

Amending the Rome Statute and Peoples: Crimes Against Present and Future Generations (CPFG)

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ABSTRACT

The Rome Statute, which established the International Criminal Court (ICC), in 2002, sought to end the impunity associated with mass crimes. After decades of negotiations in the international community, the ICC emerged to establish an apex court able to investigate and prosecute individuals most responsible for crimes of concern to the international community¹. These crimes include Genocide, War Crimes, Crimes Against Humanity, and Crimes of Aggression.

Key Words: corporate conduct, corporate human rights obligations, ICC, international crimes and permanent damage to the environment, poverty and environmental harms, international criminal law and environmental harms, harmful economic systems

A significant gap in the Rome Statute is that it does not cater to mass crimes or harms committed by Corporations. Corporate conduct and its role in human rights abuses and actions that give rise to and sustain poverty have come under renewed scrutiny. The United Nations and human rights advocacy organizations have focused on corporate use and support of sweatshop labor in the footwear and apparel industries, permanent damage to the environment, and the destruction of peoples' livelihood capabilities through the extractive industries.² International criminal law is being investigated as a legitimate enforcement tool concerning corporate human rights obligations and as a means to curtail corporate impunity.³

Studies have indicated that approximately 21,000 people die every day from hunger-related causes. This number of deaths is over 7.5 million people per annum every year. Poverty is the principal cause of hunger, underpinned by harmful economic systems that fuel poverty and inequality through the ordinary and accepted global economic and political systems.

Harmful economic systems and practices promote large-scale environmental degradation that is responsible for the spread of killer diseases, giving rise to new killer diseases.⁴

¹ GR. Cryer, H. Friman, D. Robinson, E. Wilmschurst An Introduction to International Criminal Law and Procedure (2010) 146.

² D. Lima Business and International Human Rights (2009) Heinonline 18,18.

³ L Van Den Herik and J Cernic: Regulating Corporations under International Law: From Human Rights to International Law and Back (2010) Heinonline 720, 725.

⁴ L. Van Derslice Harmful Economic Systems as a Cause of Hunger and Poverty (2015) 34 available at www.worldhunger.org/harmfuleconomicssystem.htm.

Environmental related illnesses caused by polluted water, deforestation, and environmentally damaging agricultural processes kill the equivalent of a jumbo jet full of children every 30 minutes.⁵

Poverty and environmental-related mass deaths are ordinarily not seen as part of the major crimes of concern to the global community. Even though in scale, they exceed the numbers caused by genocides, war crimes, and crimes against humanity. This scale level is because individuals and institutions that drive harmful economic systems are generally within the most powerful bloc of countries in the developed world and sections of the developing world. Global politics and the exercise of power through international institutions may be one reason that harms associated with the process of impoverishment and destruction of the environment are not under the jurisdiction of the ICC.

Human Rights Theory and the Conceptual Barriers to Criminalising the Harms Associated with Harmful Economic Activities and Corporate Criminal Liability

State-based International Human Rights Law

*The root causes of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.*⁶

The statement above by John Ruggie, the UN Special Rapporteur on Business and Human Rights, suggests that globalization has contributed to powerful corporations operating within weak states leading to governance gaps concerning human rights. The governance gap in relation to corporations' accountability for human rights abuses is intertwined with international human rights law history.⁷ The origins of international human rights law were arguably a market-based theory of rights, with the first human rights to emerge being the right to private property. Muchlinksi argues that this early protective role over corporations frames the contextual barrier to extending human rights obligations to corporations.

Diplomats formalized the state-based international human rights architecture in the aftermath of World War II to protect individuals from the excesses of public state power.⁸ This focus on the state served to crystalize the idea within state-based international human rights law that States were the only duty bearers for human rights.⁹ The strengthening of economic globalization in the 1970s and 1980s cemented this conceptual barrier through more overt measures to protect business interests.

⁵ S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute.

⁶ J. Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2008) UN DOC A/HRC/8/5 1,12.

⁷ P. Muchlinksi' Human Rights and Multinationals: Is there a Problem' in International Affairs (2001) HeinOnline 31, 33.

⁸ L Van Den Herik and J Cernic (Note 4 above) 727.9

⁹ Ibid 734.

The hegemony of ideas and policies linked to free trade has given Corporations more power than they had at any time in history.

