

Our Business Is People (Even If It Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo

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I. INTRODUCTION

The war in what is now the Democratic Republic of Congo (DRC), formerly Zaire, easily ranks as one of the greatest human rights disasters of the last fifty years. At least 3.5 million people died in the war, a direct result of Rwandan and Ugandan military occupation.¹ Warring parties in the conflict exploited the country’s natural resources, including diamonds, gold, coal, and coltan, to finance their military operations and buy weapons, frequently committing human rights violations in the

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1. U.N. Security Council Press Release, *Security Council Is Told Peace in Democratic Republic of Congo Needs Solution of Economic Issues That Contributed to Conflict*, 4634th Mtg., U.N. Doc. SC/7547 (Oct. 24, 2002), available at <http://www.un.org/News/Press/docs/2002/sc7547.doc.htm> [hereinafter 2002 Press Release].

process.² In 2000, the United Nations Security Council commissioned a Panel of Experts (the Panel)³ as an independent fact-finding body to provide recommendations to the Council⁴ and ordered the Panel “to follow up on reports and collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo.”⁵ The Security Council further directed the Panel to research and analyze connections between the continuation of the conflict in the DRC and the exploitation of said natural resources.⁶ Non-Governmental Organizations (NGOs) and other human rights activists criticized the Security Council, the Panel, and individual Member States for failing to hold multinational enterprises (MNEs) accountable for their involvement in the exploitation and in the continuation of the conflict.⁷ The prosecutor for the International Criminal Court (ICC) announced that his office concurrently would consider investigating the contribution that MNEs made to the prevalence of war crimes, and crimes against humanity committed during the conflict.⁸

This Comment then seeks to determine whether the ICC could, in fact, prosecute MNEs for their involvement in war crimes, and crimes against humanity, committed in the DRC. As a precursor, a discussion of the ethical standards employed by the Panel in determining the culpability of MNEs proves informative. This Comment examines the effectiveness of the Panel’s chosen ethical standard, the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines).⁹ This Comment will analyze newer and more comprehensive set of standards, the United Nations

2. Anneke Van Woudenberg, *Britain Must Confront Shameful Trade that Ruins Congolese Lives*, INDEP. (London), Oct. 31, 2003, available at <http://news.independent.co.uk/world/africa/story.jsp?story=458965>. Coltan (columbo tantalite) is the mineral from which the metal tantalum is extracted, which then is used to help produce electronic equipment. See *Letter from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo to the Secretary-General* (Oct. 15, 2003), U.N. Doc. S/2003/1027, at 5, ¶ 10 [hereinafter 2003 Letter].

3. See 2003 Letter, *supra* note 2, at 15, ¶ 48.

4. *Id.* at 7, ¶ 15.

5. 2002 Press Release, *supra* note 1.

6. *Id.*

7. See *D.R. Congo: U.N. Must Address Corporate Role in War*, HUM. RTS. WATCH, Oct. 27, 2003, at <http://hrw.org/press/2003/10/drc102703.htm> [hereinafter Human Rights Watch Report].

8. *Id.*

9. ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter OECD 2000 GUIDELINES].

Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)¹⁰ and then compare and contrast this with the Guidelines.

This Comment is necessarily limited, however, in that the Panel seldom offered specific examples of illicit conduct of MNEs. As the Panel's findings of fact are not widely accepted,¹¹ this Comment may only offer generalized possibilities for the prosecution of MNEs for crimes against humanity and war crimes committed in the DRC, according to the comparatively little amount of specific information available. This Comment seeks then, not to provide an opinion by which MNEs should be prosecuted, but rather to suggest methods in which MNEs may be prosecuted if the Panel's findings of fact relating to that MNE warrant an indictment.

II. BACKGROUND

The situation in the DRC first began to destabilize in 1994, when hundreds of thousands of refugees from neighboring Rwanda flooded into Zaire.¹² The situation deteriorated when hostilities erupted between Zairian forces and the local rebel movement known as the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL), which neighboring forces from Angola, Rwanda, and Uganda supported.¹³ The AFDL's leader, the late President Laurent-Désiré Kabila, indirectly encouraged these foreign forces to conduct business in territories "liberated" by the AFDL.¹⁴ As the AFDL advanced through Eastern and Southeastern Zaire, Kabila signed contracts with numerous foreign companies.¹⁵ In its 2002 Report, the Panel identified three distinct groups operating in three different areas, which the Panel referred to as

10. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *Human Rights Norms*].

11. See Human Rights Watch Report, *supra* note 7.

12. *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo*, U.N. Doc. S/2001/357, at 6, ¶ 22 (2001) [hereinafter 2001 Report]. Crimes committed by Rwandan citizens during the Congolese war could not be prosecuted by the International Tribunal for Rwanda, as that tribunal only possesses jurisdiction over violations of international humanitarian law committed between January 1, 1994 and December 31, 1994. See generally Statute of the International Tribunal for Rwanda, U.N. SCOR 955, 3453rd Mtg., Annex, U.N. Doc. S/RES/955, art. 1 (1994), *reprinted in* 33 I.L.M. 1598, 1602 (1994) (recognizing the humanitarian law violations that occurred in Rwanda).

13. 2001 Report, *supra* note 12, at 6, ¶ 23.

14. *Id.*

15. *Id.* at 6, ¶ 26.

“elite networks.”¹⁶ Controlled by the governments of the DRC, Rwanda, and Uganda, respectively, these elite networks maintained control over the exploitation of resources, diversion of taxes, and other revenue generating activities throughout their respective spheres of influence.¹⁷ Eventually, the conflict in the DRC became mainly about access, control, and trade of five key mineral resources: cobalt, coltan, copper, diamonds, and gold.¹⁸

Based on countries’ budget allocations for their respective armed forces versus their actual expenditures, the Panel ultimately found a definite link between the exploitation of resources of the DRC and the continuation of the conflict in the area.¹⁹ The private sector was considered to be instrumental in the exploitation of resources and the continuation of the war.²⁰ Some companies would directly perpetuate the war by trading arms for exploited resources, while others would provide access to the financial resources needed to purchase weapons.²¹ The lawlessness of the country, combined with the central authority’s weakness, made the country an attractive target for foreign elements to exploit the DRC’s natural resources.²² Accordingly, the conflict was considered a “win-win” situation for all belligerents.²³

Forces from Uganda, Rwanda, and Burundi therefore engaged in a widespread pattern of exploitation of resources in the Congo region, using tactics such as confiscation, extraction, price-fixing, and forced monopoly.²⁴ While these forces claimed to be acting on behalf of security and political interests, the Panel found “strong indications” that financial and economic reasons motivated top army officials.²⁵ Major battles were fought in areas of great economic importance, the control of which allowed the DRC government to continue the war effort.²⁶ Generally, attacks would coincide with the extraction and removal of coltan from areas rich with the mineral.²⁷ When the price of coltan spiked in 1999,

16. *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/1146, at 6, ¶ 20 [hereinafter 2002 Report].

