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DISTINGUISHING TYPES OF "ECONOMIC ABUSES": A THREE-DIMENSIONAL MODEL

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ABSTRACT. Is international criminal law adequate in respect of "economic abuses" such as corporate complicity in human rights abuses or harm arising through the exploitation of resources from conflict-affected areas? Attempts to assess the adequacy of international criminal law to deal with "economic abuses" have given rise to a complex and multi-layered debate. Authors have analysed a range of different phenomena, making it challenging to generalise conclusions on the suitability of existing international criminal law. Against this background, it is crucial to distinguish different types of "economic abuses" if we are to assess the adequacy of international criminal law to address them. To do so, I propose a three-dimensional model to disentangle the various categories of "economic abuses". Depending on whether the actor, the harmful activity, and the affected legal interests are economic or non-economic, legally distinct types of "economic abuses" can be discerned. Through exploring three specific constellations, the article demonstrates that the adequacy of international criminal law varies significantly for the various types of "economic abuses". The model aims to serve as an analytical entry point to distinguish the nature and extent of the legal challenges in a factual scenario and contributes to the elaboration of nuanced and meaningful conclusions on the relative adequacy of international criminal law in relation to "economic abuses".

Keywords: economic abuses, economic crimes, resource exploitation, international criminal law, pillage, corporate accountability

CONTENTS

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I INTRODUCTION

Discussions of what could or should be done to address problems such as corporate complicity in human rights abuses, harm arising through the exploitation of resources from conflict-affected areas, or government policies grossly abusing people's economic well-being increasingly turn their attention to international criminal law. Yet, international (criminal) lawyers disagree to what degree their discipline is capable of addressing what is colloquially often referred to as "economic abuses" or "economic crimes". Some have expressed frustration and have concluded that existing legal norms and mechanisms are inadequate to deal with "economic abuses",[1] while others are more optimistic.[2] How much potential does international criminal law really have when it comes to abuses with economic dimensions?

It almost seems as though the more carefully international criminal lawyers examine "economic abuses", the more questions emerge. Doug Cassel concluded that there were "too many questions, too many answers" in the debate on the accountability for harm related to the involvement of corporate actors in human rights abuses. He complained that there was "confusion engendered by ... multi-layered debates" and that this confusion "denies legal certainty".[3] Similarly, a panel chair of an international conference on "Transnational Business and International Criminal Law" summarised the outcome of the discussions by concluding that "more questions had been raised than answered".[4]

Against this background, the central claim made in this article is that we need to distinguish legally separate types of "economic abuses" because the adequacy of international criminal law varies significantly for different types of such abuses.

"Economic abuses" can relate to a wide array of phenomena and associated legal problems, such as corporate liability, the exploitation and trade of conflict minerals and other resources from conflict-affected areas, or the conduct of private military and security companies. Several commentators have observed that a major difficulty characterising the debate(s) on "economic abuses" or "economic crimes" is the variety and range of legal problems the literature attempts to address and, in turn, the number of legal questions it tries to tackle: Some concentrate exclusively on corporations abusing human rights through typical profit-oriented business activities. For example, Stewart focuses on corporate liability for the

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[1] See, for instance, K. Ainley, 'Individual Agency and Responsibility for Atrocity' in R. Jeffery (ed.) *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency* (New York, Palgrave, 2008), 37, 55, writing that international human rights and criminal law have "little to say about economic abuse or hardship, or the extent to which economics influences war". C. Olivet, *Towards an International Tribunal on Economic Crimes* (Transnational Institute, 2010) http://www.tni.org/article/towards-international-tribunal-economic-crimes (last visited 27 April 2015), summarizing proposals that we need a tribunal on "economic crimes" because "international law has no jurisdiction over economic crimes".

[2] W. Schabas, 'War Economies, Economic Actors and International Criminal Law' in K. Ballentine and H. Nitzschke (eds.) *Profiting From Peace: Managing the Resource Dimensions of Civil War* (Lynne Rienner, Boulder, 2005); A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M. Kamminga and S. Zia-Zarifi (eds.) *Liability of multinational corporations under international law* (Brill, Boston, 2000); J. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', 47 *N.Y.U.J. INT'L L. & POL.* (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354443 (last visited 27 April 2015) or N. Bernaz, *Does the World Need a Business and Human Rights Treaty?* (Rights as Usual, 2014) http://rightsasusual.com/?p=850 (last visited 27 April 2015).

[3] D. Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', 6 *NW.U.J. INT'L HUM. RTS* (2008), 304, 304. The author refers to the questions of whether corporations can and should be held liable for international law violations at all, and if so, for what kind of violations, whether executives can be held liable as accessories, whether international criminal law requires a knowledge or a purpose standard, and whether the definition of aiding and abetting should be drawn from international or from domestic law.

[4] J. Geneuss, et al., 'Core crimes Inc.: Panel discussion reports from the conference on Transnational business and international criminal law – held at Humboldt University Berlin, 15-16 May 2009', 8 *J.INT'L CRIM. JUST.* (2010), 957.

war crime of pillage in his publication entitled "*Corporate War Crimes*". [5] This use of the term suggests that the perpetrator of a "corporate war crime" is an economic actor carrying out an economic activity. Farrell also focuses on abuses committed by corporate actors through their economic activities.[6] Similarly, Vest argues that "business-typical" abuses require an exclusive focus on those "economic abuses" in which an economic actor commits a crime by carrying out an economic activity.[7] Yet, for others, "economic abuses" or "economic crimes" can relate to any conduct as long as it is committed by an economic actor – independent of whether or not the harm arises through an economic activity. Nerlich and others, for instance, concentrate on the economic nature of the actor and emphasise that it does not matter whether the activity or the interest affected by the perpetrator's conduct is of an economic nature.[8] A third way to view "economic abuses" is to concentrate on the harm arising from natural resource exploitation that negatively affects economic interests and livelihood of the affected communities, without necessarily limiting the focus on abuses committed by economic actors though economic activities.[9] In sum, the varied ways in which the loose umbrella terms of "economic abuses" or "economic crimes" can be conceptualised point to the complexity of the debate and the potential usefulness of disentangling it.

Against the background of this complex debate, Anita Ramasastry rightfully "warned against the danger of lumping together different types of conduct" when assessing the relationship between transnational business, human rights abuses and international criminal law.[10] Also pointing out differences between various scenarios of "economic abuses", Schabas suggested that the adequacy of international criminal law varies according to different types of abuses analysed. For some categories, he suggested, "the problem may be more a question of implementation and enforcement" rather than inadequacies in the law.[11] Indeed, this article will confirm that the question of the adequacy of existing international criminal law in relation to "economic abuses" cannot be answered in and of itself, but that there is a need to distinguish legally separate phenomena that are dealt with in the literature and in case law.

