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Academic Foresights

## Corporate Criminal Responsibility at the ICC

*How do you analyze the present status of corporate criminal responsibility at the International Criminal Court?*

One question constantly being raised is the issue of corporate criminal responsibility at the international criminal tribunals, specifically the International Criminal Court (“ICC”). It is important to first outline what corporate criminal responsibility currently resembles under the Rome Statute before hypothesizing how it could play out over the next few years and before making recommendations on changes to improve the ICC’s role in combating genocide, war crimes, and crimes against humanity. There are three substantive limitations key to understanding corporate criminal responsibility, including the inability to charge legal persons (as opposed to natural persons), whether the alleged conduct meets the legal standard for gravity, and respecting the principle of complementarity. There are also several procedural limitations including triggering an investigation into the situation and fulfilling the requirements of jurisdiction. Ultimately, the current framework allows for the criminal prosecution of people not organizations. Companies can be implicated but are not responsible, even if the misconduct benefits the company rather than solely the individual. Although it is improbable that we will see any substantive changes to the Rome Statute over the next few years, it is not impossible.

Any analysis begins with triggering the investigative process. Article 13 outlines three different methods for triggering a preliminary examination into a situation: referral by state party, referral by UN Security Council, and self-initiation by the Prosecutor may trigger the process via *proprio motu* powers pursuant to Article 15. Of the situations currently under investigation, the least objectionable method, State referrals (5 referrals), has dominated the mode of triggering action, followed by the more controversial method, the Prosecutor exercising her *proprio motu* powers (3 self-initiated investigations), and lastly, also controversial in some respects, referrals by the security council (2 referrals).

Although historically state practice did not foresee the prosecution of corporations or business enterprises for criminal conduct and focused on prosecuting corporate directors and managers, by 1994 (the publication of the draft statute for an international criminal court) common law states had already moved away from that manner of thinking and civil law countries were slowly accepting that reality. Nevertheless, unless there is an amendment to the Rome Statute, only natural persons will be targeted for investigation

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and prosecution.

Not all international criminal tribunals are constrained by the “natural person” requirement. For example, the Special Court for Lebanon recently charged both natural (Ms. Karma Khayat and Mr. Ibrahim Al-Amin) and corporate persons (New TV S.A.L and Akhbar Beirut S.A.L.) with the willful interference with the administration of justice when disclosing confidential information regarding protected witnesses among other things. [1] Interestingly, International Humanitarian Law (“IHL”) already recognizes non-state actors as subjects. They have been included in treaties such as the London Charter following World War II.

There are other jurisdictional requirements to take into account. Jurisdiction can either be exercised over nationals of a state party to the Rome Statute (regardless of where the conduct takes place) or the alleged conduct must have taken place within the territory of a state party (regardless of whether the person is a national of a state party). As the statute limits jurisdiction to individuals, the individual’s nationality becomes important, not the place of business or where the corporation was established or where it currently holds its place of business.

One concern is that a director, non-national to state party, cannot be indicted if she does not personally step foot on the territory of a state party. This concern can be addressed by utilizing a theory of a co-perpetration liability, one who plans, instigates, or orders another can be held liable, even if that act was not within the territorial confines of a state party so long as the action took place within the territory.

Other important limitations to consider are temporal limits on prosecutable crimes. As a general bar, crimes committed before 1 July 2002 (entry into force of the Rome Statute) will not be investigated. Similarly, if a state accedes at a later date, the applicable law is unenforceable as to events taking place before accession unless there is a declaration (i.e., Article 12(3) declaration) made to that effect. For example, Palestine recently acceded to the Rome Statute on 2 January 2015, but retroactively declared the ICC’s ability to investigate crimes taking place after 13 June 2014 through an article 12(3) declaration. States can also indicate upon accession that it will not be bound for crimes under article 8 (war crimes) for up to seven years.

The last limitation on jurisdiction requires the alleged conduct to fall within one of the four categories of crimes: (1) The crime of genocide; (2) Crimes against humanity; (3) War crimes; or (4) The crime of aggression. With respect to business activities in conflict areas, one of the major concerns is not just the substantive crimes enumerated in the statute but the ancillary ones that fund and exacerbate the conflict situation. For example, a company could be involved in the illegal exploitation of resources, land grabbing, corruption, embezzlement, money laundering, or the illegal trafficking in arms, human beings, minerals, and drugs. If the ICC is unable to take these other crimes into account, then it is forced only to deal with part of the problem. Secondly, these are crimes that could be taken into account during the gravity analysis (see below) or in linking various criminal activities that are separated by time and space around the globe.

