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International Corporate Crime and Human Rights:

Perspectives from a Defence Practitioner

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(1) Perspective & Core Messages

I will address the issue of international corporate crime from the perspective of a criminal defence lawyer. (Whatever the forum or client, we instinctively focus on the presumption of innocence and right to a fair trial.) I will also touch on the perspectives of NGOs, including mine, that have been building the ICC for almost a decade.

Let me start with one basic message for businesses, who face increased risk in the field of human rights, and a related message for lawyers who can help them manage that risk creatively.

Message to Business Leaders: The central aim of the ICC is to end impunity for the leaders who are responsible for genocide and war crimes. They may be government leaders, military leaders, opinion leaders or leaders of non-state organizations – such as, for example, guerrilla armies or terrorist networks. The intent is to hold any leadership group accountable for inciting, facilitating or directly ordering atrocities.

At first sight, the chaos of war seem far from the world of the marketplace. But what if businesses operate in countries that become conflict zones or descend into civil wars? Or what if they have profitable business relationships with governments and political leaders who organize ethnic cleansing campaigns? In such cases, business leaders benefit from no immunity from investigation or prosecution.

So, if businesses are not <u>ex</u>cluded from suspicion, the question becomes, how might they get <u>in</u>cluded? What are the ways in which they could incur criminal liability? Conversely, how can they limit liability by properly managing their "terms of engagement" in certain countries and markets?

Message to Lawyers: Lawyers can help corporations answer these questions. They can play a creative role in helping them anticipate the future development of the ICC and the international criminal justice system, and help design preventative measures.

To do this effectively, we need to rise to several challenges. One is to work effectively across national boundaries, building international legal teams serve multinational corporations. Another is that lawyers with varied expertise will need to create teams that cross professional boundaries. Criminal defence. Corporate law. Human rights. This may be a bigger challenge than crossing national boundaries. It takes creativity, tolerance and true perseverance.

Criminal defence lawyers, like surgeons, instinctively go to work when clients are in trouble. But we will need to learn from our commercial peers that the goal is to keep corporate clients out of court. In medical terms, prevention is far better than cure.

In this regard, let's remember that the ICC has been designed to dissuade and hopefully prevent war crimes. Rather than a thick book of indictments, we can hope for fewer civil wars and less crimes to prosecute. Kofi Annan, for example, emphasizes the court's dissuasive role. The leaders of multinational corporations also have a strong legal and business interest in conflict prevention. Lawyers need to make this known to leaders at the UN, the ICC and the Assembly of States Parties.

(2) Warning Signs for Corporations

Multinational corporations have experience confronting a wide variety of anti-globalization and environmental protests. But CEOs expect to be attacked on issues relating directly to their business operations – for example on the issues of compliance with international labour, environmental and fair trade standards. So, how can they be also held responsible for genocide, war crimes and mass human rights violations?

The short answer is that corporations are not viewed as the starring actors in these tragedies. But they can be viewed as supporting actors.

What kind of "support" do I mean? In major war crimes trials, courts focus not only on the physical acts of atrocity but what happened behind the scenes. This leads to investigation of the chains of command, the role of the media in inciting violence and on what we might call the "support systems" for mass violence. Among these are economic and financial support systems. Consider the focus on the Nazi industrial system in the Nuremberg trials. A related example is the focus on money laundering investigations in the international wars on drugs and terrorism.

The key legal question is: what kind of support can a business leader or corporation offer the leaders of a genocide or illegal war? This question is drawing increased attention from judges, prosecutors and human rights NGOs.

As a criminal defence lawyer, I can see a number of warning signs on the horizon for corporations. They come from a variety of sources. From US civil law. From international criminal law. From national criminal law. From NGOs.

Warning Sign #1: The first warning sign comes from the domain of civil law (or tort law) in the United States. Others on this panel know far more than me about the recent suits brought, under the Alien Tort Claims Act of 1789, against international oil companies that have operated in conflict zones (Unocal case in California, Talisman case in New York). Let me just highlight a few basic points.