But how should we differentiate between different types of "economic abuses"? To separate distinct types of "economic abuses", the article puts forward a conceptual model that is organised along three dimensions. I submit that the debate can be clarified with the help of such an analytical model. The central tenet of the suggested model is to distinguish which

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[5] J. Stewart, *Corporate war crimes: prosecuting the pillage of natural resources* (Open Society Institute. 2010).

[6] N. Farrell, *Attributing Criminal Liability to Corporate Actors*, 8 *J.INT'L CRIM. JUST.* (2010), 873-4

[7] Vest criticises the *Musema* judgment of the ICTR. The Trial Chamber found the defendant guilty based on superior responsibility of civilians because he was found to have controlled employees of a factory who used "vehicles, uniforms or other Tea Factory property in the commission of [international] crimes". *Prosecutor v Musema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-13-T, 27 January 2000 [880]. Vest submits that this is not a case about "economic abuses" because the actor did not engage in an inherently economic activity when he tolerated the use of the company's property in the commission of crimes: H. Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law', see id., 851, 870-2.

[8] V. Nerlich, *Core Crimes and Transnational Business Corporations*, id., 895, 900-2, pointing out that "it cannot be said that business corporations can only be involved in certain economic core crimes. Rather, depending on the circumstances of each case, their involvement may extend potentially to all crimes under international law" (note omitted); or W. Kaleck & M. Saage-Maass, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: the Status Quo and Its Challenges*, id., 699.

[9] This is the focus of Larissa van den Herik and Daniëlla Dam-De Jong's article on pillage. L. Van den Herik & D. Dam-De Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', 22 *CRIM. L.F.* (2011), 237.

[10] Geneuss et al, above n 4, 960.

[11] Schabas, above n 2, 426.

aspects of a given factual scenario are economic (the actor, the activity or the affected legal interest).

The usefulness of separating different types of "economic abuses" is threefold. First, disentangling the debate will allow us to determine with more certainty which legal challenges pertain to which type of economic abuse. By arguing that conclusions about the adequacy of existing international criminal law would be safer to reach if we could more easily separate the distinct types of "economic abuses" and their associated legal challenges, the article contributes to the growing literature on the legal accountability for "economic abuses", business, human rights and international criminal law. In particular, I hope to show that there is a danger of overlooking the potential for existing international criminal law to be applied in those areas in which it is relatively adequate if we do not differentiate the various types of "economic abuses".

Second, and related, a method to separate "economic abuses" into legally separate types will serve to ensure that we can more easily verify if different authors are addressing the same phenomenon in relation to "economic abuses". As a consequence of the varied ways in which the term "economic abuses" (or similar vocabulary such as economic crimes, corporate abuses, etc.) is used, it cannot be taken for granted that the conclusions reached by one author will pertain to other categories of "economic abuses". It thus seems safer to rely on conclusions reached in the literature after we have distinguished which precise category of abuses an author has examined.

Third, a clarification of the debate on the adequacy of international law to address "economic abuses" in international criminal law is also warranted from a practical perspective. Only if we know how adequate existing law really is can we decide whether or in which areas new legal norms are required, or whether international lawyers should focus on strengthening enforcement measures and the implementation of the existing legal framework, for instance, by encouraging international prosecutors or truth commissioners to take into account the economic dimensions of armed conflicts.

In terms of structure, Section II introduces the suggested model, which highlights the conceptual distinctions of the various types of "economic abuses". I will consider three specific constellations and discuss them in turn in sections III to V – assessing the potential adequateness of international criminal law to deal with some types of "economic abuses" and highlighting its shortcomings when dealing with other types. The analysis will reveal how the adequacy of international criminal law varies for each constellation and how the legal challenges most prominently associated with each of these selected scenarios are distinct in kind as well as in degree. Section VI concludes by discussing the limitations and the potential usefulness of the model.

II THE SUGGESTED MODEL AND ITS THREE AXES

The analytical model considers three aspects of an economic abuse: the actor, the legal interests affected by the conduct and the activities carried out by the alleged perpetrators.[12] Each of these aspects can be either economic or non-economic.[13] As soon as at least one of the three aspects is economic in nature, the abuse is part of the debate on "economic abuses". My model uses these three aspects as the axes of the model:

The first axis concerns the *actor*. An economic actor is a legal person such as a corporation, or a natural person acting on behalf of a corporation, such as a company's

[12] An abuse is defined as any scenario in which victims' enjoyment of human rights is negatively affected.

[13] As with every model, there is a level of simplification involved in this binary division. The limitations of the model are discussed below in section VI.

directors or executives. In contrast, a non-economic actor is, for instance, a state, an armed group or an individual who is not acting on behalf of a corporation.

The second axis relates to the *legal interest* protected by international law. An economic legal interest is an underlying legal interest related to someone's property or someone's access to economic rights, such as the right to food, water, work or housing. An actor polluting farmland, for instance, threatens the community's economic legal interests. On the other hand, an actor who abducts someone, for instance, primarily harms a non-legal interest, such as the victim's freedom of person.

The third axis concerns the *activity* behind the abuse. An activity is considered economic when it has an industrial or commercial character or concerns any activity that is undertaken in exchange for remuneration,[14] while a non-economic activity misses these features. The relevant activity is the abusive conduct as such (i.e. the killing, the destruction of property, etc.), and not the activities that an actor might wish to further through the commission of an abuse.

The graphic depiction of the three axes shows that many combinations of these three aspects are possible. If we assume that it is clear for an abuse whether or not each of the three aspects are economic or non-economic, there are eight possible constellations – each of them represented by a cube.[15]

[INCLUDE FIG. 1 HERE]

Fig. 1: The three axes of the model illustrate whether or not the actor, the affected legal interest threatened by the actor's conduct and the abusive activity are economic or non-economic. Depending on how these aspects are combined, eight different types of "economic abuses" arise.

To illustrate the usefulness of conceptually distinguishing various types of "economic abuses" depending on how the three axes of the model are combined, I will discuss three selected constellations. The three examined constellations only represent some of the possible types of abuses with an economic aspect, but they serve the purpose of emphasizing the importance of disentangling the debate so that legally distinct abuses are not lumped together, avoiding overly broad (or overly narrow) conclusions about the adequacy of international criminal law. I will discuss each constellation in turn, starting with a summary of the constellation before examining the most prominent legal challenges associated with each of the three selected constellations. We will consider examples of cases litigated in the past and present in order to illustrate the types of "economic abuses" and the legal challenges pertaining to each constellation. Given the relative scarcity of prosecutions based on international criminal law, these examples are not limited to international crimes cases but – where useful to illustrate a point – also include cases brought before domestic tribunals, including cases with civil causes of actions.

[14] Similar to the definition advanced in *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie*, C-268/99 [2001] ECR I-08615 [19]. We could also draw inspiration from the conclusion of the US Supreme Court that an activity is economic when it relates to the production or distribution of any goods or services for which there is a lucrative market. *Gonzales v Raich*, 545 US 1 (2005) [10].

