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Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo

by Julia Graff

HUMAN RIGHTS ORGANIZATIONS HAVE long criticized corporations operating in war-torn countries for maximizing profits at the expense of human rights. Shareholders' primary concern with the bottom line often leads corporate decision-makers to purchase raw materials in developing countries at the cheapest price, regardless of the human rights credentials of their suppliers. Some corporations, increasingly concerned by allegations of complicity in human rights abuses, are implementing stronger monitoring devices to ensure that they comply with international standards.

Other companies intentionally engage in illegal business ventures with armed groups in places where weak judiciaries are unlikely to prosecute much-needed investors for corporate malfeasance. In countries experiencing ongoing civil conflict, the systematic elimination of independent judges, prosecutors, and witnesses willing to testify reduces the likelihood of prosecution and weakens the rule of law. This article explores the possibility of holding corporate officers and managers criminally responsible before the International Criminal Court (ICC) for grave human rights violations committed by their agents, employees, or business partners, using the Democratic Republic of Congo (DRC) as a test case.

BACKGROUND

NEARLY TWO YEARS AFTER THE ROME STATUTE entered into force, the ICC is now almost fully operational. The Court has jurisdiction over war crimes, crimes against humanity, and genocide committed after July 1, 2002. The Office of the Prosecutor (OTP) may receive referrals of cases from the UN Security Council, states, individuals, and non-governmental organizations, but the OTP may also act on its own initiative to investigate and prosecute cases, with authorization from the Pre-Trial Chambers. The ICC may try the nationals of states parties as well as the nationals of non-ratifying states if they commit certain crimes within the territory of a state party. Under the principle of complementarity embodied in the Statute, the Court only has jurisdiction when the relevant states are unable or unwilling to prosecute. Chief Prosecutor Luis Moreno Ocampo made clear in his September 2003 policy paper that the OTP intends to focus the Court's limited resources on those leaders who bear the most responsibility for crimes, "such as the leaders of the state or organisation allegedly responsible for those crimes."

The ICC can prosecute heads of state, political and military leaders, and the leaders of irregular warring factions, yet corporations are not subject to criminal liability before the ICC. Some delegations argued during the drafting stages of the Rome Statute that the inclusion of corporations within the Court's jurisdiction would facilitate victims' compensation. Others cautioned that the evidentiary challenges of prosecuting legal entities, and many national legal systems' rejection of the criminal liability of corporations, made the exclusion of corporations from ICC jurisdiction more appropriate. Following

the philosophy of the Nuremberg Tribunal that "international crimes are committed by men, not by abstract entities," article 25(1) of the Rome Statute ultimately limited the Court's jurisdiction to "natural persons." The OTP may prosecute corporate officers, managers, and employees, but not the corporate entity itself.

From Nuremberg to the *ad hoc* tribunals for the former Yugoslavia and Rwanda, international courts have found individual corporate officers, managers, and employees criminally responsible for war crimes, crimes against humanity, and genocide. Moreno Ocampo has recently made several statements indicating the OTP's interest in investigating the financial links to crimes committed in the Democratic Republic of Congo (DRC). In the OTP policy paper, Moreno Ocampo stated that "financial transactions ... for the purchase of arms used in murder, may well provide evidence proving the commission of such atrocities."

At the September 2003 Assembly of States Parties, Moreno Ocampo announced that his office is closely following the situation in the Ituri district of the northeastern DRC, where massacres, rape, and forcible displacement routinely occur. While it is not certain that the first cases before the Court will be from the DRC, the chief prosecutor revealed that he is prepared to seek authorization from the Pre-Trial Chambers to begin an investigation of those responsible for the crimes committed there. He emphasized the possibility that those who direct operations in the extractive industries "may also be the authors of crimes, *even if they are based in other countries*" (emphasis added). Such statements, along with the broad prosecutorial discretion granted to the OTP, lead some to wonder how far the Court will go in pursuing military, political, and even corporate leaders.

THE TEST CASE: CIVIL WAR AND THE EXTRACTIVE INDUSTRIES IN DRC

MORE THAN THREE MILLION CIVILIANS have died in the DRC since 1998, making it the most devastating conflict to civilians since World War II. At least 5,000 civilians have died in the Ituri district alone since July 1, 2002, the effective date of the Court's temporal jurisdiction. Before the upsurge in violence in May 2003, the United Nations estimated that the violence in Ituri had internally displaced approximately 500,000 people, or ten percent of the area's population. On January 16, 2004, a massacre in Ituri left an estimated 100 dead, prompting the chief prosecutor to announce a few days later at the International Conference Against Genocide that he will select two cases from Ituri by mid-2004, and hopes to begin investigations by October. If this timeline proceeds as planned, trials could begin in 2005.

