Business and International Crime

What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?

A summary of the Chatham House International Law Discussion Group session on Thursday 23rd February. The Speakers were Anthony Dworkin, Executive Director of the Crimes of War Project and Hakan Friman, Visiting Professor at University College London and former Associate Judge of Appeals in Sweden. The meeting was chaired by Elizabeth Wilmshurst and was attended by lawyers, academics, and representatives of governments and civil society.

Anthony Dworkin began by providing the historical background to the current issues raised by corporate international criminal responsibility. As early as the Nüremberg trials, prosecutors attempted to implicate German industrialists in indictments for "crimes against peace". He quoted Justice Robert Jackson, Chief Counsel for the United States at Nüremberg, in a speech made during the trial of Gustav Krupp: "It has at all times been the position of the United States that the great industrialists of Germany were guilty of the crimes charged in this Indictment quite as much as its politicians, diplomats, and soldiers." After Nüremberg, there followed a series of landmark "industrialist trials". These did not involve allegations of crimes associated with the crime of aggression, as in Nüremberg, but resulted nevertheless in convictions of other war crimes for direct and indirect involvement of the accused. These cases included:

- *G. Farben* (in a United States court) involved 12 officials of a chemical company who were convicted of plunder for taking possession of industrial facilities in occupied territory and of slavery for exploiting concentration camp inmates in their factories (including a site at Auschwitz, famous from its description in Primo Levi's "If This is a Man");

- *Krupp* (in a United States military tribunal), in which several officials of the company were also convicted of plunder and slave labour, for appropriating factories in France and the Netherlands and for using the labour of POWs and other coerced workers from Eastern Europe;

- The famous *Zyclon B* case in a British military court saw Bruno Tesch, the owner of the company that supplied Zyclon B gas to concentration camps, as well as two other officials, charged for arranging shipments of "poison gas used for the extermination of allied nationals in concentration camps, well knowing that the said gas was so to be used." The case resulted in one aquittal and in the conviction and execution of Tesch and the remaining defendant;

- *Washio Awochi*: the Japanese businessman was convicted for the war crime of "enforced prostitution" for having coerced Dutch women in Batavia into working in his brothel, under threat of being turned over to the Japanese authorities if they did not comply.

All the above cases can be characterised by two defining features. The guilty were convicted for their actions *as individuals*, not as representing their companies. Secondly, the cases highlight the idea of responsibility flowing from entertaining a commercial relationship with war criminals, as well as from committing crimes directly.

These and other individual prosecutions were then set in the wider context of the evolving framework of international law relating to conflict – the Geneva Conventions, their Additional Protocols, the jurisprudence of crimes against humanity at peace as well as in wartime, the law on genocide, etc. Mistreatment of civilians, abuse of prisoners, indiscriminate attack, the use of unnecessarily devastating weapons, sexual enslavement and abuse, destruction of property and

forced displacement and confinement were being progressively more clearly established as international crimes. Among these developments were occasional calls for action against businesses.

In the 1990s international criminal justice experienced a revival with the International Criminal Tribunals for Former Yugoslavia and Rwanda as well as the International Criminal Court, among other initiatives. Of particular relevance to corporate criminal responsibility was the case in the ICTR which resulted in the conviction of two directors of the radio station "RTLM" for incitement to genocide in Rwanda.

But significant developments were occurring at the national level as well. There was the Dutch case of Frans Van Anraat, known as "Chemical Frans", who in December 2005 was convicted of complicity in war crimes for supplying chemical components to Saddam Hussein. The industrialist was quoted as objecting: "The images of the gas attack on the Kurdish city of Halabja were a shock. But I did not give the order to do that." It was contended, however, that he was aware of the ultimate purpose and destination of his supplies, and that this was sufficient to impute responsibility.

The context was further widened to incorporate the changing nature of the world economy and of the dynamics of conflict: these were two developments relevant to the question of corporate responsibility. The rise of multinational corporations, both economically and territorially, gives rise for concern, in particular where they operate in conflict zones. This increased awareness of the potential and actual effects of their business in conflicts around the world, indicated for example by the appointment of a UN Special Rapporteur on Human Rights and Transnational Corporations, has contributed enormously to the development of the notion of corporate complicity in international crime.