The state-centred conceptual barrier concerning human rights accountability and its underlying supportive ideology has also narrowly defined what constitutes human rights. Following World War II, the collective international moral outrage led to the strengthening of political and civil rights as legally enforceable rights.¹⁰ Though, much of the developed world continues to question whether social and economic rights are genuine human rights. McCorquodale and Fairbrother suggest that explicit recognition of especially economic rights as a human right would strengthen arguments that business entities as powerful actors able to positively or negatively impact the fulfilment of these rights should be direct duty bearers.¹¹

Overcoming the theoretical obstacle for corporate accountability for human rights is still the subject of significant debate and negotiation in the international arena.

State-based International Criminal Law

The limitation of state-based international criminal law lies in the limited scope of the international crimes of concern to the international community. Crimes associated with human rights abuses with a nexus in economic, social, and cultural rights are excluded. The basis for this exclusion is primarily due to the same factors that have given rise to states being treated as the primary duty bearer for human rights. The international and domestic enforcement gaps

in relation to human rights abuses by MNCs also allows for the normalization of harmful economic policies and operations that harm people and their environments. These policies include globalized economic policies that often result in increased unemployment levels, poverty, and reduced access to basic needs such as water and critical services such as health care and education.¹² There is enough evidence that the harms associated with economic and financial transactions are crimes that should be of concern to the international community. The severity of injury to human rights that result from harmful economic practices justifies the addition of a crime under the ICC jurisdiction to prosecute those most responsible for these harms.

The perpetrators of the crimes associated with harmful economic activities should include states and non-state actors, especially corporations. As discussed earlier, for corporations to be held accountable for human rights abuses, a conceptual shift is required. This change is a paradigm shift that acknowledges and codifies the idea that non-state actors can be human rights duty bearers and the direct subjects of criminal law.¹³

¹⁰ M. Perry *The Morality of Human Rights* (2013) 50 *San Diego Law Review* 775, 778.

¹¹ R. McCorquodale and R. Fairbrother *Globalisation and Human Rights* (1999) 21 *Human Rights Quarterly* 731, 743.

¹² *ibid* 748.

¹³ Clapham in a paper entitled, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups* (2008) has written that the Universal Declaration of Human Rights (UDHR), through articles 40 and 29(2) provides for duties to respect human rights to be found in society, the state, groups and individuals. Van den Herik and Ceric (2015), however, indicate that aside from the preamble and provisions within the UDHR, which is a non-binding instrument, there are no international covenants that include provisions for correlative private duties.

Unlike international human rights law, international criminal law does offer opportunities for bringing corporations into the accountability loop. The duty holder in international criminal law is the individual or natural person. Therefore, the paradigm shift from a natural person to a legal person as the subject of law in international criminal law is entirely possible. The Nuremberg and Tokyo Criminal Tribunals laid the basis for corporate criminal liability with the effect that under international criminal law, there is an extraterritorial exercise of jurisdiction over individuals. Individuals linked to corporations are also already under the jurisdiction of the ICC.¹⁴ As Slye suggested, the ICC could also become the vehicle to ‘reassert’ the veil of organizational responsibility for international crimes.¹⁵ I shall discuss arguments for an additional crime under the ICC jurisdiction, and then I shall discuss non-derivate liability for corporations next.

An Additional Crime of Concern to the International Community

The Evolving Consensus on Subject Matter Jurisdiction of the ICC

States’ governments established the International Criminal Court to facilitate international cooperation and enhance the prosecution and prevent crimes of international concern. For jurisdiction, the state parties to the statute agreed that the ICC jurisdiction would be solely on the crimes described as ‘most serious crimes of concern to the international community’.¹⁶ The documents reviewed on the research, legal opinions, and the submissions

of member states on what constitutes the ‘most serious crimes of concern to the international community’ indicate that the ratified Rome Statute has four crimes under its jurisdiction. Previous reports of the International Law Commission, the International Commission of Jurists, and the submission of member states suggest that the possible crimes that could have been considered to be under the jurisdiction of the ICC could have been much broader.

After years of negotiations, the uncomfortable consensus reached at the end of the Diplomatic Conference in Rome was that the ICC’s subject matter jurisdiction would be the four core crimes defined as international crimes. The agreement on these crimes facilitated a Rome Statute wherein all State Parties to the statute recognized their inherent jurisdiction. State Parties, therefore, also accepted that they had a responsibility to prosecute individuals suspected of perpetrating these crimes either directly or as accomplices. Such prosecution would be done at the municipal level, failing which the ICC would do the prosecution of perpetrators in the Hague.