[15] In situations in which it is impossible to decide whether or not one or several aspects are economic or not, the total number of mathematically possible combinations would increase to 256 (2ˆ8) given that each axis (n) can have a binary value (economic or non-economic) and there are eight cubes (k). The laws of enumerative combinatorics determine that we would need to calculate nˆk = 2ˆ8=256. Given the practical need to identify which legal challenges pertain to a specific factual scenario, the model is most useful in cases in which it is feasible to determine whether the aspects are at least primarily economic or non-economic in nature. On the limitations of the model, see below in section VI.

III CONSTELLATION NO. 1: THE ACTOR IS ECONOMIC, THE LEGAL INTEREST AND THE ACTIVITY ARE NOT

In the first constellation, I will examine the situation of an economic actor threatening a non-economic legal interest though a non-economic activity. This constellation is expressed in graphic form below, with the shaded area representing the relevant combination.

[INCLUDE FIG. 2 HERE]

Fig. 2: Constellation no. 1: The actor is economic, while the affected legal interest and the activity are not.

This constellation arises, for instance, if a corporation or its executives are involved in intimidating or killing civilians. In this constellation, the alleged conduct – killing civilians or intimidating them – threatens non-economic legal interests such as victims' life and their bodily integrity.[16] I will discuss the legal challenges of such a scenario below.

The following cases illustrate the first type of "economic abuses". Consider – as a matter of illustration – the factual background of some of the abuses in the *Unocal* lawsuit. Amongst other abuses, plaintiffs in this Alien Torts Statute litigation before US courts alleged that victims were subjected to acts of murder and rape because Unocal failed to stop abuses inflicted by the armed forces of Myanmar/Burma.[17] The factual pattern of this aspect of the lawsuit falls within constellation no. 1. An economic actor, Unocal Corporation, was accused of threatening non-economic legal interests, the life and bodily integrity of the victims and the company was alleged of doing so through conduct that was not inherently economic: Although committed in the wider context of the pursuit of economic activities, the killings and rapes and Unocal's tolerance of the military's abuses are not economic activities according to the definition mentioned above. A more recent complaint against an employee of the Danzer timber trading group also falls within constellation no. 1. Submitting a criminal complaint in Germany, two NGOs allege that the individual aided and abetted rape, arbitrary arrests and attacks against a forest community in the Democratic Republic in Congo, including by providing vehicles and drivers used in the commission of the abuses.[18] We could add examples from ongoing lawsuits in Canada, such as the one against Hudbay Minerals before Canadian courts. Hudbay Minerals is a Canadian mining corporation alleged of complicity in the killing of a Guatemalan community leader, the shooting and paralyzing of a young man and the gang-rape of eleven women from a community who opposed mining operations in a remote area in Guatemala. In July 2013, the Superior Court of Ontario has ruled that claims against this economic actor can proceed to trial.[19]

In constellation no. 1, the focus is on economic actors committing abuses that threaten legal interests such as life and bodily integrity. The relevant activity in constellation no. 1 does not involve industrial or commercial transactions and is not undertaken in exchange for remuneration. Rather, it is an activity that could in principle be undertaken by anyone. Importantly, economic actors may be involved in abuses like torture, killings, disappearances, or rape just as any other actor. As Nerlich posits, depending on the circumstances of the case,

[16] Note that the question of whether harm to life and bodily integrity equates harm to non-economic legal interests is a matter of shades of grey, and not of black and white. See on this point section IV.

[17] *Doe v Unocal*, 248 F.3d 915 (9th Cir, 2001) [939-40]. The case settled out-of-court.

[18] European Center for Constitutional and Human Rights and Global Witness, 'Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community' (Media Release, 25 April 2013), http://www.ecchr.de/index.php/danzer-en.html (last visited 27 April 2015).

[19] Choc v. Hudbay Minerals Ind., [2013] ONSC 1414.

economic actors such as corporations may be involved in any crime and their obligations are not limited to crimes committed for financial gains for through business activities as such.[20]

How adequate is international criminal law in relation to constellation no. 1? The most prominent legal challenge in constellation no. 1 concerns the establishment of criminal liability rather than problems surrounding the substantive definitions of international law norms. In particular, difficulties involve the *mens rea* requirements of possible modes of liability and, related to that, the remoteness and often indirect nature of the economic actor's involvement in the abuse. Legal and natural persons must be considered separately.

As soon as the perpetrator is an economic actor as a legal person, the issue that immediately arises is whether and to what extent corporations can be liable in the first place under domestic law or under international criminal law and if so, what requirements must be met. It is well-known that the jurisdiction of the ICC is confined to natural persons.[21] As Clapham recounts, states at the Rome Conference could not adopt a text by consensus that would have given the new institution jurisdiction over legal persons when setting up the permanent court, partly because of the differences with which the various national criminal systems address conduct of legal persons.[22] On the other hand, it is notable that the Appeals Chamber of the Special Tribunal for Lebanon recently insisted on its interpretation that the term "person" in international and Lebanese sources to include legal persons such as corporations, although its exploration of corporate liability was limited to contempt offences.[23] The decision has attracted criticism[24] and it seems questionable why the term "person" would have a different meaning for contempt offences than for other crimes.[25] At the time of writing, the first of two trials related to the contempt proceedings were ongoing. These proceedings make clear that the last word is far from having been said on corporate liability and the interpretation of the term "person" is far from settled. Be this as it may, domestic legislation in a number of jurisdictions allows national tribunals to deal with the involvement of corporate actors in many types of abuses, including international crimes.[26] It must be kept in mind that the scope of corporate liability is governed by the relevant criminal law regimes applicable before domestic tribunals and these vary from jurisdiction to jurisdiction in their application to legal persons and remain untested in many jurisdictions.[27] Stewart convincingly argues how the "criminal angle" against corporate impunity is "underappreciated". [28] In his

[20] Nerlich, above n 9, 895, 901.

[21] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*') art 25.

[22] Clapham, above n 2; Bert Swart, et al., 'Discussion: International Trends Towards Establishing Some Form of Punishment for Corporations', 6 *J. INT'L CRIM. JUST.* (2008); D. Stoitchkova, Towards corporate liability in international criminal law (Intersentia, Antwerp, 2010).

[23] Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-06 (23 January 2015) in which the Panel affirms its Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL-14-05, Appeals Chamber (2 October 2014).

[24] D. Jacobs, 'A Molotov Cocktail on the Principle of Legality: STL confirms contempt proceedings against legal persons' (Blogpost on *Spreading the Jam*, 6 October 2014) http://dovjacobs.com/2014/10/06/a-molotov-cocktail-on-the-principle-of-legality-stl-confirms-contempt-proceedings-against-legal-persons/ (last visited 27 April 2015).

[25] Y. McDermott Rees, 'Criminal Liability for Legal Persons for Contempt returns to the STL' (Blogpost on *PhD Studies in Human Rights*, 8 October 2014) http://humanrightsdoctorate.blogspot.ch/2014/10/corporate-liability-for-legal-persons.html (last visited 27 April 2015).

