did not create special provisions to guide action for companies to conduct heightened human rights due diligence in conflict affected and high risk areas (CAHRAs). Moreover, while operational remedy is often inadequate, nowhere is it least apt to remedy harms than in the atrocity context.²⁰⁸ There is emerging BHR literature that argues that certain human rights impacts are irremediable and require novel approaches to remedy under Pillar Three of the UNGPs.²⁰⁹ Professor David Birchall has argued that given the unique nature of certain large-scale abuses, corporations should contribute to a “Trust Fund for Victims,” where a range of corporate contributors would pay into a fund that would then make disbursements to victims.²¹⁰ As discussed, *infra*, the European Network of Supervisory Authorities would be a natural institution to compel Member States to distribute any “atrocity-linked assets” won to a centralized remedial fund administered by Eurojust and the Genocide Network.²¹¹

Third, civil enforcement alone fails to realize meaningful justice for communities devastated by atrocity crimes. Although civil liability can be an important step within the larger “bouquet of remedies,”²¹² it denies victim communities the participatory, community-level access that attends international criminal justice fora, like truth commissions or *ad hoc* tribunals. Civil enforcement denies victim communities the holistic view of the company’s involvement in the atrocity, with different standards of proof and evidentiary rules at play.²¹³ As various scholars have demonstrated through empirical studies, victim communities

207. *Id.* at 4.

208. *See generally* Laplante, *supra* note 31 (describing the inadequacy of OGMs to remediate human rights impacts).

209. *See generally* Birchall, *supra* note 157 (articulating the need for a special victim’s trust fund concerning the gravest corporate human rights abuses).

210. *See id.*

211. *See* Surya Deva, *Access to Effective Remedy: Taking Human Rights and Rights Holders Seriously*, CAMBRIDGE CORE BLOG (Nov. 14, 2017), <https://www.cambridge.org/core/blog/2017/11/14/access-to-effective-remedy-taking-human-rights-and-rights-holders-seriously>.

212. *Id.*

213. *See* KELLY, *supra* note 20, at 3-4.

often desire to see the substantive crime perpetrated against their members named and appropriately punished.²¹⁴

VI. RECOMMENDATIONS: TOWARD HARMONIZED ACCOUNTABILITY

The BHR and ICL literature are seldom placed in direct conversation. Yet each body of law wrestles with a similar dilemma: how to make rightsholders and communities whole. This Note offers three recommendations to harmonize each body of law as it concerns corporate accountability for atrocity crimes. These recommendations are not intended to be exhaustive. Rather, they are designed as first steps in addressing the significant barriers that rightsholders face in accessing both justice and effective remedies.

A. *Recommendation One: Pursue Doctrinal Reform*

In transposing mHREDD obligations, European lawmakers should account for the unique nature of atrocity crimes and pursue doctrinal reform, adopting corporate criminal liability as appropriate to ensure rightsholders' access to effective remedies. Given the revised CSDDD's entry into force on March 18, 2026, the most likely implementation modality would be for EU Member States to, through their post-Omnibus CSDDD transposition processes, adopt a new provision within their criminal codes to include corporate involvement in atrocity crimes.²¹⁵

Member States should also provide precise, operational guidance to companies to establish OGMs in the context of atrocity crimes. Neither the CSDDD nor other mHREDD law currently explains how corporations should engage with stakeholders, perform victim outreach, or tailor their remedy when operating within the unique landscape of atrocity crimes. As Professor LaPlante has argued, the current constellation of OGMs is akin to the "Wild West," with a lack of oversight for the distribution of private remedy. In the atrocity context, this approach is particularly concerning.²¹⁶ To address this, the European Network of Supervisory Authorities should publish guidance concerning the procedure, format, and baseline process for all company-led OGMs.

214. *See id.* at 4; Mara Revkin, *Evidence-Based Transitional Justice: Incorporating Public Opinion into the Field, with New Data from Iraq and Ukraine*, 133 YALE L. J. 1582, 1658 (2024); Nadim Houry, *Bringing ISIS to Justice: Running out of Time?*, HUM. RTS. WATCH (Feb. 5, 2019), <https://www.hrw.org/news/2019/02/05/bringing-isis-justice-running-out-time>.