The first is that judges have opened the door – in principle – to the legal theory that corporations can be found to support systems of war crimes and genocide. The key issue is whether they engaged in various forms of joint action or co-operation with oppressive regimes. In legal terms, the possibilities include aiding, abetting, conspiracy and various types of negligence. In business terms, joint action might include the direct supply of

arms to oppressive regimes – probably illegally. It might also include less direct forms of support such as earning foreign exchange from resource exports and various types of war profiteering. Or it might even involve "turning a blind eye" to what happens outside the factory gate or the hotel fence.

The preliminary rulings in the Alien Torts cases have opened a large basket of potential torts. This recently led the Harvard Business Review – hardly a left-wing tabloid – to publish an article warning that "it is only a matter of time before some company becomes the Enron of human rights abuse." The article provides a list of well-known MNCs (and global brands) that are at risk. They operate not only in the extractive industries but also in the consumer products, pharmaceuticals, agricultural, technology, financial services and automotive sectors.

A final point is worth noting. The actions against the oil companies are class action suits. This opens the door to potentially large damage awards to compensate broad classes of alleged victims.

Warning Sign #2: The second warning sign for corporations comes directly from the International Criminal Court. The new Chief Prosecutor, Luis Moreno Ocampo, has raised the possibility that individual company executives and employees might be investigated for the offence of supporting the armies (or private armed gangs) committing atrocities in the Congo (Ituri province). In July, he was quoted as saying: "There is general concern that the atrocities allegedly committed in the country may be fuelled by the exploitation of natural resources there and the arms trade, which are enabled through the international banking system." His concern was that individual war criminals would be prosecuted, but that the financial and business infrastructure of the Congolese war would remain in place. This could lead, eventually, to a new round of conflict.

The ICC can follow two main routes for investigating and prosecuting companies. One is to prosecute individual executives directly for their alleged role in facilitating atrocities. The other is for the ICC Prosecutor to co-operate with national prosecutors who have authority to investigate financial crimes and prosecute corporations. In my opinion, the second route will prevail in many cases. The ICC will likely choose to press for joint action by European countries who are signatories to the Rome Treaty and support the new court.

If individual business executives were ever brought to trial at the ICC, another route would open up. It would take the form of a compensation claim presented by victims' groups. It is not yet clear what kinds of claim might be permitted; such a proceeding might resemble a class action leading to the creation of a compensation fund.

Let me speculate for a moment about the companies that could be investigated. There are international banks operating under legal charters and structures. There are illegal arms dealers. Then there are mining and resource companies, state and privately owned. Not to mention many types of transportation and trucking companies. In short, we are looking at the Good, the Bad and the Ugly of African business. All types of company

could be viewed as playing some sort of role in the economic support system of the Congolese civil war.

Warning Sign #3: Mr. Ocampo's comments about working with national prosecutors point to a third warning sign. It is the increasing political pressure in many countries to prosecute "corporate criminals" for a variety of offences. In North America, the current focus is on prosecutions of executives for financial fraud and insider trading. In the United Kingdom, my colleague Ken Carr tells me that the focus is much broader. It encompasses financial fraud, cartels and price fixing, proceeds of crime, industrial accidents and – most visibly in recent months – lethal train accidents.

Many governments are combatting money laundering and may create a model for co-operation among national prosecutors towards this end.

Driving all this activity is political pressure. The public is mistrustful of leaders – both business and government leaders. And they are intolerant of organizational failure. Before, people might have explained a train wreck or tainted blood supply as an "act of God." Today, they want the individuals responsible held to account. The same attitude certainly applies to leaders responsible for human rights violations.

The ICC was founded to "end impunity" for war criminals. But this initiative is part of a broader movement to "end immunity" for leaders generally.

Warning Sign #4: International NGOs are leading the movement to "end impunity." This is a fourth warning sign for corporations.