[26] For an overview, see, International Commission of Jurists, Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (ICJ. 2008).

[27] J. Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (2014), www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf (last visited 27 April 2015), 40.

[28] Stewart, above n 5, 76.

view, we are witnessing "the birth of a fledgling field" now that more and more domestic jurisdictions have adopted corporate criminal liability.[29] Although not a panacea, he argues that the coupling between corporate criminal liability and international crimes in national jurisdictions "has potentially distinct advantages, which spoil many of the normative objections offered against the [Alien Torts Statute in the USA]". [30] Even if not globally and uniformly, and despite the fact that it remains challenging to successfully litigate such cases,[31] it is at the very least conceivable that we can address at least some "economic abuses" of the first constellation even when they are committed by a legal person.

As far as liability for economic actors *qua* natural persons is concerned, corporate actors such as employees, officers and directors of corporations, can be the target of national as well as international criminal prosecutions. The famous *Cyclone-B* case, for instance, illustrates that economic actors can be defendants before international criminal tribunals.[32] As Buhmann and Ryngaert summarise, "[n]othing prevents [the ICC] from launching investigations into the role of individual company representatives in the perpetration of human rights violations that qualify as international crimes".[33] In the same vein, Kaleck and Saage-Maass conclude that substantive international criminal law "is well prepared to tackle corporate misbehaviour" by natural persons[34] – at least if there are no additional legal problems related to the type of activity or the affected legal interest. In constellation no. 1 cases that concern natural persons, the requirements for attributing responsibility and the common remoteness of the alleged perpetrator from the crime scene is where most of the challenges arise – whether a case is adjudicated under international criminal law or domestic law. The requisite understanding of various modes of responsibility and their relevant elements vary across jurisdictions and remain unsettled in international criminal law.[35] Moreover, business executives or other individuals acting on behalf of a corporation often play an indirect role in the commission of crimes, or may at least be able to portray their role as such. This is why the concept of "corporate complicity" becomes key: Many of the existing cases related to constellation no. 1 concern allegations that the economic actor was complicit in abuses perpetrated by others (such as security forces or state actors) rather than allegations that an economic actors committed an abuse as the principal perpetrator. In constellation no. 1, much thus usually depends on how geographically, organisationally and politically close the economic actor was to the commission of the crime, and how much influence the economic actor had on the commission of the crime.[36]

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[29] Id., 77, 1.

[30] Id., 46.

[31] A recent case in point is the case brought in France against the involvement of Veolia and Alstom in the construction of a tramway in the West Bank. Plaintiffs alleged that the companies violated international law. Two French courts ruled that the invoked provisions would not bind corporations and could not be invoked to nullify the relevant concession contract. Cour d'appel de Versailles [Versailles Court of Appeal], 11/05331, 22 March 2013, www.france-palestine.org/IMG/pdf/decision_de_la_cour_d_appel.pdf (last visited 27 April 2015).

[32] Bruno Tesch was the owner of a company. *United Kingdom v Tesch and others (Judgment)* (Courts in the British Zone of Control in Germany, Court at Hamburg, 8 March 1946), 1 Law Reports of Trials of War Criminals 93 (*Cyclone-B Case*).

[33] K. Buhmann & C. Ryngaert, 'Human Rights Challenges for Multinational Corporations Working and Investing in Conflict Zones', 6 *HUM. RTS. & INT'L LEGAL DISCOURSE* 3(2012), 8.

[34] Kaleck and Saage-Maass, above n 9, 699.

[35] See in particular Vest, above n 8; Farrell, above n 7 and International Commission of Jurists above n 26, in particular Vol. 2.

[36] Before the ICC, the judgment in *Lubanga* evinced, for instance, the intricacies of drawing the line between essential and non-essential contributions of those alleged of co-perpetration of crimes. *Prosecutor v Lubanga (Judgment pursuant to art 74 of the Statute)* (ICC, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012 [1137-350]. On the establishment of a sufficient connection between the business entity most closely related to the abuse, its parent company as well as between the parent company and the abuse, see Jennifer Zerk,

The major challenge of establishing liability aside, the first type of economic abuse – economic actors harming non-economic legal interests through non-economic activities – is generally within the reach of existing law. As Farrell summarises, "a corporate actor who knowingly assists in the commission of an international crime during armed conflict will expose itself to potential criminal liability". [37] The legal challenges associated with this constellation boil down to problems related to liability rather than difficulties concerning the substantial definitions of crimes. Legal challenges for the other two selected constellations are inherently different.

IV CONSTELLATION NO. 2: THE LEGAL INTEREST AFFECTED BY THE ABUSE IS ECONOMIC, THE ACTOR AND ACTIVITY ARE NOT

In the second selected constellation, I will examine situations in which the legal interest affected by the abusive conduct is economic but the actor and activity are not.

The actors could be government officials involved in armed conflicts. A discriminatory legislative act by a government could, for instance, be at the origin of an "economic abuse" that threatens economic legal interests, such as access to jobs or property. The *Polenstatut* in occupied Poland during the Second World War provides an excellent example. This set of regulations "completely deprived the Poles of all rights to real property ..., deprived the Poles of the right to choose their employment, fixed their condition of employment and wages … at a considerably lower level than that for the Germans".[38] A Polish tribunal convicted Nazi officials for their involvement in the adoption and implementation of these regulations.[39] Another example would be a non-economic actor, such as a rebel leader, who deprives civilians of access to agricultural land or humanitarian relief in an armed conflict, thereby threatening the victims' access to food or water. Both examples concern "economic abuses" in the colloquial sense of the term. Yet, they are legally quite distinct from the types of abuses considered in the previous section. In the three-dimensional model, this constellation relates to the following:

[INCLUDE FIG. 3 HERE]

Fig. 3: Constellation no. 2: A non-economic actor threatens an economic interest by engaging in a non-economic activity.

The adequacy of international criminal law in relation to the second selected type of "economic abuses" might be more promising than what is generally thought. In this constellation, perpetrators commit abuses that affect the victims' economic legal interests. The abusive conduct is a non-economic activity and the actor is not a corporation or an individual acting on behalf of a corporation.

It is sometimes thought that "economic abuses" affecting economic legal interests can hardly ever be addressed by international criminal law. The adequacy of international criminal law in relation to this second type of "economic abuses" is therefore not seen as promising. Bassiouni, for instance, wrote that "[e]conomic interests are perceived as the least important of the international interests that international criminal law seeks to protect". [40] Schabas

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Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press, 2006), 215-40.

[37] Farell, above n 6, 893.

[38] *Prosecutor v Greiser (Judgment)* (Supreme National Tribunal of Poland, 7 July 1946) XIII Law Reports of Trials of War Criminals 70, 73.

[39] Id.