215. *See* Directive (EU) 2026/470, *supra* note 49.

216. *See generally* Laplante, *supra* note 31 (describing the diverse constellation of approaches that companies have taken to standing up OGMs).

B. *Recommendation Two: Address Practical and Procedural Barriers to Justice*

Forthcoming domestic legislation to transpose the CSDDD should adopt provisions that reflect the significant practical and procedural barriers that victims, NGOs, and unions face when advancing claims in European judicial fora. These provisions should make both criminal and civil adjudication more accessible to communities victimized by atrocity crimes.

For criminal prosecutions, European lawmakers should gold-plate their mHREDD laws beyond what is currently required by the CSDDD to reflect a key procedural innovation, largely drawn from the French system: Third Party Standing for NGOs and victims. This would allow victims and their NGO representatives to play a crucial role in offering testimony, bearing witness, and providing evidence during official proceedings.

As it concerns civil litigation, Member States should consider a number of procedural innovations to enable rightsholders to advance their claims. During their transposition efforts, Member States should ease rules of pre-trial evidence and disclosure to ensure that victims can access the necessary corporate documents to make their prima facie case. As Professor Stéphane Brabant has argued in the French civil litigation context, rightsholders seldom have the necessary understanding of corporate mechanics to request relevant documents with specificity.²¹⁷ Member States should also mandate that the network of EU Supervisory Authorities compels in-scope corporations to disseminate information about their legally actionable rights.

Third, Member States should permit the joinder of claims and civil class action suits to go forward, compelling other Member States to amend their rules of civil procedure. Several regimes, like Germany, have disfavored permitting class action or “collective redress mechanisms” from going forward.²¹⁸ This provision would respond to the well-surveyed challenges that rightsholders face when mounting individual suits, including cost, access to counsel with human rights expertise, and lack of familiarity with foreign judicial systems. By adopting a class action framework within their rules of civil procedure, Member States would generate a meaningful avenue for similarly situated

217. See Stéphane Brabant & Marie-Charlotte Epaud, *Duty of Vigilance: Accounting for Information Asymmetry in Adjusting the Burden of Proof*, VILLAGE JUST. (Aug. 12, 2022), <https://www.village-justice.com/articles/duty-vigilance-accounting-for-information-asymmetry-adjusting-the-burden-proof,43393.html>.

218. See *Class Actions in Germany*, CMS (Feb. 3, 2022), <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/germany>.

rightsholders to join claims, share in costs, and marshal shared testimony to make their prima facie case.

C. *Recommendation Three: Channel Financial Awards to Victim Communities*

The European Union should stand up a novel “Remedy Coordination Mechanism,” coordinated by Eurojust and the Genocide Network, to ensure that administrative penalties, criminal fines, civil damages awards, and all judicial settlements won in domestic cases against corporate defendants for atrocity crimes flow to impacted victim communities, not to the coffers of the state.

Within ICL, a current debate centers on how to operationalize reparations for survivor communities. For example, several scholars have recently called for the United States Department of Justice (DOJ) to channel the 777.8 million USD it acquired through its criminal settlement with Lafarge to flow to Iraqi and Syrian victim communities still recovering from the Islamic State’s brutal reign.²¹⁹ At the same time, within BHR, scholars frequently wrestle with how to ensure victims have access to remedies, as transnational litigation seldom yields favorable awards for rightsholders in host states. To address both sets of concerns, this Note proposes that the European Union stand up a “Remedy Coordination Mechanism,” with attendant procedural rules that would govern how judicially, or administratively-derived remedial awards would flow to victims.