The root of the current conflict dates back to May 1997, when the Alliance of Democratic Forces for the Liberation of Congo, led by Laurent Kabila, overthrew the dictatorship of Mobutu Sese Seko. Rwanda and Uganda supported Kabila's uprising, but soon became concerned that his regime would not expel the Rwandan Hutu extremists hiding in eastern DRC after the Rwandan genocide. Uganda and Rwanda invaded the country in 1998 to destabilize the

Kabila government, ostensibly to prevent a Hutu invasion of Rwanda and to protect ethnic Tutsis in the DRC. In the process, however, they heightened regional and tribal tensions, supported Congolese rebels, and strategically positioned themselves to exploit the DRC's coveted mineral resources. Angola, Zimbabwe, and Namibia sent troops to back Kabila. He managed to retain power until his assassination in January 2001, when his son Joseph was appointed to succeed him.

As the war continued, the DRC government maintained control of only the western half of the country, leaving the eastern DRC an occupied territory under the primary control of Uganda and its local proxies from 1998 to 2003. During that time, Uganda dramatically increased its exports of diamonds, gold, and coltan, a rare mineral used in cellular phones and laptop computers, from the rebel-held Congolese territory. The Ugandan army helped arm and train the approximately ten armed insurgent groups that currently exist in Ituri, instigating ethnic feuds between the Hema and Lendu militias to gain access to the region's vast mineral resources.

Under mounting international pressure, Rwanda and Uganda agreed in July and August 2002, respectively, to withdraw their troops from the eastern DRC. By mid-2003, most foreign troops had officially pulled out of the region, but the Ugandan Peoples' Defense Forces (UPDF) trained local paramilitary forces to protect the economic interests of the UPDF officers after their departure. The Rwandan Patriotic Army left in place certain officers from battalions specializing in mining activities to perform the same functions as apparent civilians. While their withdrawal was a positive development for the resolution of the conflict, the exiting powers left in their wake an intricate web of actors in a self-financing war economy.

THE UN PANEL OF EXPERTS FOR THE DRC

In June 2000, the Security Council established a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo (Panel) to investigate the extent to which investment in the extractive industries fueled the war. In its October 2002 report, the Panel alleged that 85 companies were involved in business activities in the DRC that breache the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). American, European, and South African corporations figure high on the list. The Panel also named specific Congolese and international businesspeople as well as high-ranking military officers and political officials from Uganda, the DRC, Zimbabwe, and Rwanda who were connected to illegal mining activities and arms trafficking. The violations include "theft, embezzlement, diversion of public funds, undervaluation of goods, smuggling, false invoicing, non-payment of taxes, kickbacks to public officials and bribery."

The Panel's 2002 report provoked strong reaction from the companies and countries it alleged were helping to perpetuate the war in the DRC. Western governments and business lobbies pressured the UN to excise a controversial section of the Panel's subsequent 2003 report that detailed the continued participation of military officials and businesses in the illegal export of minerals. The UN complied, voicing concerns that the information could endanger the DRC's transitional government. The 2003 report also states that cases against 48 of the companies have been resolved, while the rest of the cases are either pending or require further monitoring.

The 2002 report describes in great detail the way in which "elite networks" of political and military leaders, as well as businessmen and certain rebel leaders, cooperate to protect and exploit resources and generate revenue in areas controlled by the DRC government, Rwanda, and Uganda. By controlling the various armies and local security forces and carrying out select acts of violence, these elite networks monopolize the production, commerce, and financing involved in extracting diamonds, gold, copper, cobalt, and coltan. Rebel administrations in the occupied territories serve as fronts for these international operations, generating public revenue which is then diverted into network coffers.

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The elite network operating in the government-controlled area of the DRC is comprised of Congolese and Zimbabwean government officials and private businesspeople. This network transfers publicly owned mineral assets by way of secret contracts to joint ventures controlled by private companies, amounting to a multi-billion dollar corporate theft of the DRC's public assets. Officials in the Congolese government grant mining licenses and export permits to the companies in exchange for personal gain. The Congolese government then uses revenue from the sale of diamonds and other resources to purchase arms for the Congolese Armed Forces.