17. *Id.*

18. 2001 Report, *supra* note 12, at 41, ¶ 213.

19. *Id.* at 27, ¶ 109.

20. *Id.* at 42, ¶ 215.

21. *Id.*

22. *Id.* at 41, ¶ 213.

23. *Id.* at 42, ¶ 218.

24. *Id.* at 6, ¶ 25.

25. *Id.* at 7, ¶ 28.

26. *See id.* at 36, ¶ 175(c).

27. *Id.* at 37, ¶ 177.

rebel groups and unscrupulous business people in the DRC forced farmers and their families to leave their agricultural land, or chased people off land where they found coltan and forced them to work in artisanal mines.²⁸ This forced dislocation resulted in widespread destruction of agriculture, and effectively amounted to slavery in many instances.²⁹ Recently however, the exploitation of resources has concentrated on gold and diamonds.³⁰

In December 2002, the various Congolese parties signed the Global and Inclusive Agreement, which provided for establishment of the Government of National Unity.³¹ Nevertheless, insurgent groups continue to perpetuate the conflict in the eastern and northeastern regions of the country, funded by the continued exploitation of the DRC's natural resources.³²

The Panel found that the DRC government supported its own war effort through the "direct and indirect uptake of money from parastatals and other private companies," notably mining enterprises and oil companies.³³ The Panel further found that large reputable countries were linked with actors in the conflict so that they were able to operate with confidence.³⁴ Specifically, foreign coltan purchasers knew of the illegal means used to acquire the mineral.³⁵ Additionally, the Panel found that staff members of developed countries' embassies, including the United States, promoted business deals between foreign businesses and the insurgent group-controlled coltan dealers.³⁶ Companies subsequently acknowledged that they had exercised little scrutiny over the origin of the minerals they purchased, and thus they might inadvertently have purchased minerals from conflict areas.³⁷

28. *Id.*

29. *Id.*

30. 2003 Letter, *supra* note 2, at 14, ¶ 46.

31. *Id.* at 14, ¶ 43. The new Congolese Parliament convened for the first time on August 22, 2003. *Id.*

32. *Id.* at 14, ¶¶ 45-46.

33. *See* 2001 Report, *supra* note 12, at 33, ¶ 153.

34. *Id.* at 38, ¶ 182.

35. *Id.*

36. *Id.* at 38, ¶ 183. It is worth noting that the Panel found American companies engaged in these business arrangements. *See id.*

37. 2003 Letter, *supra* note 2, at 9-10, ¶ 24.

III. AVAILABLE ETHICAL STANDARDS FOR INVESTIGATIONS INTO THE
AFFAIRS OF BUSINESS ENTERPRISES IN THE DRC

A. *The OECD Guidelines*

The Panel used the OECD Guidelines as an ethical standard while conducting its research.³⁸ The Guidelines are recommendations addressed by OECD Member governments to MNEs operating in their territories, designed both to provide guidance to such MNEs and to ensure that the companies' enterprises are in harmony with the host state's policies.³⁹ Home Governments of these countries, if signatories to the OECD Guidelines, must ensure that their businesses comply with the guidelines; if they do not take remedial measures, the governments themselves risk complicity.⁴⁰ The OECD Committee on International Investment and Multinational Enterprises (CIME), comprised of representatives (or National Contact Points (NCPs)), monitors compliance with the Guidelines.⁴¹ Critics of the Guidelines claim that they have had little impact, as few corporations have any idea of their content.⁴²

In the Annexes of its October 2002 Report, the Panel of Experts listed 157 business enterprises with well documented commercial connections to the three elite networks engaged in hostilities in the DRC.⁴³ Through contributions to the revenues of the various elite networks, these business enterprises directly and/or indirectly contributed to the ongoing conflict and human rights abuses.⁴⁴ The Report alleged that eighty-five companies involved in business activities in the DRC breached international norms, including the OECD Guidelines.⁴⁵ Naturally, the companies and individuals listed in the Annexes to the 2002 Report "elicited strong reactions" to being named in the report.⁴⁶ The Security Council accordingly authorized the Panel to work with the

38. See generally *id.* at 8, ¶21 (noting the worldwide applicability of the OECD Guidelines).

39. ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3, 17-18 (1986) [hereinafter OECD 1986 GUIDELINES].

40. 2002 Report, *supra* note 16, at 32, ¶ 178.

41. 2003 Letter, *supra* note 2, at 8, ¶ 20.

42. Jessica Woodroffe, *Regulating Multinational Corporations in a World of Nation States*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 131, 137 (Michael K. Addo ed., 1999).

43. See 2002 Report, *supra* note 16, at 32, ¶ 174, Annexes I-III.

44. *Id.* at 32, ¶ 175.

45. Human Rights Watch Report, *supra* note 7.

46. Security Council Press Release, *Security Council Condemns Continuing Exploitation of Natural Resources in Democratic Republic of Congo*, 4863rd Mtg., U.N. Doc. SC/7925 (Nov. 19, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7925.doc.htm> [hereinafter 2003 Press Release].

named parties, in order to arrive at a resolution of the issues, prompting their inclusion in the Annexes.⁴⁷

The Panel met with 119 of the 157 listed parties, evaluating information voluntarily submitted in light of the Panel's own experience in the region.⁴⁸ It then reorganized the parties into five categories: those whose cases had been resolved; those whose cases were provisionally resolved; those referred to their local OECD NCPs for updating or further information; those referred to their local NCPs for further investigation; and those that did not react to the Panel's report.⁴⁹

Companies in the first category, those whose cases were resolved, are now viewed as having been removed from the Annexes.⁵⁰ Resolution could be achieved through a party's acknowledging that its business behavior was inappropriate, and either subsequent actions to remedy said behavior, or accepting a time-bound commitment to remedy it.⁵¹ A case could also be considered resolved if a company ceased operations in the DRC, or ceased transactions with Congolese parties.⁵² Yet another example of resolution entailed companies that had conducted business in the DRC for many years, prior to control by rebel and opposition groups.⁵³ If such companies ran their businesses in a responsible manner, and did not directly fund activities contributing to the conflict, the Panel considered those companies' cases resolved.⁵⁴ In all, the Panel achieved a resolution with 61 of the 157 companies listed in the 2002 Report, with no outstanding issues or referral to OECD NCPs.⁵⁵ Eighteen companies, including some well-known international operators, either rejected the idea that their activities in the DRC were questionable, or refused to accept responsibility for helping to perpetuate the violence.⁵⁶

In choosing the OECD Guidelines as an ethical standard, the Panel obviously expressed a preference for municipal prosecution and enforcement of criminal activities by MNEs affiliated with the elite networks. But this reliance on municipal enforcement of international norms against a nation's businesses may prove unrealistic. In October 2003, Human Rights Watch reported that *none* of the governments

47. *Id.*

48. *See id.*

49. *See* 2003 Letter, *supra* note 2, at 9-12, ¶¶ 22-32.

