

ENDING CORPORATE IMPUNITY: OPTIONS TO AMEND THE ROME STATUTE
TO INCLUDE CRIMES AGAINST PRESENT AND FUTURE GENERATIONS
(CPFG)

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I. Introduction.....	3
II. Human Rights Theory and the Conceptual Barriers to Criminalizing The Harms Associated with Harmful Economic Activities and Corporate Criminal Liability	5
a. International Human Rights Law	5
b. International Criminal Law	6
III THE FIFTH CRIME OF CONCERN TO THE INTERNATIONAL COMMUNITY	9
a. The Evolving Consensus on Subject Matter Jurisdiction of the ICC.....	9
b. The Crimes Under the Jurisdiction of the ICC	10
c. The Core ICC Crimes as International Crimes.....	10
d. The Gravity of Crimes that Contribute to Poverty and Permanent Damage to the Environment	12
e. The Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment.	14
i. The CPFPG as amended	15
<u>IV Including the Liability of Legal Persons within the Jurisdiction of the ICC</u>	18
.....	22
Bibliography	24

I. Introduction

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

A significant gap in the Rome Statute is that it does not cater for mass crimes or harms committed by Corporations. Corporate conduct and its role in human rights abuses and actions that give rise to and sustain poverty have come under renewed scrutiny. The United Nations and human rights advocacy organisations have focused on corporate use and support of sweatshop labour in the footwear and apparel industries, permanent damage to the environment and the destruction of the livelihood capabilities of people through the extractive industries.² International criminal law is being investigated as a legitimate enforcement tool with respect to corporate human rights obligations and as a means to curtail corporate impunity³.

Studies have indicated that approximately 21,000 people die every day from hunger related causes. This is over 7.5 million people per annum every year. Poverty is the principal cause of hunger, underpinned by harmful economic systems that fuel poverty and inequality through the ordinary and accepted operations of global economic and political systems. Within the context of harmful economic systems and practices is large-scale environmental degradation that is responsible for the spread of killer diseases and that gives rise to new killer diseases.⁴ Environmental related illnesses caused by polluted water,

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

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

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

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

deforestation and environmentally damaging agricultural processes kill the equivalent of a jumbo jet full of children every 30 minutes.⁵

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

⁵ S. Myers *Global Environmental Change: The Threat to Human Health* (2009) World Watch Institute 12.

II. Human Rights Theory and the Conceptual Barriers to Criminalizing The Harms Associated with Harmful Economic Activities and Corporate Criminal Liability

a. International Human Rights Law

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

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

The international human rights architecture was formalized in the aftermath of World War II with the intention of protecting individuals from the excesses of public state power⁸. This focus on the state served to crystallise the idea within

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

⁷ P. Muchlinksy ‘Human Rights and Multinationals: Is there a Problem’ in *International Affairs* (2001) HeinOnline 31, 33.

⁸ L Van Den Herik and J Cernic (Note 4 above) 727.

international human rights law that states were the only duty bearers for human rights.⁹ The strengthening of economic globalization in the 1970s and 1980s served to cement this conceptual barrier through more overt measures to protect business interests. The hegemony of ideas and policies linked to free trade has in fact given Corporations more power than they had at any time in history.

The state centered conceptual barrier in relation to human rights accountability and its underlying supportive ideology has also sought to narrowly define what constitutes human rights. The collective international moral outrage following World War II led to the strengthening of political and civil rights as legally enforceable rights¹⁰. Much of the developed world though continues to question whether social and economic rights are genuine human rights; McCorquodale and Fairbrother suggest that explicit recognition of especially economic rights as a human right would strengthen arguments that business entities as powerful actors able to impact positively or negatively on the fulfillment of these rights should be direct duty bearers¹¹.

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

b. International Criminal Law

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

⁹ Ibid 734.

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

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

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

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

Unlike international human rights law, international criminal law does offer opportunities to bringing corporations into the accountability loop. The duty holder in international criminal law is the individual or natural person. The paradigm shift from natural person to legal person as the subject of law in international criminal law is therefore entirely possible. The Nuremberg and Tokyo Criminal Tribunals laid the basis for corporate criminal liability with the effect that under international criminal law, there is extraterritorial exercise of jurisdiction over individuals. Individuals linked to corporations are also already under the jurisdiction of the ICC.¹⁴ As suggested by Slye, the ICC could also

¹² *ibid* 748.