Finally, turning to a substantive matter, even if the court found that it has jurisdiction

over the alleged conduct of a business enterprise, there is another threshold that must be met - admissibility. Under article 17, a case is inadmissible if the principle of complementarity is not satisfied or if not of sufficient gravity. It is important to recall that the ICC is not trying to replace national courts or usurp sovereignty – the Court continues to stress the importance of national primacy - the ICC can only take action under certain circumstances. In analyzing complementarity, the ICC will focus on whether the home state has taken any genuine action against the accused or whether the state is unable or unwilling to do so. In other words, the ICC will focus on whether proceedings were intended to shield individuals, whether there is an unjustified delay in investigation or prosecution, whether the state's criminal justice system is independent and the proceedings are impartial, and lastly, whether the state has the material ability to investigate or prosecute the case.

This analysis can be illustrated with an example of a large multinational corporation from a developed country doing business in a developing country rife with corruption, plagued by armed conflict and with porous governing rules. In analyzing complementarity, the first question is whether there is an investigation. If the answer is no, then it turns on why. Is there just a reasonable delay? Is the state unable or unwilling to conduct an investigation? If the answer to the investigation question is yes, then the question would turn on the independence and impartiality of the process or whether it was meant to shield a perpetrator. In this example, developing states have rarely charged corporate leaders – especially for an ancillary role in the commission of international crimes - unless these persons were direct perpetrators. In this case, it would be possible for a case similar to this to be admissible before the ICC. However, the analysis would then turn on the next question – gravity.

The Prosecutor analyzes gravity by assessing the scale of the crimes, the manner of commission of the crimes, and impact of the crimes. This process acts as a filter; not all conduct merits a case before the ICC and gravity goes a long way in ensuring only the most serious offenses go before the court. In the previous scenario, if the violation occurred during a protest of a business activity and security forces arrived to protect private property in a one-off event, any resulting violation might not satisfy the gravity requirement. Of course, it depends on the circumstances.

Lastly, the Prosecutor also has some discretion when deciding whether to bring a case forward. Article 53(1)(c), a residual, catch-all provision, allows the Prosecutor to refrain from moving forward should the interests of justice so dictate. The Prosecutor therefore has some flexibility when deciding to bring forward. This provision is similar to Article 16, which allows the Security Council to defer an investigation or prosecution.

***In your opinion, how will the situation likely evolve over the next five years?***

These next examples represent a small sample of potential cases similar to those that could arise at the ICC over the next few years. There are several examples that illustrate the role of business in the commission of international crimes, either directly or indirectly. Of the next three cases, one is from the Nuremberg Tribunal, discussing a

direct role in the crimes charged, one from the International Criminal Tribunal for Rwanda (“ICTR”), illustrating the use of media to incite genocide, and one from the Special Court for Sierra Leone (“SCSL”), demonstrating how an ancillary commercial transaction funds and supports an armed conflict to devastating effect.

The IG Farben case [2] is perhaps one of the most egregious examples of gross human rights violations by a commercial entity. The commercial activities in question took place leading up to and during World War II. IG Farben was short for **Interessen-Gemeinschaft Farbenindustrie AktienGesellschaft** (emphasis added), a German conglomerate of chemical and pharmaceutical companies. IG Farben and its directors were charged with participation in extermination (what would be later considered genocide as it was not a “mainstream” concept at the time), enslavement and other crimes. Of particular note, Article 9 of the London Charter allowed the International Military Tribunal (“IMT”) to recognize certain organizations (or non-state actors) as criminal and under article 10, the IMT could charge its members, as in the IG Farben case. In the end, individuals would still be primarily responsible along side the organization.

The International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”) have also taken steps against illicit commercial activity taking place during an armed conflict. In the case of the Prosecutor v. Nahimana, Barayagwiza and Ngeze, also known as the Media case, the first two accused formed part of the steering committee that led to the creation of *Radio Télévision Libre des Mille Collines* (“RTLM”), a radio station that played a role in inciting genocide by branding Tutsis as “the enemy” and sympathetic Hutus as accomplices. Here, the legal person RTLM was not criminally charged because the ICTR statute only pertained to natural persons.

Similarly, the SCSL looked at the trafficking of “blood diamonds” for arms in the Prosecutor v. Charles Taylor case. [3] While Taylor was the first African leader to face an international tribunal, it is not a far stretch to imagine a future case in which a business director could stand trial for trafficking conflict materials for arms or charges of enslavement in the mining of the materials under a theory of indirect co-perpetration.