50. *Id.* at 9, ¶ 23.

51. *Id.* at 9-10, ¶ 24.

52. *Id.* at 10, ¶ 26.

53. *Id.* at 10-11, ¶ 28.

54. *Id.* at 11, ¶ 28.

55. *See id.* at 9, ¶ 23.

56. David Usbourne, *Congo: UN Says War Fueled by Foreign Firms*, INDEP. (London), Oct. 31, 2003, available at <http://www.corpwatch.org/news/PND.jsp?articleid=8891>.

participating in the OECD had yet to investigate the conduct of any of the businesses listed in the Annexes to the 2002 Report.⁵⁷ Rather, the Human Rights Watch report implied that political pressure from the businesses' home nations prompted the resolution of cases and removal of businesses from the Annexes found in the 2003 Report.⁵⁸ The NGOs then called upon both the Security Council and UN member nations to conduct open and transparent investigations, using either the OECD Guidelines or other judicial procedures, in order to clarify the roles played by businesses in the DRC conflict.⁵⁹

The text of the 2002 and 2003 reports support Human Rights Watch's assertion that political pressure prompted the resolutions.⁶⁰ In 2002, the Panel clearly stated that the business enterprises listed in Annexes I and II "are in violation of the OECD Guidelines."⁶¹ The Panel further stated that the Annex III enterprises had also violated the Guidelines.⁶² Yet one year later, the Panel backtracked, and explained that enterprises in Annexes I and II were included because they contributed, directly or indirectly, to the continuation of the conflict in the DRC, but that *only* those in Annex III had violated the Guidelines.⁶³ The Panel gave no explanation for this glaring discrepancy in regard to the enterprises included in Annexes I and II.⁶⁴

B. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

As the Panel conducted its investigation, the UN Sub-Commission on the Promotion and Protection of Human Rights was drafting a new human rights document governing behavior of MNEs, the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms).⁶⁵ The Norms, and their accompanying commentary, comprehensively detail the human rights responsibilities of companies, and detail criteria for companies who wish to improve their compliance with international human rights

57. Human Rights Watch Report, *supra* note 7 (emphasis added).

58. *Id.*

59. *Id.* The other NGOs included Oxfam International, Friends of the Earth, and OECD Watch, among others. *Id.*

60. *See generally* 2003 Letter, *supra* note 2; 2002 Report, *supra* note 16.

61. 2002 Report, *supra* note 16, at 32, ¶ 175.

62. *Id.* at 32, ¶ 177.

63. 2003 Letter, *supra* note 2, at 6, ¶ 12 (emphasis added).

64. *See id.*

65. *See generally* Human Rights Norms, *supra* note 10.

law.⁶⁶ The Sub-Commission unanimously adopted the Norms on August 13, 2003, with support and approval from over eighty NGOs.⁶⁷

According to Amnesty International, the Norms not only provide an authoritative interpretation of the Universal Declaration of Human Rights adopted in 1948, but also combine the key international human rights laws, standards and best practices applying to businesses in one document.⁶⁸ Even though a number of codes and guidelines cover business and human rights, these various procedures lack the UN's authority and commitment to universality.⁶⁹ Accordingly, the UN-endorsed Norms may encourage uniformity in the various nonbinding principles adopted by NGOs, companies and industry associations, and possibly even contribute to developing the laws concerning the international responsibilities of corporations.⁷⁰ As the United Nations drafted the Norms to cover all transnational corporations and businesses, they could potentially command wide support.⁷¹ While the Norms are not a formal treaty, a recognized international standard grounds each principle in the Norms.⁷²

Admittedly, the Panel was mandated to collect information on the illegal exploitation of wealth during the conflict in the DRC, and not specifically to investigate human rights violations.⁷³ But considering that the continuation of any conflict will almost certainly result in human rights violations, one could infer that the Panel was at least indirectly charged with the investigation of human rights violations. That is, by investigating the illegal exploitation in the DRC, the Panel actually investigated the human rights violations that MNEs caused, permitted, or at least enabled, against the backdrop of the conflict in the DRC. Furthermore, the OECD itself has admitted that the success of sustainable development depends upon the protection of human rights

66. AMNESTY INT'L, THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY (2004), at <http://web.amnesty.org/pages/ec-unnorms-eng> (last visited Jan. 8, 2004) [hereinafter AMNESTY INTERNATIONAL NORMS FOR BUSINESS].

67. *Id.*

68. Press Statement, Amnesty International, Nongovernmental Organizations Welcome the New U.N. Norms on Transnational Business (Aug. 13, 2003), available at <http://web.amnesty.org/pages/ec-unnorms-eng>; Public Statement, Amnesty International, United Nations: Human rights responsibilities of transnational corporations and other business enterprises (Aug. 8, 2003) A.I. Doc. No. POL 30/012/2003.

69. AMNESTY INTERNATIONAL NORMS FOR BUSINESS, *supra* note 66, at 15.

70. *Id.* at 5-6, 15.

71. *Id.* at 8.

72. *Id.* at 6-7.

73. 2002 Press Release, *supra* note 1.

and the rule of law.⁷⁴ In this context then, one must wonder if the Panel would have resolved as many cases, if it had followed the Norms instead of the OECD Guidelines.

The Norms were not adopted until August 2003,⁷⁵ approximately three years after the Security Council charged the Panel with investigating the illegal exploitation of resources in the DRC.⁷⁶ Application of the Norms to the entirety of the Panel's investigations would therefore have been simply impossible. Businesses could further argue that adoption of the Norms as an ethical standard between August 2003 (when they were adopted by the UN Sub-Commission) and October 2003 (when the Panel submitted its Final Report) would amount to a substantive due process violation (even though the Panel was not a judicial body).⁷⁷ If the Security Council and UN member nations do in fact conduct independent and transparent investigations into the activities of businesses (as called for by various NGOs)⁷⁸, the Norms would serve as the ideal ethical standard to apply to a new investigation.⁷⁹ The fact that the United Nations supports the Norms and their complete delineation of human rights responsibilities of transnational companies bolsters this assertion.⁸⁰ Generally speaking, proponents of the Norms believe that they provide "the 'world's most comprehensive and authoritative standard on corporate responsibility.'"⁸¹

When the Panel stated in its 2002 Report that the companies listed in the Annexes had violated the OECD Guidelines, it neglected to elaborate on how the companies violated the Guidelines, or which specific Guidelines were violated.⁸² Nevertheless, a cursory reading of both the Guidelines and the Norms reveals that the Norms impose

74. Chris Avery, *Business and Human Rights in a Time of Change*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 17, 34-35 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (quoting OECD, *Development Partnerships in the New Global Context*, available at <http://www.oecd.org/dataoecd/31/61/2755357.pdf> (last visited Mar. 8, 2004)).

75. AMNESTY INTERNATIONAL NORMS FOR BUSINESS, *supra* note 66.

76. See 2003 Letter, *supra* note 2, at 15, ¶ 48.

77. 2003 Press Release, *supra* note 46.

