

**Crans Montana Conference:  
11<sup>th</sup> Annual Summit on Transnational crime**

**Panel on “*Business & Human Rights Abuses*”  
Friday, 13 November 2009, at 11:30**

**Elise Groulx  
Solicitor & Barrister  
President of the International Criminal Defence Attorneys Association  
(ICDAA) Founding President of the International Criminal Bar (ICB)**

**I. Companies have a responsibility to respect human rights.**

For years, many business corporations considered that they were not responsible for enforcing human rights, arguing that this was the exclusive responsibility of states. The duty of business, they argued, was limited to compliance with legislation, regulations and court rulings that state organs issue to enforce human rights.

Today, there is a growing international consensus that private actors, including business corporations, have a “responsibility to respect” human rights. This responsibility is generally presented as being anchored in a general business duty to respect the rule of law but as also extending to a growing body of international, voluntary and treaty-based standards. Corporations increasingly recognize the need to implement and promote these standards in order to earn their so-called social licenses to operate. This responsibility applies with special force in countries that may lack legal enforcement powers, or where states themselves commit human rights abuses.

The consensus on the “corporate responsibility to respect” has emerged from 4 years of work (2005-2009) by John Ruggie, the United Nations special representative on business and human rights. His 2008 report articulates a policy framework comprising three core principles that links to business responsibility to the other complementary principles: the “state duty to protect against human rights abuse” and “greater access to remedies” by victims. That report won broad support from member states sitting on the UN Human Rights Council. The Council gave Ruggie an extended mandate, to 2011, with instructions to make recommendations regarding enforcement and the so-called “operationalization” of human rights in the business world.

Significantly, Ruggie has refused to give business a short list of rights of special concern to the private sector arguing that “business can affect virtually all internationally recognized rights” given the wide variety of economic activities around the world. The specific rights of concern to states, companies and victims will clearly vary from one case to the next.

## 2. Enforcement is a big challenge.

The primary challenge in most fields of human rights is not to articulate the rights in charters, declarations and treaties – there are already several dozen of these legal instruments on the books of the UN system. Nor is the challenge to win general commitments in principle to respect human rights and the rule of law. The really difficult “trial by fire” in most fields of human rights is the effective enforcement of human rights standards that states, corporations and other stakeholders have made multiple commitments to respect. This is as true in the political sphere as in the business world.

In this regard, Ruggie argues that the primary problem is “governance gaps created by globalization.” In his key 2008 report, he defines these as gaps “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”

Ruggie faces a jungle of policy options regarding enforcement, and a lot of debate about the issue. The options, developed over a number of decades, include the following:

- Self-regulation by individual companies
- Voluntary industry codes
- Soft law & multi-stakeholder initiatives<sup>1</sup>
- Ombudsmen
- Criminal & civil law
- Disclosure requirements in securities law for public companies
- Legislation on environment, labour rights, human rights, etc
- Treaties on these subjects

There is often a broad consensus on the substance of human rights. It is the issue of enforcement methods that generates heated debate between business leaders and their critics in the NGO world. The debate often degenerates into an exchange of sweeping arguments about the value of binding legislation versus self-regulation by business.

These discussions often produce more heat than light, as Ruggie the pragmatist has pointed out on several occasions. He and other experts point out that, in fact, enforcement of human rights is rarely an “either/or” issue. The main challenge is to find the best combination of enforcement instruments for a specific right or family of rights.

If the punishment must fit the crime, it is equally true that the enforcement instrument must match the right. When to use carrots or sticks? Voluntary codes or legislated minimum standards? Soft law or hard law? These questions need to be answered in order to move forward in the field of business and human rights.

---

<sup>1</sup> Examples include the Voluntary Principles on Security and Human Rights, Extractives Industry Transparency Initiative, OECD Guidelines on Multinational Corporations.

### **3. Enforcement is robust for large-scale violations of human rights**

There is one field of human rights where the governance gap is being rapidly closed by the international community of nations and where the debate on enforcement methods is largely complete. This is the field of massive human rights violations occurring in wars, civil conflicts and insurgencies. These violations are defined as major international crimes in various “hard law” instruments. They are defined, in fact, as war crimes, crimes against humanity and genocide – essentially the same crimes judged by Nuremberg tribunals in 1945-47.

Not surprisingly, given the gravity of the crimes, there is a broad political consensus that strong international legal standards are required and that “big sticks” are required to ensure enforcement. The consensus is reinforced by a recounting of the sad history of massive war crimes and genocides – often officially sanctioned and later minimized or denied – that marked the 20<sup>th</sup> century. And it leads to serious statements of intent to “end impunity” for the leaders who organize major international crimes.

