

Which International Jurisdiction for Corporate Crimes in Armed Conflicts?

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The commission of gross violations of human rights and international humanitarian law (“IHL”) requires the participation of many actors, including businesses, since economic life does not cease with the start of an armed conflict. Various types of businesses play a role in armed conflict: for example, the extractive industry, private military companies, and private banks do so by allowing the flow of money and financial transfers. In cases of gross violations of international law involving corporations, it can sometimes be difficult to identify who is responsible for a particular crime. This is notably due to the complex structure of corporations and, according to a majority of scholars today, the lack of corporate legal personality in international law.

IHL applies in the context of armed conflict, during which it is considered as *lex specialis*.¹ Grave breaches of IHL are sanctioned by international criminal law (“ICL”), which gives rise to international crimes.² The idea of international crime is not new, but there is no universal definition of what exactly can amount to it³. Today, it is accepted that the Rome Statute, which created the International Criminal Court (“ICC”), provides definitions for crimes such as war crimes, crimes against humanity, genocide and aggression,⁴ albeit limited to cases that fall within the Court’s jurisdiction.

International tribunals prosecute individuals for IHL violations, regardless of the lack of their legal personality in international law. This is founded on the belief that some crimes should be governed by international law, rather than domestic law, because of the *gravity* of

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¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Rep. 1996, ¶ 22-428 (July 8); Juan-Carlos Abella v. Argentina, Report No. 55/97, Inter-Am. Ct. H.R. (ser. C) No. 137 ¶ 157-165 (Nov. 18, 1997); Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67 ¶ 32-34 (Feb. 4, 2000); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004, ¶ 105-109 (July 9).

² Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT’L L. REV. 1040, 1044 (2009).

³ It was the post-WWII courts at Nuremberg and Tokyo that established a list of international crimes for the first time, although limited to their jurisdiction. It is important to underline, that the international crimes established in these courts were different from domestic crimes known up until that time. Professor Antonio Cassese proposed several common cumulative factors to identify international crimes. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 11-12 (3rd ed. 2013).

⁴ Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90.

the crime. Some argue that core crimes⁵ hurt universal values respected by all actors of international community. Consequently, international justice can eliminate obstacles that are usually present in domestic courts, including prescription and immunities.⁶

In the course of contemporary international legal development, the remit of international crimes naturally extends to corporations alleged to be responsible for core crimes. Crime in itself is not limited to individuals as authors of crime. By prosecuting corporate executives for their involvement in international crimes, the Nuremberg trials⁷ opened a new era, progressively erasing the traditional legal theory of *societas delinquere non potest*, which stated that enterprises cannot be held criminally responsible. It also opened new opportunities for international criminal justice to prosecute not only corporate executives, but also corporations, as legal entities.

INTERNATIONAL CRIMINAL COURT (ICC) AND CORPORATE CRIMINAL LIABILITY AS APPROPRIATE JURISDICTION

From the very start of the negotiations to create the ICC, the issue of whether to provide for jurisdiction over legal persons was controversial because of the diverse ways that national legal systems addressed corporate criminal responsibility.⁸

In its final version, the Rome Statute excludes legal persons from its jurisdiction.⁹ The inclusion of legal persons would, seemingly, be constrained primarily by the principle of

⁵ Core crimes are considered to be war crimes, crimes against humanity and genocide.

⁶ DROIT INTERNATIONAL PÉNAL 67 (Robert Kolb et al. Eds., 2008), according to Robert Kolb, it is widely recognized today that there is not a prescription for an international crime. *See also* Rome Statute of the International Criminal Court, *supra* note 4, at arts. 27, 29.

⁷ NUREMBURG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. VI (1950) (regarding the *Flick Case*); NUREMBURG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. VII (1950) (regarding the *I.G. Farben Case*); NUREMBURG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. IX (1950) (regarding the *Krupp Case*).

⁸ The United Nations Committee on International criminal court has issued a report on the proposal for the future status of court 5 September 1951. Regarding the article 25 of the proposal, the Committee asked: “Should the court be competent to try individuals only, or should it also be competent to try legal entities?” United Nations Committee on International Criminal Jurisdiction, *Draft Statute for an International Criminal Court*, U.N. Doc. A/AC/48/4 (Sept. 5 1951); Subsequently, the Committee rejected the Australian proposal to include legal persons in the statute stating that the courts of Nuremberg and Tokyo were not ready to recognize a new principle of corporate criminal liability, U.N. G.A.O.R., 9th Sess., Suppl. No. 12, U.N. Doc. A/2645 (1954) (proposition of revised article 25). Notwithstanding the various attempts to provide the basis for the ICC, the project actually began in earnest in 1992 with the request by the General Assembly of the Commission to develop the proposal for the future status of court; G.A. Res. 47/33 (Nov. 24, 1992); G.A. Res. 48/31 (Dec. 9, 1993). *See also* Andrew Clapham, *The Questions of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 171 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

⁹ For detailed comment of this article, *see* Kai Ambos, *Article 25, Individual criminal responsibility*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 743-770 (Otto Triffterer, ed., 2008). For the historical process of Rome statute negotiations regarding the legal persons, *see* William Schabas, *International criminal law and the business world*, in *LA RESPONSABILITÉ DES ENTREPRISES MULTINATIONALES EN MATIÈRE DE DROIT DE L’HOMME* (Emmanuel Decaux, ed., 2010). *See also* Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2 (Feb. 4, 1998); *Draft Statute for the International Criminal Court*, U.N. Doc.