[40] Cherif Bassiouni, Introduction to international criminal law (Transnational, Ardsley 2003), 133.

cautioned that "the core issues [of international criminalisation] would generally deal with "threats to bodily integrity, such as killings, mutilations, summary executions, sexual assaults, and pillage",[41] but "do not generally deal with economic matters". [42] Pillaging, which is a war crime, is often seen as the only relevant crime that protects economic legal interests: "Economic crimes", Schabas explains "... are essentially absent from the Rome Statute, save for the war crime of 'pillage and plunder'". [43]

Yet, the number of international crimes that are capable of protecting economic legal interests is not restricted to the criminalisation of pillaging. As discussed in much more detail elsewhere, the criminalisation of a range of other international crimes is capable of protecting people's access and enjoyment of some of their economic rights and underlying economic interests.[44] The adequacy of existing international law for constellation no. 2 is arguably better than what is commonly assumed. Two considerations are key for this argument:

First, threats to bodily integrity can also affect economic legal interests. Killings, for instance, may not only be committed by firearms, but can also be the ultimate result of the perpetrator's abusive interference with the victims' access to economic rights, making the criminalisation of killing capable of protecting underlying economic interests. Consider the deprivation of food or water of victims in the hands of the perpetrator. If the perpetrator causes death, such conduct may constitute wilful killing, a war crime. Other threats to bodily integrity could include denials of the right to health (another right linked to economic interests), for instance when perpetrators hinder medical personnel in their attempts to assist the sick and wounded. Thus, international criminalisation dealing with "threats to bodily integrity" sometimes overlap with threats to underlying economic legal interests. International criminal law is, therefore, capable of dealing with "economic abuses" in which the affected legal interests are economic but that originate from non-economic actors and non-economic activities.

Second, even where bodily integrity is not at stake, crimes other than pillage can address abusive conduct that affects economic legal interests and that is part of constellation no. 2. Most of the substantive definitions of existing war crimes can protect economic legal interests.[45] Consider, for instance, the war crime of "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies". [46] The criminalisation of this prohibition protects economic legal interests, such as people's access to food production infrastructure, water sources or shelter, if such is indispensable to their survival. War crimes such as the destruction and appropriation of property can also be relevant. Another straightforward example is the war crime of employing poison, which extends to poisoning the food and drink of an opposing party. This war crime protects economic legal interest insofar as the poisoning of water and food sources affects people's enjoyment of economic rights such as the right to food and drinking water – and constitutes criminalised conduct under international law applicable in armed conflicts.[47]

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[41] Schabas, above n **2**, 431.

[42] Id.

[43] Schabas, above n **2**, 427.

[44] E. Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, Cambridge, 2015).

[45] Evelyne Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' 71 Heidelberg J. Int'l L. (2011), 523.

[46] Rome Statute art 8(2)b(xxv) (in international armed conflict).

[47] The ICC Trial Chamber concluded that there are reasonable grounds to consider that the contamination of water sources was committed in furtherance of a genocidal policy. *Second Decision on the Prosecution's Application for a Warrant of Arrest against Al Bashir* (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010 [38]

A similar argument can be made for crimes against humanity. For instance, consider how the criminalisation of forcible transfers protects economic legal interests. The crime of forcible transfer of population is defined as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". [48] The term "forcibly" includes the full range of pressures inflicted to coerce victims to leave,[49] and thus potentially also captures threats to economic legal interests. Where perpetrators interfere with people's enjoyment of their right to housing, access to employment, or services such as electricity or health care with the intent of displacing them, such abuses of economic rights may constitute the crime of forcible transfer. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Krnojelac* held that "[t]he prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference". [50] It is possible that "economic abuses" of the second constellation fall within the definition of this crime as it does not legally matter whether this interference affects victims' economic legal interests or whether they are evicted at gunpoint. The ICTY confirmed in the *Krajišnik* Trial Judgment that the creation of severe living conditions can constitute the underlying conduct of forcible transfer. The Tribunal found that the restrictive measures taken by Serb forces against Muslims and Croats, which included cutting off water or electricity, or preventing them to work in their jobs, were aimed at, and succeeded in, making it practically impossible for most Muslims and Croats to remain in municipalities controlled by Serb forces and thus fulfilled the elements of the crime of forcible transfer.[51] This indicates that pillage is not the only international crime relevant to the protection of underlying economic legal interests but that other "economic abuses" of the second type can be addressed by international criminal law.

If crimes other than pillage are capable of addressing claims related to economic abuse affecting victims' economic legal interests in scenarios pertaining to constellation no. 2, this means that the potential of existing law is at least somewhat more significant than what is commonly acknowledged. In any event, it is apparent that the legal nature of the abuses in constellation no. 2 is distinct from the first examined type of "economic abuses". Here, the problem of liability for economic actors does not arise in the same manner as it does for constellation no. 1 as this second type of "economic abuses" deals with "classic" defendants such as government officials or rebel leaders. Rather, the main challenge is to determine whether the threat to economic legal interest can overlap with the accepted definitions of international crimes. Where this arises, international criminal law has the potential to address this second category of "economic abuses". Acknowledgement of this potential is obviously not a panacea and not all threats to economic legal interests can be qualified as an international crime. Nevertheless, the potential for using international criminal law to strengthen the protection of economic legal interests and economic rights (i.e. to address "economic abuses" of the second type) deserves to be recognised and explored. For instance, if the arguments made above are accepted, tribunals or truth commissions could deal with at

[48] For instance, Rome Statute art. 7(2)d.

[49] *Report of the Preparatory Commission for the International Criminal Court: Addendum 2 — Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) footnote 12.

[50] *Prosecutor v Krnojelac (Appeal)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No ICTY-97-25-A, 17 September 2003 [218]. See also G. Acquaviva, 'Forced Displacement and International Crimes', Legal and Protection Policy Research Series (United Nations High Commissioner for Refugees, Geneva, 2011) 16.

[51] *Prosecutor v Krajišnik (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No ICTY-00-39-T, 27 September 2006 [729].

least some of the "economic abuses" of the second type, namely those in which the threat to economic legal interest overlapped with the accepted definition of an international crime.[52]

So far, we have considered two types of "economic abuses" in which only one of the aspects was of an economic nature. In contrast to the first and second constellation, the third selected constellation of "economic abuse" combines multiple economic aspects and gives rise to a range of far more complex problems.

V CONSTELLATION NO. 3: ALL THREE ASPECTS ARE ECONOMIC

In the third constellation, the actor, the activity as well as the affected legal interests are economic. In this example, economic actors are the authors of abusive economic activities and these activities threaten economic legal interests. In the graphic model, this constellation refers to the following combination:

[INSERT FIGURE 4 HERE]

Fig. 4: Constellation no. 3: An economic actor engages in an economic activity. By doing so, the actor threatens economic legal interests.