Of the three modes to trigger a preliminary examination, article 13(c), allowing the Prosecutor to exercise *proprio motu* powers to bring forward a case, appears to be the most likely means of initiating an investigation into alleged illegal conduct of corporate bodies. As states and the Security Council move forward at a conservative pace, this issue could move forward under a stable, secure, and independent Prosecutor. This trigger mechanism has the most flexibility and allows the Prosecutor to bypass state parties and the Security Council. In other words, state parties have had the ability to craft the statute and its mission, yet there have not been significant changes leading towards the targeting of businesses fueling armed conflicts and other crimes against humanity and the Security Council has only referred two situation to the ICC. This is not an affront to state parties nor the Security Council, but rather an unfortunate reality. First, the slow moving process is a byproduct of multilateral agreements and the difficulty in amending such agreements. Secondly, the Security Council must be able to survive a veto and pass a motion to refer a case to the ICC. Interestingly, neither Sudan

nor Libya fell under the jurisdiction of the ICC and the only way to bring the situation before the ICC was by Security Council resolution. It appears from these two cases the Security Council can bypass, at the very least, some of the jurisdictional requirements. Can and would the Security Council use its power to pursue business activity connected to crimes enumerated in the statute? Even if it chooses to do so, it would be subject to a veto of any of the five permanent members.

In contrast to the inaction of the Security Council and the ASP, in September of 2003, then ICC prosecutor Luis Moreno-Ocampo stunned lawyers attending the International Bar Association meeting with an announcement that the crimes taking place in the Democratic Republic of the Congo (DRC) would only stop when illegal business activity from companies in 25 countries ceased their activities. He also made known his intention to investigate the illegal export of natural resources, trade in arms, and the banking system helping fund these illegal business operations. In the end, Moreno-Ocampo did not pursue individuals for their roles in illegal business activities in the DRC as he had intimated. Nevertheless, it is not too much of a stretch to see a prosecutor take this stand as the institution becomes more established and more state practice.

Since that time, we have seen states take a bolder stance on business activities in conflict areas. The United States in 2010, passed Section 1502 of the Dodd-Frank Act [4] directing companies using conflict materials from the DRC to investigate and disclose. The US Congress acknowledged the conflict material trade helped finance the conflict which only exacerbated violence in the region, including sexual- and gender-based crimes. Similarly, the European Union has implemented regulations to curb the import and use of conflict minerals, including tin, tantalum, gold and tungsten from West Africa, Central Africa, and some regions in South America and East Asia [5]. As more states acknowledge certain activities contribute to sustaining armed conflicts or crimes against civilians, the ICC will gain political momentum to take these situations into consideration.

With respect to jurisdiction, the ICC can use either the nationality of the individual director/manager or the location of the alleged conduct to find jurisdiction. Moreover, even persons only indirectly associated with conduct leading to crimes enumerated in the statute could still find themselves within the crosshairs of the ICC. Under articles 25 and 28, persons can be found to be individually criminally responsible individually, jointly, through another person (regardless of whether that person is criminally responsible), or by failing to take reasonable measures to address illegal conduct after the fact. In other words, a director/manager could be held responsible for planning; instigating; ordering; committing (direct perpetration); aiding and abetting in the planning, preparation or execution of a crime; superior/command responsibility; co-perpetration (joint perpetration); indirect perpetration; and indirect co-perpetration.

Domestically, states have opened new avenues to allow victims to hold business enterprises accountable in civil court. Both Canada [6] and the United Kingdom [7] have included a novel duty of care when analyzing negligence under tort law – a supervisory duty of care. In both cases, this new duty was used to bring a domestic

superior duty of care. In both cases, this new duty was used to bring a domestic parent corporation to court under basic tort law where the activities of the subsidiary occurred abroad against non-nationals. Although these are not criminal courts, it is loosely analogous to a company paying a fine in a criminal court for illegal activities.

Lastly, meeting the gravity requirement can be problematic under certain circumstances. For example, the Prosecutor in the Registered Vessels of Comoros, Greece and Cambodia situation decided the underlying conduct on the flotilla did not meet the gravity requirement thereby declaring her intention to not move forward in the process. [8] Notwithstanding the fact that 10 activists were killed when Israeli commandos raided six civilian aid ships in international waters heading to Gaza, subsequent reports, including the autopsies of the deceased and the report of the fact-finding mission of the Human Rights Council, raised serious questions regarding the raid. Nevertheless, while the Prosecutor believed that there is a reasonable basis to believe that war crimes had been committed, because of the limited scale (only one of six ship had problems and only a small number of the total passengers were killed or injured), the gravity requirement was not met. As described earlier, isolated or limited incidents tied to business activities, unless part of some larger operation or “attack”, may fail to catch the gaze of the Prosecutor.

#### ***What are the structural long-term perspectives?***

There are two significant long term changes that would improve the ability of the ICC to address international crimes tied to commercial activity: (1) adding “legal persons” to article 25 and (2) extending jurisdiction to consider ancillary crimes tied to the main crimes under the statute as part of its case against the accused. There are also smaller changes that can be made without seeking an amendment to the statute: (1) clearly announcing the intention and policy of the Prosecutor to pursue business activity contributing to crimes falling under its jurisdiction and (2) re-evaluating the gravity analysis to give greater weight to secondary or tertiary effects.

