

THE CORPORATE CRIMES PRINCIPLES

ADVANCING INVESTIGATIONS AND
PROSECUTIONS IN HUMAN RIGHTS CASES

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MEMBERS OF THE INDEPENDENT COMMISSION OF EXPERTS

The Corporate Crimes Principles were adopted by the following experts in their individual capacity.

Justice Ian Binnie (Co-Chair) **Anita Ramasastry** (Co-Chair)

William Bourdon
Siri Frigaard
Nuhu Ribadu
James G Stewart
Mark Taylor
Alex Whiting
Martin Witteveen

PROJECT ADVISERS

Amnesty International is a global movement of more than 7 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights. Its vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. It is independent of any government, political ideology, economic interest or religion and is funded mainly by its membership and public donations.

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labour and development organisations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations. ICAR is a project of the Tides Center.

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The listing of the above organisations and their participation in this Project does not constitute an endorsement of the *Principles*.

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INTRODUCTION

When corporate actors, including corporate entities or individuals acting on behalf of a corporate entity, commit or are complicit in the commission of crimes linked to human rights abuses, accountability all too rarely follows. It is this impunity gap that *“The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases”* (“the Principles”) seek to address.

Human rights abuses occur in many different business contexts around the world. Examples include the murders of environmental defenders in Latin America, toxic waste dumping in Africa, the export of tools of torture from North America, forced labour in fisheries in Asia, the trafficking of migrant workers to the Middle East and the selling of surveillance equipment from Europe to enable governments to clamp down on freedom of expression. Yet systems of accountability built by regulators and implemented by law enforcement have not kept pace with the globalisation of corporate crimes. Particularly in the area of human rights and wrongdoing across borders, gaps exist where investigators, prosecutors and State policy-makers have failed to challenge corporate actors when they engage in crimes.

“Corporate crime” is defined in the *Principles* as illegal conduct that is linked to a human rights abuse, including conduct that *should be* criminalised in order to meet requirements under international law even if the State has failed to do so. In the latter case, law enforcement may be constrained in its ability to react. The State may also not have accepted certain international human rights obligations. The primary onus would be on the State to fill this gap. However, the *Principles* also call on law enforcement to use the full range of laws at their disposal to investigate and prosecute corporate crimes to the maximum extent possible under existing law.

The consequences of the status quo are grave – victims of corporate crimes cannot vindicate their rights and a culture of impunity is permitted. This fails to serve the public interest. In addition, corporate actors that seek to abide by the law are unfairly disadvantaged by the acts of competitors who may not behave ethically. This harms the integrity of markets and stifles fair competition.

These *Principles* address corporate crimes broadly, focusing not just on human rights abuses that should be criminalised, such as forced labour, human trafficking and aiding and abetting sexual and other forms of violence, but also conduct which may result in, or contribute to, human rights abuses. This latter category could include the following offences: toxic waste dumping (linked to negative impacts on the rights to health or water); pollution of air, land or water (which impair people's rights to work, water or health); economic sanctions violations (which enable corporate actors to profit from human rights abuses); extortion (by abusive armed groups who control mine sites); handling of stolen goods (the sale of which benefits a human rights abuser); and other economic crimes such as fraud (used to circumvent environment or health regulations), tax evasion and corruption (which deprive the State of public funding for education and other essential services).

Tackling corporate crimes – especially when they occur across borders – raises many legal, political and practical challenges. Relevant laws may apply only within a State's territory or may have been historically designed to address individuals rather than corporate entities. State authorities may not prioritise the investigation and prosecution of corporate crimes. Law enforcement officials may lack the expertise and resources to pursue this type of offence or face difficulties in collecting evidence, including from abroad. Because the corporate actors involved in crimes will often be located in multiple national jurisdictions, investigations can appear to be particularly daunting.

In contrast, transnational businesses often operate across borders with ease. They may benefit from differences in law and in the enforcement of law between States, or from well-established legal concepts such as limited liability and the corporate veil. They are often well-resourced and wield significant economic and political power in both their host and home countries.

To be clear, addressing corporate crimes is not a voluntary pursuit. A State's duty to ensure remedy for human rights abuses, including to investigate allegations of violations and hold perpetrators accountable, is reflected in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. According to this instrument, the obligation to protect includes the duty to "[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law".

This obligation is also reflected in the core international and regional human rights treaties, and has been further elaborated by the treaty bodies through their commentaries and jurisprudence. The UN Human Rights Committee (UNHRC), the expert body that provides authoritative guidance on the implementation of the International Covenant on Civil and Political Rights (ICCPR), has emphasised that, where investigations reveal violations, States parties must ensure that those responsible are brought to justice. A failure to do so could in itself give rise to a breach of the ICCPR. The UNHRC has stated that these obligations arise notably in respect of violations recognised as crimes under either domestic or international law. Various expert human rights monitoring bodies have also clarified that the State duty to protect human rights has an extra-territorial dimension – a State should take measures, consistent with international law, to prevent a corporate entity headquartered or incorporated in its jurisdiction from abusing human rights in another jurisdiction.¹

To address corporate crimes, political barriers to pursuing these cases must be addressed. Investigators and prosecutors must be independent and impartial and have the capacity to bring cases without fear of reprisals, despite political ties that may exist between corporate actors and key government actors. To achieve this, States should provide political leadership by prioritising corporate crimes cases and making clear that corporate accountability is essential to ensuring the rule of law and access to justice. Once evidence of illegal activity comes to light, corporate actors need to know that they will be held accountable, whether at home or abroad, while still benefiting from due process and fair trial protections. Similarly, victims need to know that they will receive remedy and reparation for harm caused and that offenders will be held accountable.

In many cases, these goals can be achieved by actively recognising that corporate crimes need to be investigated and prosecuted properly through the better enforcement of existing laws and the use of specific policies and incentives encouraging law enforcement authorities to tackle corporate crimes. In his capacity as the UN Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises, John Ruggie affirmed that “criminal provisions remain mere words on paper unless States act upon their obligations to investigate individual and corporate involvement in business and human rights-related crimes”.²

In other cases, achieving these goals will require the adoption of new laws or the reform of existing laws. The *Principles* recognise that across the globe, law enforcement will face very different kinds of challenges. This document seeks to identify ten core principles that should guide all investigators and prosecutors in their approach to accountability for corporate crimes, while taking into account the diversity of legal cultures. Each principle is supplemented by instructive commentary as well as examples of relevant tools and cases from particular jurisdictions.

In sum, the *Principles* are dedicated to implementing the State duty to protect as well as the realisation of the right to remedy and reparation for victims of corporate crimes. The *Principles* seek to ensure the highest possible level of accountability, deter future harm, encourage a responsible business culture and enable rights for the victims. They should be carefully studied and embraced by all State actors responsible for accountability for corporate crimes.

METHODOLOGY

Over a period of two years, the Project Advisers conducted a series of global consultations with prosecutors, investigators, academics and other experts specialising in criminal prosecution and investigation as well as international criminal law and human rights law. Drawing from the findings of the consultations, the Project's Independent Commission of Experts ("experts") developed the *Principles* to advance investigations and prosecutions in human rights cases.

The Independent Commission of Experts

The nine Experts were chosen due to their expertise in relevant subject areas, including international criminal law and human rights law, and to represent a diversity of legal jurisdictions. The Commission is co-chaired by Justice Ian Binnie, a former justice of the Supreme Court of Canada, and Professor Anita Ramasastry, an expert in anti-corruption and business and human rights.

Consultations with Civil Society and Law Enforcement

From February 2014 to May 2016, the Project Advisers, together with the Experts, conducted a series of confidential consultations with over 120 law enforcement officials, including investigators and prosecutors, legal experts, non-government organisations (NGOs) and academics. The consultations were conducted in person, or via telephone, written questionnaire or correspondence. The Project Advisers conducted 57 individual consultations and five group consultations held in Bangkok, Addis Ababa, New York, London and The Hague. The consultations included representatives from twenty countries: Argentina, Bangladesh, Belgium, Canada, France, Germany, Ghana, India, Indonesia, the Netherlands, Nigeria, Norway, Portugal, Slovenia, South Africa, Switzerland, Thailand, Uganda, the United Kingdom and the United States.

The individuals consulted specialised in a wide range of legal disciplines, such as international human rights law; international criminal law; environmental law; commercial and finance law; economic crime law including bribery, corruption, money laundering and economic sanctions; and general criminal law.

Drafting of the *Principles*

Working sessions between the Experts and the Project Advisers took place over a one-year period, including three in-person meetings. During this period, proposals and text were formulated for addressing key challenges identified during the consultations. The final draft was presented at the last of those meetings, which also involved individuals external to the Project from law enforcement as well as NGOs.

During the consultations, cases were discussed to illustrate both the problems and successes in pursuing investigations and prosecutions against corporate actors. While some of these cases are not specific to human rights, they have been included in the *Principles* for illustrative purposes along with an accompanying explanation.

Company responses

Before publication, the Project Advisers contacted the companies referenced in the *Principles* to provide the text of the relevant case studies and provide an opportunity to respond. The responses are reflected in the *Principles* as appropriate and available on the Project website at www.commercehumanrights.org.

All other materials relating to the Commerce, Crime and Human Rights Project and the *Principles* are also available on the Project website.

KEY TERMS

Corporate actor	A corporate entity or individual acting on behalf of a corporate entity.
Corporate crime	Illegal conduct that is linked to a human rights abuse, including conduct that <i>should</i> be criminalised in order to meet requirements under international law even if the State has failed to do so.
Corporate entity	Any type of undertaking that carries on a business or trade, whether an incorporated entity, a limited liability company, a partnership or otherwise.
Home State	The State in which a corporate entity is incorporated, registered, has its legal address (domicile) or main office.
Host State	The State, other than the home State, in which a corporate entity operates, whether through a subsidiary, joint venture or other commercial arrangement.
Law enforcement	Police, investigators, investigative judges and prosecutors.
NGO	Non-governmental organisation.

1 Fight impunity for corporate crimes by investigating and prosecuting offences

States have a duty to protect against human rights abuses committed by corporate actors. This includes addressing issues of political will, adopting adequate regulations, prohibiting corporate crimes, investigating abuses and providing an effective remedy. Where there are gaps in the existing legal frameworks, States must adopt or amend laws. States must also guarantee the safety and independence of investigators and prosecutors to pursue corporate crimes.

Law enforcement plays a central role in ensuring justice. They can face significant personal risks and other obstacles in doing so. Yet to fight impunity, law enforcement must take action to confront the challenges of pursuing corporate crimes head-on, including the inherent complexity and power of corporate actors.

COMMENTARY

Challenges

Investigators and prosecutors interviewed by the Project Advisers acknowledged that in some States a significant obstacle to justice in corporate crimes cases is the influence corporate actors may have over governments and regulatory systems, either directly or indirectly. For example, in some cases it may not be in the interest of government authorities to pursue a corporate entity or its directors for corporate crimes due to personal and professional relationships, or financial and/or other aligned interests between the corporate actor and the State. Individual investigators or prosecutors may be pressured into, or rewarded for, turning a blind eye. On the other hand, if they do decide to act in that situation and pursue corporate actors for illegal activities, they may face real personal risks and find their safety compromised.

Where law enforcement does have the independence to act, corporate crimes cases still often receive less priority than other domestic offences. There are many reasons why corporate crimes cases

receive insufficient attention. Examples include a lack of experience with such cases among investigators and prosecutors as well as internal pressures to close cases quickly and successfully. Additionally, corporate crimes cases can generally be seen as more complicated, requiring specialised knowledge and additional resources. They can involve a large number of actors: the company itself, its subsidiaries and affiliates as well as those directors, employees and agents acting on their behalf. In some jurisdictions, laws applicable to corporate crimes may set out specific or even unique legal tests for establishing liability that are challenging to meet. Other jurisdictions may not criminalise serious human rights abuses in line with international law or may not provide for the criminal liability of corporate actors.

In some cases, very specific evidence (e.g. senior level involvement in the crime) may be required to satisfy the legal standards needed to charge or prosecute. Finding the right evidence may require particular expertise that individuals considering the case may not have, including an understanding of corporate and management structures or recovering and analysing large amounts of financial, commercial, electronic, telecommunications and digital data. Moreover, some of that evidence may be under the control of the relevant corporate actor.

Corporate actors may also have greater financial, legal and technical resources to fight a case than other investigative targets. For example, although the financial burden of defending a case is high, wealthy corporate actors could more easily afford to retain many of the more specialised technical and financial experts, consequently leaving prosecutors and investigators with few experts at their disposal.

The cumulative effect of these challenges is the perpetuation of a culture of impunity for corporate crimes. Where illegal conduct goes unchallenged, victims are left without effective remedies and there is little deterrent against future abuse.

Solutions

Issues of political will must be tackled head-on: States must make accountability for corporate crimes a priority. Where there are gaps in the existing legal frameworks, States must adopt or amend laws.

States must also create an environment that is conducive to pursuing corporate crimes cases. States must ensure that law enforcement is incentivised to pursue corporate crimes and has the necessary tools and resources, institutional capacity, independence and impartiality to do so. States should provide targeted training and guidance on corporate crimes.

Law enforcement must also be free to pursue corporate crimes cases without fear of reprisals or undue influence. Senior officials in government must regard the independence and impartiality of investigators and prosecutors as sacrosanct. Where required, States must build specific protections into the system. These could include legal measures (e.g. statutory requirements that ensure transparency about how and when ministers have oversight of the prosecutor's office) and sanctions to protect the independence and impartiality of law enforcement, as well as practical measures to ensure their personal security and that of their families.

For its part, law enforcement officials must be committed to fight impunity for corporate crimes. In particular, they should take steps to ensure they feel able to take corporate crimes cases forward, having both the confidence and skills required to do so. They should also take steps to ensure they are properly equipped to address corporate crimes cases, including through accessing training as well as global expert networks and corporate intelligence specialists (e.g. individuals or offices familiar with techniques or technologies for investigating corporate transactions or asset tracing). When pursuing corporate crimes cases, law enforcement should take appropriate measures to protect themselves from harassment, intimidation, threats of violence or other reprisals.