The Crimes Under the Jurisdiction of the ICC

The four crimes that the ICC has jurisdiction over the most serious crimes are genocide, crimes against humanity, war crimes, and crimes of aggression.

¹⁶ International Law Commission Draft Statute for an International Criminal Court with Commentaries 1994 UN Doc , in Yearbook of the International Law Commission, Vol II, Part two (1994) 27.

The nexus between gravity and power allowed for agreement on the four horses of the apocalypse.

The Core ICC Crimes as International Crimes

Terje Einarsen, in a paper exploring the concept of Universal Crimes, writes that universal crimes are those crimes that are so grave that they ‘shock the consciousness of human beings’.¹⁷ This nexus between gravity and universal crimes is reflected in the preamble to the ratified Rome statute as ‘atrocities that deeply shock the conscience of humanity.’¹⁸ Einarsen further opines that crimes that shock the consciences of humanity and societies must also be protected by the international community’s norms and institutions.¹⁹

In the context of adding crimes under the jurisdiction of the ICC, the following definition of international crimes offered by Einarsen is useful:

Universal crimes are certain identifiable acts that constitute grave breaches of rules of conduct usually committed, organized, or tolerated by powerful actors. According to contemporary international law, they are punishable whenever and wherever they are committed; and that requires prosecution and punishment through fair trials, or in exceptional cases, some other kind of justice, somewhere at some point.²⁰

In developing his definition of international crimes, Einarsen undertook a detailed literature review on the subject by leading international criminal law scholars. Einarsen’s study included

the writings of Zahar and Sluiter, Cassese, Werle, Bassiouni, Schabas, and Cryer.²¹ Schabas and Cryer’s writings, as cited by Einarsen, are particularly instructive in discussing the criteria for international crimes. Schabas writes that the reference in the ICC preamble on the notion of the ‘most serious crimes’ and ‘grave crimes’ suggests a qualitative criterion for inclusion of crimes for inclusion under the jurisdiction of the Rome Statute.²² For Schabas, within the context of the ICC, the precise definitions of the gravity or seriousness of crimes were not as important as considering whether such crimes are effectively prosecuted at national levels.

The implication of the suggestion by Schabas is that a crime ceases to be one that has to be of concern to international justice if it is effectively prosecuted at national levels. The stance taken by Schabas is contradicted by the ICC’s Office of the Prosecutor that regarded the introduction of the principle of complementarity to be one that would make the ICC more effective. The effectiveness is measured by the willingness and abilities of State Parties to prosecute people accused of the core crimes in national jurisdictions.²⁵ In essence the principle of complementarity numerically expands the potential jurisdictions of the ICC to every State Party.

¹⁷ Terje Einarsen (Note 46 above) 23.

¹⁸ *Ibid.*

¹⁹ *Ibid.* 62.

²⁰ *Ibid.* 123.

²¹ *Ibid.* 150 – 163.

²² *Ibid.* 156.

²³ *Ibid.* 156.

²⁴ Morten Bergsmo Informal Expert Paper: The Principle of Complementarity in Practise ICC-OTP (2003) 4. Available at www.icc-cpi.int

The principle of complementarity was not intended as a means to exclude or include certain serious crimes from the jurisdiction of the ICC.

The issue as raised by Schabas is interesting. However, the United States (US) opposed direct criminal liability for corporations under the ICC jurisdiction based on the principle of complementarity. The US argued that the weak national jurisdictions dealing with non-derivative corporate criminal liability within the context of the principle of complementarity would render its inclusion in the ICC statute unworkable. The US argument is the opposite of that offered by Schabas but indicates that political considerations rather than purely legal arguments may have been at play.²⁵

A discussion on the addition of a possible new crime under ICC jurisdiction needs to be concerned with the issues of ‘gravity’ and the harmful impacts on people of possible acts and commissions. Such consideration will allow for an assessment of whether the proposed crime linked to harmful economic systems meets the competing requirements based on gravity, the legal basis for its criminalization based on international legal prescripts. The negotiations on the ICC’s material jurisdiction resulted in a consensus, which Schabas summarises as ‘the court is designed to try nothing but crimes of extreme gravity and the most heinous offenders’.²⁶ Einarsen writes that the necessary and sufficient conditions for a crime to be of concern to the international community are to contain an inherent gravity clause. He cites Article 8 bis of the revised ICC statute, which

deals with the crime of aggression to illustrate the elements of gravity—‘to qualify as [a crime of aggression] an act of aggression must by its character, gravity, and scale, constitute a manifest violation of the Charter of the United Nations.’²⁷