Changing the Rome Statute to include corporate entities would be no small feat according to David Scheffer [9] speaking at Harvard on July 7, 2016. Scheffer’s concerns, *inter alia*, revolved around the implications of adding legal entities to the statute and how it would change the existing process. Moreover, other issues reemerge concerning the parameters of what a legal entity would include, for example, whether this new status includes state agencies, governmental corporations, etc... or the fact that some legal systems do not allow for criminal prosecutions against legal entities (for purposes of complementarity). These obstacles appear daunting but are not insurmountable. As more domestic legal systems adopt laws to punish legal entities, the ASP might see a benefit in having a neutral forum to separate the state from the prosecution of economic actors – especially in developing countries.

Nevertheless, the main impetus to include business organizations in criminal proceedings is two-fold: to give access to victims to reparations under article 75 and solidify the fact that non-state actors are subjects to, at the very least, IHL. While the ICC does not allow, what is known in civil law traditions as “action civile”, judges are

able to order, among other things, restitution, compensation, or rehabilitation. Failure to add the business entity to the case limits where compensation comes from to pay for reparation of large scale atrocities. In other words, corporate assets would be available to pay for reparation to serious violations of international law rather than from just the personal assets of the manager or director. Lastly, IHL already recognizes non-state actors as subjects; extending this principle to the entirety of the Rome Statute to include non-armed conflict related conduct (i.e. crimes against humanity in a non-armed conflict situation) will begin to dismantle outdated procedural requirements. In effect, the notion of non-state actors as subjects of international law will begin to move beyond IHL, *lex specialis*, to general international law.

Next, the ASP should consider broadening the types of crimes one can be punished for beyond genocide, war crimes, crimes against humanity and the crime of aggression to include ancillary crimes such as the illegal exploitation of resources, land grabbing, terrorism, corruption, embezzlement, money laundering, theft and extortion, and illegal trafficking in arms, human beings, minerals, and drugs. In other words, the first set of crimes described is merely the band aid, whereas the second set of crimes targets some of the underlying causes or the vehicle that prolongs these serious violations of international law.

Lastly, there are two policy considerations that can be changed to better deal with the fact that the crimes enumerated under the statute are not committed in isolation from other forms of activity. First, the ICC policies should clearly indicate the intention of the Prosecutor to go after actors supporting the underlying crimes; this includes those who are linked to the crimes by activities that provide material resources or financial support. The gravity analysis should also be changed to reflect this change in position. Some cases that appear to be isolated incidents and which would normally not meet the gravity threshold, might be linked together by the ancillary activities such as money laundering, selling of conflict materials, or trafficking of humans. For example, take an arms dealer trading weapons for blood diamonds, then turns and uses that money to buy and sell more arms to another buyer – perhaps in the same conflict or another. By focusing on just the buyer, the Prosecutor might find that the incident would not meet the gravity threshold, similar to Comoros situation. However, by focusing on both the arms buyer and dealer, we see that this incident is really only a small part of a much larger web – one that should be considered when analyzing gravity.

#### **Endnotes:**

[1] See *In the Case Against New TV S.A.L. and Karma Mohamed Thasin Al Khayat*; See also *In the Case Against Akhbar Beirut S.A.L. and Ibrahim Mohamed Al Amin*; <https://www.stl-tsl.org/en/the-cases/contempt-cases> .

[2] *U.S. v. Carl Krauch et al. (1947)*, known as the "I.G. Farben Case", [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-10.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf).

[3] *The Prosecutor v. Charles Taylor*, SCSL-03-1-T, 26 April 2011.

[4] “H.R. 4173 — 111th Congress: Dodd-Frank Wall Street Reform and Consumer Protection Act.” [www.GovTrack.us](http://www.GovTrack.us). 2009. June 29, 2017 <<https://www.govtrack.us/congress/bills/111/hr4173>>.

[5] [http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc\\_155423.pdf](http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf).

[6] Choc v Hudbay Minerals Inc., 2013 ONSC 1414 (CanLII), <http://canlii.ca/t/qlr0n> .

[7] HRH Emere Godwin Bebe Okpabi & Ors v. Royal Dutch Shell Plc & Another, Court of Appeal - Technology and Construction Court, January 26, 2017, <http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/Judgment-26-Jan-17-FINAL.pdf> .

[8] <https://www.icc-cpi.int/comoros>

[9] David Scheffer is an American lawyer and diplomat who served as the first United States Ambassador-at-Large for War Crimes Issues. He participated in the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. He also led the U.S. negotiating team regarding the International Criminal Court.

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