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

¹⁴ L Van Den Herik and J Cernic (Note 4 Above) 740-743.

become the vehicle to ‘reassert’ the veil of organizational responsibility for international crimes.¹⁵ The arguments for an additional crime under the jurisdiction of the ICC and non-derivate liability for corporations will be discussed next.

¹⁵ R Slye *Corporations, Veils and International Criminal Liability* (2008) 33 Brook J. International Law 955, 965.

III THE FIFTH CRIME OF CONCERN TO THE INTERNATIONAL COMMUNITY

a. The Evolving Consensus on Subject Matter Jurisdiction of the ICC

The ICC was established to facilitate international cooperation to enhance the prosecution and the prevention of crimes of international concern. With respect to jurisdiction, the state parties to the statute agreed that the jurisdiction of the ICC would be solely on the crimes described as ‘most serious crimes of concern to the international community’.¹⁶ The documents reviewed on the research, legal opinions and the submissions of member states on what constitutes the ‘most serious crimes of concern to the international community’ indicate that the ratified Rome Statute has four crimes under its jurisdiction. Previous reports of the International Law Commission, the International Commission of Jurists and the submission of member states, however, suggest that the possible crimes that could have been considered to be under the jurisdiction of the ICC could have been much broader.

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

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

b. The Crimes Under the Jurisdiction of the ICC

The four crimes that the ICC has jurisdiction over the most serious crimes are genocide, crimes against humanity, war crimes and crimes of aggression. The nexus between gravity and power allowed for agreement on the four horses of the apocalypse.

c. The Core ICC Crimes as International Crimes

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

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

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

In developing his definition of international crimes Einarsen undertook a detailed literature review on the subject by leading scholars of international criminal law. This included the writings of Zahar and Sluiter, Cassese, Werle, Bassiouni,

¹⁷ Terje Einarsen (Note 46 above) 23.

¹⁸ *Ibid.*

¹⁹ *ibid* 62.

²⁰ *ibid* 123.

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

The implication of the suggestion by Schabas is that a crime ceases to be one that has to be of concern to international justice if it is effectively prosecuted at national levels.²³ The stance taken by Schabas is contradicted by the ICC's Office of the Prosecutor that regarded the introduction of the principle of complementarity to be one that would make the ICC more effective, the effectiveness being measured by the willingness and abilities of State Parties to prosecute people accused of the core crimes in national jurisdictions.²⁴ In essence the principle of complementarity numerically expands the potential jurisdictions of the ICC to every State Party. The principle of complementarity was not intended as a means to exclude or include certain serious crimes from the jurisdiction of the ICC.

The issue as raised by Schabas is interesting though as the United States (US) opposed direct criminal liability for corporations under the jurisdiction of the ICC on the basis of the principle of complementarity. The US argued that the weak national jurisdictions dealing with non-derivative corporate criminal liability within the context of the principle of complementarity would render its inclusion in the ICC statute unworkable. The US argument is the opposite of that offered by

²¹ *ibid* 150 – 163.

²² *ibid* 156.

²³ *ibid* 156.

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

Schabas but indicates that political considerations rather than purely legal arguments may have been at play.²⁵

A discussion on the addition of a possible new crime under the jurisdiction of the ICC therefore, needs to be concerned with the issues of 'gravity' and the harmful impacts on people of possible acts and commissions. This will allow for an assessment of whether the proposed crime linked to harmful economic systems meets the competing requirements based on gravity, the legal basis for its criminalization based on international legal prescripts. The negotiations on the material jurisdiction of the ICC resulted in a consensus which Schabas summarises as 'the court is designed to try nothing but crimes of extreme gravity and, moreover, the most heinous offenders'.²⁶ Einarsen writes that the necessary and sufficient conditions for a crime to be of concern to the international community are for it to contain an inherent gravity clause. He cites Article 8 bis of the revised ICC statute which deals with the crime of aggression to illustrate the elements of gravity – 'to qualify as [a crime of aggression] an act of aggression must by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations'.²⁷

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

Given the above discussion, it is therefore imperative to outline just how 'grave' the impacts of poverty and permanent damage to the environment are. Chapter I of this paper indicated that approximately 21,000 people die every day from hunger related causes, which amounts to 7.665 million people per annum every year. In addition, environmental related illnesses caused by polluted water, deforestation and environmentally damaging agricultural processes kill the

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

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

²⁷ Terje Einarsen (Note 46 above) 253.

equivalent of a jumbo jet full of children every 30 minutes.²⁸ The consequences of harmful economic practices are even more dire for children based on reports from the United Nations Children's Fund (UNICEF). Approximately 22,000 children die every day due to poverty related illnesses and a hunger due to poverty.