The Gravity of Crimes that Contribute to Poverty and Permanent Damage to the Environment

Given the above discussion, it is therefore imperative to outline just how ‘grave’ the impacts of poverty and permanent damage to the environment are. At the beginning of this paper, I indicated that approximately 21,000 people die every day from hunger-related causes, which amounts to more than 7.5 or amounts to 7.665 million people per annum every year. Also, environmental-related illnesses caused by polluted water, deforestation, and environmentally damaging agricultural processes kill the equivalent of a jumbo jet full of children every 30 minutes.²⁸ The consequences of harmful economic practices are even direr for children based on reports from the United Nations Children’s Fund (UNICEF). Approximately 22000 children die every day due to poverty-related illnesses and hunger due to poverty.

²⁵ The issue of non-derivative corporate liability is discussed in more detail in the next chapter.

²⁶ William Schabas *An Introduction to the International Criminal Court* Cambridge University Press (2004) 167.

²⁷ Terje Einarsen (Note 46 above) 253.

²⁸ S. Myers *Global Environmental Change: The Threat to Human Health* (2009) World Watch Institute 12.

To put the deaths of children due to causes attributable primarily to poverty into perspective: it could perhaps be better understood in the context of international criminal law where it can be compared with the three more prominent genocides. Approximately 11 million people were killed in the holocaust that essentially contributed to framing the modern definitions of the crime of Genocide and Crimes Against Humanity. Approximately 900 000 people were killed in the Rwandan Genocide and approximately 7000 people in the former Yugoslavia. These genocides and crimes against humanity gave rise to the ad-hoc criminal tribunals and helped frame the jurisprudence for the ICC's subject matter jurisdiction. These atrocities almost appear small compared to the deaths of 8.1 million children every year due to poverty-related causes.

The harms from climate change and related pollution are just as catastrophic. Kofi Annan's Global Humanitarian Forum has conservatively estimated that climate change causes 300,000 deaths a year and leaves over 325 million people vulnerable to the effects of climate change.²⁹ Leleveld et al. suggest that outdoor air pollution leads to 3.3 million deaths per year globally.³⁰ The World Health Organisation (WHO) estimates that indoor and outdoor pollution's combined effect contributes to approximately 7 million deaths globally per annum.³¹

These statistics indicate that poverty is the norm for most of the world's people and countries. The combined impacts of poverty and environmental damage contribute significantly to mortality rates across the globe. The mortality rates and other

harms associated with poverty and environmental degradation disproportionately affect poor people in developing countries. People did not choose to live in poverty, and neither is it natural. Poverty, inequality, and permanent degradation of the environment result from powerful people and institutions' decisions and actions. (Intent)

Harmful economic systems have multiple features. The role that Illicit Financial Flows (IFFs) plays have recently rightfully come under scrutiny.

The Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment.

There have been previous efforts for adding an additional crime under the jurisdiction of the ICC. Academics and activists have developed drafts of possible crimes, which have been discussed at international forums, but thus far, they have not been submitted by any state part. For this paper, the Draft Crimes Against Present and Future Generations (CPFPG) provide the most appropriate template for additional crime. Its stated objectives are to end impunity related to harmful economic systems, environmental damage, and corruption. The draft Crime Against Present and Future Generations was written by

³⁰ J. Lelieveld et al., 'The Contribution of Outdoor Air Pollution Sources to Mortality on a Global Scale'. Available at www.nature.com Accessed on 16 September 2015.

³¹ WHO statistics available at www.who.org Accessed on 15 November 2015.

Sebastian Jodoin of the Center for International Sustainable Development Law and was commissioned by World Future Council.³² The CPFPG contains elements of the Crime of Ecocide³³ and suggests the criminalization of corruption. Therefore, it is not explicit enough on these matters, and I suggest amendments to include activities linked to IFFs and corruption. For the title of the actual proposed crime, both proposed ‘Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment’ and Jodoin’s framing relating to ‘present and future generations’ is appropriate. A more precise and accurate formulation of the crime can be arrived at in follow up discussions and deliberations.