Ultimately, law enforcement must make as strong a commitment to the investigation of corporate crimes as it does to the fight against other types of serious crimes. They should recognise the merit of pursuing these cases and be aware of the diversity and types of illegal acts that can constitute corporate crimes in their jurisdiction. Priority should be given to cases that are of strategic value or importance, will set or build a precedent or are likely to be successful. This will build knowledge and expertise, and make it more likely that additional resources and support will be made available by the State to pursue future cases.

Law enforcement should consider the following factors when prioritising corporate crimes cases for investigation and, if appropriate, prosecution:

1. Whether the crime involves human rights abuses;
2. The public interest in pursuing the case, including the potential harm or risk to society for not doing so;
3. The history of wrongdoing of the corporate actors involved;
4. Whether the corporate actors benefitted or could have benefitted from the wrongdoing;
5. The deterrent effect of pursuing the case; and
6. The availability, or unavailability, of alternative accountability mechanisms (i.e. will the failure to pursue a criminal case mean that the victims will not obtain effective remedies).

In pursuing cases, it must also be remembered that enforcement has to be executed in a manner that is consistent with international and national laws for procedural fairness, particularly with respect to individuals who are accused.

EXAMPLES

EXAMPLE ONE: The importance of protecting prosecutors' personal safety to ensure that they are free from intimidation, hindrance, harassment, improper interference, unjustified exposure to civil, penal or other liability or reprisal when discharging their duty in pursuing cases is recognised by international organisations, such as the International Association of Prosecutors (IAP).

The IAP is a global organisation of prosecutors with representatives from over 170 countries. It was established in 1995 primarily to address the rapid growth in serious transnational crimes, including drug trafficking, money laundering and fraud.³ Its aim is to set and raise standards for the professional conduct and ethics of prosecutors; promote the rule of law, fairness, impartiality and respect for human rights; and improve international cooperation to combat crimes.⁴

In 2008, the IAP adopted the Declaration on Minimum Standards Concerning the Security and Protection of Public Prosecutors and their Families.⁵ The Declaration established standards that States should abide by in protecting prosecutors and their families from threats to their safety and security as a result of their work. The Declaration, consisting of fourteen principles, establishes that States should take appropriate steps to assess the security risks facing prosecutors and their families, and implement measures to ensure they are physically protected. When threats, violence, harassment or other forms of intimidation or inappropriate forms of surveillance occur, States should ensure that such incidents are fully investigated and steps are taken to prevent reoccurrences.

EXAMPLE TWO: The prosecution in Belgium of multinational company Carestel (now Auto-Grill) and German company Kronos for human trafficking demonstrates how prioritising the investigation and prosecution of certain types of crimes can encourage police and prosecutors to pursue cases even if they are resource-intensive and complex. Belgium's multi-disciplinary and collaborative approach to tackling human trafficking also provides lessons relevant to Principle 5 (*Collaborate widely to ensure accountability for corporate crimes, particularly in cross-border cases*).

In 2012, following an extensive criminal investigation that began in 2006, Carestel and Kronos were found guilty of human trafficking for the purposes of labour exploitation under Article 433 of the Belgian Penal Code.⁶ Carestel managed various motorway service stations in Belgium. It outsourced the cleaning of the bathrooms to Kronos, which was responsible for hiring and managing staff. The investigation started after a routine visit by labour inspectors found that cleaners in the restrooms were subject to harsh working conditions.⁷

The cleaners hired by Kronos came mostly from Eastern Europe, had been brought into Belgium illegally and worked seven days a week for fifteen hours a day for about three to four euros per hour.⁸ The cleaners worked as self-employed sub-contractors who are not protected under Belgian labour laws on wages and working hours.⁹ The cleaners had signed contracts they did not understand, were unaware as to whether they were working as employees or independent contractors, lived in a house owned by Kronos and were transported by Kronos staff to and from the various locations they worked every day.

The court ruled that Kronos was guilty of human trafficking and that Carestel was also guilty as an accomplice under Article 66 of the Belgian Penal Code.¹⁰ Although Carestel claimed it was not responsible for the actions of Kronos as a sub-contractor, the court found that it willingly and knowingly collaborated with Kronos and that such collaboration resulted in an illegal act. At the very least, the court ruled, Carestel willingly and knowingly collaborated with Kronos in awareness and acceptance of the risk of such collaboration. The court fined Kronos €528,000 (then US\$649,000) and Carestel €99,000 (then US\$122,000).¹¹

The fact that human trafficking is a priority area for the Belgian government played a key role in enabling the prosecution of cases such as the Carestel/Kronos case. Since 1999, the Ministry of Justice (MOJ) and the Board of Prosecutors General have issued a directive to law enforcement agencies outlining national policy on the investigation and prosecution of human trafficking, which is reviewed by the MOJ's Criminal Policy Department on a yearly basis.¹² The Directive provides standardised guidance on investigating and

prosecuting human trafficking cases, including recommendations on investigative methods in more complex cases. It sets out criteria for which cases to prioritise, including the young age of the victims, the extent of the infringement on human dignity, the degree of violence used or threatened, elements pointing to the repeated occurrence of the offence, and elements revealing the major social impact of the offence. The Directive also promotes a multi-disciplinary approach to trafficking, providing for collaboration and regular information and data sharing between judicial officials and law enforcement, as well as between local and national authorities.

EXAMPLE THREE: The partnership between the UN International Commission to Combat Impunity in Guatemala (known by the Spanish acronym CICIG), the Guatemalan Prosecutor General's office and the "high-risk" courts demonstrates how international cooperation can help to overcome the political hurdles inherent in the investigation and prosecution of high-profile human rights cases.

CICIG was created at the request of the Guatemalan government to deal with the extremely high levels of impunity for violent crime, parallel criminal structures and a lack of progress on human rights cases from the internal armed conflict in Guatemala that resulted in the deaths of nearly 200,000 people, mostly indigenous persons.¹³

CICIG is mandated to support the Guatemalan judicial system and operates under Guatemalan law. CICIG may act as a prosecutor, with the authority to initiate investigations into "illegal security groups" and "clandestine security structures", defined as groups that "commit illegal acts that affect the Guatemalan people's enjoyment and exercise of their fundamental human rights, and have direct or indirect links to State agents or the ability to block judicial actions related to their illegal activities".¹⁴ CICIG can also file administrative complaints against public officials, and particularly those that seek to impede the functions of CICIG.

While CICIG is unusual in that it has independent investigative authority, it nonetheless depends upon Guatemalan authorities to investigate and adjudicate cases.¹⁵ It was therefore essential for CICIG and the international governments who support CICIG, including the United States and other western donors, to

encourage the appointment of independent prosecutors and judges to process these cases. CICIG and its supporters therefore publicly monitored and reported on the proceedings to select these judicial personnel and CICIG also investigated sitting judges for failing to properly adjudicate high-profile cases.¹⁶

A key component of CICIG's success has been its focus on the security of Guatemalan judicial personnel, who are the subject of violent threats and extortion by powerful criminal networks. CICIG and its supporters contributed to the creation of "high-risk" courts that adjudicate cases concerning human rights and organised crime.¹⁷ While these courts continue to face significant political barriers, they have been successful in overcoming many such barriers to prosecute high-level military personnel involved in mass atrocities committed during the armed conflict.¹⁸

CICIG's efforts to promote the independence of the Prosecutor General's office also contributed to the nomination of the first female Prosecutor General of Guatemala who played a significant role in reducing rates of impunity in Guatemala for atrocities committed during the armed conflict. All of these efforts contributed to a wave of high profile arrests, including the arrest of the then-President of Guatemala, Otto Perez Molina, on major corruption charges.¹⁹

2 Fight impunity for cross-border corporate crimes by choosing to assert jurisdiction

Exercising jurisdiction in cross-border corporate crimes cases is essential to fighting impunity. For these purposes, consider the State's obligations under international law, all potential bases for jurisdiction and the likelihood that victims will not receive effective remedies elsewhere. If it is legally or practically impossible to exercise jurisdiction, refer the case to appropriate authorities, collaborate with them where possible and provide support to any investigation or prosecution that may occur.

COMMENTARY

Challenges

Investigators and prosecutors noted additional challenges specific to cross-border corporate crimes cases, where a corporate actor registered or domiciled in one jurisdiction (the home State) is suspected of causing or contributing to a human rights abuse in another jurisdiction (the host State).

Multinational corporate entities act across borders with ease due to developments in technology as well as favourable corporate, trade and investment laws. They exercise significant power and influence. Laws to protect human rights and deter companies from committing wrongful acts have not kept pace with these developments. For example, the issues of separate legal personality and limited shareholder liability present significant legal challenges for accountability where the case involves a parent company based in a home State that operates through a local subsidiary or joint venture in the host State. This "governance gap" has created an environment in which corporate actors are able to commit serious human rights abuses and other corporate crimes with little accountability for doing so.

The governance gap may be exacerbated when law enforcement in the host State where the harm occurred is unwilling or unable to pursue the case. The corporate actor may exercise significant

economic and political power and influence in the host State, and law enforcement may be under-resourced or have weak institutional capacity. As such, legal action against corporate actors is rarely taken. There may also be specific practical barriers to overcome – the corporate entity involved in the abuse may no longer operate in the host State, other corporate actors involved may have fled the jurisdiction or the corporate entity (including its subsidiary or affiliates) may have insufficient assets or resources in the host State to meet any fine.

Home State laws may not provide for jurisdiction over offences committed abroad. Even where grounds for exerting jurisdiction exist, law enforcement may not know they can assert jurisdiction or may be reluctant to do so because the harm occurred in another country. The prosecutors may also need to overcome certain additional procedural hurdles before exercising jurisdiction. These may include: (1) the need to obtain consent from senior and other government officials; (2) legal restrictions on the home State prosecuting crimes more closely connected with another State; (3) a requirement that the relevant act be an offence in both the home State and the host State; or (4) a requirement that the suspect be present in the jurisdiction.

Solutions

Where the relevant host State is unable or unwilling to exercise jurisdiction, or where remedies provided to victims have not been effective, law enforcement in home States should, as a matter of principle, exercise jurisdiction over all cross-border corporate crimes cases that come to their attention, taking the following into account:

1. Whether the State is obligated under international law to investigate and prosecute the case (see sources in Endnote 1);
2. The possibility of victims not achieving effective remedies in any other jurisdiction; and
3. The challenges or threats that victims and witnesses may face if the case is pursued in an alternative jurisdiction.

When determining whether the State should exercise jurisdiction, law enforcement should consider all potential bases for asserting jurisdiction, such as the following:

1. Nationality and location of the victims and the relevant corporate actors;
2. Location of the harm;
3. Location of the evidence;
4. Where the elements of the offence were committed; and
5. The role played by the corporate actors in the wrongdoing and the location of the corporate entity's subsidiaries and affiliates, business activities and assets as well as where key decisions were made.

If law enforcement determines that it is legally or practically impossible to exercise jurisdiction, they should refer the case to appropriate authorities in another relevant jurisdiction (such as where any corporate actors involved may be registered, are nationals or reside). They should commence discussions with relevant jurisdictions as early as possible to determine who is in the best position to successfully investigate and prosecute the case. They should then cooperate with any investigation and prosecution in that jurisdiction and, as appropriate, offer support to law enforcement.

EXAMPLES

EXAMPLE ONE: The prosecution for genocide and war crimes of a Dutch businessman who supplied chemicals to Saddam Hussein's regime in Iraq shows how pursuing cross-border cases not only ensures justice for victims but also catalyses action in future cases.

Between 1984 and 1988, Dutch national Frans van Anraat purchased large quantities of thiodiglycol from the United States and Japan and then sold the chemicals through numerous companies in different jurisdictions to the government of Saddam Hussein in Iraq.²⁰ The government used the thiodiglycol to produce mustard gas.²¹ The gas was used in chemical weapon attacks by the Iraqi government against the Kurds in Iraq in 1987 and 1988, including an attack in Halabja that killed over 5,000 people.²²

Van Anraat was originally arrested in Italy in 1989 at the request of the U.S. government.²³ He was released on bail and then fled to Iraq, where he stayed until 2003.²⁴ In December 2004, van Anraat was arrested in the Netherlands and charged with complicity in genocide and war crimes for, among other things, providing the opportunity and/or means to commit those crimes by supplying chemicals.²⁵ He was prosecuted under Article 1 of the Genocide Convention Application Act and Article 8 of the Criminal Law in Wartime Act, in conjunction with Article 48 of the Dutch Penal Code.²⁶

In December 2005, van Anraat was found guilty by a court in The Hague of complicity in war crimes and sentenced to fifteen years in prison (later extended to seventeen years).²⁷ Although the court found that the attacks against the Kurds amounted to genocide, it found van Anraat not guilty of complicity in genocide due to insufficient evidence that he knew of the genocidal intent of the Iraqi government.²⁸ In March 2013, a Dutch court ruled that van Anraat must pay €25,000 (then US\$33,000) each to sixteen victims who originally joined his criminal case as plaintiffs to seek civil damages.²⁹

The case is notable because it is relatively rare for corporate actors to be charged with international crimes and because it

was one of the first such international crime cases brought in the Netherlands. Originally established in 1994 to investigate war crimes in the former Yugoslavia, the Dutch International Crimes Unit that brought the case is now widely recognised as one of the most effective and active units specialising in international crime. It consists of both investigators and prosecutors as well as specialist consultants hired on a case-by-case basis.³⁰

EXAMPLE TWO: A 2006 toxic waste dumping case involving multinational commodities trader Trafigura shows how a corporate crime case involving multiple jurisdictions can give law enforcement in relevant jurisdictions legal grounds to take action. The case is also relevant to Principle 5 (*Collaborate widely to ensure accountability for corporate crimes, particularly in cross-border cases*), as it shows how a lack of international cooperation and experience in tackling cross-border cases obstructs justice.