78. Human Rights Watch Report, *supra* note 7.

79. AMNESTY INTERNATIONAL NORMS FOR BUSINESS, *supra* note 66, at 15.

80. *Id.*

81. *U.N.: New Standards for Corporations and Human Rights*, HUM. RTS. WATCH, Aug. 13, 2003, available at <http://www.hrw.org/press/2003/08/un081303.htm> (quoting Arvind Ganesan, Director of the Business and Human Rights Program of Human Rights Watch) [hereinafter *New Standards*].

82. See 2002 Report, *supra* note 16, at 32, ¶¶ 174-178. Presumably this dearth of information prompted Human Rights Watch to request that the Security Council release the findings of the Panel to the ICC. See Human Rights Watch Report, *supra* note 7.

stricter responsibilities upon businesses than the Guidelines. Under the Guidelines, businesses are to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”⁸³ However, the Guidelines do not elaborate on what rights are included, or on how broadly the group of “those affected by their activities’ extends.”⁸⁴ In contrast, the Norms include a very detailed and expansive definition of “human rights.”⁸⁵

The Commentary to the Norms reveals that the Norms place an affirmative duty on businesses to use due diligence to ensure that their activities do not contribute directly or indirectly to human rights abuses, and not to benefit directly or indirectly from human rights abuses of which the business was aware, or should have been aware.⁸⁶ Businesses also have an affirmative duty to refrain from activities which would undermine the rule of law, as well as governmental efforts to respect human rights.⁸⁷ The text of the Norms similarly places an affirmative duty on businesses not to engage in or benefit from crimes against humanity and other war crimes, including forced or compulsory labor.⁸⁸ Likewise, security operations for businesses have an affirmative duty to observe international human rights norms as well as the domestic laws of

83. OECD 2000 GUIDELINES, *supra* note 9, at 19.

84. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 487 (2001) (quoting OECD 2000 GUIDELINES, *supra* note 9).

85. *Human Rights Norms*, *supra* note 10, at 7, ¶ 23. The Norms define “human rights” and “international human rights” as including:

civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

Id.

86. *Commentary on the Draft Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Commentary Submitted Pursuant to Resolution 2002/8*, Sub-Commission on the Promotion and Protection of Human Rights, 54th Sess., Provisional Agenda, Item 4, at 4, ¶ 1(b), U.N. Doc. E/CN.4/Sub.2/2003/38 (May 30, 2003) [hereinafter *Norms Commentary*]. The Preamble to the Human Rights Norms describes the Commentary as “a useful interpretation and elaboration of the standards contained in the Norms[.]” *Human Rights Norms*, *supra* note 10, pmb. at 3.

87. *Norms Commentary*, *supra* note 86, at 4, ¶ 1(b).

88. *Human Rights Norms*, *supra* note 10, at 4, ¶ 3. The Norms state:

Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

Id.

the host state.⁸⁹ The commentary to this section explains that such business security arrangements should be used for defensive and protective measures only, and should not be used to supplement activities which are the sole responsibility of the state.⁹⁰ MNEs employing such private security forces have a further duty to ensure that security employees follow any relevant international limitations.⁹¹

The Norms further forbid businesses from offering or knowingly benefiting from a bribe and maintain that businesses should not be expected to give a bribe to any government or member of the armed forces or security forces.⁹² The Guidelines have an almost identical provision.⁹³ The Panel determined that some foreign companies placed local military commanders on their corporate boards, in exchange for protection from the armed forces.⁹⁴ Such conduct clearly offends both legal standards. Perhaps most importantly, the Norms provide that business enterprises shall refrain from any activity which supports or encourages the abuse of human rights, and must further seek to ensure that their goods and services will not be used to abuse human rights.⁹⁵

These affirmative duties make the Norms a remarkable human rights document, in that the duties for transnational corporations appear to contain no mental state requirement.⁹⁶ These corporations and enterprises shall refrain from profiting from human rights violations, encouraging states to abuse human rights, and shall ensure that their own products will not be used to abuse human rights.⁹⁷ If such is indeed the case, the Norms would already present a notable departure from existing human rights documents; international criminal law conventions generally include the defendant's mens rea in the definition of a crime.⁹⁸ While the criminal laws generally require intent and knowledge, the extent of a defendant's intent and knowledge regarding each element of a crime can vary from crime to crime.⁹⁹

Given this lower threshold of culpability, one can easily see that if the Panel used the Norms, rather than the Guidelines, as an ethical standard, it would have arrived at fewer resolutions with enterprises than

89. *Id.* at 4, ¶ 4.

90. *Norms Commentary*, *supra* note 86, at 6, ¶ 4(b).

91. *Id.* at 6, ¶ 4(d).

92. *Human Rights Norms*, *supra* note 10, at 5, ¶ 11.

93. OECD 2000 GUIDELINES, *supra* note 9, at 24-25.

94. *See* 2001 Report, *supra* note 12, at 16, ¶ 82.

95. *Human Rights Norms*, *supra* note 10, at 5, ¶ 12.

96. *See id.* at 5, ¶ 11.

97. *Id.*

98. Ratner, *supra* note 84, at 523.

99. *Id.*

the sixty-one ultimately achieved. Companies who ran their businesses in a responsible manner, but who may have indirectly contributed to the continuation of the conflict, would therefore need to take additional measures in order to arrive at a resolution under the Norms. The Norms are not a treaty and, therefore, do not establish any penalties for violations.¹⁰⁰ Companies and governments can adopt the Norms if they so desire.¹⁰¹ But the Norms do not specify an enforcement mechanism, and thus could be considered merely a statement of aspiration, rather than the binding code of conduct into which the drafters may have hoped they would evolve.¹⁰²

The Guidelines do provide for an enforcement mechanism: the Home Governments of businesses.¹⁰³ But if these Home Governments choose not to enforce the Guidelines (as Human Rights Watch alleges), then offending businesses could escape responsibility for their role in continuing the conflict.¹⁰⁴ Another problem with enforcing the Guidelines is that only thirty-four countries subscribe to them.¹⁰⁵ Paradoxically, member nations are among the world's wealthiest, while most acute problems arise in developing nations.¹⁰⁶ The 2002 Report provides evidence of this dilemma, as at least seventeen Home Governments of businesses listed in the Annexes have not adopted the Guidelines.¹⁰⁷ Even if the Human Rights Watch Report is incorrect, and Home Governments are in fact both willing and likely to issue OECD sanctions, the businesses of these countries could still escape punishment simply because their governments do not recognize the applicable legal scheme. Moreover, while OECD member nations are considered

100. AMNESTY INTERNATIONAL NORMS FOR BUSINESS, *supra* note 66, at 6.

101. *New Standards*, *supra* note 81.

102. *See generally Human Rights Norms*, *supra* note 10 (stating means of enforcement not included).

103. 2002 Report, *supra* note 16, at 32, ¶ 178.