The Congo Desk of the Rwandan Patriotic Army (RPA) centrally manages the elite network in the Rwandan-controlled area of the DRC, linking the commercial and military activities of the RPA. A Panel source claims that income to the Congo Desk accounted for 80% of the RPA's revenues in 1999, thus facilitating Rwanda's continued commercial presence in the DRC. The RPA controls most of the coltan mining in the eastern DRC, does not pay taxes on the extracted mineral, and uses forced labor, reported-

ly including prisoners brought in from Rwanda who work as indentured servants. In the Ugandan-controlled area, the elite network is decentralized and loosely hierarchical. The Panel reported that the network generates revenue “from the export of primary materials, from controlling the import of consumables, [and] from theft and tax fraud.” The UPDF have trained local militias, and the elite network has fostered ethnic tension by alternately favoring Hema and Lendu businessmen and politicians, leading to increased violence in the region.

Corporations could thus be implicated in, and found criminally liable for, a number of violations of international criminal law committed in the DRC. Such violations include subjecting local populations, including children, to forced labor in the extraction of natural resources; the torture, rape, and murder of thousands of civilians during military operations to secure mineral-rich land; and the destruction of agricultural infrastructure to force peasant farmers to participate in extractive work, resulting in reduced food supplies and slave-like conditions in the coltan mines.

PROSECUTION OF CORPORATE CRIMINALS BEFORE THE ICC

To the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to “efficient” business prac-

groups and churches. After much debate and compromise, the delegates adopted this distinction in article 28 of the Rome Statute.

Article 28(b) governs civilian superiors and imposes a much more rigorous test than does 28(a), which pertains to military commanders. A military commander may be criminally liable if he or she either knew or *should have known* of a subordinate’s criminal activities and failed to take “all necessary and reasonable measures within his or her power to prevent or repress their commission” or to inform the competent authorities. In contrast, for the Court to hold civilian authorities criminally liable for their subordinates’ conduct, article 28(b)(i) provides that the prosecutor must demonstrate that the superior “either knew, or *consciously disregarded* information which clearly indicated the subordinates were committing or about to commit” a crime (emphasis added). This more rigid state-of-mind requirement, akin to willful blindness, may be difficult to meet in most cases.

The prosecution must also establish a superior-subordinate relationship based on either *de jure* control, emanating from an official delegation of power, or *de facto* control. By definition, such a relationship does not exist among equals. It seems unlikely, therefore, that the Court will deem a corporate officer or manager the superior of his or her rebel trading partners or of fellow corporate actors with whom he or she designs and implements criminal plans. A superior-subordinate relationship may be established, however, if the clients are acting

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tices, or supplying the means to commit the crime. Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers. The OTP may invoke theories of “intermediary participation,” such as command responsibility and accomplice liability, to hold them accountable for acts committed by others.

Command or Superior Responsibility

Under the theory of command responsibility, an official commander, or one effectively acting as a commander, may be individually criminally responsible for failing to supervise properly and control the conduct of others acting under his or her effective authority and control. Articles 6(3) and 7(3) of the Statutes for the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for command responsibility, but they do not differentiate between military commanders and civilian superiors. In a controversial departure from that approach, the US delegation to Rome proposed distinct “state-of-mind” requirements for the liability of military commanders on the one hand and civilian superiors on the other. Examples of people who might fall under the category of civilian superiors are government officials, corporate officers and managers, and even teachers and leaders of social

at the behest of the corporation when they commit the crime (e.g., while providing security for mining facilities or when carrying out orders to assassinate a company’s union members). The prosecutor could establish such a relationship by showing that the subordinates who committed the crime were under the accused’s actual and effective control when they acted.

It is not unprecedented for an international tribunal to find a corporate manager liable on the theory of superior responsibility. In *Prosecutor v. Musema*, the International Criminal Tribunal for Rwanda convicted the director of a tea factory and sentenced him to life imprisonment for acts of genocide and crimes against humanity that his employees perpetrated against Tutsi refugees. The Trial Chamber found that Musema exercised effective control over the employees of the tea factory, but it was not satisfied that he exercised such control over other groups of perpetrators, such as the *interahamwe* paramilitary forces and plantation workers. Thus, the standard for effective authority and control is high—it is not merely one’s capacity to influence local armed groups that triggers superior responsibility, but rather actual and effective subordination stemming from an exercise of that influence. This will be easier to prove when a corporation directly employs the perpetrators.

Aiding and Abetting, or Accomplice Liability

Article 25 of the Rome Statute provides a less rigorous means of holding corporate war criminals accountable for acts committed by others. Unlike superior responsibility, aiding and abetting liability requires that the accused act knowingly. Because it does not require a superior-subordinate relationship, article 25 might be an appropriate mechanism for holding corporate actors accountable for transactions with suppliers whom they know procure raw materials by means of grave human rights abuses.