Constellation no. 3 deals with inherently economic activities, such as the exploitation of natural resources which can exacerbate or prolong armed conflict or civic strife. This is the type of "economic abuses" several UN reports have directed attention to when examining the relationship between natural resources, armed conflicts and human rights violations.[53]

This category of abuses covers, for instance, many of the allegations against Shell in Nigeria – namely those that involve activities that are a core part of the exercise of Shell's economic activities. Abuses of the third constellation are analytically different from constellation no. 1 where the activities are non-economic and could in principle have been undertaken by anyone (such as contributing to rape or to the executions of villagers.[54] In constellation no. 3, we are interested in activities of an inherently economic nature. For over a decade, allegations against Shell related to the exploitation of oil reserves in the Niger Delta have resulted in lawsuits and judgments in several jurisdictions, including a landmark decision by the Supreme Court of the United States of America that curtailed the opportunities to bring extraterritorial cases before US courts.[55] Plaintiffs were more successful

[52] See, Schmid supra n 44 and n 45; E. Schmid and A. Nolan, '"Do No Harm"'? Exploring the Scope of Economic and Social Rights in Transitional Justice', 8 *INT'L J. OF TRANSITIONAL JUST.* (2014), 362; D. Sharp, 'Introduction: Addressing Economic Violence in Times of Transition' in D. Sharp (ed.) *Justice and Economic Violence in Transition* (Springer, New York, 2013); L. van den Herik, 'Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?' in E. Riedel, G. Giacca and C. Golay (eds.) *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges* (Oxford University Press, Oxford, 2014), 343. On the ongoing debate about the relevance of economic aspects in 'transitional justice', see also, for instance, Z. Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', 2 *INT'L J. OF TRANSITIONAL JUST.* (2008), 267.

[53] See, for instance, United Nations Office of the High Commissioner for Human Rights, '*Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the DRC between March 1993 and June 2003'* (OHCHR, Geneva, 2010), http://www.unhcr.org/refworld/docid/4ca99bc22.html (last visited 27 April 2015).

[54] The fact that examples for constellation no. 1 were drawn from the *Unocal* litigation does not mean that Unocal did not also commit abuses in Burma/Myanmar that would fall within constellation no. 3. *Vice versa*, some of Shell's abuses in Nigeria could have been included as examples for constellation no. 1 (e.g. the company's alleged role in relation to the arrest and killing of Ken Saro Wiwa and others).

[55] For an overview of the various lawsuits, see Business & Human Rights Resources Centre, 'Shell Lawsuit (Re Nigeria) and Shell Lawsuit (Re Oil Pollution in Nigeria)', http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria

before Dutch civil courts. The District Court of The Hague partially found in favour of Nigerian farmers affected by oil spills from oil pipelines and facilities.[56] Plaintiffs alleged that Shell failed to prevent oil flowing into farmland and fishponds, polluting the plaintiffs' food sources and resulting in damages to their livelihoods and economic assets.[57] Another example for the third type of "economic abuses" concerns the ongoing cases against Argor-Heraeus SA, a Swiss gold refiner is alleged of pillaging gold from the Democratic Republic of the Congo by an illegal armed group whose activities were financed by the illicit sale and traffic of gold ore.[58] These lawsuits were/are litigated primarily on the basis of domestic law (rather than international criminal law) but they illustrate the types of abuses that conceptually belong to the third constellation: by exercising an economic activity, a corporation allegedly harmed the economic legal interests of the affected population, such as their farmland, access to food and water.

This constellation is the most complicated of the debate on "economic abuses". When "economic abuses" are committed through inherently economic activities and those activities affect economic legal interests, international criminal law is in a difficult position. The actors in the third constellation are economic. Hence, the legal challenges described for the first constellation arise in the third constellation as well and they can be particularly demanding if the defendant is a legal rather than a natural person. The challenges associated with the first constellation – liability and potential problems of remoteness – are, however, not the only ones. Rather, the obstacles described for the first constellation are exacerbated by the specific challenges that arise from the combination of the economic nature of the activities and the legal interests affected by the conduct of the economic actors.

The fact that the affected legal interests in the third constellation are economic can complicate attempts to address this type of "economic abuses". Although we have seen in constellation no. 2 that economic interests can be protected by international criminal law, justifiably or not, prosecutors and lawyers tend to find abuses affecting interests such as victims' property, access to work or their economic survival or well-being more difficult to address than abuses affecting non-economic legal interests.[59]

Further, the third selected scenario deals with economic activities. In contrast to constellation no. 2, the third constellation raises the additional problem that economic activities are usually prima facie legal undertakings, such as the production and sale of goods or the acquisition of property or land. The activities relevant to the third constellation are most often considered neutral undertakings, from either a domestic or international law perspective.[60] In the third constellation, the boundary between legal, legitimate activities and

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, and http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Shelllawsuitreoilpollutioninnigeria (both last visited 27 April 2015). In *Kiobel*, the Supreme Court of the USA decided that claims under the Alien Torts Statute can only succeed if they 'touch and concern' the territory of the United States. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659.

[56] *Akpan and Others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria* (The Hague District Court, 30 January 2013), www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/at_download/file (last visited 27 April 2015).

[57] Id.

[58] Documents on this case are available on the website of the Stop Pillage Campaign, 'Swiss Criminal Case', http://www.stop-pillage.org/swiss-criminal-case/ (last visited 27 April 2015).

[59] On this tendency, see, for instance, E. Harwell, 'Building Momentum and Constituencies for Peace: the Role of Natural Resources in Transitional Justice and Peacebuilding' in C. Bruch, W. Muffett and S.Nichols (eds), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Routledge, 2013), stating that acts threatening economic interests and involving natural resources, for instance, are neglected even when they clearly constitute crimes. See also Schmid, above n 45, 532.

[60] On this point, see van den Herik and Dam-De Jong, above n 9, 248; C. Burchard, 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute', 8 *J. INT'L CRIM. JUST.* (2010), 919.

criminal conduct is more complex to draw than in the first or second. As has been pointed out, for instance, by van den Herik and Dam-De Jong, "the distinction between what is 'illegal' and 'criminal' becomes crucial",[61] and by far not all forms of economic activities such as the harmful exploitation of natural resources committed within the context of armed conflicts will meet the elements of an international crime. Vest points out that, "[i]n theory, no business activity, regardless of how ordinary or "neutral" it seems to be, can explicitly be left outside the scope of, e.g. accessorial liability to the commission of an international crime". [62] Yet, defining the threshold at which "neutral" activities become punishable gives raise to numerous problems in theory and practice. When do economic activities such as providing funds or products become legally relevant? Clearly, "a line must be drawn between the morally condemnable behaviour of "doing business with a bad actor" and criminally relevant contributions to another entity's international crimes". [63] Drawing this line can be far from obvious and there remains "significant legal uncertainty surrounding the scope of key liability concepts". [64] On the one hand, there are good reasons not to consider criminal all conduct that contributes, in one way or another, to an armed conflict or a "bad situation", as "guilt by association" would contradict the bedrock principle of criminal law that a crime requires an act or omission with a guilty mind. On the other hand, uncertainties surrounding legal standards and the novelty of prosecutions can hamper prosecutions and contribute to impunity. In addition to the problems related to the economic nature of the actor and the affected legal interests, constellation no. 3 thus faces the additional and particularly significant challenge of determining which economic activities are legally relevant. In sum, the economic nature of all three aspects of the model leads to a combination of legal challenges which imply that the establishment of legal accountability for this third constellation is more challenging than for the previous two.