104. Human Rights Watch Report, *supra* note 7.

105. 2003 Letter, *supra* note 2, at 8, ¶ 20.

106. Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 74, at 75, 84.

107. *See* 2002 Report, *supra* note 16, Annexes. Namely, the DRC, Rwanda, Uganda, Kinshasa, Harare, Kigali, Antwerp, Ghana, Zimbabwe, South Africa, China, Malaysia, Kazakhstan, the United Arab Emirates, Thailand, Saint Kitts, and Israel have not adopted the guidelines, yet the Annexes to the 2002 Report included at least one business enterprise from each of the countries. *See id.* For a complete list of OECD member countries, see ORG. FOR ECON. COOPERATION & DEV., RATIFICATION OF THE CONVENTION ON THE OECD: OECD MEMBER COUNTRIES, *available at* http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Jan. 9, 2004). In addition to these thirty countries, Argentina, Brazil, Chile, and the Slovak Republic have adopted the Guidelines. *See* OECD 2000 GUIDELINES, *supra* note 9, at 4.

complicit when they do not take remedial measures against their own businesses,¹⁰⁸ these nations have already expressed reluctance to sanction businesses residing within their respective jurisdictions, characterizing the Guidelines as “voluntary and not legally enforceable.”¹⁰⁹ Indeed, the Guidelines are not binding, and do not provide a method for publicly denouncing delinquent corporations.¹¹⁰

In that respect then, the Guidelines provide no more useful an enforcement mechanism than the Norms. If the Norms in fact provide “the world’s most comprehensive and authoritative standard on corporate responsibility,”¹¹¹ then they would logically serve as a better reference standard for future investigations than the Guidelines. Furthermore, as it appeared in October 2003, no OECD member nations had investigated the activities of listed businesses registered within their jurisdiction, then Human Rights Watch’s assertion that the Panel’s findings lack enforcement power appears valid.¹¹² Such an assertion becomes even more apparent when one considers that the Home Governments of many businesses included in the Annexes do not even recognize the Guidelines.¹¹³ In fact, Home Nations often hesitate to compel their corporations to comply with international law in general, as they believe that such regulation puts their corporations at a competitive disadvantage with other states’ corporations.¹¹⁴ Since national governments therefore seem unwilling to enforce the violations of international norms conducted in the DRC, then perhaps enforcement can now be achieved at the international level only.

IV. THE INTERNATIONAL CRIMINAL COURT

The prosecutor for the ICC, Luis Moreno Ocampo, stated that his office may investigate the effect that multinational businesses had on the continuation of the conflict.¹¹⁵ Theoretically the ICC would provide an ideal forum for prosecution of international violations committed in the DRC, as it is a permanent court set up for the prosecution of violations of

108. 2002 Report, *supra* note 16, at 32, ¶ 178.

109. See Claudia M. Pardinias, *The Enigma of the Legal Liability of Transnational Corporations*, 14 SUFFOLK TRANSNAT’L L. REV. 405, 435 (1991).

110. Joseph, *supra* note 106, at 84.

111. *New Standards*, *supra* note 81 (quoting Arvind Ganesan, Director of the Business and Human Rights Program of Human Rights Watch).

112. See Human Rights Watch Report, *supra* note 7.

113. See 2001 Report, *supra* note 12, Annex III.

114. Joseph, *supra* note 106, at 80.

115. Human Rights Watch Report, *supra* note 7.

international law committed by individuals.¹¹⁶ However, several procedural obstacles must be surmounted before the Court would be able to prosecute corporate defendants.

The ICC possesses jurisdiction over every international defendant for the most serious crimes, as delineated by the Rome Statute of the ICC.¹¹⁷ Article 15(1) of the Rome Statute enables the ICC Prosecutor to initiate investigations of his own accord, based on information of crimes within the jurisdiction of the ICC.¹¹⁸ If the Prosecutor concludes that the investigation should go forward, he must then submit to the Court's Pre-Trial Chamber a request for authorization of an investigation.¹¹⁹ Then, if that Chamber concludes that the investigation should proceed, and that the case falls within the Court's jurisdiction, the Chamber may authorize the investigation.¹²⁰ The Court may then exercise jurisdiction over the case pursuant to article 13(c),¹²¹ if one of two conditions are met: either the State in which the conduct in question occurred has acquiesced to the jurisdiction of the Court pursuant to article 12(2)(a),¹²² or the Home Government of the defendant has similarly acquiesced under article 12(2)(b).¹²³ As both the DRC and Uganda have ratified the Rome Statute, and Burundi has signed it,¹²⁴ most offenders could theoretically be subject to the Court's jurisdiction under article 12(2)(a).¹²⁵ Similarly, the United Kingdom, Belgium, and the Netherlands, hosts to many of the companies listed in the 2002 Annexes,¹²⁶ have all ratified the Rome Statute,¹²⁷ thereby promising jurisdiction for many offenders under article 12(2)(b).¹²⁸

Alternatively, the Security Council may elect to refer the issue to the Prosecutor.¹²⁹ Such a referral would eliminate the need for an application

116. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

117. *Id.* arts. 1, 5.

118. *Id.* art. 15(1).

119. *Id.* art. 15(3).

120. *Id.* art. 15(4).

121. *Id.* art. 13(c).

122. *Id.* art. 12(2)(a).

123. *Id.* art. 12(2)(b).

124. See AMNESTY INT'L, THE INTERNATIONAL CRIMINAL COURT: TABLE OF SIGNATURES AND RATIFICATIONS OF THE ROME STATUTE (2003), available at http://web.amnesty.org/pages/icc-signatures_ratifications-eng#ATA [hereinafter AMNESTY INTERNATIONAL TABLE] (last visited Jan. 9, 2004).

125. Rome Statute, art. 12(2)(a).

126. 2002 Report, *supra* note 16, Annexes.

127. AMNESTY INTERNATIONAL TABLE, *supra* note 124.

128. See Rome Statute, art. 12(2)(b).

129. *Id.* art. 13(b).

and request before the Pre-Trial Chamber, and would not require the preconditions to the exercise of jurisdiction (acquiescence by the state in which the conduct occurred, or by the Home Government of the accused).¹³⁰ The Security Council could refer a company's case to the ICC prosecutor if NGOs could demonstrate to the Security Council one of the following: (1) that many of the companies listed in the 2002 Annexes were not, in fact, sanctioned by their Home Governments pursuant to the OECD Guidelines and thereby will escape punishment; (2) that those enterprises pledging remedial measures in exchange for resolution failed to do so; or (3) that the companies' actions grossly violated the Norms and thereby demand a stricter punishment than called for by the Guidelines.¹³¹ Such a referral would eliminate the procedural difficulties attendant with an independent investigation by that office into the activities of MNEs in the DRC.