The CPFPG as amended³⁴

The Crimes Against Present and Future Generations template is the main body of the text in this section. Following the manner in which documents are amended through negotiations in multilateral organisations, changes to the original text will be denoted as follows:

Additions will be bracketed and in italics.

Deletions will be struck through and in bold font.

Proposed changes to the text will be explained in footnotes.

1. Crimes against Present and Future Generations means: any of the following acts within any sphere of human activity including, inter alia political, military, economic, (social) cultural, or scientific activities, when committed with the knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of (livelihood and) survival of any identifiable group or collectivity. *(The CPFPG seeks to prevent and end impunity crimes associated with the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, tax evasion, tax avoidance and tax competition that have the effect of depriving states with the resources to reduce poverty to provide adequate health, social and other services that would enhance the well-being of its people):³⁵*

(a) Forcing (through public policy, business policy, and practice) any members of any identifiable group or collectivity to work or live-in conditions that seriously endanger their health or safety, including forced labor (enforced unpaid labor), (wages below minimum wages rates as legislated by states), enforced (sex work) and human trafficking;³⁷

³² S. Jodoin (Note 47 Above).

³³ Read A. Gray, The International Crime of Ecocide (1990) CWSL Scholarly Commons.

³⁴ S. Jodoin (Note 47 Above).

³⁵ Based on preambular paragraph 3 of the United Nations Convention Against Corruption (2003).

³⁶ Original footnote as used by Jodoin to explain the term ‘any identifiable group or collectivity’: The expression “any identifiable group or collectivity” means any civilian group or collectivity defined based on geographic, political, racial, national, ethnic, cultural, religious, or gender grounds or other grounds that are universally recognized as impermissible under international law.

³⁷ The additions of measures related to wages are central to efforts that seek to reduce the impacts of harmful economic systems. The insertion of the word ‘sex work’ as opposed to prostitution is based on personal preference. The terms ‘prostitution’ and ‘sex work’ are subject to intense debate internationally based on ideological differences in women’s rights and agency concerning sex work.

(b) Unlawfully appropriating or acquiring the public or private resources and property of members of any identifiable group or collectivity, including the large-scale embezzlement, misappropriation, or other diversions of such resources or property by a public official;

(c) The bribery of national public officials, foreign public officials and officials of public international organizations and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official.³⁸

(d) Trading in influence, money laundering of the proceeds from corruption; and the concealment of corrupt practice through accounting and book-keeping offenses; the abuse of functions and illicit enrichment by public officials, private citizens and legal persons.³⁹

(e) Bribery in the private sector when committed intentionally in the course of economic, financial, and commercial activities).⁴⁰

(d) Deliberately depriving members of any identifiable group or collectivity of objects indispensable to their survival, including by impeding access to water and food sources, destroying or severely depleting water and food sources, or contaminating water and food sources by harmful organisms or pollution;

(e) Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner;

(f) Imposing measures that seriously endanger the health of the members of any identifiable group or collectivity, including by impeding access to health services, facilities, and treatments, withholding or misrepresenting information essential for the prevention or treatment of illness or disability, or subjecting them to medical or scientific experiments of any kind which are neither justified by their medical treatment nor carried out in their interest;

g) Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational, and higher education;

(h) Causing ecocide, meaning widespread, long-term, and severe damage to the natural environment, including by destroying an entire species, sub-species, or ecosystem;

³⁸ Based on articles 15, 16, and 17 of the UN Convention Against Corruption (2003).

³⁹ Based on Articles 18, 19, 20, and 21 of the UN Convention Against Corruption (2003). The reference to legal persons is based on the general reference to legal persons' liability as defined by article 26 of the Convention Against Corruption.

⁴⁰ Based on article 21 of the Convention Against Corruption (2003).

*(i) Polluting air, water or soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;*⁴¹

(j) Other acts of a similar character gravely imperiling the health, safety, or means of survival of members of any identifiable group or collectivity;

(k) Any of the above acts which cause serious, widespread, and long-term harm to human health and future generations of an indiscriminate and uncontrollable nature.

2. Crimes Against Future Generations shall also include any acts which cause, or have a strong possibility of causing, any of the effects identified in Section 1 (a) – (k) and undertaken without due diligence as to the probability of such effects (precautionary principle).

