Punishing the financiers and enablers of atrocities: individual criminal responsibility of business-executives and corporations

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Context

• Discussion to focus:
• Role of corporations in situations of conflict
• Effect on impunity on the phenomenon
• Can international courts prosecute corp or individuals who contribute financially to int’l crimes
• What can States do to effectively invest. and prosecute high level business executives and corporations
The Criminal Justice Project

• “Crimes committed against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Nuremberg Tribunal, vol. 1, 223 (1947)
Two Principles of Nuremburg

• Individuals should be held accountable for the most serious international crimes (need for accountability).

• Individuals should only be punished through a fair trial which safeguards the rights of the accused (importance of fair trials).

Judge Philippe Kirsch, President of the ICC, September, 2006
ICC JURISDICTION

• Jurisdiction over individuals under the principle of complementarity i.e. states unable and unwilling to prosecute

• Corporations not subject to criminal liability under the ICC

• Individual corporate executives may be prosecuted
The push back to corporate inclusion under ICC

• inclusion of corp within ICC jurisdiction (promoting victim’s compensation): Statute negos

• Pushback by majority of delegates:
  – Evidentiary challenges of prosecuting legal entities
  – Many legal systems rejected criminal liability of corp.
  – Battle of systems led to rejection of inclusion.
Nuremberg Philosophy incorporated

• “international crimes are committed by men, not by abstract entities”

• Art. 25(1) RS ICC jurisdiction limited to “natural persons”.

• OTP may prosecute corporate officers, managers, and employees **BUT not the corporate entity itself.**

• Nuremburg, ad hoc Tribunals, the ICC prosecutions of corporate entities.
Recognition of corporate complicity to international crimes

- “Financial transactions...for the purchase of arms used in murder, may well provide evidence proving the commission of such atrocities”

- Those in direct operations in the extractive industries “may also be the authors of crimes, even if they are based in other countries”.

  Moreno Ocampo, ASP, September, 2003

- “Office will seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.” OTP Policy paper on case selection and prioritisation, 15 Sept. 2016, para 7
Corporations implicated

• Corp could be implicated in, and be found criminally liable for violations of int’l crim.

• E.g. illegal extraction of natural resources; torture, rape, murder, genocide, CaH etc

• To extent that executives play a role in these activities, more likely to remain behind the scenes, issuing secret orders, turning a blind eye to efficient business means or supplying resources.
Practical e.g.’s of corporate complicity

• Note: numbers of death and IDPs in the Ituri district of DRC

• Findings of UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC: investigated the extent to which investment in the extractive industries fueled the war.

• 85 Companies involved in business in the region breached Guidelines for Multinational Enterprises of the OECD.

• Panel named specific Congolese and international business persons as well as high ranking military officials from Uganda, DRC, Zimbabwe and Rwanda

• Existence of elite networks of political, military and business leaders exploiting resources in the region.

• See UN Doc. S/2002/1146, 16 Sept. 2002
Practical e.g.’s of corporate complicity

- Involvement of Big Transnational Private Military and Security Companies (PMSCs) in Energy Sector; Transitional Societies; usage of branding

- e.g. DynCorp (UN in Bosnia); G4S and Armor Group in Afghanistan; Saracen Uganda in DRC; Securitas; Blackwater (Academi)/Aegis/ArmorGroup in Iraq; CACI and Titan (Iraq); IDG Security; DAS Air (transportation of coltan in DRC)

- Chiquita Brands Int’l case: The contribution of Chiquita corporate officials to crimes against humanity in Colombia

See Lou Pinget, “Dangerous Partnership: Private Military & Security Companies and the UN, June 2012


What is the Current problem?

- Weak laws enabling avoidance of corporate personnel’s accountability

*RSA Regulation of Foreign Military Assistance Act number 15 of 1998*

- Governments foster culture of impunity
Re-igniting the Conversation

- ROLE OF NGOs, PVT SECTOR AND GOVTS

- Art. 15 Communication e.g. of Chiquita Brands

- ICC provisions viz- art 25(3)(d)(ii)RS to prove contribution liability= mens rea and actus reus of crime
- Less rigorous means of holding corporate criminal accountable. Just prove conduct contribution

- Aiding and abetting under art 25(3)(c) RS; & art. 28 (a)(b)RS Command Responsibility (Bemba Judgment)/ accomplice/joint liability.

- “acting knowingly”

- No requirement for superior-subordinate rlp

- Evidence of payments, elaborate payment and accounting system (internal documents) etc

- Challenges of Evidence gathering?
- Duress as a defence
Promoting Accountability for corporate crimes

- **Malabo Protocol**: Jurisdiction of proposed new court (exploitation of natural resources)
- Challenges of Malabo!!!!
- Enhancement of domestic legal frameworks (Legislations)
- Usage Public Access to Information Legislations
- Trainings into financial investigations etc
- **Strategic Litigation** (The Role of SALC)
CONCLUSION

• Corporate complicity to commission of crimes is real
• Lets engage directly with problem of commercial corps implicated.
• Enhancement of domestic legal framework
• ICJ promotes less rigorous ways of holding corporates accountable.
• Lets keep the conversation going.
• THANK YOU! MERCI!