In August 2006, toxic waste was dumped at various locations in and around the city of Abidjan, Côte d'Ivoire. The waste had been generated by Trafigura by using caustic soda to “wash” on board a vessel at sea an extremely sulphurous petroleum product called coker naphtha. Trafigura intended to mix the cleaned naphtha with gasoline and sell it to the West African market, among others, for a profit of around US\$7 million per cargo. This process (called “caustic washing”) produces a hazardous and highly-odorous waste product. Trafigura attempted to dispose of the waste in Amsterdam using a company that processed ships’ waste. The company unloaded half of the waste from the ship but, the next morning, residents near the port complained of a bad smell and experienced nausea, dizziness and headaches. The company tested the waste and realised it was more contaminated than Trafigura had led them to believe. Trafigura rejected the company’s offer to dispose of the waste safely in the Netherlands for €544,000 (then US\$694,000). The waste was loaded back onto the ship and ultimately dumped in Abidjan by a local company hired by Trafigura to dispose of the waste for just under US\$17,000.³¹

As a result of the dumping, over 100,000 people sought medical assistance, and extensive clean-up and decontamination was required. Côte d'Ivoire authorities recorded about fifteen deaths.³²

At the time of publication, the extent of ongoing pollution and the long-term health impacts of the dumping remain unclear.

In September 2006, authorities in Côte d'Ivoire arrested two Trafigura executives who visited the country following the dumping and charged them with poisoning and breaches of public health and environmental laws.³³ In October 2006, authorities also started a damages claim against Trafigura for 500 billion West African francs (then around US\$1 billion).³⁴ In February 2007, Trafigura entered into a settlement agreement with the Côte d'Ivoire government for 95 billion West African francs (then around US\$200 million) with no admission of liability.³⁵ In return, Trafigura and its executives and employees were granted blanket protection from any legal proceedings in Côte d'Ivoire, effectively granting them immunity from prosecution. The following day, the Trafigura executives were released from prison and left the country. The prosecution against them was subsequently dropped due to insufficient evidence. Ultimately, successful prosecutions were brought against only two local residents who were not Trafigura employees.³⁶

Criminal actions were also explored in the Netherlands and the United Kingdom. Action was pursued in the Netherlands because the parent company of the Trafigura group was based there and because of Trafigura's attempt to dispose of the waste in Amsterdam. Actions were pursued in the United Kingdom on the basis that Trafigura's UK subsidiary coordinated the events leading to the dumping.

In September 2006, Greenpeace filed a report with the Dutch Public Prosecutor requesting that a criminal investigation be instigated into offences relating to the dumping of the waste in Côte d'Ivoire.³⁷ In June 2008, Dutch prosecutors brought limited charges against Trafigura and an employee in relation to the events that occurred in the Netherlands (i.e., illegally importing and exporting the waste). Trafigura was found guilty and eventually fined €1.3 million (then around US\$2 million).³⁸ Although having jurisdiction under the Dutch Penal Code, prosecutors decided not to prosecute Trafigura for the dumping in Abidjan because, despite attempts to do so, it "appeared impossible" to conduct an investigation in Côte d'Ivoire.³⁹

In March 2014, Amnesty International sent a detailed legal brief and supporting evidence to UK authorities calling on them to investigate whether Trafigura's UK subsidiary conspired in the United Kingdom to dump the waste in Abidjan.⁴⁰ In March 2015, the UK Environment Agency refused to investigate despite acknowledging that, if the allegations were true, "a serious offence was committed with a relevant aspect of the conduct taking place within the jurisdiction".⁴¹ The Environment Agency acknowledged that, despite having a criminal enforcement unit, it lacked the resources (particularly due to government financial cuts), expertise and capacity to pursue the case. The Environment Agency only agreed to look at Amnesty's evidence under threat of judicial review proceedings.⁴²

Civil actions have also been pursued in the United Kingdom, the Netherlands and Côte d'Ivoire.

In November 2006, 30,000 victims of the dumping brought a civil claim against Trafigura in UK courts.⁴³ Under a September 2009 settlement agreement, Trafigura agreed to pay £30 million (then US\$45 million), amounting to around £1,000 (US\$1,500) to each person with no admission of liability for the dumping.⁴⁴

At the time of publication, victims are still pursuing civil proceedings against Trafigura in Côte d'Ivoire and the Netherlands.

As such, while Trafigura has been subject to civil and criminal proceedings related to the dumping and paid some compensation to victims, it has never admitted responsibility, or been properly held to account, for its role in the actual dumping of the waste.⁴⁵

Trafigura denies responsibility for the dumping and maintains that this case and earlier publications contain significant inaccuracies. It disputes in particular that the matter has not been subject to proper judicial scrutiny, that the dumpsites have not been remediated and that the long-term health impacts of the dumping remain unclear. Trafigura also maintains that it believed the local company would dispose of the waste safely and lawfully.⁴⁶

EXAMPLE THREE: A case involving serious human rights abuses in the Democratic Republic of the Congo (DRC) and Canadian/Australian multinational Anvil Mining Ltd. illustrates how the failure of States to assert jurisdiction can leave victims with no avenue to obtain justice or an effective remedy. This case is also relevant to Principle 3 (*Guarantee accountability and transparency in the justice process when pursuing corporate crimes*) because it shows that a government policy of deliberately not commenting on individual investigations, to any degree, can detract from ensuring that victims have adequate information, accountability and transparency with respect to the process itself.

In 2004, a United Nations in-country investigative mission found that multinational Anvil Mining LTD (Anvil Mining) had provided logistical support to a Congolese army operation carried out in October 2004. This operation had been conducted to counter an attempt by a small armed rebel group to take over the town of Kilwa, a key port for the company's operations.⁴⁷ The UN report stated that Anvil Mining had provided the army with trucks, food, lodging and other logistical support for the operation.⁴⁸ In addition it found that planes, chartered by Anvil Mining to evacuate its personnel to the nearby city of Lubumbashi, were used to transport around 150 soldiers back to Kilwa.⁴⁹ The UN report stated that, during the operation, soldiers from the army murdered and tortured civilians. The UN concluded that seventy-three civilians were killed, including at least twenty-eight who were summarily executed.⁵⁰ In response, Anvil claimed that the logistical support was forcibly requisitioned by authorities and has publicly denied that the company or its employees committed any wrongdoing.⁵¹

In October 2006, a Congolese military prosecutor charged three employees of Anvil Mining's DRC subsidiary with aiding and abetting war crimes committed by the Congolese army.⁵² These employees, as well as nine Congolese soldiers, were tried before a DRC military court between December 2006 and June 2007 under, among other things, Articles 173 and 174 of the DRC Military Code and Article 8 of the Rome Statute of the International Criminal Court.⁵³ Ultimately, all twelve defendants were found not guilty. The court also found Anvil Mining's DRC subsidiary "not guilty" despite the company never being formally tried before the court.⁵⁴

Contrary to the findings of the UN investigation, the Congolese court held that no summary executions had occurred in Kilwa, but that people had been killed during “fierce” fighting between the rebels and the army.⁵⁵ As a reaction, the United Nations High Commissioner for Human Rights at the time publicly expressed serious concerns about the verdict.⁵⁶ Non-governmental organisations (NGOs) expressed concerns relating to flaws in the trial process, including intimidation of witnesses and political interference.⁵⁷ In February 2008, the military court denied the victims’ appeal against the judgment.

Subsequent criminal actions were explored in Australia and Canada because of relevant links. Australia was chosen because the ultimate parent company of the corporate group was listed on the Australian Stock Exchange. It was the principal place of business of Anvil Mining, as well as the jurisdiction of incorporation of one of the holding companies of Anvil Mining’s DRC subsidiary. Furthermore, the CEO at the time, Bill Turner, who publicly represented the company’s view on the events that occurred in Kilwa on Australian TV, was Australian.⁵⁸ Engaging a third jurisdiction, the ultimate parent company had legally reorganised in Canada at the time of the incident and was listed on the Toronto Stock Exchange. The Canadian entity directly employed two senior employees of the Congolese entity, both of whom were Canadian, one of whom managed the Congolese operations.⁵⁹

The Australian Federal Police opened an investigation into the Australian entity in September 2005 based on acts carried out in the DRC, but advised that they closed the case following the military court decision. They advised that investigations could be re-opened if new evidence came forward.

In March 2007, Rights and Accountability in Development (RAID) and Global Witness asked the Canadian Minister of Justice to open a formal investigation into the Canadian entity based on acts carried out in the DRC.⁶⁰ The War Crimes Unit of the Royal Canadian Mounted Police (RCMP) in Canada opened an investigation, but its current status, many years later, is unknown. In a letter to RAID and Global Witness of June 2007, the Minister of Justice and Attorney General of Canada stated that “it is generally contrary to Canadian government policy to comment on individual investigations, or even to provide information as to whether or not a particular investigation

is being conducted”.⁶¹ In August 2016, RAID, acting on behalf of victims, wrote to the RCMP seeking an official statement relating to the status of the investigation. A response is pending.

The victims also made subsequent attempts to seek compensation through non-criminal processes in Anvil Mining’s home States of Australia and Canada but faced significant hurdles.

The victims’ preliminary efforts to obtain disclosure of documents prior to starting a civil lawsuit in Australia had to be abandoned when DRC authorities refused to allow the victims’ legal representatives to travel to Kilwa to meet the claimants. The DRC lawyers received death threats and the Australian law firm withdrew. Given the extremely limited financial means of the Congolese claimants as well as the security threats that had blocked access to Kilwa and prevented confirmation of the lawyers’ instructions, it was not possible at that time to approach another law firm to take up the case.

In November 2010, the Canadian Association Against Impunity (CAAI), an organisation established by an international consortium of NGOs with the primary purpose of undertaking a class action, filed a class action complaint in Québec on behalf of the victims.⁶² Although the lower court in Québec ruled that it had jurisdiction and that there was no other viable forum for the victims to seek justice, the Québec Court of Appeal overturned this decision in January 2012.⁶³ The appellate court ruled that, on the facts of the case, the conditions for taking jurisdiction under Québec law were not met.⁶⁴

In May 2014, the African Commission on Human and Peoples’ Rights agreed to hear a complaint submitted on behalf of the victims against the DRC for violations of the African Charter on Human and Peoples’ Rights.⁶⁵ At the time of publication, there has not been a ruling on this complaint.

3 Guarantee accountability and transparency in the justice process when pursuing corporate crimes

Ensure the justice process is as accessible, transparent and accountable as possible, from when the crime is alleged to the close of the case.

COMMENTARY

Challenges

Lawyers and investigative NGOs interviewed stated that they faced significant obstacles in accessing the justice system and obtaining effective remedies for victims. They expressed concerns that law enforcement may not pursue cases even if compelling evidence is presented to them. Prosecutors may be permitted broad limits of discretion by law, and this may contribute to cases not being pursued. In many jurisdictions, the prosecutor's discretion is unfettered and cannot be legally challenged.

Prosecutors interviewed also stated that issues of independence and accountability are especially problematic in corporate crimes cases, as law enforcement may face particular political or external pressures not to pursue a case due to the power and influence of the corporate actors involved.

Many of these cases are brought to the attention of law enforcement by NGOs, whistle-blowers and others acting in the public interest. These actors request State action based on evidence of illegality that has come to light, possibly during the course of their work or their investigative research. As they are external to the formal State system, these actors often have no official rights to demand action by law enforcement.

If authorities do respond to complaints, they sometimes do so only with significant delays. In the worst-case scenario, statutory time limits for charging or prosecuting the crime may have already lapsed

when they do. They may also respond by declining to pursue a case without explaining their reasons. Victims or other persons reporting crimes may be unable to formally challenge that decision, or may be unaware that such a right exists. Where a formal review process does exist, it may lack transparency because final decisions are not made public. These issues relating to access, transparency and accountability are not unique to corporate crimes, but can be exacerbated in these instances.

Solutions

To overcome these obstacles, law enforcement should ensure that the justice process in their jurisdiction is as accessible, transparent and accountable as possible.

What law enforcement can do in practice will vary from country to country depending on the legal limits and practical challenges within their national systems.

In recognition of these variations, law enforcement should consider best practices across jurisdictions including what is outlined in the examples below. At a minimum, law enforcement should issue publicly-available guidance on how to access the system by bringing a complaint as well as how law enforcement will respond. This guidance should include: an overview of the process, timeline of the different steps including appropriate time-frames for responses to complaints, criteria for deciding whether or not to pursue the complaint, any right to review that decision and the procedure for doing so. Law enforcement should act in accordance with the guidance, and communicate with the complainants about their decision-making process to the extent possible.

The importance of accountability and transparency in the justice process is recognised by international organisations, such as the International Association of Prosecutors (IAP) and the United Nations Office on Drugs and Crime (UNODC). In 2014, the UNODC and the IAP produced a guide on The Status and Role of Prosecutors (“UNODC/IAP Guide”).⁶⁶ The UNODC/IAP Guide highlights that in jurisdictions where prosecutors have discretion over whether to prosecute cases or not, this discretion “can potentially lead to abuse”.⁶⁷ As such, the UNODC/IAP Guide states that prosecutors

should be able to make that decision “free of outside influence” and recommends the relevant jurisdiction adopt policy guidelines on the use of the discretion.⁶⁸ To reduce outside influence, it calls for transparency and public accountability in the relationship between prosecutors and any government ministers to which prosecutors are accountable. It also recognises that internal review mechanisms and the ability of victims to appeal decisions not to prosecute can minimise the risk of prosecutorial discretion being abused.

The UNODC/IAP Guide also notes that prosecution services are “accountable to the public they serve and as such they should be in a position to inform and explain actions they have taken in the administration of justice”.⁶⁹ In particular, it highlights the importance of providing reasons for specific decisions and notes that “prosecutors should be held accountable for the way in which they discharge their functions and duties”.⁷⁰

EXAMPLES

EXAMPLE ONE: UK codes of practice and guidance include various provisions that seek to address issues of transparency, accessibility and accountability in the justice system.