While there may be scope to include other aspects of harmful economic systems, permanent damage to the environment and corruption, the elements included in the draft crime outlined above are more likely to find favor. I conclude this point based on the fact that almost all of the elements are based on existing conventions, soft law, and treaties. Together with the apparent gravity of the outcomes of policies and practices associated with the harmful economic systems, damage to the environment, the additional crime to be included, as part of the subject matter jurisdiction of the ICC, would provide the basis for effective negotiations by state parties to the ICC. Detailed work on the elements of the crimes outlined above would need to be done but are outside this paper's scope.

Including the Liability of Legal Persons within the Jurisdiction of the ICC

As discussed in Section II, juristic persons may not be the subjects of International Law, including International Criminal Law. However, their inclusion has been on the international community's agenda for decades. The reason for this is that all of the international crimes, including the proposed crime as proposed in this paper, agree on the premise that powerful individuals, states, and institutions generally perpetrate these crimes. At the very least, there is the recognition that powerful individuals, states, and institutions facilitate the commission of international crimes through their control of economic, financial, military, and political resources. The centrality of powerful actors in the commission of international crimes was core to Einarsen's attempts to define Universal Crimes:

Universal Crimes are individually identifiable acts that constitute grave breaches of rules of conduct: and that committed, organized or tolerated by powerful actors: and that, according to current international law, is punishable whenever and wherever they are committed: and that require prosecution and punishment through fair trials, or in exceptional cases, some other kind of justice, somewhere at some point.⁴²

⁴¹ The use of the word 'unlawfully' in the original CPFG template is not helpful as pollution may take place lawfully and be permitted by states.

⁴² Terje Einarsen (note 46 above) 22.

I contend that all the powerful actors capable of being involved in the commission of international crimes should be liable for prosecution under the ICC. A rolling text on individual criminal liability prepared by the Preparatory Committee chaired by Adrian Bos in the run-up to the Rome Diplomatic Conference provides a window to the debate on the liability of legal persons.⁴³ The rolling text, hereafter referred to as 'Rolling Text X', was then dealing with individual criminal liability under Article 23. Paragraph 5 of Rolling Text X reads as follows:

When a natural person has been convicted by the court, the court shall also have jurisdiction over the legal persons or other organisations for criminal conduct under this statute if:

- The convicted person was an agent, representative or an employee of that legal person or organisation, and,
- The crime was committed by the natural person acting on behalf of [and with the consent or acquiescence of] [and with the assent of] that legal person or organisation [and][or] in the course of its regular activities.
- For the purposes of this statute, 'legal persons or other organisations' mean corporations or private organisations, whose objective is for the private gain.⁴⁴

The Rolling Text X hints at the opposition to the inclusion of corporations made by the many delegations led by the United States, based on the

argument that it would render the principle of complementarity unworkable. The premise of this argument was that corporate criminal liability was not yet universally recognized by states.

The arguments for excluding legal persons from non-derivate liability under the ICC are essentially political and further explored.

In a paper that deals specifically with the potential of international law to prosecute corporations criminally, Clapham questions the principle of '*societas delinquere non protest*', which means that enterprises cannot be criminal.⁴⁵ Clapham further suggests that the Adhoc Criminal Tribunals and the International Criminal Court that focus on individuals as their jurisdictions' subjects can be adjusted to exercise jurisdiction over legal persons, including corporations. Clapham emphasizes the effectiveness principle and argues that if international law is to be effective, all actors, whether individuals or non-state actors, should be prohibited from assisting states in violating human rights principles.⁴⁶ The effectiveness principle holds true for all the crime areas under the ICC jurisdiction. However, it is imperative concerning the recommended crime where the primary perpetrators are most likely to be MNCs.

⁴³ ICC Preparatory Committee, Rolling Text on Article 23 (undated). Available at PURL:<https://www.legal-tools.org/doc/f77746>. Accessed on 29 September 201.

⁴⁴ *ibid* para 5.

⁴⁵ A Clapham 'Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 899. Accessed at <http://jicj.oxfordjournals.org/cgi>.

⁴⁶ *Ibid* 901.

The current international legal framework limits corporate criminal liability to being a participant or, more specifically, being complicit in the commission of crimes. This reliance on complicity as the means to hold corporations accountable is linked to the practice in international law that states are the subjects of human rights obligations and individuals the subjects of criminal liability.