Also relevant is the role of resource exploitation in fuelling conflict: A World Bank Report states that "All rebel groups that succeed in escalating violence to the scale of civil war must therefore in part be business organizations", focusing on the extractive sector. The evidence suggests that civil wars are most likely in countries where there is a high dependence on resource extraction, prominent examples being Angola, Sierra Leone, and the Democratic Republic of the Congo (DRC). Indeed, there are instances where rebel groups sell mineral resource extraction rights over territory they have not yet even acquired control of, channelling the proceeds into that very territorial acquisition.

These and other concerns spurred the debate on the appropriate level of legal responsibility that corporations should have for their business. Among the significant contributions to that debate, the following were cited:

- The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, whose reports have implicated several companies in the continuing conflict in the DRC, has suggested a framework for different categories of corporate responsibility;

- Human Rights Watch produced a report, "The Curse of Gold", showing the direct relationship between the plight of the rebel groups in the DRC and their control and exploitation of gold mines;

- The first Security Council Resolution on the subject, Resolution 1625 of 14 September 2005, reaffirmed the Council's "determination to take action against illegal exploitation and trafficking of natural resources and high-value commodities in areas where it contributes to the outbreak, escalation or continuation of armed conflict";

- Similarly, in Resolution 1653 of 27 January 2006, the Security Council was "*Aware* that the link between the illegal exploitation of natural resources, the illicit trade in those resources and the proliferation and trafficking of arms is one of the factors fuelling and exacerbating conflicts in the Great Lakes region of Africa, and especially in the Democratic Republic of the Congo".

There is an incresed sensitivity to corporate involvement in the arena of international criminal

prosecutions, too. David Crane, former Chief Prosecutor of the Special Court for Sierra Leone, has stated that in order to fulfil the aim of prosecuting those most responsible, "One must appreciate that rarely do these conflicts involve combatants alone. External players consist of States, international criminal cartels, possibly corporations, terrorists, and heads of government acting in their personal capacity in a type of joint criminal enterprise." This ambition, however, has not been fulfilled yet with respect to corporate actors – the Special Court has not to date heard any case directly involving business.

Equally, before a press conference in July 2003, the Chief Prosecutor of the International Criminal Court Luis Moreno Ocampo stated that "[T]he fighting ... in Ituri [DRC] seems to be the outcome of ethnic strife and of the struggle for local power, intertwined with national and regional conflicts. All of these aspects of the situation are fuelled by the way natural resources are exploited. ... [T]he Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed." Mr Ocampo denounced the "...links between the activities of some African, European and Middle Eastern companies and the atrocities taking place in the Democratic Republic of Congo."

This informative *tour d'horizon* was concluded with the suggestion that the most fertile ground for further breeding the concept of corporate criminal responsibility for international crimes might indeed be the DRC, with its multiple actors and clear links between commercial interests and conflict. While several intentions to this effect have been voiced, hopefully more practical results would follow. Finally, two themes were identified as necessarily running through the debate on corporate criminal responsibility: on the one hand, the increased awareness that following commercial and financial leads does reveal underlying fundamental responsibilities; on the other, that this raises complex questions surrounding the necessary level of involvement in a crime to legally assign responsibility.

Hakan Friman took the discussion to more technical aspects of prosecution of corporate actors in connection with international crimes. Defining the scope of his contribution, he stated that he would focus on the crimes of genocide, crimes against humanity and war crimes, all subject to international criminal jurisdictions (like the ICTY, ICTR, and the ICC) or to hybrid or "internationalised" courts, such as the Special Court for Sierra Leone. In addition, he would consider other serious international crimes only subject to domestic jurisdictions, such as torture. The selection also reflects the crimes for which many states exercise extraterritorial criminal jurisdiction. Other international crimes or human rights violations were outside the scope of his inquiry.

Turning to the relationship between commercial transactions and international crimes, it must be remembered that corporations are usually not accused of being the principal perpetrators of the criminal acts in question. This theme focuses attention on the notions of complicity, and the different forms that it may take:

- *"Direct corporate complicity"* – as in the forced labour and plunder cases in Germany and Japan after WWII, this implies "knowingly assisting a state... in violating customary international law."