The Code for Crown Prosecutors sets out general principles that prosecutors should follow in deciding whether or not to prosecute a case. It provides a two-stage test for prosecutors to apply: is there a realistic prospect of conviction (the evidential test) and do the public interest factors against prosecution outweigh those tending in favour (the public interest test).⁷¹ The Code includes a number of public interest factors to take into account for these purposes, such as the seriousness of the offence and the harm caused to victims. UK law enforcement agencies have also issued the Guidance on Corporate Prosecutions.⁷² This includes additional guidance on evidential and public interest issues relevant to the prosecution of corporate actors, including whether the corporate entity has a history of similar conduct.⁷³ Both sets of guidance are publicly available. The Crown Prosecution Service (CPS) also publishes guidance on its website which describes the legal tests and relevant precedents for establishing criminal offences (such as corporate manslaughter) as well as certain procedural issues (such as what offences require Attorney General consent before prosecution).⁷⁴

In particularly serious or noteworthy cases, UK law enforcement agencies may issue public statements explaining their reasons not to pursue a case. For example, the CPS issued a detailed statement in December 2015 explaining its decision not to prosecute News Group Newspapers in connection with well-publicised phone hacking charges.⁷⁵

Victims can seek review of a decision by the CPS not to prosecute, through the Victims' Right to Review Scheme. The CPS has issued public guidance on the Scheme, which includes time limits for review and response. Victims and other interested parties can also apply for judicial review of any decision whether or not to investigate or prosecute a case.⁷⁶ Court judgments are generally made public.

EXAMPLE TWO: Political interference has been recognised by the Organisation for Economic Co-operation and Development (OECD) as a serious concern in certain cases, such as those that involve bribery. Article 5 of the OECD Anti-Bribery Convention (OECD Convention) provides that the investigation and prosecution of bribery should not be influenced by, among other things, “the potential effect upon relations with another State” (which has been interpreted by some to include national security).⁷⁷

Although the UK government is a party to the OECD Convention, it has not incorporated Article 5 into domestic law. While not a human rights case, a decision to discontinue an investigation by the UK Serious Fraud Office (SFO) calls into question the implementation of Article 5 and illustrates how political interference may affect the exercise of prosecutorial discretion.

In 2004, the SFO began an investigation into bribery allegations concerning a 1985 arms-for-oil deal between the UK and Saudi Arabian governments under which UK defence company BAE Systems was the key contractor.⁷⁸ In December 2006, the SFO, a prosecuting authority that is independent of the government, decided to stop the investigation following representations by BAE, the UK government (including then-Prime Minister Tony Blair) and the Saudi government that the continuation of the investigation would negatively affect the United Kingdom’s national security.⁷⁹ That month, according to newspaper reports, the Saudi government had given the United Kingdom ten days to halt the investigation or lose a key contract to supply fighter jets worth US\$10 billion.⁸⁰ In March 2007, the OECD expressed “serious concerns” about the decision to discontinue the investigation and whether it was consistent with the OECD Convention, as well as about shortcomings in the UK’s anti-bribery legislation.⁸¹

EXAMPLE THREE: A criminal case in France against a multinational timber company illustrates the challenges that claimants may face when there is uncertainty and significant delays in the investigation and prosecution process. The company was alleged to have bought illegally obtained timber during the Liberian civil war, the sale of which enabled its then President Charles Taylor to procure arms in breach of UN sanctions and to wage a campaign of violence which saw over 250,000 people killed and almost 1 million displaced.

In November 2009, human rights and environmental organisations, including SHERPA, Global Witness, Greenpeace France and Les Amis De La Terre (collectively “the complainants”), filed a criminal complaint in France against DLH France and DLH Nordisk A/S, both part of the Dalhoff, Larsen, Horneman Group (collectively referred to as “DLH”), one of the world’s biggest timber and wood products wholesalers.

The complaint alleged that DLH bought wood from timber companies in Liberia that had been illegally awarded forest concessions by Charles Taylor.⁸² More specifically, the complaint alleged that DLH France traded in wood originating from Liberian timber companies that failed to comply with Liberian law and/or did not have a legal right to operate. The complaint relied on evidence of DLH’s suppliers’ involvement in corruption, tax evasion, environmental degradation, UN arms sanctions violations and gross human rights abuses. As a result, it was claimed that by importing timber from forest concessions operated by unscrupulous and corrupt Liberian companies, the French arm of DLH was guilty of *recel* – the handling of and profiting from goods obtained illegally, punishable under French criminal law.

Revenue from forestry was a major source of funding for President Charles Taylor’s illicit off-budget activities during the conflict. Taylor also used forest exploitation as a major source of funding for arming his forces during the Liberian civil war.⁸³ In fact, two companies that were major suppliers of logs to DLH were operated by Dutch businessman, Guus Kouwenhoven, who smuggled arms through timber factories into Liberia and to Charles Taylor.⁸⁴ Kouwenhoven was charged in the Netherlands in June 2006 with illegally supplying weapons in violation of the UN arms trade ban and complicity in war crimes committed with these weapons. After a lengthy legal battle, he was acquitted of all charges due to lack of reliable evidence in 2008.⁸⁵

The prosecutor in the Republic of Nantes (France), where the case against DLH was filed, initiated a preliminary investigation in 2010. After two years of investigation, he transferred the case to the public prosecutor’s office of Montpellier.⁸⁶ During this period, the complainants sent letters, translated documents from English to French, and requested to meet with prosecutors in both Nantes and Montpellier in order to encourage a proper

consideration of this case.⁸⁷ Complainants advised that prosecutors were reluctant to communicate with them. They were also advised that the prosecutor's office could not comment on the case as an inquiry was still underway. In 2013, the prosecutor in Montpellier dismissed the complaint citing insufficient evidence to support the claims.⁸⁸ The complainants made four written requests to see the documents the prosecutor had on file for the case, but received no answer.⁸⁹

In March 2014, after the prosecutor dismissed the case, the complainants decided to initiate a criminal case themselves by filing a claim *avec constitution de partie civile*. Under this proceeding, victims can submit a complaint directly to a French magistrate who can start a criminal investigation.⁹⁰

Meanwhile, Global Witness also submitted a complaint to the Forest Stewardship Council (FSC) regarding DLH's purchasing of illegal timber and violations of Liberian national laws for harvesting timber.⁹¹ The FSC is an international NGO established to promote the responsible management of forest resources, while providing sustainability certifications to its stakeholders.⁹² In February 2015, the FSC officially decided to terminate DLH's membership and suspend its sustainability certificates.⁹³ In February 2016, the FSC placed DLH back on probation after the company submitted a report on progress made to compensate communities affected by the illegal timber trade and on improving DLH's due diligence system.⁹⁴

While the French court case remained pending adjudication, and the FSC continued to keep DLH on probation, DLH announced in February 2016 that it would be closing down DLH France, one of the defendants in the criminal case.⁹⁵ The closure process, including selling of DLH France's assets, was due to be completed by August 2016. The termination of DLH France may further affect the decision of the French magistrate to pursue this case, as it will make it difficult for the authorities to enforce the sentencing if the complainants' *recel* case proves successful.

EXAMPLE FOUR: A case concerning the murder of a Colombian trade union activist who was involved in a labour dispute with a subsidiary of Swiss food company, Nestlé, demonstrates

how prosecutorial decisions about whether or not to pursue a case can obstruct the investigation and prosecution of corporate crimes.

In September 2005, a former employee and trade union activist of Nestlé's Colombian subsidiary was kidnapped, tortured and murdered by members of a paramilitary group.⁹⁶ The former employee, Luciano Romero, had previously received death threats following a long-standing labour dispute between the trade union and the subsidiary. The trade union reported these death threats to the subsidiary as well as Nestlé in Switzerland.⁹⁷

In March 2012, the European Centre for Constitutional and Human Rights (ECCHR) and the trade union filed a criminal complaint against Nestlé and five of its managers in the canton of Zug, Switzerland, alleging that they were guilty of "homicide through negligence through omission" under Swiss Criminal Code Articles 117 and 12(3) for failing to take precautionary measures to prevent the murder. In particular, ECCHR's complaint alleged that the subsidiary put Romero in greater danger by falsely accusing him of being a guerrilla and that Nestlé in Switzerland failed to prevent these actions.

The office of the prosecution in Zug transferred the case to the canton of Vaud because it had jurisdiction over Nestlé's other headquarters in Switzerland. In May 2013, the Vaud prosecutor's office decided not to open an investigation, on the basis that the seven-year time limit for prosecuting the case under the statute of limitations had passed in September 2012. Prosecutors did not therefore consider the substance of the allegations made by ECCHR.⁹⁸

Under Article 7 of the Swiss Criminal Code, criminal justice authorities are "obliged to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed". The ECCHR appealed the prosecutor's decision to the Cantonal Court, arguing that the case was not statute-barred because the criminal liability of corporate entities represents an on-going offence and that prosecutors were in breach of their obligations under Article 7 of the Criminal Code for failing to take action for

fourteen months after ECCHR filed the complaint.⁹⁹ The Cantonal Court dismissed the appeal in December 2013 on the grounds that the statute of limitations had passed. The ECCHR then made a final appeal to the Swiss Federal Supreme Court. In July 2014, the Supreme Court confirmed the legal reasoning of the prosecutor's office and the Cantonal Court and concluded that the investigations were statute-barred.¹⁰⁰

In October 2012, the ECCHR and other human rights organisations included the Romero case in a communication requesting the International Criminal Court (ICC) to open an investigation into the situation in Colombia, on the basis that the level of violence against trade unionists reached the threshold of crimes against humanity. At the time of publication, the ICC is still conducting a preliminary examination into the situation in Colombia. In December 2014, ECCHR submitted a complaint to the European Court of Human Rights on behalf of Romero's widow, asking the court to examine whether the Swiss judiciary adequately investigated the case. The Court dismissed the complaint in March 2015 without providing any reasons.¹⁰¹

4 Identify the legal standards and secure the evidence needed to establish liability for corporate crimes in your jurisdiction

Know the laws and evidence required to establish the liability of corporate actors for corporate crimes. From the early stages of the investigation process, identify the specific evidence needed to meet these requirements, how and where it can be obtained and what specialist assistance is required.

COMMENTARY

Challenges

Prosecutors interviewed noted that establishing liability for corporate entities and individuals involved in corporate crimes can present particular legal and evidentiary challenges. For example, laws applicable to corporate crimes can set out specific or even unique legal tests for establishing liability. Under some criminal laws, the State must prove that the defendant had the required guilty state of mind when committing the offence. Under other criminal laws or strict liability offences, the state of mind of the defendant is irrelevant as long as he or she committed the relevant act. Some laws may also provide for specific offences that are applicable only to corporate entities.

In many jurisdictions, a corporate entity will only be guilty of an offence if the conduct of an individual can be attributed to it. There are different legal tests for doing so, such as:

1. The corporate entity will be liable if a member of the board of directors or a senior level official was involved in committing the offence (known as the “identification” or “directing mind and will” principle); or
2. The corporate entity will be liable for the relevant wrongful acts of any employee or agent if they were acting within the scope of their employment and, in some jurisdictions, acting in part to benefit the company (known as “vicarious liability” or “*respondeat superior*”).

Evidence may therefore be needed to meet the relevant legal standards for charging or prosecuting the corporate actors involved. Specialist skills may be required to recover and analyse that evidence. As these skills may not be easily available in some contexts, building them will require additional costs and assistance from other agencies or international bodies. For example, it can be difficult in practice to find evidence of the involvement of board members or senior level officials in an offence, and to identify which particular official was involved, especially within multinational corporate entities where decisions may be taken by various entities or individuals. This may require analysis of complex corporate documents to understand who has authority to make decisions relevant to the alleged corporate crimes on behalf of the corporate entity and how the entity is actually managed and makes decisions. It may also require the recovery and analysis of large amounts of data to determine if there has been board or senior-level involvement in an offence. Investigators and prosecutors who have no experience investigating corporate crimes may find it challenging to navigate these cases for the first time.

The corporate entity itself may make the evidence-gathering process more difficult by taking deliberate action to obscure the involvement or knowledge of senior officials in the wrongdoing or by destroying data or materials. Furthermore, some evidence may be located in multiple jurisdictions, which presents additional challenges.

Interviewed prosecutors noted that law enforcement may underestimate the type and extent of evidence required to establish liability for corporate crimes or face difficulties in obtaining the evidence required to meet the legal standards for proving corporate crimes in that jurisdiction. Interviewed prosecutors also noted that investigators should identify and collect key pieces of evidence at the start of the investigation, but that this does not always happen in practice. As a result, evidence may have disappeared or may no longer be available. All of this can result in the case being delayed (e.g. if case files are sent back because more evidence is required), dropped or unsuccessful in court.

Solutions

To address this challenge, it is vital that investigators and prosecutors know the laws applicable to corporate crimes in their jurisdiction, what evidence is required to establish liability and how and where it can be obtained. States should take action to build the capacity of law enforcement in this area, including by looking to best practices in other jurisdictions and seeking international assistance.

Where investigators and prosecutors do not have expertise in this area, they should request guidance and training from relevant senior officials or departments (such as the Prosecutors' Office or the Ministry of Justice). Guidance and training should address:

1. The range of corporate crimes cases with a human rights impact and the public interest in pursuing these from a human rights perspective;
2. The legal standards for charging and prosecuting corporate crimes in their jurisdiction;
3. Typical corporate structures and decision-making processes; and
4. Effective investigative methods, especially in cases involving large corporate entities or cross-border offences. This training should identify specific techniques for gathering evidence against corporate actors, areas where specialist assistance is likely to be required and what resources and technology are available in the jurisdiction.