The “big sticks” have been created in the form of both new international courts and extensions of the jurisdictions of national prosecutors, investigating magistrates and superior courts.

An obvious example is the creation in the 1993-2008 period of a half-dozen UN ad hoc courts and special courts, including those for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon.

Another dramatic example is, of course, the International Criminal Court and its treaty, called the Rome Statute. The Rome Statute creates an international Office of the Prosecutor within the ICC. Less well known is the fact that it also empowers national prosecutors and courts in about 110 states parties to enforce the Rome Statute using a form of universal jurisdiction. Canada has already started with two prosecutions of Rwandese citizens arrested in Canada (one completed and one recently launched) and Germany has recently followed with the arrests of two Rwandese living in Germany and alleged to lead a militia committing atrocities in the eastern Congo.

In Europe, national prosecutions have also been launched (and in some cases completed) against business officials and companies alleged to have supported violence by repressive regimes in various ways – from joint ventures in major natural resource projects to purchases of conflict timber, illicit arms imports and UN sanctions busting. In these actions, the courts of the Netherlands, Belgium, France, and Spain have been asked to exercise a form of universal jurisdiction against executives or companies located in their jurisdictions but alleged to have participated in war crimes committed in other countries.

In the United States, the federal government has so far refused to ratify the Rome Statute while generally supporting the UN ad hoc tribunals. At the same time, the US court system and strong tort law tradition have combined to become an incubator of

civil law innovations aimed at seeking redress for victims of war crimes and a variety of other serious crimes such as torture.

Most notably, the US federal court system has been used to launch about 40 tort actions against companies alleged to have supported the commission of major international crimes by repressive regimes in Africa, Asia and Latin America. The Supreme Court has confirmed the jurisdiction of federal district courts to hear such actions using extraterritorial authority to apply international standards of justice under the Alien Torts Claims Act (ATCA) and other federal statutes. While the precise legal standards to determine liability are still subject to debate, the jurisdiction to hear such cases is now established, creating another avenue besides criminal justice for victims' groups to seek redress against companies that are alleged to act as "accomplices" in human rights abuse.

Based on the US experience, victims' groups have launched various civil and criminal actions in European courts. There are also legislative proposals to create a sweeping European version of ATCA to be used by victims of environmental and human rights violations in any country to launch actions against European-based companies.

There are still gaps in jurisdiction and the ICC is still in its early days. Nevertheless, robust enforcement instruments are being developed in this field of human rights at a rapid pace.

In the debate on human rights and business, corporate leaders often plead for a focus on self-regulation and "soft law" standards. That plea does not apply in the field of international criminal law. The only issue is how, and in which circumstances, that body of law applies to business executives and companies.

#### **4. Applications to Business**

The primary aim of the ICC and international criminal justice is to "end impunity" for the leaders who organize large-scale violence against civilians. For the most part, those leaders are political and military figures. But the net of liability is expansive – and it has been cast wide enough to catch those who plan, support or contribute to conflict. In certain cases, that group can certainly include business executives.

There are clear precedents. The main ones are the prosecutions at Nuremberg of Nazi Industrialists, most notably the management teams of major German companies such as Krupp (arms) and IG Farben (chemicals) for their role in supporting the Nazi war machine. Many senior and mid-level executives were convicted, mainly for participating in (even encouraging) various Nazi schemes for property confiscation and forced labour regimes in occupied Europe.

At Nuremberg, the business leaders were not found to be lead actors – in fact, they were generally acquitted of charges that they participated with the Nazi leadership in planning

to wage an aggressive war. But they were clearly identified, and punished, for playing the role of supporting actors.

This pattern also emerged in more recent prosecutions in the Netherlands. One led to the conviction of a businessman charged with selling the components of chemical weapons to Saddam Hussein whose regime used them to commit acts of genocide. The other case ended in the acquittal (on appeal) of a top business associate of Charles Taylor, charged with complicity in war crimes and UN sanctions busting.

One point is illustrated clearly by these cases: the fact that business executives are not lead actors does not make them immune from prosecution. Nor are their organizations in any way immune from investigation and public challenge about their roles in armed conflict and, worse, ethnic cleansing.

To understand the emerging legal risks, Directors and Officers of companies operating in conflict zones need to understand two fundamental legal concepts: (i) substantive crimes (ii) modes of participation, or various ways in which supporting actors can be held liable for committing a crime.