complementarity. The ICC is the “last resort” jurisdiction; it can prosecute only if states were unwilling or unable to do so. But many of them do not recognize legal persons in their internal orders, which would challenge the effective implementation of the principle of complementarity.¹⁰

The decision to exclude legal persons was, however, far from unanimous. As underscored by Professor Andrew Clapham, though the negotiations failed to include legal persons in the Rome Statute, the discussions during negotiations reinforced the idea that there was a need for further development of corporate liability.¹¹ The first opportunity to do so arose when Prosecutor Luis Ocampo announced the investigation of corporations for crimes committed in the Democratic Republic of Congo.¹² But as he had no legal basis, the corporations do not appear in the indictments. It is regrettable to note, that while the Prosecution has considerable discretion over the choice of affairs to investigate, the procedures *motu proprio* were limited¹³ and no executive directors were indicted either. Although the option to prosecute corporate executives exists within article 25 of the Rome Statute, the modification of the Statute to include corporations would provide the most opportune solution for both victims and international justice. Not only would the ICC qualify the crimes and pronounce sanctions for them, but victims already have rights that no other international criminal tribunal accorded them previously (such as participation in the procedure and obtaining reparation through the Trust Fund for Victims). Thus, any potential financial sanction of legal persons would assist in allocating potentially significant reparation amounts.

IS INTERNATIONAL ARBITRATION A SUBSTITUTE FOR A CIVIL OR COMMERCIAL PROCEEDING AND AN APPROPRIATE ARENA FOR INTERNATIONAL CRIMES?

Many commercial contracts signed between states and corporations have an arbitration clause in which the parties agree to settle any contractual disputes in an arbitration proceeding rather than in a court of law. But when it comes to corporate core crimes, who would sign the arbitration agreement in the name of victims? Their legal representatives? The state? The same state that often proves too weak to process civil or commercial disputes?

Arbitration is a process where the parties may have unequal power and the corporation can easily impose conditions through the arbitration agreement. Many arbitration agreements signed between states and companies contain clauses of immunity from

A/CONF.183/2/Add.1 (Apr. 14, 1998), U.N. Doc. A/CONF.183/2/Add.1/Corr.1 (May 26, 1998); Draft Rules of Procedure Revision for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.2/Rev.1, at art. 23 (Apr. 15, 1998).

¹⁰ Albin Eser, *Individual Criminal Responsibility in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 778-79 (Antonio Cassese et al. eds., 2002); Harmen van der Wilt, *Corporate Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. OF INT'L L. 43, 45 (2013).

¹¹ Clapham, *supra* note 8 at 140.

¹² Press release, Office of the ICC Prosecutor, Communications Received by the Office of the Prosecutor of the ICC, 009-2003 (Jul. 16 2003).

¹³ See Situation in the Republic of Kenya, ICC-01/09-19-Corr, Pre-Trial Chamber II Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010).

criminal prosecution. Indeed, arbitration agreements allow parties broad flexibility in designing arbitral procedures, including choice of applicable law and which acts will be prosecutable, which is why corporations favor this type of dispute settlement.

Arbitration procedures are most often private and the final awards are confidential, permitting the corporation to continue its (criminal) business with full discretion. Furthermore, it discards one of the basic criminal procedure principles as there can be no appeal of the arbitration award.

Therefore, it appears that arbitration stands in full contradiction to the ideology behind international crime and its prosecution. It is not an appropriate institution to process international crimes, and it is highly unlikely that it would provide victims with satisfaction or justice.

NEW TRIBUNAL: INTERNATIONAL COURT FOR HUMAN RIGHTS AND HUMANITARIAN LAW?

There are several regional courts with jurisdiction over human rights violations.¹⁴ Nevertheless, not all regions have a court on human rights. Furthermore, some regions that do have them have technical, political or financial difficulties that constrain the courts in their pursuit of human rights violators. Amending their statutes and allowing the court's jurisdiction over corporations would inevitably require more experts, research, and logistics in international business, criminal and humanitarian law.

However, one alternative might be to create a new international court with jurisdiction over human rights and international humanitarian law violations. Such a court could act as universal human rights court—which is lacking today—with both human rights (with its derogation systems) and IHL as *lex specialis* and its basic principles can govern *ratione materiae* jurisdiction (jurisdiction over core crimes). Various UN bodies already report on violations of both HR and IHL by natural persons, including non-state actors and corporations. In this new ad hoc jurisdiction, judges could identify human rights and IHL violations, and pronounce an appropriate judgment accordingly, taking a step further from the report phase. It could also provide the possibility for victims to claim compensation, while international justice could be attained. However, not many states would be willing to finance the new international tribunal.

To this day, the doctrine has not fully seized the opportunity opened by the Nuremberg trials; the main focus remains on individuals, business leaders, or states, leaving aside legal persons like corporations. Their role and implication in international crimes is significant and it should not be left in impunity. International criminal law remains the best option for the prosecution of legal persons for international crimes.

¹⁴ European Court for Human Rights, Inter-American Court for Human Rights, African Court for Human Rights, The Arab Human Rights Committee's experts.