A coalition of 1,200 NGOs was created to support the creation of the ICC. They have made clear their intention to continue working around the court. In my opinion, they will They will concentrate on monitoring civil conflicts and wars, pressing for redress for victims and recommending prosecutions. Mr. Ocampo's focus on the Congo, for example, is based in part on two detailed reports from NGOs. NGOs support some of the US trials under the Alien Torts statute.

I have had some experience with NGOs and the Coalition is represented on the board of the International Criminal Bar (ICB). The world of NGOs is complex. There are hundreds of groups, ranging from radical to moderate, neo-Marxist to religious. They come from many countries and offer varied perspectives on the issues.

The involvement of NGOs means that – frankly – court cases are need to be seen in the broader political context of the global human rights movement. For some companies, a criminal trial at the ICC might be the last of many problems. It would come after NGO protests, media exposure and rumours of a criminal investigation by the ICC Prosecutor. A wave of "negative branding" could already have hurt the company a lot.

Multinational oil companies know well how NGOs can mobilize a powerful coalition: community groups, churches, socially responsible investment analysts and socially

responsible consumer groups. A company can experience a simultaneous attack on its reputation, its product brands, its market share, its bond rating and the price of its shares. All this without a trial.

- *Possible examples: Talisman – trying to leave Sudan even while fighting the Alien Torts case. Exxon paid billions in compensation for the Exxon Valdez spill – while the court case is still running.*

These risks place a premium on dealing effectively with NGOs. Many multinationals already have experience, but I think it is fair to say that we are early in the process of negotiation, education and mutual accommodation. I would suggest that companies make developing these stakeholder relationships a strategic priority.

To deal effectively with NGOs, there is no magic formula. In my experience, it is 1% inspiration and 99% perspiration. A few rules of thumb that I have used:

- Listen and take time to understand their perspective.
- Communicate your perspective before confronting NGOs with your position.
- Do all this before negotiating, when possible.

As in the business world, a lot rides on your personal credibility and trust. Building it takes years not months.

There are opportunities for corporations to make progress. I do not believe, for example, that NGOs are uniformly anti-corporate. Some groups are looking for information and access to corporate decision makers – they are willing to talk. But they do not understand corporations and how they are managed.

In the context of the ICC and international criminal law, NGOs have one major weakness. Call it tunnel vision. Most are single issue groups, dedicated to their mission. They are, therefore, impatient with complexity.

(3) Nature of Corporate Criminal Liability: Shades of Grey

As a defence lawyer, I have found many NGOs to be impatient with the complexity of trial procedure. They have not readily understood (much less accepted) our central argument – that even the alleged architects of genocide should be presumed innocent until proven guilty. That a fair trial is just as important to the international rule of law as guilty verdicts for dictators. That a strong defence makes for strong, independent courts.

Corporate criminal liability under international humanitarian law is another complex subject. I see two really difficult issues here. The first is the complex nature of genocide and war crimes trials. The second issue is the real difficulty of understanding the nature of corporate complicity or support for war-mongering regimes. A central challenge will be to help human rights advocates understand these two issues.

War Crimes Trials – Shades of Grey: Most people assume that genocide, war crimes and large-scale terrorist acts create clear-cut court cases. The evidence is well-known (or so we think). The culprits are public figures. The legal principles are clear (or so we think). So, there verdicts are obvious (so the story goes.)

But there is a problem with this picture. It is not factual. Specifically, it does not accurately depict many major court cases tried in the last 10 years, including some at the ad hoc tribunals for the former Yugoslavia and Rwanda. The real picture is different. It is one of (i) factual ambiguity (think of the evidence problems in Lockerbie) (ii) procedural and jurisdictional complexity (think of the Pinochet case) (iii) political controversy (think of Milosevic, Taylor, Pinochet and many others).

Major ICC cases will try to reconstruct entire pieces of history. They will look at how groups of people confronted complex political situations – even turning points in history. At how some individuals were accused of horrible crimes and how others sought compensation for grievous harm. Obviously, many such cases will involve political and moral controversy, and passionate differences of opinion. The facts will not always be clear and evidence may be lacking.