In addition, law enforcement should reach out to relevant networks and contacts for advice and assistance. For example, they should tap into forensic expertise that exists in relation to financial crimes, such as corruption and banking. When pursuing corporate crimes, early in the investigation process investigators should:

1. Seek to have prosecutors seconded to their team on a temporary or permanent basis to provide on-going advice and guidance on corporate crimes cases, where legally permitted;
2. Identify, with prosecutors where legally permitted, what evidence is needed to prove the case against the corporate actors involved and how and where it can be obtained;
3. Identify and request any evidence and assistance required from other jurisdictions;
4. Identify and request any specialist assistance needed to recover and analyse financial, commercial, electronic, telecommunications and digital data; and
5. Involve the judiciary and other appropriate officials to ensure appropriate warrants and other authorisations are provided in accordance with due process principles.

EXAMPLES

EXAMPLE ONE: While not a human rights case, a U.S. prosecution of both a corporate entity and individual employees shows how specific types of evidence can be used to establish guilt for corporate crimes. Under U.S. law, the acts of any employee can be attributed to a corporate entity, providing that the employee was acting in the scope of their employment and at least in part for the benefit of the corporate entity (known as vicarious liability or *respondet superior*).

In *United States v. Ionia Management S.A.*, U.S. prosecutors successfully utilised vicarious liability to attach criminal liability to a foreign corporate entity for the actions of low-level employees after prosecutors determined that the wrongdoing in the corporate entity was widespread and reached high levels. In *Ionia*, a Greek tanker company, Ionia Management (Ionia), was prosecuted for illegally dumping oil into U.S. territorial waters contrary to the Act to Prevent Pollution from Ships, which implements into U.S. law the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).¹⁰² Ionia, which was incorporated in Liberia and headquartered in Greece, managed a Bahamas flagged ship called the M/T Kriton.¹⁰³ While in U.S. territorial waters, crewmembers routinely discharged oily waste into the sea (using a system that by-passed the ship's pollution prevention equipment) and made false entries into the ship's oil record book to hide the illegal discharges. They also obstructed the investigation by hiding the by-pass system and lying to Coast Guard officials.

During the trial, prosecutors showed that the crew was acting within the scope of their employment by presenting witness evidence from the crew members that they were acting under direct orders from superiors (chief engineers) in discharging the oil, falsifying the records and lying to the Coast Guard. To establish that the crew was acting for the benefit of the corporate entity, prosecutors presented expert evidence about the time and expense of properly maintaining and using the prevention equipment, allowing the jury to infer that the crew used the by-pass system to benefit the corporate entity and lied to the Coast Guard.

to protect it. In September 2007, Ionia was found guilty and, in 2009, the U.S. Court of Appeals upheld its conviction.

EXAMPLE TWO: The International Criminal Court's (ICC) involvement in a "first responders" project is a good example of how law enforcement can strategically position itself to collaborate more closely with NGOs and others on the ground to ensure quick and effective access to potential evidence.

Following the collapse of several high-profile trials due to insufficient evidence, the Office of the Prosecutor (OTP) of the ICC announced in its 2012-2015 Strategic Plan that the Investigation Division would be diversifying the type of evidence it collects and enhancing its capabilities to collect such evidence.¹⁰⁴ The Strategic Plan recognised that individuals or groups working on the ground have proximity to the crime scene and can play a key role in collecting information, such as photos and videos, to support ICC investigations.¹⁰⁵ The OTP therefore developed a model for increased cooperation with these "first responders", with the aim of encouraging them to provide information proactively to the ICC.¹⁰⁶

The "first responders" project is designed to increase cooperation between the ICC and first responders, such as NGOs, journalists, forensic scientists and health professionals, and to enhance the effectiveness of first responders in collecting potential evidence.¹⁰⁷

5 Collaborate widely to ensure accountability for corporate crimes, particularly in cross-border cases

In view of the particular skills and evidence needed to prove corporate crimes, especially in cross-border cases, collaborate as widely as possible both nationally and internationally to build the knowledge, expertise, capacity, networks and contacts needed to tackle corporate crimes effectively.

COMMENTARY

Challenges

Investigators and prosecutors interviewed noted that effectively tackling corporate crimes can raise unique challenges that require a different approach than other crimes and may require particular evidence or specialist assistance in some areas, especially in cross-border cases.

They also recognised that obtaining evidence and assistance in cross-border corporate crimes cases can be especially challenging. There is often a significant degree of formality involved in requesting cooperation under mutual legal assistance treaties (MLATs) and equivalent mechanisms such as letters rogatory (a formal written request for assistance from a court in one country to a court in another country). The formal nature of this system makes it difficult to ensure that sufficient evidence is provided upon request and to ask for additional information where insufficient evidence is provided.

There may also be additional legal or practical barriers to overcome in gathering evidence from another jurisdiction, making it less likely that adequate or even any evidence will be provided. These barriers may occur in circumstances where: (1) the offence in the home State is not an offence in the host State; (2) the home and host States have different tests for establishing corporate liability; or (3) the host State lacks the law, equipment, material or skills necessary to obtain evidence.

Solutions

Effectively tackling corporate crimes, and especially cross-border cases, requires a multi-disciplinary, multi-jurisdictional and innovative approach that seeks to respond to criminal activity in a timely manner and, ideally, to disrupt and prevent corporate crimes from occurring in the first place.

With respect to cross-border cases, States should enter into treaties that allow for formal mutual legal assistance in criminal matters to be provided in a fast and efficient manner, including directly between judicial authorities and prosecuting authorities.

In all cases, law enforcement should collaborate as widely as possible nationally, internationally, formally and informally. This will help to build the knowledge, skills, capacity, networks and contacts needed to tackle corporate crimes effectively even where there is a lack of political will or support at the State level to pursue these cases. It will also help to obtain intelligence, evidence and assistance, especially in cross-border cases. Information from informal contacts (such as through direct police cooperation) can help investigators be more specific in subsequent formal requests to other countries for evidence and to identify which authority to approach. Having well-developed networks and contacts can mean law enforcement receive intelligence about a potential case from other countries, NGOs or other organisations.

Effective collaboration may include:

1. Building contacts, nationally and internationally, with:
 - (a) Other law enforcement or regulatory bodies and officials, particularly those specialising in corporate crimes or other relevant areas (e.g. Interpol has established an environmental crime unit);
 - (b) Other bodies involved in work or analysis relevant to corporate crimes (e.g., those looking at innovative ways to effectively recover and analyse large amounts of data);

- (c) Specialists in analysing corporate or management structures or in recovering and analysing financial, commercial, electronic, telecommunications and digital data; and
 - (d) International organisations such as the United Nations, NGOs and victims groups.
- 2. Joining existing networks or inter-jurisdictional teams working on corporate crimes or similar issues, or building new networks or teams.
- 3. Building networks of informants and developing specific methods for gathering information and intelligence on corporate crimes, especially to pro-actively detect corporate crimes when they are occurring and to identify patterns of illegal activity of corporate actors.
- 4. When pursuing a case:
 - (a) Obtaining background and intelligence from identified contacts, networks and open-source data; and
 - (b) Consistent with the principles of due process and evidentiary rules, requesting evidence and assistance early in the investigation process, both informally through contacts and networks as well as formally through MLATs or equivalent mechanisms.

EXAMPLES

EXAMPLE ONE: There are various formal and informal networks focused on cross-border collaboration between the police, prosecutors and the judiciary. For example, the European Union's Judicial Cooperation Unit (Eurojust) was formed by the European Union to improve judicial cooperation in the fight against serious crime by helping national authorities cooperate and coordinate on serious cross-border crime.¹⁰⁸ The unit is comprised of prosecutors, magistrates and police officers.¹⁰⁹ One of its main functions is to facilitate the exchange of information between interested parties and to strengthen cooperation between national authorities when tackling specific cases.¹¹⁰ For example, in a human trafficking case, law enforcement in Bulgaria and the Netherlands initially agreed at a Eurojust meeting that one country would investigate the offence of human trafficking while the other would focus on money laundering linked to the trafficking.¹¹¹ However, law enforcement in one country later discovered that, under its national law, it would be difficult to establish the ancillary case of money laundering without the prior conviction of human trafficking.¹¹² The countries subsequently decided at another Eurojust coordination meeting that the money laundering case should be transferred to the other country where the national laws allow the charge of money laundering to be established absent conviction of the predicate offence of human trafficking.¹¹³

EXAMPLE TWO: A trafficking case in Southeast Asia shows how multi-jurisdiction collaboration is vital to ensure the successful investigation and prosecution of corporate crimes.

A March 2015 investigation by the Associated Press revealed that migrant workers from Myanmar, Cambodia and the People's Democratic Republic of Lao were being trafficked to work in the Indonesian fishing industry. The fish and seafood they caught was then transported to Thailand and eventually supplied to major supermarkets and retailers in the United States. The commercial fishing vessels involved were operated by Thai nationals.¹¹⁴

Indonesia commenced prosecution of six defendants for human trafficking in November 2015 after discussions between the

countries involved regarding the responsibility and jurisdiction of each country to prosecute the case. Five of the six individuals charged (including the captain) were Thai nationals and employees of Pusaka Benjina Resources, a large fishing firm in eastern Indonesia.¹¹⁵

The defendants were accused of subjecting hundreds of foreign fishermen to serious labour abuses. Law enforcement found that these fishermen were mostly recruited in Thailand and brought to Indonesia using fraudulent immigration documents.¹¹⁶ Thai officials provided assistance leading up to the prosecution including sending a multi-disciplinary team comprised of officials from the police; the prosecutors' office; the Ministry of Labour, Social Development and Human Security; and the Ministry of Foreign Affairs to provide assistance on investigation and victim protection.¹¹⁷

In November 2015, the States of the Association of Southeast Asian Nations (ASEAN) signed the Convention Against Trafficking in Persons, Especially Women and Children to formalise cooperative efforts in relation to law enforcement, mutual legal assistance and extradition to further promote cross-border cooperation in tackling human trafficking in the region.¹¹⁸

EXAMPLE THREE: The on-going criminal case in connection with the 1984 Bhopal gas leak disaster in India shows how a lack of collaboration between India and the U.S. and the failure of the U.S. Department of Justice (DOJ) to file a notice to appear before the Bhopal criminal court on relevant U.S. companies under a mutual legal assistance treaty with India has obstructed justice in this case.

The case is also relevant to Principle 2 (*Fight impunity for cross-border corporate crimes by choosing to assert jurisdiction*) in that it shows how the financial and political power of multinational corporate entities, as well as their ability to flee the jurisdiction, obstructs effective remedy in cross-border cases.

In December 1984, toxic gas leaked from a storage tank at the Union Carbide pesticide factory in Bhopal, India. Nearly 10,000 people died in the immediate aftermath of the disaster.¹¹⁹ Around

500,000 were exposed to hazardous levels of toxins.¹²⁰ In 1984, Indian authorities brought criminal proceedings against U.S.-based Union Carbide Corporation (UCC); its majority-owned Indian subsidiary, Union Carbide India Limited (UCIL), that operated the plant; its Hong Kong-based subsidiary, Union Carbide Eastern (UCE), that managed UCIL; UCC's then chairman Warren Anderson (a U.S. national); and various Indian nationals for "culpable homicide not amounting to murder".¹²¹

Anderson, who visited the site shortly after the disaster, was arrested in India in December 1984 but was released on bail the same day, following intervention by the U.S. Embassy in India, and left the country two days later.¹²² UCE ceased to exist in 1991.¹²³ In 1994, UCC sold all of its shares in UCIL to the London-based Bhopal Hospital Trust (despite legal attempts to prevent this). In effect, UCC ceased to operate in India and its chairman fled the jurisdiction.¹²⁴

In February 1989, the Indian Supreme Court approved a settlement agreement between the Indian government, UCC and UCIL under which the companies agreed to pay US\$470 million – less than 15% of the US\$3.3 billion originally claimed by the government.¹²⁵ The settlement was negotiated before the full extent of damages had been estimated and without consultation with survivors. The settlement terminated all then pending claims against UCC and UCIL including the criminal proceedings. In October 1991, following a public backlash, the Supreme Court revoked the decision to quash the criminal proceedings.¹²⁶

In June 2010, India-based UCIL and seven Indian nationals were convicted of causing death by negligence.¹²⁷ At the time of publication, the culpable homicide charges against UCC remain outstanding. Between 1991 and 1992, U.S.-based UCC was ordered to appear six times before the Bhopal court, with three summonses being served through the DOJ. In 1992, the Bhopal court declared UCC an "absconder from justice" for failing to appear.¹²⁸ Warren Anderson never appeared before the Bhopal court to face the charges against him and the United States denied requests from India for his extradition.¹²⁹ The Bhopal criminal court declared him an "absconder from justice" in 1992.¹³⁰ Proceedings against him were officially stopped in March 2015, following his death in September 2014.¹³¹

U.S.-based Dow Chemical Company now owns UCC. Dow has been summoned to appear before the Indian courts on five occasions to explain why UCC has not appeared before them.¹³² The summonses were sent to the DOJ for service under a 2005 Treaty on Mutual Legal Assistance in Criminal Matters between India and the United States.¹³³ Dow has not yet appeared before the court, stating “any efforts to directly involve [Dow] in legal proceedings in India concerning the 1984 Bhopal tragedy are without merit”.¹³⁴ In September 2015, according to Bhopal criminal court records, the DOJ wrote to the Indian government stating that it had not served the notice on Dow.¹³⁵ The DOJ claimed that it needed additional information in regards to whether the matter was primarily civil or criminal in nature and the legal basis for serving Dow given that it acquired UCC after the disaster. In June 2016, over 120,000 people signed a petition calling on the U.S. government to meet its obligations under the treaty and international law and asking the White House to explain what it is doing about the issue.¹³⁶ The White House declined to comment on this request, citing its Terms of Participation under which it can decline to address certain matters to “avoid the appearance of improper influence”.¹³⁷

EXAMPLE FOUR: Using local connections obtained through State embassies may be a good way to collect cross-border evidence more swiftly. While not a human rights case, the example below illustrates how U.S. investigators worked with the U.S. Embassy in Beijing to collect information in China in a case against a Chinese businessman for financial fraud.