Section 3(a) of article 25 provides that a person can commit a crime “whether as an individual, jointly with another or through another person,” and section 3(b) covers one who “orders, solicits, or induces” the commission or attempted commission of a crime. Section 3(c) establishes that a person will be individually responsible for a crime if that person “aids, abets, or otherwise assists in its commission or attempted commission, *including providing the means for its commission*” (emphasis added). A person could also be criminally liable under section 3(d) if he or she “in any other way contributes” to a crime or an attempted crime by a group of persons acting with a common purpose. That section further provides that such contributions can be made either with the aim of furthering the group’s criminal activity or purpose, or *simply with the knowledge that the group intends to commit the crime*.

The Rome Statute does not specify what constitutes the provision of means to commit a crime and the forms of contribution for facilitating the commission of a crime required for aiding and abetting liability. In the *Zyklon B Case* (1946), the British Military Court convicted German industrialist Bruno Tesch, the owner of a company that supplied poison gas and corresponding equipment, for selling Zyklon B gas to the Nazi S.S., knowing that the S.S. was using it to kill allied nationals in concentration camps. By analogy, if a company operating in the DRC trades weapons for diamonds, the ICC might deem such weapons the means for the commission of a crime. However, if a corporation purchases diamonds from a rebel group or a state whose military uses the revenue to purchase arms for use against civilians, will the purchase money itself fall within the definition of “means of commission” or “contribution” to the crime? Or would the corporation have to pay more than fair market value for the commodities it purchases from known human rights violators for such payment to constitute a contribution? The Court will have to grapple with these and other complicated questions in 2004 as it begins to develop its own jurisprudence based on the cases it accepts from the DRC or other countries.

CONCLUSIONS AND RECOMMENDATIONS

THE INTRICATE AND EXTENSIVELY DOCUMENTED web of corporate involvement in the DRC’s brutal conflict would make it an interesting test case for holding corporate officers and managers accountable for the role they play in exacerbating civil conflicts. The chief prosecutor has been outspoken in his interest in investigating the financial transactions behind the war crimes in the DRC. The OTP already has a considerable amount of investigatory work from the UN Panel of Experts at its disposal if it decides to pursue leading international businesspeople in the Antwerp and New York diamond markets or high-tech companies that rely on Congolese cobalt. The imprisonment at

The Hague of corporate executives would further the Court’s goal of deterrence and motivate corporations to monitor more strictly their business activities in war-torn countries.

However, practical limitations might result in few, if any, prosecutions of corporate officers. States and corporations may simply refuse to cooperate with the OTP’s requests for information or extradition of corporate officers. Moreover, the OTP is acutely aware that its work will be under the microscope of the international community and that the Court’s legitimacy rests on avoiding charges of politicization. Thus, the OTP may decide to tread lightly on what surely will be controversial grounds and shy away from high-level prosecutions of corporate officers until the Court establishes a reputation of fairness and neutrality.

Given the high legal hurdles imposed by article 25(3) and, to a lesser extent, article 28(b), it might be difficult to successfully prosecute individuals on the grounds of corporate complicity or superior responsibility in the DRC and elsewhere in future cases. If the OTP moves forward with an investigation in the DRC, the Security Council should make available all of the information the UN Panel uncovered in its investigation of corporate involvement in the war. The cooperation of the international community, particularly the intelligence services and the attorneys general of African as well as European and American governments, will be essential in allowing the prosecutor to investigate the financial transactions that fuel the war. The referral of the DRC case by an African country would further strengthen the Court’s legitimacy among developing countries. If the OTP begins investigating the DRC, human rights advocates in Africa and in countries with commercial links to the country should pressure their governments to cooperate fully with the investigation, as it will set an important precedent for the relationship between the Court and the international community.

In the DRC and elsewhere, NGOs and human rights advocates who seek to hold corporations accountable for their contributions to serious human rights abuses should focus their investigative work on the issues presented here and forward relevant information to the Office of the Prosecutor. The most critical information is that which helps establish the existence of a superior-subordinate relationship, the state of mind of corporate officers and managers, and the aiding and abetting of crimes. Activists from countries whose nationals and corporations the UN Panel has identified as having violated international human rights and humanitarian law principles while in the DRC should pressure those companies to adhere to the OECD Guidelines, while pressuring the governments where those companies are registered to investigate and take appropriate action against them. Activists in the United States should pressure their congressional representatives to strike the provisions of the American Servicemembers Protection Act of 2002 that prohibits the US government from cooperating with ICC investigations.

Finally, those countries concerned that the Court might exercise jurisdiction over their nationals doing business in the DRC should conduct thorough, transparent investigations and, if necessary, prosecute their own corporate officers. In this way, the principle of complementarity will serve to keep cases off the ICC’s docket and ensure that corporate officers are brought to justice in their own countries. *HRB*