So where NGOs and the media see black-and-white, the court will see many shades of grey. These cases will challenge lawyers as much as they will judges and new legal institutions. And defence lawyers will have the unpopular job of challenging, poking holes and acting as a spoiler of the prosecution's party. At stake is not only a win or a loss in one case, but the right to a fair trial, the presumption of innocence and the institutional legitimacy of the court.

Corporate Criminal Liability – A Whiter Shade of Grey: If there are shades of grey in many genocide trials, there will be many more when courts confront the issue of how corporations may – or may not – have supported the oppressive governments or private armies who conducted ethnic cleansing campaigns.

As I have indicated, corporate executives and employees rarely commit atrocities themselves. But every company is involved to some extent in the system of governance in a country and has some relationship with the governing regime. So, what is the nature of that involvement and that relationship?

This question is not only being asked by NGOs. It is being asked by Chief Prosecutor Ocampo, by the United Nations, by the World Bank, by the Harvard Business Review and by George Soros. All are concerned with the economic systems that support oppressive regimes and rebel armies. For example, a World Bank analysis indicates that civil wars often occur in poor countries where one large ethnic group dominates others and where it is easy to capture income from exports of oil, diamonds or drugs. George Soros points to the linkage between corruption, exploitation of natural resources and human rights violations.

> "There is a close connection between the exploitation of natural resources and the prevalence of corrupt and oppressive regimes. A secure revenue stream such regimes to maintain power, and controlling vast flows of money gives dictators a powerful incentive to cling to power. Without the need for broader public support, these regimes can oppress their citizens and ignore basic needs such as healthcare and education."

Problem countries listed by Soros include Angola, Sierra Leone, Chad, Congo and Sudan. All were the scenes of long, bloody civil wars in which many civilians died or fled their homes. The Talisman case in the US probes the heart of the relationship between a key oil exploration and drilling program and the government of Sudan's conduct of a war in the same region.

The least that can be said is that the facts can be hard to gather and that relationships can be intricate. There will be many opinions, perspectives and points of view. And many shades of grey.

(4) Three Scenarios: The Bad, The Good and The Ugly

As a defence lawyer, I can imagine at least three different types of scenario emerging from genocides and civil wars. In each case, the relationship of companies to the government is significantly different.

All scenarios are imaginary.

Scenario #1: A Gang of "Bad Companies"

The first scenario involves a gang of "bad companies." In this country, there are a triangle of arms dealers, diamond merchants and gold mining companies. A corrupt government operates at the centre of the triangle, transferring diamond and gold revenues from the exporters to the arms dealers, to the army and to their own offshore bank accounts. The army conducts an ethnic cleansing campaign that lasts five years and finally attracts UN intervention.

A transition regime takes power and quickly asks the ICC to prosecute key political, military and business leaders, who have fled to a non-ICC country.

The arms and diamond companies have operated illegally, for the most part. They could have been prosecuted in the country, but prevented investigation through systematic corruption of police and prosecutors. All parties regularly transferred funds through a single bank that holds the funds in numbered accounts in the Cayman Islands.

Here is a case with clear-cut facts. All the businesses profit from the conflict and form part of the economic system that directly supports an army engaged in systematic ethnic cleansing. Business leaders may in fact be considered by a court to be *de facto* members

of the regime. In this case, the defence needs to test the evidence and help define the nature of the criminal liability imposed. But it will be representing a "gang of bad companies" … and may choose not to present their side of the story in detail.

Now, let's consider another type of case.

Scenario #2: A "Good Company" in a Bad Neighbourhood

It involves a peaceful island country, known for its pristine beaches and thriving tourism business. This country slips unexpectedly into civil war after a rebel movement massacres most of the ruling elite. The genocide is brutal but lasts only two months.

The company in question is an international hotel chain operating beachside resorts in three locations. It is a "good company" that makes some compromises with the regime in place. On the positive side of the ledger, the company …

- Continues operating before and after the civil war.
- Earns valuable foreign exchange for both governments and local tourist businesses.
- Observes fair labour standards with local employees.
- Observes environmental standards.