If, however, a government does not recognize the Court's jurisdiction, then that State may challenge the admissibility of the case and the Court's exercise of jurisdiction pursuant to article 19(2)(c).¹³² Undoubtedly, the United States, a very vocal opponent of the Court, would claim that its businesses are exempt from the Court's jurisdiction and therefore would challenge any action brought against a U.S. registered business under article 12(2)(a).¹³³

A. *Jurisdiction of the ICC over "Legal Persons"*

At the 1998 Rome Diplomatic Conference on the International Criminal Court (Rome Conference), the delegate from France proposed that legal persons should be included in the Court's jurisdiction.¹³⁴ Several arguments were posited to justify criminal liability of corporations, including deterrence, the need to assure compensation for victims (who would be unable to collect from an individual defendant, but could collect from a corporation), and to insure that a legal person would be penalized for its criminal violations of international law.¹³⁵ Employees of private armed forces, employed by governments engaged

130. *See id.* art. 12(2).

131. *See id.* art. 13; U.N. CHARTER arts. 33-36.

132. Rome Statute, art. 19(2)(c).

133. *See id.* art. 12(2)(a).

134. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 74, at 139, 146.

135. *See id.* at 147.

in conflicts, posed a particularly thorny problem.¹³⁶ Upon the cessation of hostilities, these employees are unlikely to remain within the jurisdiction of the state where the conflict took place, and thus could evade responsibility for any crimes committed within that state.¹³⁷

While these individuals would remain responsible for any crimes that he or she committed individually, some believed that holding the employer corporation responsible for war crimes and crimes against humanity would more effectively deter such crimes.¹³⁸ To that end, delegates from Madagascar and Comoros proposed a new crime of “mercenarism” to impute criminal liability onto such private security corporations.¹³⁹ Interestingly, while this new crime was not included in the final Statute, the concept would resurface in the Human Rights Norms, as described in Part III.B above.¹⁴⁰

However, it proved impossible to reach a consensus about what types of organizations should be included in the definition of “legal persons.”¹⁴¹ Some countries feared that the proposed definition could be used to penalize organizations struggling for self-determination or against state entities; others simply refused to accept the concept that corporations could be held criminally liable.¹⁴² Still other countries expressed procedural concerns relating to who would represent a legal person before the Court, and how assets of a defendant corporation could be seized without affecting the rights of third parties.¹⁴³ Delegates expressed concern, however, that the prosecution of corporate crimes could ultimately lead to the introduction of state crimes.¹⁴⁴ Particularly, states with public corporations, joint ventures, and blurred distinctions between government and commercial activities were concerned about the potential for government prosecution as well as a risk of major financial penalties.¹⁴⁵

The French delegate ultimately withdrew the proposal;¹⁴⁶ accordingly, the ICC currently has jurisdiction over natural persons

136. *See id.* at 149.

137. *Id.* at 150.

138. *Id.*

139. *Id.* at 149.

140. *See Norms Commentary, supra* note 86, at 6, ¶ 4(b).

141. *See* Clapham, *supra* note 134, at 157.

142. *See id.*

143. *See id.*

144. *Id.* at 191.

145. *Id.*

146. *Id.* This does not mean, however, that the Court will never possess jurisdiction over legal persons; a Review Conference in 2009 will consider noninstitutional amendments to the

only.¹⁴⁷ Nevertheless, the delegates tacitly demonstrated support for the idea that corporations can be bound by criminal law, as no delegation claimed that international criminal law fails to bind such entities.¹⁴⁸ Considering that individuals have rights and duties under customary international human rights law, legal persons must also have the necessary legal personality to both enjoy these rights and to be prosecuted for violations of their international duties.¹⁴⁹ Both state (civil) and individual (criminal) international standards recognize complicity as long as the underlying activity is illegal, and the party involved has at least some knowledge of the illegality of the activity.¹⁵⁰ By extension then, for corporate activity, if a business materially contributes to violations of human rights, committed by a government, with knowledge of the offensive activity, then the business should be held responsible as a matter of international law.¹⁵¹

Simply put, corporations have some limited international legal personality,¹⁵² and have a duty not to form complicit relationships with governments.¹⁵³ In fact, corporations have been bound by international criminal law concerning war crimes and crimes against humanity since the Nuremberg Tribunal Judgments.¹⁵⁴ The U.S. Tribunal convicted directors of the I.G. Farben Corporation for war crimes committed under the auspices of company activities, because the Tribunal considered the directors' actions no different from those of Nazi officers, soldiers, or officials.¹⁵⁵ Though the Tribunal lacked jurisdiction over I.G. Farben's corporate person, the company's actions violated the Hague Regulations on laws of war.¹⁵⁶ Accordingly, the Tribunal held the individual I.G. Farben directors criminally responsible and convicted them for

Statute (seven years after the Statute enters into force). *See id.* at 159. The Rome Statute entered into force on July 1, 2002. AMNESTY INTERNATIONAL TABLE, *supra* note 124.

147. *Developments in the Law—International Criminal Law: Corporate Liability for Violations of International Human Rights*, 114 HARV. L. REV. 1943, 2032 (2001).

148. Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 65 (2002) (citing and quoting Clapham, *supra* note 134, at 191).

149. Clapham, *supra* note 134, at 190.

150. *See* Ratner, *supra* note 84, at 502.

151. *Id.*

152. Clapham, *supra* note 134, at 190.

153. Ratner, *supra* note 84, at 502.

154. Clapham, *supra* note 134, at 191.

155. VILIAM ENGSTRÖM, WHO IS RESPONSIBLE FOR CORPORATE HUMAN RIGHTS VIOLATIONS? 44-45 (2002), <http://www.abo.fi/institut/imr/norfa/ville.pdf>; *see also* The I.G. Farben Trial, Case No. 57, 10 L. REP. OF TRIALS OF WAR CRIM. 1 (U.S. Military Tribunal, Nuremberg 1947-48).

156. ENGSTRÖM, *supra* note 155, at 45.

knowingly participating in crimes vis-à-vis their membership in an “organization or group” connected with the commission of the crime.¹⁵⁷ But even though the Rome delegates may not have disputed the applicability of international criminal law to legal persons, they nevertheless clashed over the procedure of an international trial of a nonnatural person.¹⁵⁸ Specifically, they disagreed on how indictments should be served, the requisite level of culpability to be shown, and how to ensure that natural persons could not hide behind group responsibility.¹⁵⁹

Clapham however notes that the irrelevance of legal persons in the international criminal legal order looks certain to change, considering recent developments in the field of international corruption.¹⁶⁰ According to Clapham, though, the ultimate inclusion of legal persons within the ICC’s jurisdiction depends upon whether the Court initially includes corporate directors involved in international crimes as defendants, and whether reparations to victims appear derisory.¹⁶¹ If this comes to pass, then efforts at including legal persons within the statute could be rekindled. One historical precedent for convicting corporate directors already exists, *The I.G. Farben Trial*.¹⁶² While the ICC Statute does not impose liability for membership in an organization connected with the commission of a crime, article 25(3)(b) could impose managerial liability if a director “[o]rders, solicits, or induces the commission of such a crime.”¹⁶³ Furthermore, if a director has de jure or de facto authority, ability, and control over the actions of his or her subordinates, as well as knowledge of a violation, then article 28 of the Statute may also impose “command responsibility” upon the director.¹⁶⁴

Cases brought before the ICC, in which the conviction of a natural person implicates the legal person, therefore depart from the Nuremberg trials, which implicated an individual because of his or her association with the legal person.¹⁶⁵ This reversal in position possibly stems from the high level of moral turpitude associated with crimes against humanity

157. *Id.*

158. Clapham, *supra* note 134, at 191.

159. *Id.*

160. *Id.* This is manifested by conventions enacted by the OECD, Organization of American States, Council of Europe, and the European Union. *Id.*

161. *Id.* at 192.