In this case, the U.S.-based investigators acting under a court-appointed receivership discovered preliminary evidence indicating that his company illegally diverted assets to a newly set up company to the detriment of the U.S. shareholders in the first company. The investigators needed to obtain certain material information from the businessman, who resided in China. Instead of asking U.S. law enforcement to submit a formal MLAT request, they reached out to contacts at the U.S. Department of State who connected them with the Commercial Division of the U.S. Embassy in China. The U.S. Embassy agreed to formally request the local vice mayor in Beijing to provide information concerning the businessman. As a result, the investigators were able to meet with the businessman and obtain

material information that helped them to discover concrete proof of corporate fraud and malfeasance. This process enabled the investigators to obtain information that might not otherwise be available through official channels in a much shorter timeframe.¹³⁸

6 Pursue charges that reflect the gravity of the corporate crimes committed

Explore potential legal avenues for investigating the corporate crime early in the process and pursue those reflecting the gravity of the offence, unless legitimate or strategic reasons exist for pursuing alternate or lesser charges.

COMMENTARY

Challenges

Prosecutors interviewed noted that law enforcement may not pursue the most serious charges against corporate actors involved in corporate crimes due to a lack of familiarity with the subject, skills, expertise, resources and evidence. For example, prosecutors referred to cases where they were restricted from pursuing a more severe criminal charge because the evidence required to prove that charge had not been obtained during the initial investigation stage.

Law enforcement may also face internal pressure from their managers to bring cases to a close quickly and successfully, meaning that even in cases involving serious corporate crimes there can be pressure to pursue lesser charges that are easier to prove with the aim of reaching a swift settlement with the corporate actor. In many cases, the terms of the settlement are confidential and do not require an admission of guilt or wrongdoing. This approach can entrench corporate impunity because it does little to deter future harm or provide justice for victims.

Solutions

To overcome these challenges, action is required on two different levels. First, States and senior officials in law enforcement should create an enabling environment so that law enforcement has the support and resources needed to take on corporate crimes cases and pursue the most serious criminal charges against the corporate actors involved.

Second, law enforcement should pursue charges that reflect the gravity of the crime. They should map all potential causes of actions early in the investigation process, taking into account the nature and location of the corporate entity's business activities, assets and resources, profit flows, corporate structure and decision-making structure as well as the nature and extent of the misconduct involved. In jurisdictions that do not provide criminal liability for corporate entities, law enforcement should similarly identify causes of actions under equivalent laws, in addition to pursuing criminal accountability for the responsible individuals. Investigators should undertake this mapping exercise in collaboration with prosecutors, where legally permitted, and other appropriate specialists in relevant government bodies. Law enforcement should also reach out for assistance and advice from other relevant contacts and networks.

Law enforcement should only pursue alternate or lesser charges, such as regulatory or administrative sanctions, where there are legitimate or strategic reasons for doing so. For example, it may be impossible to secure the evidence required to prove the more serious offence. Or, if law enforcement pursues alternate or lesser charges, the evidence collected might build towards future criminal or equivalent actions against the corporate actor for more serious offences. For example, where permitted by law, pursuing tax offences may give access to books and records needed to prove grand corruption.

Care should be taken in pursuing alternate or lesser charges in situations where the corporate crime is particularly severe, such as where widespread human rights harms occur. In these situations, co-operation in the investigation or prosecution, or voluntary remedial measures undertaken by the corporate entity or individuals, should not presumptively result in alternate or lesser charges. Instead, such actions should be considered in the sentencing phase of the case.

EXAMPLES

EXAMPLE ONE: In the Rana Plaza factory case in Bangladesh, an initial charge of “culpable homicide” brought by investigators against the accused was changed to the more serious offence of murder, which was accepted by the court.

In 2013, an eight-story commercial building called Rana Plaza located in Savar, Dhaka, Bangladesh collapsed, killing more than 1,100 people and leaving over 2,000 injured.¹³⁹ The majority of the people in the building at the time of the collapse were garment workers employed in five factories located on the top floors. These factories supplied clothing to well-known global fashion brands.

Law enforcement in the case initially pursued charges against owners of the factories for violations of the National Building Code and for culpable homicide, the latter of which carries a minimum seven-year prison sentence. This followed the findings of a government-led inquiry in the immediate wake of the disaster, which recommended that charges of culpable homicide be brought against the factory owners.¹⁴⁰ However, investigators decided to change the culpable homicide charge to the more serious offence of murder two years later after further investigation revealed more evidence.¹⁴¹ It was speculated that the delays in bringing murder charges were possibly the result of corporate capture and political interference.¹⁴²

The evidence that caused the shift in charges showed that Sohel Rana, his staff and management of the factory had ignored warnings that the building was unsafe and also threatened and forced workers to enter the building. Human Rights Watch reported that a “government inspector had ordered the Rana Plaza’s evacuation the previous day after large cracks had appeared in the walls. But on the morning of the collapse, factory managers persuaded and cajoled workers to return, telling them it was safe. In some cases managers threatened them with dismissal if they did not comply”.¹⁴³ It was further reported that, “[s]hortly afterwards, Savar was affected by a power cut. Once the Rana Plaza’s electrical generators were switched on, the building started to shake and then collapsed”.¹⁴⁴

In December 2015, the court ordered the arrest of 24 people, who tried to abscond from proceedings, as well as the seizure of their assets.¹⁴⁵ Prosecutor Anwarul Kabir stated that those facing arrests included “associates of Rana who ‘slapped and forced’ the workers to join the shift”.¹⁴⁶

In July 2016, a Bangladeshi court formally charged 38 people with murder, including plaza owner Sohel Rana as the principal accused, more than a dozen government officials and factory owners. Three were also charged with helping Rana to flee after the incident.¹⁴⁷

In addition, RAJUK, the Capital Development Authority of Bangladesh, along with the Police have proceeded with the case against the factory owners for violating the National Building Code by constructing the structure with substandard materials and building additional floors beyond what was permitted.¹⁴⁸ It has been reported that the building was intended as office and retail space, and that the additional factory floors were added illegally.¹⁴⁹ Eighteen people (17 of whom are among the 38 charged with murder) have been indicted, including plaza owner Sohel Rana,¹⁵⁰ and the trial is set for October 2016.¹⁵¹

It is reported that the family of a victim also filed a separate murder case with a Dhaka court who had ordered the Criminal Investigation Department to do the investigation for this case alongside the case filed by the police.¹⁵²

EXAMPLE TWO: While not a human rights case, a corruption case against high-level officials of the Fédération Internationale de Football Association (FIFA), which started from a criminal investigation of one executive member’s tax records, demonstrates how evidence collected for a lesser offence may lead to evidence for more serious charges.

In 2011, an investigator at the U.S. Internal Revenue Service (IRS) noticed one FIFA executive member, Chuck Blazer, had failed to file his personal tax return, and began investigating Blazer’s tax record. The IRS investigation discovered evidence that revealed a broader corruption scheme involving other high-level FIFA officials. The agency subsequently collaborated with the Federal

Bureau of Investigation to pursue the corruption investigation, with Blazer acting as a confidential informant.¹⁵³

The investigation found evidence that multiple FIFA officials may have accepted bribes in exchange for favours and used official funds for personal purposes. The full investigation eventually pulled in assistance from police agencies and diplomats in 33 countries. To date, it has led to criminal indictments of fourteen people.¹⁵⁴

7 Investigate and prosecute those corporate actors most responsible for the wrongdoing

Explore all potential defendants responsible for the wrongdoing early in the investigation process. Identify and prioritise pursuing those most responsible, including individual actors as well as the corporate entity itself, by considering any legal restrictions as well as the facts of the case. With respect to individuals, prosecutors should not limit their efforts to low or mid-level employees. Where sufficient evidence exists, senior executives and officers should be pursued.

COMMENTARY

Challenges

Prosecutors interviewed noted that law enforcement does not always pursue the corporate actors most responsible for the corporate crime. This may arise for legal reasons, such as limitations in the law or the availability of corporate criminal liability in the jurisdiction. It may also be due to internal pressures, such as pressures to settle cases quickly, or for other practical reasons, such as the complexity of prosecuting a corporate entity.

Interviewed prosecutors recognised that taking this approach risks entrenching corporate impunity. Where jurisdiction exists but law enforcement only pursues the individuals implicated in a corporate crime, there is little incentive for the corporate entity itself to create, reform or implement compliance programmes and to take other measures to prevent future wrongdoing and harm. In such situations, if law enforcement focuses on prosecuting only low-level or mid-level individuals of the corporate entity, this may further permit impunity as senior officials and the corporate entity itself can escape sanctions. On the other hand, where law enforcement only pursues claims against the corporate entity, individuals responsible within the entity are left unaccountable for criminal actions.

Solutions

Action is needed on two levels to overcome these challenges.

First, States should criminalise serious harms under national law and include clear provisions relating to the liability of corporate actors for corporate crimes. Where appropriate, law enforcement should look to develop legal standards and advocate for new laws in this area.

Second, using the laws and tools at their disposal, law enforcement should prioritise pursuing those corporate actors, whether individuals or corporate entities, most responsible for the wrongdoing. For these purposes, law enforcement should map all potentially culpable corporate actors linked to the corporate crime early in the investigation process. At this stage, no actor should be categorically exonerated. Where legally permitted, investigators should consult with prosecutors and other legal experts in relevant government bodies to ensure that appropriate evidence is gathered to prosecute the corporate entities or individuals.

In prioritising those actors most responsible for the wrongdoing, law enforcement should:

1. Take into account the legal restrictions in the jurisdiction pertaining to pursuing corporate entities or individuals;
2. Consider the strategic advantages of pursuing the corporate entity, any individuals implicated in the offence or both; and
3. In light of the facts of the case, consider:
 - (a) The level of seniority or decision-making power of the individuals within the enterprise;
 - (b) The degree of responsibility and culpability each actor has for the wrongdoing; and
 - (c) The scale and severity of the wrongdoing involved.

In some jurisdictions, prosecutors may enter into agreements with the corporate entity under which they agree not to prosecute the entity in exchange for payment of a fine and undertakings from the entity to identify responsible individuals or fulfil certain other terms and conditions (referred to as non-prosecution or deferred prosecution agreements in some jurisdictions). These agreements should not be used where a corporate entity is implicated in a corporate crime linked to a severe human rights abuse. Such agreements should also not be used as a way for individuals implicated in severe human rights abuse to escape liability. For example, where such an agreement is signed with a corporate entity in exchange for information on the identity of responsible individuals, particularly senior executives and officers, law enforcement should investigate and, where appropriate, prosecute such individuals. In those situations, where a prosecutor and a corporate entity enter an agreement, prosecutors should enforce the agreement strictly by prosecuting the entity for violations of its terms.

EXAMPLES

EXAMPLE ONE: A recent policy shift in the United States highlights how focusing only on corporate entities rather than senior level individuals may not sufficiently deter wrongdoing or ensure justice for victims. This policy is also relevant to Principle 6 (*Pursue charges that reflect the gravity of the corporate crimes committed*) in that it shows how corporate entities and their directors and employees may see fines (whether under settlement agreements or otherwise) simply as a cost of doing business.

In recent years, the U.S. Department of Justice (DOJ) has focused mainly on pursuing and fining corporate entities connected with wrongdoing, and has rarely prosecuted senior level individuals. This policy has been criticised on the grounds that it has not deterred further misconduct and that corporate entities and senior management may view these fines simply as a cost of doing business. For example, in September 2015, federal prosecutors entered into a Deferred Prosecution Agreement (DPA) with General Motors (GM) concerning its decade long concealment of an ignition switch default credited with killing at least 124 people.¹⁵⁵ The U.S. Attorney General stated that the agreement was reached in part because of the GM's "extraordinary cooperation" with its investigation.¹⁵⁶ However, no individuals involved in the cover-up of the defect were prosecuted due to insufficient evidence.¹⁵⁷ In the months following the settlement, a few lawyers made several allegations to the prosecutor that GM was in violation of the DPA.¹⁵⁸ GM refuted these allegations.¹⁵⁹

The U.S. government has begun to shift its policy, aiming to deter corporate misconduct by focusing more on individual accountability. In September 2015, the U.S. Deputy Attorney General issued a memo (the "Yates Memo"), which states, among other things, that corporate entities will only benefit from cooperation credit if they provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct".¹⁶⁰ The memo also directs law enforcement to focus on individual wrongdoing from the beginning of any investigation. This guidance has been incorporated into the U.S. Attorneys' Manual, which contains policy and guidance for public prosecutors.¹⁶¹

EXAMPLE TWO: While not a human rights case, the progressive investigation and filing of criminal charges against Alstom Network UK and its former employees demonstrates how investigating and prosecuting both individuals and corporate entities can serve the goals of ensuring the greatest possible level of accountability and deterring future harm.

In 2009, the UK Serious Fraud Office (SFO) began investigating Alstom Network UK, a subsidiary of French power and transportation company Alstom SA, on suspicion of bribery, corruption and conspiracy to pay bribes in relation to a number of foreign projects.¹⁶² In September 2014, the SFO filed its first set of criminal charges against the company for violations of the Prevention of Corruption Act 1906 and the Criminal Law Act 1977 in relation to transport projects in India, Poland and Tunisia. The SFO filed similar charges against Alstom Network UK in connection with the Budapest Metro project in Hungary in May 2014, and against Alstom Power Ltd in connection with a power plant project in Lithuania in December 2014.

While initial charges were brought only against the corporate entity, a number of former employees were warned that the SFO intended to charge them with corruption offences over the next year.¹⁶³ As investigations progressed, additional charges were brought against two former managing directors, a business development director, and the company's ex-senior vice president of ethics and compliance.¹⁶⁴ The various trials are due to take place between June 2016 and May 2017.¹⁶⁵

EXAMPLE THREE: A 2013 Canadian price fixing case involving petroleum company Global Fuels illustrates a successful prosecution of mid-level managers and the corporate entity. While not a human rights case, it also shows the key role that laws on corporate criminal liability play in ensuring successful prosecution.