To put the deaths of children due to causes largely attributable to poverty into perspective, it could perhaps be better understood in the context of international criminal law where it can be compared with the three more prominent genocides. Approximately 11 million people were killed in the holocaust that essentially contributed to framing the modern definitions of the crime of Genocide and Crimes Against Humanity. Approximately 900,000 people were killed in the Rwandan Genocide and approximately 7,000 people in the former Yugoslavia. These genocides and also crimes against humanity gave rise to the ad hoc criminal tribunals and helped frame the jurisprudence for subject matter jurisdiction of the ICC. These atrocities almost appear small when compared with the deaths of 8.1 million children every year due to poverty related causes.

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

These statistics indicate that poverty is the norm for the majority of the world's people and countries and that the combined impacts of poverty and

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

²⁹ Global Humanitarian Forum, 'Anatomy of a Silent Crisis' (Geneva) 2015.

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

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

environmental damage contribute significantly to mortality rates across the world. The mortality rates and other harms associated with poverty and environmental degradation disproportionately effect poor people in developing countries. People did not choose to live in poverty and neither is it natural. Poverty, inequality and permanent degradation of the environment are the results of decisions and actions taken by powerful people and institutions. (Intent)

It is evident that harmful economic systems have multiple features. The role that Illicit Financial Flows (IFFs) plays have recently, rightfully come under scrutiny.

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

There have been previous efforts with respect to adding a fifth crime under the jurisdiction of the ICC. Academics and activists have developed drafts of possible crimes, which have been discussed at international forums but thus far they have not been submitted by any state party. For the purposes of this paper, the Draft Crimes Against Present and Future Generations provide the most appropriate template for a fifth crime. Its stated objectives are to end impunity related to harmful economic systems, environmental damage and corruption. The draft Crime Against Present and Future Generations (CPFPG) was written by Sebastian Jodoin of the Center for International Sustainable Development Law and was commissioned by World Future Council.³² The CPFPG contains elements of the Crime of Ecocide³³ and suggests the criminalization of corruption. It is not explicit enough on these matters and I therefore suggest amendments to include activities linked to IFFs and corruption. With respect to the title of the actual proposed crime, both proposed 'Crimes of Harmful Economic Systems and Deliberate Destruction of the Environment' and Jodoin's framing relating to 'present and future generations' are appropriate. A more precise and accurate formulation the crime can be arrived at in follow up discussions and deliberations.

³² S. Jodoin (Note 47 Above) .

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

i. The CPFPG as amended³⁴

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

(a) Forcing (*through public policy, business policy and practice*) any members of any identifiable group or collectivity³⁶ to work or live in conditions that seriously endanger their health or safety, including forced labour, (*enforced unpaid labour*), (*wages below minimum wages rates as legislated by states*), enforced (*sex work*) ~~prostitution~~ and human trafficking;³⁷

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

³⁴S. Jodoin (Note 47 Above).

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

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

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

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

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

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

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

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

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

~~(f) Preventing members of any identifiable group or collectivity from enjoying their culture, professing and practicing their religion, using their language, preserving their cultural practices and traditions, and maintaining their basic social and cultural institutions;~~⁴¹

(g) Preventing members of any identifiable group or collectivity from accessing

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

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

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

⁴¹ In the context of seeking to focus on criminalizing harmful economic systems and corruption this clause seems extraneous and could detract from the focus of the fifth crime as formulated in this paper.

primary, secondary, technical, vocational and higher education;

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

(i) ~~Unlawfully~~ polluting air, water or soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;⁴²

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

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

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

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

⁴² The use of the word 'unlawfully' in the original CPFPG template is not helpful as it pollution may take place lawfully and be permitted by states.