The elements of complicity indicate the limits of using international criminal law to hold corporations accountable even as accomplices for crimes of concern to the international community. As suggested by Schabas, an arms supplier or the Managing Director of an airline that transports prohibited weapons can only be charged if there is a direct and substantive link with the commission of crimes committed that are regarded as international and under the jurisdiction of the ICC.

While participation in international crimes may be carried out through a corporate shell, the current legal framework will only prosecute individuals associated with the company. An example of this is that the supplier of Zyklon B was convicted of war crimes. At the same time, the manufacturers of Zyklon B successfully pleaded ignorance of the intended use of the product by the end-user. While this piercing of the corporate veil is important to prosecute those most responsible, it also ironically leaves the corporation to continue to produce and participate in international crimes.

Schabas and the ICJ are of the view that legal reform should take place to prosecute the corporation itself. Failure to do so will leave corporate complicity at the level of being only

theoretically possible. Ironically, in contrast to some delegations' negotiation stance concerning the principle of complementarity, it may provide the solution to this problem. The principle of complementarity in the ICC context would allow state parties to enable national legal systems to proceed with legal persons' prosecutions, especially corporations. In contrast, legal persons in states that are unable and unwilling to prosecute could be prosecuted in the Hague. Those states without the requisite laws would be patently unable, and this would also open the possibility for states with the requisite legal systems to exercise universal jurisdiction.

While this is ideal, I would propose the formulation as contained in what I refer to as Rolling Text X in the paper, is used as a means to ensure that legal person that are perpetrators in relation to crimes associated with harmful economic systems, permanent damage to the environment and corruption, are brought to book. The formulation of Rolling Text X allows for ICC to have jurisdiction over a legal person if the convicted natural person was an agent, representative, or an employee of that legal person. It also confers ICC jurisdiction over a legal person if the convicted natural person acting on behalf of, with the consent of that legal person's assent. This formulation would allow for the prosecution of a legal person associated with a natural person convicted for crimes associate with harmful economic systems, permanent damage to the environment, and corruption.

In Sum

The grave consequences on humanity as a result of the harmful economic systems are undeniable. The statistics related to mortality

rates, illness, poverty, and deprivation cannot be disputed. In terms of scale, the harms resulting from permanent damage to the environment, a process that gives rise and sustain poverty and corruption, dwarf those of some of the most horrendous genocides and other crimes of concern to the international community. Based on its grave negative impacts, the cluster of crimes associated with the policies and 'normal' operations of harmful economic practices earn the dubious status as crimes that should shock the international community's consciousness. If the global community is serious about ending global impunity by powerful people and institutions that engage in actions or facilitate the actions they know would lead to depriving people of life-saving livelihood opportunities--acts that lead to widespread death and destruction of people and the environment, then their acts should be criminalized.

Given the relatively weak governance systems in many countries, especially the developing world where people are most affected by the consequences of harmful economic systems, the ICC offers a reasonable option for the global community to hold those most responsible to account. Therefore, this paper sought to make a case for adding to the ICC's menu of crimes of concern to the international community that deny people social, cultural, and economic rights. I have argued that legal persons and in particular, MNCs should be held criminally liable for such crimes given that powerful institutions and individuals carry out the perpetrators of the suggested crimes associated with harmful

economic systems. Given the anticipated difficulty gaining state parties' agreement to the ICC applying non-derivative liability for corporations, I have suggested that the formulation described in a document, which I refer to as Rolling Text X provides a reasonable compromise. This approach may be acceptable to most state parties. Rolling Text X was a product of the negotiating process towards the finalization of the Rome Statute. It makes provision for corporations to be prosecuted. Notably, this prosecution occurs if a natural person acting as an agent of that corporation is convicted by the ICC for any crime under the ICC jurisdiction.

I have used differing terminologies for the additional cluster of crimes to be included under the ICC jurisdiction. That being said, the formulation of 'Crimes Against Present and Future Generations' (CPFPG) as offered by Sebastian Jodoin of the Center for International Sustainable Development Law on behalf of the World Futures Council is perhaps the most relevant. I used the CPFPG as a template and amended it to include crimes related to corruption and Illicit Financial Flows (IFFs). As is the case with the World Futures Council, this paper should be seen as a contribution to the debate on seeking justice for crimes associated with harmful economic systems.