- *"Indirect corporate complicity"* – where the corporate actor is not the perpetrator but benefits from crimes and violations by their host government. In this case, acquiescence is insufficient to prove complicity – there must be some form of action and encouragement on the part of the company.

- *"Silence or inaction in the face of international crimes"* - an example of this would be the continued investments by certain companies in *apartheid* South Africa. It is very difficult, however, to characterise these activities as 'complicit'.

There were three themes:

- Corporate criminal liability v. individual criminal liability

- International prosecutions v. national prosecutions
- Criminal liability v. civil liability

Individual Criminal Liability

Because the individual is the primary subject of criminal liability in modern legal systems, superseding collective responsibility, in principle nobody can be held to account for acts or omissions of a group to whom he or she belongs, unless by their position they have personal responsibility for particularly conduct. Further, no one can be held liable for offences perpetrated by another person. Participation, however, direct and indirect, can be criminalised, rendering the participant a perpetrator in turn. Indeed, criminal liability may even occur if the intended crime does not ultimately take place, following a preventive logic. Actions falling within this category of inchoate crimes include: Planning; Ordering; Attempting; nciting; Conspiring.

For the crimes relevant here, criminal responsibility flows from international law and is implemented by many states (recently, states have been further spurred to act domestically through the establishment of the ICC and its complementarity regime). These crimes, with the exception of torture, are also the subject of several international prosecutions, through the jurisprudence of which the concepts of complicity and 'joint criminal enterprise' have been extensively developed. The ICTY and ICTR, for example, have treated those acts as constituting the “commission” of a crime.

Corporate Criminal Liability

All states recognise that corporations can be held accountable if they cause harm to others. However, accountability takes many forms, through criminal, civil, or administrative proceedings. Here the collective responsibility of the enterprise is concerned. Many domestic systems admit of criminal responsibility for 'juridical persons', not only individuals. Indeed, in continental Europe it was common until the French Revolution, then to re-emerge with the rise of industrialisation. International criminal law is increasingly interested in corporate liability, suggesting that the notion of individual criminal responsibility alone does not always reflect the relevance of the crime to the corporation.

However, the concept is dealt with in widely differing ways, and raises several problems: which crimes? Whose actions or omissions? Whose intention?

International Prosecutions

The jurisdictions of the ICTY, ICTR and the ICC, as well as of the Special Court for Sierra Leone, are limited to the prosecution of natural persons, individuals. With reference to the prosecutions in Germany and the Far East mentioned above, it must be remembered that in those fora it was individuals being prosecuted. Nevertheless, the postwar military tribunals did establish that corporate entities had violated certain laws of war, and the Charter of the Nüremberg Tribunal did enable groups or organisations to be declared 'criminal', rendering membership a criminal offence. In the Tribunal's proceedings, however, the competence was not used to punish mere membership of a criminal organisation such as the Gestapo. Instead, the Tribunal focused on the notion of conspiracy, the “common purpose theory”, when addressing the involvement of such organisations. In modern times, the above mentioned international tribunals and the ICC do not dispose of the concept of corporate crime, strict liability or vicarious liability (the latter two being relevant concepts in domestic legislation on corporate responsibility), nor do they have the power to criminalise a particular organisation.

Criminal liability of juridical persons was proposed at the Rome Conference leading to the establishment of the ICC. The original wave of support it gained subsided and in the end no consensus was reached, thus limiting the Court's jurisdiction to individual responsibility. It was suggested that this was because the countries where corporate liability did not exist did not wish to see it introduced at the international level, particularly in light of the complementarity principle. They feared that their obligations to prosecute domestically might force them to develop corporate liability in their legal systems for them to be able to complement the ICC regime.

The discussion then analysed the jurisprudence of international tribunals in more depth.

Complicity

The ICTY and ICTR have used the concept of aiding and abetting or otherwise assisting in the commission of a crime. The elements of this crime must involve: an act by the principal; practical assistance, encouragement, or moral support by the accessory; a substantial effect on the perpetration of the crime; knowledge that the accessory's acts assist the perpetrator. There need not be a common purpose or plan, however.

Article 25.3.c of the Rome Statute differs from that formulation. It does not require a substantial effect, but includes “providing the means for ... commission” of the crime. On the other hand, complicity must involve an intention to facilitate the commission of the crime, thus presenting a higher mental element alongside a lower material one.