On the negative side, the company ….

- Pays "excessive" licensing fees to renew various operating permits.
- Takes government officials on luxury cruises and trips to Europe.
- Deposits certain payments in offshore banking accounts.
- Finally, during the genocide, the hotel security chief co-operates with the rebel "army" units to secure the perimeter around the hotel (just as he did with police before.)

After two years, the rebel government is defeated in an election, organized under UN auspices. Exiles who lost families sue the hotel chain for damages in US courts and the ICC prosecutor asks the newly elected government to investigate 7 hotel executives and the security chief for complicity in the genocide. The hotel claims it is a good corporate citizen and has only acted to ensure the physical security of guests and employees, protect its assets and ensure its "license to operate" in the country.

This case presents us with many shades of grey. The defence can do far more than test the evidence. It can offer an alternative perspective on the hotel's relationship with the rebel leadership. It can tell the story of a "good company" operating in a bad set of circumstances.

Now, let's look at a case where the facts are even more ambiguous.

Scenario #3: A "Good Company" on the Road to Temptation

This third scenario provides a picture of what can happen to a "good company" that becomes involved in circumstances it does not fully understand or control. And where it

may feel forced to make compromises that are morally and legally questionable. A quick sketch of events:

- The oil company starts an exploration program and operates for several years in peaceful circumstances. There are only a few prospecting teams on the ground.
- Larger scale drilling begins and some villages need to be relocated.
- Police forcibly evict families and burn 20 villages … without being asked by the company.
- After a few months, the army begins systematic ethnic cleansing in the region, using the drilling and the need for oil exports as a pretext.
- After revolts and massacres, army protection for drilling and pipeline operations becomes a condition for safe operations.
- The operation earns foreign exchange that keeps the government in power and ammunition flowing to the troops.
- Company claims several times that it wants to exit the country but protests that its workers are "held hostage" by government troops.

As the investigation begins, all sides understand that it will be hard to know the truth of what happened – "the truth" about the company may be in the eyes of different beholders. The role of the defence is to present the company's story and test the prosecution evidence. A vigorous defence plays a key role here. It helps the investigators and the court assess credibility and make difficult judgement calls about what really happened.

If time permits, let's discuss these three scenarios.

(Invite questions and comments from panel and people in room.)

(5) Role of Lawyers: Notes for Discussion

Defence lawyer's perspective: Presumption of innocence and fair trial procedure. Essential to the cause of justice, truth finding and understanding the economic support systems of genocide and war. All very important but hard to enforce in practice. Presumption of innocence may be of only theoretical interest to company those brand, reputation and business relationships are damaged by the early stages of controversy and investigation.

Corporate lawyer's perspective: Prevention is far better than cure. Better to prevent trouble than win the case. Companies need risk management strategies, organizational and legal "firewalls" and "due diligence" processes. CSR may move from "right thing to do" to legally required "due diligence." Part of good governance for an MNC board and CEO.

Multidisciplinary perspective: In prevention programs, criminal lawyers are needed to understand the nature of criminal liability. Corporate lawyers are needed to design prevention strategies; these may involve restructuring companies, employment contracts, government relations, etc. Involvement of general counsel, CEO and board.

International teams. Lawyers and investigators will be needed in several jurisdictions. Corporate headquarters, countries where alleged criminal acts took place, other countries where key decisions may have been taken, key countries where prosecutors are investigating.

Roles of Lawyers: Here are distinct roles that lawyers can play in helping companies limit criminal liability.

- Watchdog for corporations and boards of directors. Risk management.
- Corporate Advisor. Firewalls and prevention strategies. (Harvard Business Review)
- Corporate structure. Governance, contracts and relationships with governments.
- Negotiator. With NGOs and governments.
- Defence watchdog. Represent at stage of investigation.
- Criminal defence lawyer. At trial.