I did not offer a definitive nomenclature for the proposed crimes. This identifying terminology can be established through negotiations by state parties and the inevitable additional investigations done as part of such negotiations.

REFERENCES

- [1] A Clapham 'Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 899. <http://jicj.oxfordjournals.org/cgi/content/full/6/5/899>. Accessed at <http://jicj.oxfordjournals.org/cgi>.
- [2] A. Shah 'Causes of Poverty' (2011) available at www.globalissues.org/article .
AUC/UNECA Report of the High-Level Panel on Illicit Financial Flows from Africa (2014) 20.
- [3] D. Lima Business and International Human Rights (2009) Heinonline Accessed from <http://heinonline.org> on 11 August 2015.
- [4] D.Kar and J. Spanjers Illicit Financial Flows from Developing Countries: 2003 – 2012 Global Financial Integrity (2014).
- [5] Doudou Thiam ICL Second Report on the Draft Code of Offences against the Peace and Security of Mankind (1984) Vol. II, part I.
- [6] Draft Statute of the ICC: Working Paper submitted by France. GA A/AC.249/L.3 UN Doc Available at PURL: <https://www.legal-tools.org/doc/4d28ee/>. Accessed on 13 August 2015,
- [7] HP Kaul Is it Possible to Prevent or Punish Future Aggressive War-Making Torkel Opsahl Academic EPublishers (February 2011).
- [8] ICC Preparatory Committee, Rolling Text on Article 23 (undated). Available at PURL:<https://www.legal-tools.org/doc/f77746>. Accessed on 29 September 2015.
- [9] International Commission of Jurists Definition of Crimes: ICJ Brief no.1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June – 17 July 1998). Accessed at <https://legal-tools.org/doc/9fd899>.
- [10] International Commission of Jurists, Corporate complicity & legal accountability: Volume 2 Criminal Law and International Crimes (2008).
- [11] International Law Commission Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal ILC Yearbook (1950 Vol II).

- [12] International Law Commission Draft Statute for an International Criminal Court with Commentaries 1994 UN Doc, in Yearbook of the International Law Commission, Vol II, Part two (1994).
- [13] L Van Den Herik and J Cernic: Regulating Corporations under International Law: From Human Rights to International Law and Back (2010). Accessed at HeinOnline. <http://heinonline.org> 11 Aug 2015.
- [14] L. Van Derslice Harmful Economic Systems as a Cause of Hunger and Poverty (2015) available at www.worldhunger.org, accessed on 22 August 2015.
- [15] Morten Bergsmo Informal Expert Paper: The Principle of Complementarity in Practise ICC-OTP (2003). Available at www.icc-cpi.int.
- [16] Oxfam Great Britain Policy Paper Tax Havens: Releasing the Hidden Billions for Poverty Eradication (2013).
- [17] Press Release on Statements Made by Delegations to the UN Conference on the Establishment of an ICC, UN Doc L/ROM/14 available at [PURL://www.legal-tools.org/doc/7ca3e9/](http://www.legal-tools.org/doc/7ca3e9/).
- [18] Proposal for Article 5 Submitted by Cuba on Crimes Against Humanity to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC (23 June 1998) UN Doc A/CONF.183/C.1/L.17.
- [19] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst An Introduction to International Criminal Law and Procedure, Cambridge University Press (2010).
- [20] R. Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst An Introduction to International Criminal law and Procedure Cambridge University press (2010).
- [21] R. McCorquodale and R. Fairbrother Globalisation and Human Rights (1999) 21 Human Rights Quarterly.
- [22] Resolution Adopted by the Human Rights Council on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 UN Doc (6 July 2011).
- [23] Rome Statute of the International Criminal Court, ICC (17 July 1998).
S. Myers Global Environmental Change: The Threat to Human Health (2009) World Watch Institute.
Terje Einarsen The Concept of Universal Crimes in International Law' Torkel Opsahl Publishers Oslo (2012).

[24] UN Inter Agency Group Levels and Trends in Child Mortality Report 2010 UNICEF (2010).

[25] United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court at the 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome Italy,(July 1998.) UN Doc A/CONF.183/2.

[26] WA Schabas Enforcing international humanitarian law: Catching the accomplices (2001).

[27] William Schabas An introduction to the International Criminal Court Cambridge University Press (2004).

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