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

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

Universal Crimes are certain identifiable acts that constitute grave breaches of rules of conduct: and that are committed, organised or tolerated by powerful actors: and that, according to contemporary international law, are punishable whenever and wherever they are committed: and that require prosecution and punishment through fair trials, or in special cases, some other kind of justice, somewhere at some point.⁴³

It is my contention that all the powerful actors capable of being involved in the commission of international crimes should be liable for prosecution under the ICC. A rolling text on individual criminal liability prepared by the Preparatory Committee chaired by Adrian Bos, in the run up to the Rome Diplomatic Conference, provides a window to the debate on the liability of legal persons.⁴⁴ The rolling text, hereafter referred to as 'Rolling Text X', was then dealing with individual criminal liability under Article 23. Paragraph 5 of Rolling Text X reads as follows:

⁴³ Terje Einarsen (note 46 above) 22

⁴⁴ ICC Preparatory Committee, *Rolling Text on Article 23* (undated). Available at PURL:<https://www.legal-tools.org/doc/f77746>. Accessed on 29 September 2015

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

- the convicted person was an agent, representative or an employee of that legal person or organisation, and,
- the crime was committed by the natural person acting on behalf of [and with the consent or acquiescence of] [and with the assent of] that legal person or organisation [and][or] in the course of its regular activities.
- For the purposes of this statute, 'legal persons or other organisations' mean corporations or private organisations, whose objective is for the private gain.⁴⁵

The Rolling Text X hints to the opposition to the inclusion of corporations that was made by the many delegations led by the United States, based on the argument that it would render the principle of complementarity unworkable. The premise of this argument was that corporate criminal liability was not yet universally recognised by states.

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

In a paper that deals specifically with the potential of international law to prosecute corporations criminally, Clapham questions the principle of '*societas delinquere non protest*', which simply means that enterprises cannot be criminal.⁴⁶ Clapham further suggests that the Ad Hoc Criminal Tribunals and the International Criminal Court that focus on individuals as the subjects of their jurisdictions can be adjusted to also exercise jurisdiction over legal persons including corporations. Clapham emphasizes the effectiveness principle and argues that if international law is to be effective, all actors whether individuals or non-state actors should be prohibited from assisting states in violating human

⁴⁵ *ibid* para 5

⁴⁶ A Clapham '*Extending international criminal law beyond the individual to corporations and armed opposition groups*' (2008) 899. Accessed at <http://jicj.oxfordjournals.org/cgi>.

rights principles.⁴⁷ This holds true for all the crime areas under the jurisdiction of the ICC, but is particularly important in relation to recommended fifth crime where the primary perpetrators are most likely to be MNCs.

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

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

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

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

⁴⁷ Ibid 901.

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

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

V. Concluding Remarks

The grave consequences on humanity as a result of the harmful economic systems are undeniable. The statistics related to mortality rates, illness, poverty and deprivation cannot be disputed. In terms of scale, the harms as a result of permanent damage to the environment, and processes that give rise to and sustain poverty and corruption dwarf those of some of the most horrendous genocides and other crimes of concern to the international community. Based on its grave negative impacts, the cluster of crimes associated with the policies and 'normal' operations of harmful economic practices earn the dubious status as crimes that should shock the consciousness of the international community. If the global community is serious about ending global impunity by powerful people and institutions that engage in actions or facilitate the actions that they know would lead to situations that would deprive people of life-saving livelihood opportunities and leads to widespread death and destruction of people and the environment should be criminalized.

Given the rather weak governance systems in many countries especially the developing world where people are most affected by the consequences of harmful economic systems, the ICC offers a reasonable option for the global community to hold those most responsible to account. This paper therefore sought to make the case for adding to the ICC's menu of crimes of concern to the international community that deny people to social, cultural and economic rights. Given that the perpetrators of the suggested crimes associated with harmful economic systems are perpetrated by powerful institutions and individuals, I have also argued that legal persons and in particular MNCs should be held criminally liable for such crimes. Given the anticipated difficulty in getting state parties to the ICC to agree to non-derivative liability for corporations I have suggested that a formulation described in a document, which I refer to as Rolling Text X, provides a reasonable compromise that may be acceptable to most state parties. Rolling Text X was a product of the negotiating process towards the finalization of the Rome Statute. It makes provision for corporations to be prosecuted if a natural

person acting as an agent of that corporation is convicted by the ICC for any crime under the jurisdiction of the ICC.