Common Purpose Doctrine

Also known as 'joint criminal enterprise', the doctrine has been quite extensively developed by the *ad hoc* Tribunals and is present also in the ICC Statute (Article 25.3.d). Some controversy has arisen over the Tribunals' jurisprudence, particularly in that it extends the doctrine to crimes outside the plan or common purpose but that are considered “a natural and foreseeable consequence of the effecting of the common purpose” and the accused was either reckless or indifferent to that risk.

The Tribunals, however, have not used the doctrine of common purpose against business people. In the ICTR, Colonel Bagasora is charged with genocide and other crimes, including an allegation relating to the procurement and distribution of weapons to the militia in Rwanda. Bagosora's arms broker has not been indicted for complicity, nor will he be in the future, seeing as how the Tribunals no longer open new indictments.

The Tribunals’ relative reticence can be explained by their focus on the persons that bear the greatest responsibility for crimes. Prosecutions of business leaders are therefore less likely to come before them than those of politicians or military officials.

Domestic Prosecutions

At the national level, international crimes have been used against business leaders in certain cases, showing a growing support for the doctrines beginning to be developed:

- Guus van Kouwenhoven, a Dutch arms trader, was indicted in March 2005 for war crimes against Liberian citizens and for violating the UN-sanctioned arms embargo on Liberia

- In December 2005 the Hague courts convicted Frans van Anraat (mentioned above) for aiding and abetting war crimes committed by Saddam Hussein. The case is currently on appeal.

Finally, the distinction between criminal and civil procedure was addressed to highlight its relevance to corporate liability for international crimes.

The question of criminal sanctions v. civil sanctions

Civil and criminal sanctions often go hand in hand in some domestic jurisdictions (although the latter apply to individuals). For some states, particularly those sceptical of universal jurisdiction, civil procedure offers a good alternative. The most obvious example is the United States' Alien Tort Claims Act, enabling foreigners to sue alleging a violation of international law. This was followed by similar legislation in the same vein, such as the 1991 Torture Victims Protection Act, which also allowed US citizens to sue.

Discussion

In discussion the question was raised whether the financing of arms etc for a conflict was

enough to constitute complicity in war crimes for the purpose of the ICC. It was suggested that it might be, provided the necessary knowledge was established. However, establishing knowledge and consequent responsibility might give rise to problems given the structure of decision-making, for example in relation to financing policy, within companies. Another example was whether a South African company could be liable for sending mercenaries to the Sierra Leone war. It was thought that while no prosecution of companies has as yet been launched in the current international framework, domestic jurisdictions could undoubtedly hold that company liable.

The question was raised as to whether it was useful to prosecute companies as opposed to individual officers. On the one hand it could be particularly advantageous for compensation purposes, given the assets of companies. However, there were several conceptual problems yet to be overcome. There was an ongoing debate in the UK about corporate manslaughter. It was argued that the levels of responsibility mentioned above did not easily translate into domestic law. In addition, there were several problems relating to the supply chain. Wasn't personal liability better in this light? An argument in favour of corporate liability was that the company was able to continue and is liable to repeat its harmful actions after the convicted person is replaced. Furthermore, from the perspective of the ICC, which has the power to order compensation, the financial advantages of convicting companies as opposed to individuals is relevant. It was remarked that the postwar cases, though directed at individuals, were followed by the dissolution of the companies, although this was an act of the occupying powers.

In the context of the relationship between civil and criminal sanctions, the question was asked whether the ICC prosecutions office should be creating networks with civil lawyers. It was thought unlikely that this should be within the prosecutor's remit, but that useful contacts could be built and were being built for example by the arm of the ICC in charge of the victim's fund. This should not, however, raise too many expectations.

In relation to the ICC's involvement, it was suggested that perhaps the Court would over-stretch itself if it included corporate actors in its mandate. This was indeed recognised as a risk, adding that the ICC might only react to very direct and extreme corporate involvement.

Finally, a more general question was put about how the law can provide an answer to the political question of the level of responsibility of companies? It was argued that there are some clear complicity situations and that, further, the application of criminal law in different domestic jurisdictions does not vary as widely as might be expected. However, the fact that international regimes have their own set of doctrines does add to the complexity of the issue.