162. ENGSTRÖM, *supra* note 155, at 46.

163. *Id.* at 45 (quoting Rome Statute, art. 25(3)(b)).

164. *Id.* Note though that under article 28 the standard of responsibility would be stricter for corporate directors than for military commanders, for whom the United Nations designed article 28. *See id.*

165. Clapham, *supra* note 134, at 175.

and war crimes, and a belief that such collective guilt and punishment should not be too easily applied to persons only casually associated with the corporation.¹⁶⁶ However, Clapham believes that if the Court were to try and convict an individual in a position of control within a corporation, then liability may be extended to the corporation.¹⁶⁷ As punishment, the Court could either impose fines upon the corporation, or order a forfeiture of proceeds derived from the crime.¹⁶⁸

B. Applicability of Crimes Against Humanity and War Crimes to Corporate Activities in the DRC

The ICC possesses limited jurisdiction in that it may only prosecute crimes of genocide, crimes against humanity, war crimes, and aggression.¹⁶⁹ However, the statute does not limit these different types of crimes to governmental actors; rather, the Court may exercise jurisdiction over private persons (if not legal persons) who commit the same crimes.¹⁷⁰ Accounts of corporate activity and cooperation with the various elite networks in the DRC suggest that prosecutions of crimes against humanity and war crimes could be warranted.¹⁷¹ Under the Rome Statute, “crimes against humanity” might include enslavement, deportation, or forcible transfer of a population.¹⁷² No armed conflict is necessary to invoke the Court’s jurisdiction, but the acts must be committed “as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack.”¹⁷³ To qualify as such a systematic attack, the acts must entail “a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy.”¹⁷⁴

The Statute defines enslavement as “the exercise of *any or all* of the powers attaching to the right of ownership over a person.”¹⁷⁵ Forcible transfer of a population consists of “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international

166. *Id.*

167. *Id.*

168. *Id.* The ICC may order a convicted person to forfeit proceeds, property, or assets derived directly or indirectly from the crime. *See* Rome Statute, art. 77(2)(b).

169. *See* Rome Statute, art. 5.

170. Clapham, *supra* note 134, at 143.

171. As the different Panel reports do not suggest corporate complicity in the crimes of genocide or aggression, those crimes will not be considered within the scope of this Comment.

172. Rome Statute, art. 7(1)(c)-(d).

173. Clapham, *supra* note 134, at 143 (referring to Rome Statute, art. 7(2)(a)).

174. *Id.*

175. Rome Statute, art. 7(2)(c) (emphasis added).

law.”¹⁷⁶ Accordingly, some business people could be criminally liable for forcible transfer, as they assisted with the forced dislocation of Congolese people, committed by rebel groups following the spike in coltan prices during 1999.¹⁷⁷ Charges of enslavement might also attach to these business people, as they forced the dislocated Congolese into extracting coltan under conditions that the Panel considered akin to slavery.¹⁷⁸ Since various forces used coltan to finance military operations in the DRC, a “State or organizational policy” would underlie the enslavement or forcible dislocation, thereby satisfying the Statute’s “systematic attack” criteria.¹⁷⁹

Article 8 of the Rome Statute grants the Court jurisdiction over war crimes, provided that such crimes are committed as a part of a plan or policy, or as part of a large-scale commission of such crimes.¹⁸⁰ Included in the Statute’s definition of war crimes are crimes involving “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully or wantonly.”¹⁸¹ Similarly, article 8 forbids the destruction or seizure of an enemy’s property, unless imperatively demanded by the necessities of war.¹⁸²

The prosecutor could thus argue that the illegal exploitation of resources in the DRC amounts to extensive appropriation and/or destruction of property. The Panel found evidence indicating military forces (and the parastatal businesses they created), were primarily concerned with controlling these financial and economic resources.¹⁸³ That is, the resources were not an incidental means of effectuating another, comparatively more legitimate military objective. Accordingly, the prosecutor could argue that the exploitation of such resources was not, in fact, justified by military necessity, as the exploitation served as the source of the conflict. Defendants charged with such an offense might counter, though, that the military forces acted on behalf of political and security interests,¹⁸⁴ and that the resources in question were necessary to continue the individual campaigns.¹⁸⁵

176. *Id.* art. 7(2)(d).

177. *See* 2001 Report, *supra* note 12, at 37, ¶ 177.

178. *Id.*

179. *See id.* at 36-37, ¶¶ 175-178.

180. Rome Statute, art. 8.

181. *Id.* art. 8(2)(iv).

182. *Id.* art. 8(2)(xiii).

183. *See* 2001 Report, *supra* note 12, at 7, ¶ 28.

184. *Id.*

185. *See id.* at 36, ¶ 175(c).

However, article 8(2)(b)(xv) prohibits a party from compelling the nationals of the hostile party from taking part in the operations of war directed against their own country.¹⁸⁶ If in fact the collection and exploitation of resources in the DRC were necessary consequences of a war conducted for political and security reasons, then any Rwandan, Ugandan, or Burundi business who participated in the impressments of Congolese into forced labor could face criminal charges.¹⁸⁷ Article 8(2)(b)(xv) does not say that the impressed nationals must engage in combat; rather, they must not be forced into participating in the operations of war.¹⁸⁸ This is a much more general requirement than participation in combat, and could quite easily encompass manual labor involuntarily contributed to a war effort.