I have used differing terminologies for the fifth cluster of crimes to be included under the jurisdiction of the ICC. That being said, the formulation of 'Crimes Against Present and Future Generations' (CPFPG) as offered by Sebastian Jodoin of the Center for International Sustainable Development Law on behalf of the World Futures Council is perhaps the most relevant. I used the CPFPG as a template and amended it to include crimes related to corruption and Illicit Financial Flows (IFFs). As is the case with the World Futures Council, this paper should be seen as a contribution to the debate on seeking justice for crimes associated with harmful economic systems. I did not offer a definitive nomenclature for the proposed crimes. This can be done through the process of negotiations by state parties and the inevitable additional investigations done as part of such negotiations.

Bibliography

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

A. Shah 'Causes of Poverty' (2011) available at www.globalissues.org/article.

AUC/UNECA *Report of the High Level Panel on Illicit Financial Flows from Africa* (2014) 20

D. Lima *Business and International Human Rights* (2009) Heinonline Accessed from <http://heinonline.org> on 11 August 2015.

D.Kar and J. Spanjers *Illicit Financial Flows from Developing Countries: 2003 – 2012* Global Financial Integrity (2014).

Doudou Thiam *ICL Second Report on the Draft Code of Offences against the Peace and Security of Mankind* (1984) Vol. II, part I.

Draft Statute of the ICC: Working Paper submitted by France. GA A/AC.249/L.3 UN Doc Available at PURL: <https://www.legal-tools.org/doc/4d28ee/>. Accessed on 13 August 2015

HP Kaul *Is it Possible to Prevent or Punish Future Aggressive War-Making* Torkel Opsahl Academic EPublishers (February 2011).

ICC Preparatory Committee, *Rolling Text on Article 23* (undated). Available at PURL:<https://www.legal-tools.org/doc/f77746>. Accessed on 29 September 2015

International Commission of Jurists *Definition of Crimes: ICJ Brief no.1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court* (Rome 15 June – 17 July 1998). Accessed at <https://legal-tools.org/doc/9fd899>

International Commission of Jurists, *Corporate complicity & legal accountability: Volume 2 Criminal Law and International Crimes* (2008).

International Law Commission *Principles of International Law Recognised in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal* ILC Yearbook (1950 Vol II)

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

L Van Den Herik and J Cernic: *Regulating Corporations under International Law: From Human Rights to International Law and Back* (2010). Accessed at HeinOnline. <http://heinonline.org> 11 Aug 2015

L. Van Derslice *Harmful Economic Systems as a Cause of Hunger and Poverty* (2015) available at www.worldhunger.org, accessed on 22 August 2015.

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

Oxfam Great Britain Policy Paper *Tax Havens: Releasing the Hidden Billions for Poverty Eradication* (2013).

Press Release on Statements Made by Delegations to the UN Conference on the Establishment of an ICC, UN Doc L/ROM/14 available at [PURL://www.legal-tools.org/doc/7ca3e9/](http://www.legal-tools.org/doc/7ca3e9/)

Proposal for Article 5 Submitted by Cuba on Crimes Against Humanity to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC (23 June 1998) UN Doc A/CONF.183/C.1/L.17

R. Cryer, H. Friman, D. Robinson, E. Wilmschurst *An Introduction to International Criminal Law and Procedure*, Cambridge University Press (2010)

R. Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmschurst *An Introduction to International Criminal law and Procedure* Cambridge University press (2010)

R. McCorquodale and R. Fairbrother *Globalisation and Human Rights* (1999) 21 Human Rights Quarterly.

Resolution Adopted by the Human Rights Council on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 UN Doc (6 July 2011).

Rome Statute of the International Criminal Court, ICC (17 July 1998).

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

Terje Einarsen *The Concept of Universal Crimes in International Law* Torkel Opsahl Publishers Oslo (2012)

UN Inter Agency Group *Levels and Trends in Child Mortality Report 2010* UNICEF (2010)

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

WA Schabas *Enforcing international humanitarian law: Catching the accomplices* (2001)

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