Existing cases relevant to the third constellation illustrate the difficulties to address this type of "economic abuses". One well known example is the American Military Tribunal in Nuremberg which addressed the involvement of economic actors who harmed economic legal interests through the exercise of economic activities: Flick owned a major industrial conglomerate during the Weimar Republic. The Tribunal convicted him of war crimes and crimes against humanity. In this example, the relevant abuse for constellation no. 3 is Flick's conviction based on the exploitation of a steel plant in the Lorraine (count two of the indictment). The steel plant was originally the property of French owners.[65] According to the prosecution, Flick made constant efforts to influence government officials so that he would be able to exploit the plant and profit from the war by harming the economic interests of the rightful owners of the property. The prosecution argued that economic actors such as Flick exploited the situation of armed conflict in order to expand their economic activities and increase their profits because they profiteered from artificial "privatisations" of unlawfully seized French properties. In the words of the prosecution:

> "In Lorraine (France), which, in violation of international law, was annexed by Germany immediately after the German occupation, French private properties were seized by the occupation authorities under the guise of establishing temporary administration by state commissioners. This artificial creation of German state property

[61] Van den Herik and Dam-De Jong, above n 9, 248.
[62] Vest, above n 8, 852.
[63] Kaleck and Saage-Maass, above n 9, 720-721 (note omitted).
[64] Zerk, above n 27, 9.
[65] *Prosecutor v Flick and others (Indictment)* (Subsequent Nuremberg Trials, 8 February 1947) VI Reports of Trials of War Criminals 11, 17.

was only a temporary measure, and the properties were "reprivatized" by being turned over to German industrial concerns."[66]

The Tribunal concluded that Flick's "subsequent detention [of the steel plant] from the rightful owners was wrongful" and amounted to spoliation (pillage).[67] As an economic actor, Flick's business activities deprived the victims of their economic legal interests to benefit from the exploitation of their economic assets. Flick was thus convicted for harming economic legal interests through his economic activities – demonstrating that international criminal law has been able to deal with some cases of the third constellation at least when the defendant was a natural person. The *Flick* case, however, also illustrates how the Tribunal struggled with the legal challenges of the third constellation of our model: The Tribunal emphasised the need to identify the precise participation of the industrialists in the commission of activities, which the Tribunal was unsure amounted to an *actus reus* in the first place. In the end, the Tribunal found Flick alone guilty on the relevant count and acquitted the other four defendants accused of "spoliation". The Tribunal discussed their economic activities at length, but found that the evidence did not support a conviction of any of the other defendants.[68]

Although cases belonging to the third constellation have not been litigated before international criminal tribunals since WWII, more recent attempts to establish accountability over abuses of the third constellation before domestic courts also serve to illustrate the difficulties of drawing the line between ordinary economic activities and criminally relevant ones. To mention just two examples, a Dutch prosecutor faced significant difficulties in proving that Frans van Anraat (a businessman who delivered chemicals to Saddam Hussein) knew that the products would serve as the raw material for lethal mustard gas and that they would be used to commit war crimes.[69] In other words, the Tribunal had to determine whether the sale of the product was a "normal" business transaction or whether it constituted a knowing contribution to an international crime. In a more recent case, also from The Netherlands, the Public Prosecutor dismissed a case against a company renting cranes used in construction of the Israeli Wall. The company was alleged of complicity in the ensuing loss of land and livelihoods of Palestinians. The Prosecutor explained that the company's involvement appeared minor "taking into account the worldwide company activities" and that potentially costly follow-up investigations would not be conducted.[70]

Despite these difficulties, international criminal law is not entirely impotent to address conduct arising from harmful economic activities of economic actors who negatively affect the victims' economic legal interests. Van den Herik and Dam-De Jong, Ezekiel and Stewart convincingly argue that the war crime of pillage addresses various forms of illegal exploitation of natural resources by economic actors who harm economic legal interests through their economic activities.[71] Although the inclusion of the war crime of pillage in the

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[66] Id.

[67] *Prosecutor v Flick and others (Opinion and Judgment)* (Subsequent Nuremberg Trials, 22 December 1947) VI Reports of Trials of War Criminals 1187, 1207.

[68] See the discussion on count 2 in id 1202-12. The Tribunal either found no *actus reus* in the first place or it found that the evidence did not supported a finding that any of the other defendants met the subjective elements of a crime.

[69] For a detailed account of this case, see, for instance, W. Huisman and E. van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity', *8 J. INT'L CRIM. JUST.* (2010), 803.

[70] Letter of the Dutch Public Prosecutor (Reference PL-V-1340, translated by plaintiffs, 13 May 2013), http://www.alhaq.org/images/stories/Brief_Landelijk_Parket_13-05-2013_ENG__a_Sj_crona_Van_Stigt_Advocaten.pdf (last visited 27 April 2015), 3.

[71] Van den Herik and Dam-De Jong above note 9; A. Ezekiel, 'The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo', 47 *NAT. RES. J.* (2007), 225.; Stewart, above n 5. In *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial

Rome Statute is not without its difficulties,[72] the crime is a potentially useful tool for dealing with the linkages between natural resource exploitation, armed conflict and massive abuses of human rights. In an ideal world, states would amend the definition of pillage in the Rome Statute and eradicate the limitation to "private or personal use" because government officials looting the state's natural resources in non-international armed conflicts can escape accountability if they can claim that they did not personally enrich themselves.[73] *De lege lata*, it remains fair to say that the establishment of legal accountability for this third type of "economic abuses" is difficult and the capability of international criminal law is more limited in this third constellation as compared to the two previous ones, further indicating that there is considerable variation between different types of "economic abuses" and that the adequacy of international criminal law cannot be accurately assessed without distinguishing whether or not the actor, the affected legal interest and the activities are economic.

If we assume that it is unlikely states would agree to modify existing international criminal law in the near future, the most realistic and effective way to mitigate the difficulties arising for the third constellation would seem for states to strengthen their national legislation and their criminal law enforcement in line with their existing international obligations as well as the Guiding Principles on Business and Human Rights for implementing the United Nations Protect, Respect and Remedy Framework formulated by John Ruggie, the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations.[74] Principle 7 tasks states to ensure "that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses". Where states identify gaps, "they should take appropriate steps to address them", including by "exploring criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses". [75] The same is also recommended in an international due diligence study published in 2012[76] as well as in a recent report commissioned by OHCHR and published in spring 2014.[77] The latter report emphasises that "domestic criminal law systems are largely untested as a means of providing legal redress in cases where business enterprises have caused or contributed to gross human rights abuses" despite the fact that many domestic criminal law regimes "include legal principles and rules on which a prosecution for causing or complicity in gross human rights abuses in a business context could be based". [78]

VI CONCLUSION

To conclude, "economic abuses" account for a variety of legal constellations that differ in terms of the kind and degree of challenges they raise. Therefore, the question whether

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Chamber, Case No ICTY-95-14-T, 3 March 2000 [184], the Trial Chamber stated that pillage included "organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory".