There is already emerging support for such an approach to channel funds to victims of the Syrian Civil War.²²⁰ In February 2024, the European Parliament authored a formal recommendation to the Council of the European Union to create a Syrian Victim’s Fund, where Member States would channel all “monetary [judgments], sanctions, fines and penalties, forfeiture orders, funds frozen as they are linked to property unlawfully acquired by the Syrian regime, and other revenue,” to “families of the victims.”²²¹ The Fund would be intergovernmental; Member States would pool their “existing funds linked to violations of international law” under a common scheme “carefully designed” to vindicate victim communities.²²² The Atlantic Council’s Strategic Litigation Project has been working closely

219. See Rapp & Yamamoto, *supra* note 181.

220. See e.g., *Report on a European Parliament ReReport on a European Parliament Recommendation to the Council, the Commission and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on the Situation in Syria*, 2023/2052, (INI) (Feb. 19, 2024), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0109_EN.html.

221. *Id.* at 1(o).

222. *Id.*

with Syrian civil society to best determine how these funds can be most effectively distributed.²²³ It will be critical to track political developments among EU institutions in taking steps to generate the Fund in the months ahead.

This formal European Parliament recommendation follows repeated calls from civil society for the United States and Europe to create a “centralized, intergovernmental solution”²²⁴ to channel judicial and administrative awards linked to atrocity crimes to victim communities.²²⁵ It also builds upon recent U.S. and European Union precedents that officials, like Ambassador Rapp, have leveraged to argue for improved intergovernmental coordination. For example, in February 2024, U.S. Deputy Attorney General Lisa Monaco announced that 500,000 USD in forfeited Russian assets would be sent to Estonia after authorities charged a criminal network seeking to smuggle “dual-use export-controlled items” to Russia.²²⁶ Drawing on this example, Ambassador Rapp and the Atlantic Council have called for the Attorney General to wield their discretion to marshal a more concerted effort to channel other assets to Syrian victims, like the *Lafarge* settlement.²²⁷

In France, there has also been recent activity concerning channeling awards to victim communities.²²⁸ In November 2022, the French Parliament adopted a law that enables the return of any “illicit assets” confiscated by French authorities to their “countries of origin” that stem from corruption convictions against foreign officials.²²⁹ This novel provision was adopted to “fight against global inequalities”²³⁰ and requires that confiscated assets be returned “as close as possible to the deprived population.”²³¹ In September 2022, after confiscating ninety million EUR of assets belonging to the Assad family, the Court of Cassation confirmed the conviction of Rifaat al-Assad, the former

223. See Baker & Sarkarati, *supra* note 136.

224. *Id.*

225. See Joumana Seif, *It's Time to Establish a Syria Victims Fund*, JUST SEC. (Feb. 19, 2024), <https://www.justsecurity.org/92446/establish-syria-victims-fund>.

226. See Rapp & Yamamoto, *supra* note 181; *Justice Department Transfers Approximately \$500,000 in Forfeited Russians Funds to Estonia for Benefit of Ukraine*, U.S. DEP'T OF JUST. OFF. PUB. AFF. (Feb. 17, 2024), <https://www.justice.gov/opa/pr/justice-department-transfers-approximately-500000-forfeited-russian-funds-estonia-benefit>.

227. See Rapp & Yamamoto, *supra* note 181; Kmietek & Saboungi, *supra* note 180.

228. See Baker & Sarkarati, *supra* note 136.

229. See *France Operationalizes Its New Returns Mechanism for Illicit Assets*, FRENCH MINISTRY FOR EUR. AND FOREIGN AFF. (June 2023), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/development-assistance/france-operationalizes-its-new-returns-mechanism-for-illicit-assets/>.

230. *Id.*

231. Baker & Sarkarati, *supra* note 136.

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Vice President of Syria, for money laundering and embezzlement under the law and required that the funds be channeled to the Syrian people, “the deprived population.”²³²

These recent steps toward realizing a concerted path to channeling funds to victims are promising. Yet, as it concerns the CSDDD and its European Network of Supervisory Authorities, there has been little discussion among BHR scholars and practitioners for enacting a similar intergovernmental remedial mechanism. Article 21 of the CSDDD requires each Member State to generate its own supervisory authority with the power to assess millions of euros worth of pecuniary penalties up to three percent of a company’s global revenue.²³³ A European Union Remedy Coordination Mechanism could ensure that the penalties collected are channeled to the same communities impacted by a given company’s failure to engage in human rights due diligence. While such a Remedy Coordination Mechanism could channel funds to impacted rightsholders for all corporate human rights, labor rights, and environmental violations contemplated by the CSDDD in its current form, it should, at a minimum, ensure that funds linked to atrocity crimes make their way back to victim communities.²³⁴ Following the recent measures taken for Syrian victims, the CSDDD transposition process presents an opportunity to consider an official, enduring intergovernmental approach to remedy disbursement within BHR.