## **5. Substantive crimes: “pillage and plunder” are economic war crimes**

The traditional English expression “pillage and plunder” refers to the ways in which armies used to live off the land. In the 20<sup>th</sup> century, even before, these methods were clearly branded by various international conventions as war crimes. Many are also crimes against humanity and now recognized as methods of ethnic cleansing (genocide).

Consider the fictional example of a rogue army battalion (or militia) that operates a mine, takes over some plots of land for their families and illegally “taxes” peasants for money and food in a war zone. This is a common occurrence in resource wars documented by UN and the ICC in Africa. The following crimes are commonly committed in such situations.

- Property confiscation
- Forced migration
- Forced labour, enslavement & child labour
- Recruiting child soldiers
- Rape and killing of civilians as a method of enforcing co-operation in the above schemes

These actions often have significant economic motivations. In poor countries, systematic violence against civilians is used as an instrument of competition for scarce agricultural land, natural resources, labour and sources of revenue.

Corporations operating in conflict zones are also significant economic actors. They must of course ensure that their own employees do not become involved in such crimes – and, moreover, that their policies and training programs do not show implied tolerance or tacit encouragement of such conduct. In conflict zones they may also need

to develop special training programs to ensure that managers and employees (even directors) take specific steps to respect and implement International Criminal Law and International Humanitarian Law.

All these responsibilities apply to the corporation's operations and employee conduct "inside the fence."

## **6. Modes of Participation: Extending the Net of Liability**

But there is more. Corporations and executives can also be held liable for contributing to crimes perpetrated by other actors. These crimes are committed largely or wholly "outside the fence" of company operations and hierarchies. In particular, as noted earlier, executives can be prosecuted and sued as "supporting actors" in a conflict. The Rome Statute and international case law define many "**modes of participation**" that are designed to catch supporting actors and facilitators of violence.

What are those modes of participation? In judging complex war crimes cases, the international criminal courts have developed a variety of concepts such as "**common planning**" and "**joint criminal enterprise**" to hold leaders and their associates responsible for their roles in large-scale conflict. They have also adapted traditional notions of "**command responsibility**" and "**aiding and abetting**" for this purpose.

In total, we believe there are about 25 modes of participation grouped into three families that have been used by the international courts. They create what I call an **extended "net of liability"** designed to catch larger groups of associates that can include business executives.

To understand how the net can be used by the prosecution to capture a business leader, consider a scenario where an international company owns and operates the mine that is taken over by the militia. The militia leader insists that royalty payments be diverted by the company to the offshore bank account managed by the so-called political wing of the organization (operating like a sort of shadow state.) Even worse, he orders company engineers to build roads that facilitate its military operations, and regularly requisitions trucks and drivers to conduct such operations.

These arrangements can be construed as making the company a business partner of the militia that contributes to the violence. The company officials may argue that they were coerced by the militia into in co-operating – but this can be hard to prove and raise complex legal issues. How convincing does the story sound? To a judge, a jury, a journalist, or a casual Web browser?

The legal question remains complex. Does the company's decision to co-operate (even under duress) amount to indirect participation in the war crimes committed by the militia? Does the company have a legal duty to pursue (or at least explore) alternative courses of action? Does it have a related duty to prepare for such eventualities when operating in a conflict zone?

The legal answers are not yet clear since there have been relatively few prosecutions of business executives since Nuremberg. Even through precise legal standards of conduct remain to be developed, however, it is possible to offer a few practical rules of thumb to business leaders:

- “It is always important to manage your own business conduct, ensuring legal compliance and respect for the role of law. But this is not easy in a conflict zone.
- ‘When there is a risk of conflict, you must look outside your own organization to manage your business relationships with organizations that may engage in questionable conduct.
- “You need not only to manage the people working inside your fence and but also relationships with people and organizations operating outside your fence.”

The situation is complex. The risk of conflict in a country appears to void traditional working assumptions about conducting “business as usual” and respect for the “rule of law.” Most likely, it creates additional legal obligations for business corporations.

## **7. Summary**

To summarize, business leaders need to confront squarely the emerging realities of the so-called corporate responsibility to respect human rights. These realities include:

1. The emergence of enforcement methods as a key issue in the global debate on human rights and business;
2. The broad international consensus that “big sticks” are required to prosecute perpetrators of serious human rights abuses such as war crimes and crimes against humanity;
3. The risk that business executives and corporations can be held liable for many types of direct and indirect participation in violence against civilian populations that is committed by armed groups.
4. The need to manage external business relationships with other organizations, not just internal business conduct, when operating in conflict zones.

Thank you.