[72] Van den Herik and Dam-De Jong above n 9, 262-3.

[73] Id.

[74] *Human Rights and Transnational Corporations and Other Business Enterprises*, Resolution of the United Nations Human Rights Council, UN Doc. A/HRC/RES/17/4 (6 July 2011) endorsing the Guiding Principles on Business and Human Rights for implementing the United Nations Protect, Respect and Remedy Framework (annexed to A/HRC/17/31).

[75] Id, Principle 7 and commentary.

[76] O. De Schutter, A. Ramasastry, M. Taylor and R. Thompson, *Human Rights Due Diligence The Role of States* (2012), http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf (last visited 27 April 2015), 61.

[77] Zerk, above n 27, 12.

[78] Id, 40.

international criminal law is adequate to address "economic abuses" cannot be answered in the abstract. Rather, there are various legally distinct types of "economic abuses" that must be disentangled before we can ascertain the law's adequacy. To do this, I recommended a three-dimensional model to distinguish different types of "economic abuses" on the basis of whether the actor, the activity and the affected legal interest are economic or not. In order to consider how the model can assist in clarifying the debate on "economic abuses", I elaborated on three particularly relevant combinations of these aspects to demonstrate how each of the resulting type of "economic abuse" raises its own legal questions. The separation of "economic abuses" into various categories has revealed that the capacity for international law to address them varies significantly.

The three selected constellations emphasise the importance of disentangling the debate on "economic abuses". Painted with broad brush-strokes, the short analysis of the three selected types illustrated the usefulness of distinguishing which aspects of an abuse are economic. International criminal law holds relatively noticeable potential to address the first two constellations considered in this article, while the third constellation gives rise to particularly serious legal challenges. In the first constellation, an economic actor commits an abuse by harming a non-economic legal interest. Within this scenario, the economic actor is involved in the commission of a crime through an activity that is not inherently economic, for instance, by inciting security guards to injure protesters. At least in principle, international criminal law is capable of addressing the abuses in this first constellation. For constellation no. 1, I therefore concluded, in line with the finding by Jessberger and Geneuss that "de lege lata the key obstacles to actual prosecution of corporations or their employees are located not within the definition of crimes, but within the general principles of international criminal law, particularly the modes of responsibility". [79]

Where a non-economic actor engages in a non-economic activity and commits an international crime by threatening the economic legal interests of victims (constellation no. 2), international criminal law also offers potential – and not just in relation to the criminalisation of pillaging. This is because many crimes protecting life and bodily integrity also protect economic rights and interests and there are a number of well-established international crimes that can address conduct that harms economic rights and legal interests, such as crimes related to the appropriation or destruction of property, forcible transfer or deportation.

In comparison to constellations no. 1 and 2, constellation no. 3 presents the most complicated legal challenges. In scenarios in which the actors, the affected legal interests, *and* the activity are economic, international criminal law offers some avenues of redress but such scenarios remain the establishment of liability for economic actors (constellation no. 1) and the need to demonstrate that economic legal interests or economic rights can be harmed in such ways so as to amount to an international crime (constellation no. 2).

That said, the model is not without limitations. First, the consideration of a novel analytical framework alone will not be able to answer, let alone eradicate, the legal challenges posed by "economic abuses". Even in cases pertaining to constellations no. 1 or 2, the devil is often in the details and a finding that international criminal law is relatively adequate does not equate a conclusion that cases falling into these categories will be successful before a tribunal. Second, as with every model, there is a level of simplification involved in the binary division between the economic or non-economic nature of the three axes. It will sometimes be possible to contest the boundaries. For instance, it may not always be obvious whether an actor is acting on behalf of a corporation or on behalf of another, non-economic, actor, or whether the legal interest affected by the abuse is primarily economic or not. Third, the model does not address the varieties of different cases *within* each constellation. In particular, the category of "economic actors" is analytically broad and we saw that care must be taken to further

[79] F. Jessberger and J. Geneuss, 'Introduction', 8 *J. INT'L CRIM. JUST.* (2010), 695, 696..

distinguish sub-categories with actors as legal persons versus those in which the actor is a natural person.[80]

Yet, the separation of "economic abuses" in distinct categories provides a starting point for assessing the adequacy of international law in concrete cases and the model provides an analytical entry point for analysing the specific legal challenges of a factual scenario and to ascertain to what type(s) of "economic abuses" the conclusions reached in the literature pertain to. The motivation for this article stemmed from a concern that the debate on "economic abuses" must be disentangled if the adequacy of current international legal norms is to be assessed more easily and with nuance. As noted in the introductory section, some have expressed frustration with existing international law when it comes to addressing "economic abuses". [81] By examining three very distinct categories of harmful conduct with economic aspects, it became clear that it is unwarranted to conclude that international criminal law as a whole is entirely inadequate to deal with "economic abuses". Importantly, the complex difficulties related to the third constellation should not be mistaken for the comparatively less pronounced challenges of the first and the second discussed type of "economic abuses". Because each constellation gives rise to distinct legal challenges, care must be taken not to under- (or over)estimate the usefulness of existing law for some cases (or aspects of cases) that pertain to the debate on the legal accountability for "economic abuses". While all examined constellations raise real legal challenges, legal problems only seem to be one part of the challenge of establishing accountability for the various types of "economic abuses". For constellations no. 1 and 2, the scarcity of cases might be explained more by a lack of enforcement rather than by inadequacies in the law. Further research is warranted to explore this impression and the ways in which law enforcement actors understand their roles in relation to cases pertaining to these two constellations.

To conclude, differentiating the various types of "economic abuses" along the three suggested axes serves to avoid unnecessarily narrow (or unwarrantedly broad) conclusions about the reach and potential of existing international criminal law. Where international criminal law has the potential to address at least certain "economic abuses", such potential deserves to be explored even though reliance on international criminal law is far from a panacea. After all, it is only if prosecutors, lawyers, domestic legislators or truth commissioners make full use of the existing but imperfect international legal framework that we can change the fact that we still live "in a world where impunity, amnesty, and immunity ensure that even the central architects of systemic human rights violations are still about as likely to be held accountable as they are to be struck by lightning". [82]

[80] Others have further suggested distinguishing between various sub-categories of complicity, i.e. distinctions based on the level of involvement of the economic actor in the commission of the abuse. A. Clapham and S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (Background paper for the Global Compact dialogue on the role of the private sector in zones of conflict, New York, 21-22 March 2001), http://198.170.85.29/Clapham-Jerbi-paper.htm (last visited 27 April 2015).

[81] For examples, see above n 1.

[82] Schabas, above n 2, 426.