VII. CONCLUSION

The BHR and global criminal justice projects are at critical inflection points. Across Europe, Member States are increasingly pursuing domestic courts as the venue for prosecuting a range of atrocity crimes perpetrators—some with no nexus to the forum state. At the same time, Member States have been standing up mHREDD laws to ensure that the largest corporations carry out their responsibility to protect human rights throughout every tranche of their GVCs. Yet, despite these developments, both regimes have neglected the role that corporations can play in atrocity crimes. Corporate human rights violators have benefitted from an

232. See *Condemnation of Rifaat al-Assad for money laundering and embezzlement confirmed by French Supreme Court*, SHERPA (Sep. 7, 2022), <https://www.asso-sherpa.org/condemnation-of-rifaat-al-assad-for-money-laundering-and-embezzlement-confirmed-by-french-supreme-court>.

233. See *EU CSDDD*, *supra* note 202, art. 21; European Parliament Press Release, Deal on updated sustainability reporting and due diligence rules (Sep. 12, 2025), <https://www.europarl.europa.eu/news/en/press-room/20251208IPR32080/deal-on-updated-sustainability-reporting-and-due-diligence-rules>.

234. See Stephany Caro Mejia, *Collective Reparations for Victims of ISIS*, JUST SEC. (Aug. 9, 2023), <https://www.justsecurity.org/87521/collective-reparations-for-victims-of-isis/>.

incongruous, patchwork approach to criminal liability, where few EU Member States are both willing and able to prosecute them for the complicity in the commission of atrocity crimes.

This Note has placed these two literatures in conversation, arguing that meaningful justice for victim communities can only be served when the European Union harmonizes its approach to liability for corporate complicity in atrocity crimes. Lasting justice for victims of atrocity crimes demands more than political commitment. It demands contending with the doctrinal and jurisdictional barriers that have long prevented atrocity victims from gaining access to effective remedy in European courts. Until these barriers are addressed, rightsholders will continue to be deprived of remedy—*effective* remedy as envisaged by the UNGPs—for corporate complicity in the gravest crimes under international law.

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APPENDIX: TABLE OF ABBREVIATIONS

Full version	Abbreviation
African Union	AU
Business and Human Rights	BHR
Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights	BHR Working Group/OEIGWG
Conflict affected and high risk areas	CAHRAs
Corporate Sustainability Due Diligence Directive	CSDDD
Draft Articles on the Prevention and Punishment of Crimes Against Humanity	Draft CAH Treaty
United States Department of Justice	DOJ
European Center for Constitutional and Human Rights	ECCHR
Foreign Corrupt Practices Act	FCPA
Global Value Chains	GVCs
Human Rights Due Diligence	HRDD
International Bar Association	IBA
International Criminal Court	ICC
International criminal law	ICL
UN International Law Commission	ILC
International Human Rights Law	IHRL
International humanitarian law	IHL
Intergovernmental Organizations	IGOs

CONTINUED	
Full version	Abbreviation
Islamic State of Iraq and Syria	ISIS
Legally binding instrument	LBI
Mandatory human rights and environmental due diligence	mHREDD
Multinational Enterprises	MNEs
Non-governmental organizations	NGOs
Operational-level grievance mechanisms	OGMs
UN Office of the High Commissioner for Human Rights	OHCHR
Protect-Respect-Remedy	PRR
Special Tribunal for Lebanon	STL
Draft Treaty on Business and Human Rights	UN Draft Treaty
The United Nations Guiding Principles	UNGPs
Völkerstrafgesetzbuch	VStGB