In *R. v. Pétroles Global Inc.*, two territorial managers and the general manager of Global Fuel's Quebec and Maritimes operations were prosecuted and subsequently pled guilty for engaging in a scheme to fix gasoline prices.¹⁶⁶ The State also prosecuted Global Fuel under the Canadian Criminal Code, under which a corporate entity can only be held criminally liable for the action

of its senior officers. “Senior officer” is defined as a representative “who plays an important role in the establishment of the organisation’s policies or is responsible for managing an important aspect of the organisation’s activities”.¹⁶⁷ The Canadian government amended the Criminal Code in 2003 to ensure that corporate entities could be prosecuted for the acts of their middle managers.¹⁶⁸

The defence argued that the general manager was not a senior officer for the purpose of the law because he only had authority over minor expenditures related to the daily operations of the gasoline stations in the territories he oversaw. As such, his actions alone could not expose the corporate entity to criminal liability.¹⁶⁹ The prosecution argued that, although the general manager did not possess the ultimate decision making power within the entity and was not part of the senior management team, he managed “an important aspect” of Global Fuel’s business operation. As the prosecution demonstrated, the general manager supervised over 200 service stations, which amounted to two-thirds of the stations in Canada.¹⁷⁰

The Quebec court ruled in favour of the prosecution and found the corporate entity guilty of price fixing, establishing that corporate entities may be punished for actions of mid-level territory managers even in the absence of evidence that corporate executives knew of the misconduct.¹⁷¹ When determining the appropriate level of penalty for the entity, the judge emphasised that, considering the seriousness of the offence and the need to send a message to the industry to deter future wrongdoing, a fine of CAN\$1 million (then around US\$962,000) was warranted.¹⁷²

8 Use all available legal tools to collect evidence, build cases and obtain the cooperation of critical witnesses in corporate crimes cases

Corporate crimes cases are often complex and corporate structures can be difficult to penetrate. In addition, corporate entities can be well-resourced and may take active steps to oppose or block investigations. Therefore, where it is feasible to do so, steps should be taken to facilitate the cooperation of the corporate entity and key corporate individuals to achieve a successful and expeditious investigation. From the early stages of the inquiries, and consistent with the principles of due process, law enforcement should identify and use all available investigative tools to collect and analyse evidence, build cases and seek interim measures.

COMMENTARY

Challenges

Interviewed prosecutors noted that while some corporate actors welcome an objective investigation as a way to clear their reputations, others accused of crimes are not as accepting. These corporate actors may have structures that are difficult to penetrate evidentially and can wield substantial amounts of economic and political power. They are often better financially, legally and technically resourced than law enforcement. This can create a power imbalance between corporate actors and law enforcement seeking to hold them to account. Such imbalance can be intimidating to the authorities and may discourage law enforcement from taking action in even serious corporate crimes cases, or may increase the complexity or resources required to pursue a case.

Solutions

To address this potential imbalance, law enforcement should use all available legal measures to successfully investigate corporate actors and encourage their early cooperation to resolve cases swiftly. Where there is solid evidence of guilt and where permitted by national law, law enforcement should take appropriate interim steps,

such as excluding the corporate entity from government contracts, and obtaining interim, protective and precautionary judicial orders to preserve assets within the court's jurisdiction.

From the early stages of the investigation process, and consistent with principles of due process, law enforcement should:

1. Identify the full range of measures available in their jurisdiction, including through close cooperation with other agencies, departments or financial institutions that may be able to assist with inquiries or interim measures;
2. Decide which measures are strategic to use in the case, move quickly to implement those measures in cooperation with relevant agencies, departments and financial institutions, and enlist the assistance of the judiciary where applicable;
3. Decide on the benefits of pursuing covert or overt evidence gathering techniques; and
4. When seizing assets or using proceeds of crime legislation, to the extent permitted by law, take into account any claims to compensation made by the victims and the need to ensure sufficient funds are left available for these purposes.

In addition, law enforcement should consider signing agreements with whistle-blowers (or the corporate entity itself where the perpetrators are rogue employees) to secure internal information on the corporate wrongdoing and the identity of those most responsible. For example, lower-level employees involved in any wrongdoing may be willing to divulge crucial information such as the operation and decision-making process within the corporate entity in exchange for leniency in sentencing. When working with whistle-blowers, law enforcement should take care that these individuals are protected against retaliation under relevant laws.

EXAMPLES

EXAMPLE ONE: While not a human rights case, the corruption case of German company Lahmeyer in the Lesotho Highlands Water Project (LHWP) illustrates how law enforcement may work in tandem with international financial institutions to hold a multinational corporate entity accountable.

The LHWP is a large dam project financed by the World Bank to deliver water and create hydroelectric power.¹⁷³ The corporate entities involved with the project have been criticised for inadequately compensating resettled families, particularly from rural communities who lost grazing land to the project.¹⁷⁴ The development project has also submerged sacred places, including burial sites and medicinal grounds.¹⁷⁵

In addition, the project has been marred by allegations of corruption and bribery. Specifically, in 2002 and 2003 in a Lesotho court, four foreign companies were convicted of, or pleaded guilty to, the crime of offering bribes to secure contracts related to the LHWP. This included German engineering firm Lahmeyer International.

After Lesotho prosecutors charged the corporate entities in 1999, the World Bank began debarment proceedings and investigations against the two entities based on its procurement guidelines.¹⁷⁶ During this process, the World Bank worked closely with Lesotho prosecutors and provided additional resources and expertise. The European Anti-Fraud Office and Swiss authorities also collaborated with and provided assistance to the prosecutions.¹⁷⁷

In November 2006, the World Bank debarred Lahmeyer for seven years.¹⁷⁸ In August 2011, the World Bank released Lahmeyer from debarment early after determining that it had satisfactorily adopted and implemented a Compliance Management System.¹⁷⁹

EXAMPLE TWO: While not a human rights case, a bribery investigation that relied on evidence provided by the World Bank shows how law enforcement can use innovative investigative tools to collect evidence relevant to a case. This case is also relevant to Principle 5 (*Collaborate widely to ensure accountability for corporate crimes*,

particularly in cross-border cases) in that it shows the benefits of networks for gathering information and intelligence.

On 17 April 2013, the World Bank announced the ten-year debarment of a major Canadian engineering company, SNC-Lavalin Inc., and its affiliates, for misconduct related to two projects, one of which was the Padma Multipurpose Bridge Project in Bangladesh. The corporate entities misconduct involved conspiring to pay bribes and misrepresentations when bidding for World Bank-financed contracts in violation of the World Bank's procurement guidelines.¹⁸⁰

The investigation of the case was led by the World Bank's investigatory wing, the Integrity Vice Presidency (INT).¹⁸¹ In the past, the INT, whose principle mandate is to monitor World Bank loans and ferret out corruption, has cooperated with national police forces around the world to provide information about potentially illegal activities of persons within their respective jurisdictions.

While conducting its own investigation of SNC-Lavalin, the INT shared with the Royal Canadian Mounted Police (RCMP) information that incriminated some SNC-Lavalin's employees.¹⁸² Acting on the INT information, and additional evidence the RCMP collected, the prosecutor charged four individuals.¹⁸³ The respondents filed a motion to compel the World Bank to produce all of its files related to the case. The World Bank took the position that it enjoyed immunity from compelled disclosure under an international treaty, the Bretton Woods Agreement (to which Canada was a party), and implementing legislation. There was a concern that the World Bank would, in the future, withhold cooperation with local police forces if the price of such cooperation were to subject its internal files to inspection of courts around the world. In 2016, the Supreme Court of Canada reversed the lower court ruling and held that the World Bank had not waived its immunity by providing information to the police.¹⁸⁴

EXAMPLE THREE: A civil case in the United Kingdom involving the alleged complicity of British mining company Monterrico Metals in police torture in Peru shows how legal measures to preserve a defendant's assets, either in criminal or civil cases, may address the inherent inequities involved in pursuing cases against well-resourced

corporate actors and prevent them from disposing of assets before the resolution of a case.

In June 2009, thirty-one Peruvians sued Monterrico and its Peruvian subsidiary in a UK court for complicity in police brutality.¹⁸⁵ The claimants alleged that, during a series of demonstrations in 2005 against the proposed development of a mine in Peru, the police tortured and mistreated protestors by beating and whipping them, threatening them with death and rape and forcing them to eat rotten food.¹⁸⁶ According to the complaint, not only did the corporate entity provide material support to the police, but certain employees and subcontractors also participated in the abuse.¹⁸⁷

In 2007, a Chinese company bought Monterrico and subsequently moved its headquarters to Hong Kong. In May 2009, Monterrico announced that it would be de-listing from the Alternative Investment Market (AIM) of the London Stock Exchange in the United Kingdom. Although it was accepted that this decision was for genuine commercial reasons, there were concerns that any resulting transfer of assets out of the United Kingdom would affect the ability of the claimants to claim damages. In June 2009, the claimants successfully secured a £5 million (then around US\$8.1 million) worldwide freezing injunction in both the London and Hong Kong courts.¹⁸⁸ In June 2011, Monterrico settled with the claimants out of court with no admission of liability.¹⁸⁹

9 Ensure that victims of corporate crimes are able to obtain effective remedies

Ensure that victims of corporate crimes are able to obtain effective remedies in the justice process, including through adequate reparations, effective legal representation, the sharing of information and consulting with victims at appropriate stages of cases where corporate crimes are alleged.

Consider ways in which criminal justice reforms might provide for a greater focus on victims' rights, consistent with ensuring due process for the defendants, including through participation in cases where corporate crimes are alleged.

COMMENTARY

Challenges

Interviewed experts noted that victims of corporate crimes can face particular obstacles in the criminal justice process. In the worst-case scenario, they are viewed solely as witnesses to the crime and do not receive adequate reparation for the harm they have suffered. For example, prosecutors may only seek fines or jail sentences for corporate actors. This may be the case even in jurisdictions where additional measures to remediate the harm to victims are permitted by law within that jurisdiction such as: securing clean-up or an apology or providing for health care and monitoring in the case of an environmental disaster involving criminal conduct. Similarly, victims' rights may be sidelined or negatively impacted due to pressure on law enforcement to resolve corporate crimes cases quickly and with minimal costs.

Solutions

Within the criminal justice system, there is growing recognition of the need to ensure more effective and meaningful participation and representation of victims.

Under international standards on victims' rights, the right to an effective remedy encompasses: (1) equal and effective access to justice; (2) adequate, effective and prompt reparations; and (3) access to relevant information concerning judicial mechanisms. At the international level, the Rome Statute of the International Criminal Court (ICC) provides for the prosecutor to take into account the interests of victims when pursuing or deciding not to pursue a case, and for the views and concerns of victims to be presented and considered at appropriate stages in court proceedings. This is balanced against the accused's right to due process. The ICC's revised strategy in relation to victims specifically states that an objective is to ensure that "victims are able to fully exercise their right to effectively participate in the ICC proceedings with effective legal representation in a manner that is consistent with their rights and personal interests as well as with the rights of the accused to a fair, expeditious and impartial trial".

At the regional level, in 2012, the European Union adopted a directive on minimum standards on the rights, support and protection of victims of crime. At the national level, the United Kingdom has, as one example, committed to put victims first in the criminal justice system and developed a Code of Practice with minimum standards around victims' rights. This includes the right to be kept informed about the progress of any investigation and prosecution and the right to make a statement, referred to as a Victim Personal Statement, in court if the defendant is found guilty.

To overcome the obstacle that victims can face in obtaining an effective remedy, States should strive to adopt or amend laws and procedures so that victims can receive an effective remedy for corporate crimes in line with international standards and principles of due process. States must also comply with their obligations under international law to ensure that victims have access to reparations.

Similarly, law enforcement should consider practical ways, consistent with their legal system, through which victims can obtain effective remedy beyond financial penalties and sentencing. As some national jurisdictions are more open than others to taking a victim-centred approach, what law enforcement can do to ensure that victims obtain an effective remedy will vary depending on what the law permits within a given jurisdiction. To the extent possible, ensuring an effective remedy in corporate crimes cases should be

pursued alongside other objectives, such as deterring future harm by corporate actors or encouraging a more responsible business culture.

One way of ensuring equal and effective access to justice is to enable victims to participate meaningfully and effectively in proceedings where possible. For example, in select jurisdictions, victims have the right to legal representation, the right to make certain submissions in legal proceedings through a representative or the right to take part in such proceedings as a civil party independent of the prosecutor (commonly referred to as “*partie civile*”).

Additionally, prosecutors could pursue other available avenues for redress to ensure that victims receive adequate, effective and prompt reparations for any harm caused.

Reparations include not only compensation but also restitution, rehabilitation, satisfaction and guarantees of non-repetition. At an appropriate stage in proceedings, prosecutors should consider consulting with victims about any specific measures available in that jurisdiction that they could require the corporate entity or other corporate individuals to take if found guilty. Measures could include: the corporate entity implementing a code of conduct that is enforced through an internal compliance program to prevent future wrongdoing, or issuing a public apology and paying appropriate restitution to the victims and communities affected by its commercial activity.

While practice may vary between jurisdictions, law enforcement should seek to engage with victims from an early stage in the investigation and/or prosecution of a corporate crimes case, and ensure that they are given relevant information as it proceeds. This includes information to ensure that victims are aware of their rights as well as any assistance or support mechanisms available to them. Victims should be promptly informed of any decision not to proceed with the case, and the reasons for such a decision, as well as any procedure open to victims to challenge such a decision. Similarly, they should be informed as to why a prosecutor is seeking a specific sentence in their case. Information should be provided to victims in an accessible manner, including appropriate language.

EXAMPLES

EXAMPLE ONE: The legal framework in India is progressive on the role of victims in criminal proceedings, although challenges remain in regards to the implementation of the law.