As previously illustrated, the Norms still could consider many companies involved in the DRC to have violated international humanitarian law, even though such companies may not necessarily have violated the OECD Guidelines.¹⁸⁹ Unfortunately, only the most serious and large scale violations of human rights would precipitate the managerial responsibility doctrine of the ICC.¹⁹⁰ Without the specific findings of the Panel, one cannot conclusively state that prosecution of business persons participating in the DRC conflict will be forthcoming. Furthermore, one can only speculate on what types of atrocities were committed attendant to a business's activities in the DRC, but remain undisclosed because the Panel either could not have known about them, or chose not to mention them. Nevertheless, substantive proof exists to at least justify a criminal investigation into the conduct of such business people, and the ICC currently possesses the procedural mechanisms to prosecute offenders if their behavior rises to the criminal level.¹⁹¹

C. Policy Considerations

If the Court does decide to prosecute various individuals for their involvement in the DRC conflict, and through these individuals implicate the businesses they work for, more complex problems remain. For example, one must wonder if representatives of the companies who reached a resolution with the Panel should be prosecuted for their involvement. On the one hand, such corporate directors could assert that

186. Rome Statute, art. 8(2)(b)(xv).

187. See 2001 Report, *supra* note 12, at 7, ¶ 28.

188. *Id.*

189. See discussion *supra* Part III.B.

190. ENGSTRÖM, *supra* note 155, at 49.

191. See Rome Statute, art. 5, 15.

the Panel is an adjudicatory body, since it collected evidence (albeit under a reasonable standard), and met with the corporations to arrive at a resolution.¹⁹² Directors could therefore argue that they reasonably believed that the issues were, in fact, resolved, and that a criminal prosecution at this point would amount to the Anglo-American concept of double jeopardy. On the other hand, the Panel repeatedly stated that it is not a judicial body and does not have the legal powers available to a government in a criminal or civil investigation.¹⁹³ Accordingly, proponents of ICC prosecutions for such directors could argue that the dialogues between the businesses and the Panel were not in fact adjudicatory proceedings. Proponents could further attest that the Panel conducted the dialogues with the business, and not with the individual; but a trial before the ICC would primarily be for the individual, with the possibility of implicating the business if so warranted.

The rights of individual shareholders present another ambiguous problem. Article 77(2)(b) of the Rome Statute specifically allows a forfeiture of proceeds, property or assets derived from a crime without prejudice to the rights of bona fide third parties.¹⁹⁴ Yet, as discussed in Part IV.A above, the drafters of the Rome Statute hesitated to include “legal persons” in the jurisdiction of the Court, partially out of concern for the rights of third parties.¹⁹⁵ If the ICC convicted a corporate director of a crime under the Rome Statute, and liability were then extended to the corporation itself (as Clapham suggests is possible),¹⁹⁶ then inevitably shareholders of corporations would be forced to pay the judgment through a variety of means. Such means possibly could include the depletion of the corporate treasury, the withholding of dividends, and possibly even the complete loss of one’s investment if the corporation should dissolve. Thus, while the Rome Statute specifically allows the assets of third parties to be seized, corporate defendants could argue that imparting liability onto shareholders would frustrate the purpose of the Rome Statute.

Even if the corporate director’s activities did not give rise to corporate liability in such a manner, the individual shareholders may be penalized nonetheless. Indemnity provisions included in the employment agreements of corporate directors might allow a director, who has wrongfully committed an activity in violation of the Rome Statute, to

192. See 2003 Letter, *supra* note 2, at 7-8, ¶¶ 15-17.

193. See *id.* at 7, ¶ 15; 2002 Report, *supra* note 16, at 4, ¶ 8.

194. Rome Statute, art. 77(2)(b).

195. See Clapham, *supra* note 134, at 157.

196. *Id.* at 175.

recoup any judgment rendered against him from the corporate treasury, since he committed the business decisions giving rise to the liability on behalf of the corporation. Of course, the existence of an indemnity provision in a director's employment contract should not be a consideration when deciding whether or not he should be indicted, and likely could not be determined, if at all, until well after the commencement of the investigation into his affairs. Despite the Rome Statute drafters' concerns, corporations may, ironically, be held liable indirectly for the activities of their directors, and at the expense of shareholders.

Finally, parastatal entities may claim immunity to prosecution before the Court. As described in Part IV.A, the delegates to the Rome Conference expressed great concern that the prosecution of legal persons could serve as a "back door" for the introduction of state crimes.¹⁹⁷ The Panel determined that Ugandan and Rwandan actors created a number of private companies to facilitate illegal activities in the DRC.¹⁹⁸ Individuals or groups of individuals privately owned most of the Ugandan companies.¹⁹⁹ However, the government or individuals closely linked to then-Rwandan President Kagame mainly owned the Rwandan companies.²⁰⁰ Curiously, Rwanda supported the proposal to include legal persons under the Court's jurisdiction.²⁰¹

States such as Rwanda and Uganda, who operated indirectly in the DRC through state-created and controlled businesses, could argue that article 25 of the Rome Statute grants the court jurisdiction over natural persons only, not States.²⁰² Furthermore, article 25(4) recognizes that the Court's jurisdiction over individual, natural persons does not affect the rights of States under international law.²⁰³ Accordingly, the Court would be bound to limit any exercise of its jurisdiction to natural persons; namely corporate directors, and possibly to corporate entities by extension (as Clapham argues is possible).²⁰⁴ Any Court investigation into a parastatal enterprise would therefore need to be limited to individual corporate directors, and perhaps to the enterprise itself—that is, the investigation categorically could not extend into an investigation of the State's involvement in the conflict. Such an inquiry would have to be

197. *Id.* at 191.

198. *See* 2001 Report, *supra* note 12, at 16, ¶¶ 79-82.

199. *Id.* at 16, ¶ 79.

200. *Id.* at 16, ¶ 82.

201. Clapham, *supra* note 134, at 157.

202. *See* Rome Statute, art. 25.

203. *Id.* art. 25(4).

204. Clapham, *supra* note 134, at 175.

conducted by another international tribunal, such as the International Court of Justice.

Rwanda and Uganda could further argue that their governments are investigating or prosecuting the businesses' cases in their own jurisdictions, therefore absolving the Court of any jurisdiction pursuant to article 17(1)(a).²⁰⁵ Of course, the prosecutor could argue that those States are genuinely unable to carry out an unbiased investigation or prosecution, and thus article 17(1)(a) does not apply.²⁰⁶ Furthermore, the Court may consider, under article 17(2)(a), whether the State conducts such proceedings for the purpose of shielding the corporate director/MNE concerned from criminal responsibility.²⁰⁷

V. CONCLUSION

The civil war in the DRC simply could not have lasted for as long as it has without the support and participation of MNEs, whose illegal exploitation of the country's natural resources spurred inestimable human rights violations. While the total specific details of these violations will probably never be known, the enterprises responsible have currently managed to escape criminal accountability, either through pledges to do better, or through the empty threat of municipal enforcement of OECD Guidelines. If the situation is ever to stabilize, any business enterprises responsible for human rights violations simply must be given adequate and appropriate punishment. As one human rights activist eloquently stated, "[l]ooking the other way guarantees continued profits for a few and continued horror for the many."²⁰⁸ The scope of this Comment was naturally limited by the amount of available specific information, which is generalized and sporadic at best. Still, enough data exists to demonstrate that an investigation by the International Criminal Court into alleged war crimes and crimes against humanity is possible, and that such an investigation indeed may be imperative, given the ineffectualness of the OECD Guidelines as a remunerative measure in comparison to the newer and more comprehensive Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises.

205. Rome Statute, art. 17(1)(a).

206. *Id.*

207. *Id.* art. 17(2)(a).

208. Woudenberg, *supra* note 2.