Under India's Criminal Procedure Code of 1973, victims can challenge a law enforcement decision not to open an investigation into a complaint that alleges a "cognizable" offence by appealing to a higher officer in the police force.¹⁹⁰ In extreme cases, police officers may be criminally convicted if they fail to investigate a case.¹⁹¹

Victims can also challenge a prosecutor's decision not to file an indictment. The Supreme Court in India held in a 1997 case, *U.P.S.C. v. S. Pappiah*, that when law enforcement seeks to forgo a prosecution, "the informant must be given an opportunity of being heard so that he can make his submissions to persuade the magistrate to take cognizance of the offence and issue process".¹⁹²

In addition, victims have the ability to participate in court proceedings by appointing a "subsidiary prosecutor" who may, in certain situations, submit written arguments on behalf of the victims.¹⁹³ Finally, victims and their legal heirs are allowed to appeal a decision of acquittal with permission from the High Court.¹⁹⁴

EXAMPLE TWO: Two South African cases demonstrate the types of reparations that can be used to redress harms with a broad negative impact on society.

In 2012, the Regional Court of Ermelo, Mpumalanga, South Africa convicted mining company Golfview Mining (Pty) for a number of breaches of the Environmental Management Act and the National Water Act in connection with the illegal mining and pollution of a wetland in South Africa.¹⁹⁵ A plea agreement was reached and Golfview Mining was ordered to pay one-million rand (then around US\$115,000) to the South African government.¹⁹⁶ Additionally, under the agreement, Golfview Mining was also required to disperse one million rand each (then around US\$115,000) to agencies including the Water Research Counsel, the Environmental Empowerment Services and the Mpumalanga

Tourism and Parks Agency for purposes of environmental research, awareness, protection and training. It was also agreed that the accused rehabilitate the area and periodically report on progress.¹⁹⁷

In January 2014, the managing director of clay mining company Blue Platinum Ventures in South Africa was convicted of violating the National Environmental Management Act and sentenced to five years imprisonment.¹⁹⁸ Blue Platinum began mining operations in the village of Tlhabine in Limpopo in 2007, causing severe environmental damage that harmed the local community, encroaching upon sacred sites, failing to rehabilitate damage to mining locations and relocating to another site without authorisation.¹⁹⁹

In response, following a complaint from the Batlhabine community, the Department of Mineral Resources (DMR) ordered the corporate entity to remediate the damage and subsequently informed Blue Platinum that its mining rights would be cancelled unless it complied.²⁰⁰ The entity did not comply with the DMR directives and its mining rights were revoked in September 2013.²⁰¹ The affected community subsequently brought fourteen criminal charges to the Public Prosecutor against Blue Platinum and six of its directors alleging violations of the National Environmental Management Act (NEMA), the Mineral and Petroleum Resources Development Act, and the National Water Act. During the court case, community members and expert reports provided evidence in support of these allegations.²⁰²

The Public Prosecutor subsequently investigated and prosecuted the corporate entity and six of its directors, including the managing director.²⁰³ While the charges against most directors were eventually dropped, Blue Platinum and its managing director pled guilty to violating NEMA. The managing director was sentenced to five years' imprisonment, which was suspended on the condition that he repairs the environmental damage caused by Blue Platinum.²⁰⁴ The conviction represents the first time that a director of a corporate entity has been held personally liable for a mining-related environmental offence in South Africa, setting a precedent for future prosecutions.

There are, however, some problematic aspects to this case. Although both the managing director and Blue Platinum pled guilty, no penalty was imposed on the corporate entity itself. Moreover, the managing director's sentence was inadequate because it provided no detailed instructions as to what would constitute rehabilitation of the land. The court could have, for example, specified that the rehabilitation would occur under the oversight of the DMR or laid out concrete expectations on the restoration. The lack of specificity in the sentence also makes it difficult for the community to show non-compliance.

10

Put in place appropriate measures and incentives to protect victims, informants, whistle-blowers, witnesses and experts in corporate crimes cases

Enforce the laws that protect whistle-blowers and others providing evidence about potential cases. From the early stages of an investigation, identify and implement steps and processes needed to encourage, support and protect whistle-blowers, victims and others who provide intelligence and evidence so that they may act confidentially, anonymously and without fear of reprisals.

COMMENTARY

Challenges

Investigators and prosecutors interviewed noted that victims, informants and whistle-blowers can be key to exposing corporate crimes. They, as well as other witnesses, can also provide vital information to law enforcement officials and in court. Yet the interviewed investigators and prosecutors recognised that these individuals may be subject to social pressures from their community, the corporate entity or co-workers to remain silent or may be subject to significant personal risks such as harassment, intimidation and threats of violence. Whistle-blowers often do not have adequate protection under domestic laws – in particular when they are seen to come forward without “clean hands”, for example in situations where they may have contributed to the crime. The investigators and prosecutors also noted that the issue of witness and victim safety is particularly acute in cross-border cases and that special protection measures, such as resettlement, can be required. As a result, key individuals may be reluctant to come forward and provide information or may not wish to give evidence in court.

Solutions

At the national level, States should amend or adopt laws that protect whistle-blowers from harassment, intimidation and threats of violence.

At the law enforcement level, where possible, investigators and prosecutors should consider whether a corporate crimes case can be prosecuted without testimony from victims or vulnerable witnesses. The case would therefore rely on documentary evidence alone, with witnesses needed only to introduce evidence and/or testimony from police or investigators. Many States have learned to prosecute domestic violence and trafficking without needing victims to testify, and prosecutors might consider seeking to adopt similar strategies.

Where testimony from victims and witnesses is needed, law enforcement should encourage and put in place appropriate measures and incentives at an early stage to protect such individuals and help foster disclosure.

In particular, law enforcement should:

1. Understand the laws and procedures in their jurisdiction and international standards on the provision to or management and exploitation of information by law enforcement. This includes whistle-blower protection laws and evidentiary privileges that protect the source of the information;
2. Know what other measures and incentives are or could be put in place to encourage and protect victims, informants, whistle-blowers and witnesses. This includes technologies and mechanisms that allow individuals to provide evidence confidentially and/or anonymously, for example through protected sources such as journalists and using technologies that route and obscure communications so that they cannot be traced back to users; and
3. Ensure that such individuals are aware of the risks to themselves if they are identified as the source of a disclosure and what steps they can take to protect themselves;

In respect to whistle-blowers, to the fullest extent allowed under applicable laws in their jurisdiction, prosecutors should use their discretion to do the following:

1. Apply the term “whistle-blower” broadly to cover all of those who expose information that they reasonably believe, at the time of disclosure, to be true and constitute a threat or harm to the public;
2. Make the scope of the protected disclosure easily understandable;
3. Ensure that available disclosure channels are clear and publicly known;
4. Guarantee the confidentiality and anonymity of whistle-blowers;
5. Afford whistle-blowers protection from all forms of retaliation and discrimination; and
6. Impose penalties on those who threaten or initiate retaliation for the protected activity and provide remedies to the targets.

During the pre-investigation and investigation phases, law enforcement should take special care to ensure that protective and security measures are in place for individuals who are vulnerable to abuse, intimidation and retaliation. Such measures include:

1. Interviewing a large number of witnesses instead of only one or two to avoid the interviewees being singled out as targets for intimidation or retaliation;
2. To the extent possible, obtaining evidence from victims and witnesses located outside of the affected community, such as from members of the diaspora; and
3. Using investigators, police and translators who do not have connection to the affected community.

During trial, protective and security measures could include:

1. Issuing protective orders, relocating witnesses or seeking to prosecute the case in a venue further from the location where the abuse took place;
2. Allowing confidentiality or anonymity for certain information providers, taking into account due process and fair trial protections. For example, where such individuals do not want to be identified as the information provider in court, processes could be put in place to disguise their identity or to ensure investigators or prosecutors do not know or become aware of the identity of that individual (such as by ensuring that only a specialised prosecutor or specific contact knows their identity); and
3. Allowing victims, witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology like video or other adequate means.

Finally, at all stages of the justice process, law enforcement should provide support services to particularly vulnerable groups, such as victims of sexual violence, children or persons with disabilities. The support service should take into account the social, cultural and religious background of the victims.

EXAMPLES

EXAMPLE ONE: A range of legislative mechanisms exist across jurisdictions to ensure that whistle-blowers are protected and receive appropriate remedy for instances of reprisals and victimisation. South Korea has a strong legal framework for whistle-blower protection as it includes a number of important provisions. For example, the protection laws define “whistle-blower” as any persons who reports, petitions, informs, accuses or complains that a violation of the public interest has occurred or is likely to occur to a wide range of designated authorities, including a corporate officer.²⁰⁵ The Anti-Corruption and Civil Rights Commission (ACRC), a government body, is mandated to help investigate and resolve whistle-blower protection cases.²⁰⁶ The ACRC can grant protective measures such as re-instatement or compensation when instances of discrimination or reprisal against the whistle-blower for the protected disclosure occur.²⁰⁷ Whistle-blowers can also request the issuance of preventive measures when there is high likelihood of retaliation.²⁰⁸ Under South Korean law, disclosure of a whistle-blower’s identity without his/her consent and retaliation are criminal offences.²⁰⁹ Retaliation is presumed to be a consequence of the whistle-blowing if it takes place within two years of the divulgence of information.²¹⁰

In addition, in 2011, South Korea passed the Act on the Protection of Public Interest Whistle-blowers, which includes a large awareness campaign. Since the promulgation of this act, there has been a marked increase in the number of whistle-blowers. While during the preceding ten years the ACRC recovered an average of US\$5 million per year, in 2012 alone US\$10 million was recovered due to an increase in whistle-blowers.²¹¹ The number of whistle-blowers on tax evasion doubled between 2011 and 2013, while the dollar amount recovered from tax evasion investigations nearly tripled.²¹²

EXAMPLE TWO: Ghana’s Whistleblower Act provides a good framework for whistle-blower protection, although the lack of sufficient implementation of the Act also shows the importance of law enforcement having knowledge of the whistle-blower protection framework and using their discretion to apply the law to protect whistle-blowers.

The scope of the protected disclosures under the Act is sweeping. Individuals are protected when they disclose economic crimes; violations of the law; miscarriages of justice; waste, misappropriation, or mismanagement of public resources by a public institution; environmental degradation and danger to health and safety of an individual or a community.²¹³ The protected disclosure can be made to a wide range of authorities and institutions, including law enforcement, the Parliament, the Commission on Human Rights and Administrative Justice (CHRAJ) or the head of a recognised religious body.²¹⁴ Whistle-blowers are protected from any form of retaliation and victimisation.²¹⁵ The CHRAJ is tasked with investigating complaints of retaliation and may refer the case to High Court or make orders to request police protection.²¹⁶

There have been challenges in implementation of this progressive legal framework. Very few members of the public know or understand the Act. Many of the institutions mandated to receive complaints under the Act do not have procedures in place to process them, and few officers in these institutions have received training on how to handle such complaints.²¹⁷

EXAMPLE THREE: Anonymous whistle-blowers are often vital to establishing a corporate case. There are numerous ways to preserve the anonymity of the information provider.

Internet anonymity networks, such as TOR, allow communications to be routed and obscured so that they cannot be traced back to the user. For example “whistle-blowing sites” such as Afrileaks,²¹⁸ Wildleaks²¹⁹ and Transparency International²²⁰ use TOR and GlobaLeaks technologies to allow informants to pass information anonymously to journalists, wildlife crime activists and anti-corruption NGOs respectively. The Guardian newspapers Securedrop facility also uses TOR and encryption technologies to allow informants to share files with The Guardian anonymously.²²¹

Older and potentially less secure systems use more dated technologies but may also offer guarantees of non-disclosure and/or operate processes which prevent identifying information from being collected to preserve anonymity. For example Crimestoppers is a UK based registered charity, which allows anonymous infor-

mants to provide information by telephone and through the Internet.²²² It provides a guarantee that it will not collect information that identifies informants, it will not trace calls or internet-based communications and will not allow any identifying information to be included in its reports.²²³ This guarantee and the structured information collection preserve anonymity. Crimestoppers was contacted by 300,000 individuals in 2015. From those contacts 111,000 pieces of anonymous information were passed to the police resulting in 19,500 crimes being solved and prevented.²²⁴

These systems rely on technology and structured processes to create a void between the information provider and receiver. If used correctly they will normally preserve the anonymity of the information provider. The receiver will not know the provider's identity and hence cannot be forced to disclose the information, nor could law enforcement trace the provider by forensic means.

Legal opportunities for anonymous information provision may also be available, depending on the legislation in force in the relevant jurisdiction. In general terms, many jurisdictions privilege certain types of communications. For example, in common law jurisdiction communications with lawyers are normally legally privileged. In the United Kingdom, legal professional privilege protects legal communications between a registered and qualified legal practitioner and their client. This means that the content of communications between the two parties cannot be disclosed without the client's consent. In such jurisdictions, an individual who wish to pass information to law enforcement anonymously could pass it to a lawyer for onward provision to law enforcement on the explicit stipulation that the provider should not be identified as a source.

APPENDIX: RESOURCES AND FURTHER READING

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ABOUT THE CORPORATE CRIMES PRINCIPLES

The Commerce, Crime and Human Rights Project (“the Project”) was launched jointly by Amnesty International and the International Corporate Accountability Roundtable (ICAR) on 26 February 2014. The Project seeks to identify and address why States and law enforcement are rarely pursuing corporate criminal accountability in human rights cases.

A group of eminent legal experts, with the support of Amnesty International and ICAR, developed *“The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases”* (“the Principles”) to encourage State actors to combat corporate crimes more effectively. The *Principles* seek to address the impunity gap by providing a common, global approach to the investigation and prosecution of corporate crime, taking better account of the range of corporate actors that may be implicated.

The *Principles* are aimed at law enforcement officials, including police, investigators, prosecutors, judges and government legal counsel as well as State executive and legislative bodies. They have been developed in consultation with investigators, prosecutors, lawyers and civil society actors specialising in human rights. The *Principles* are intended to ensure that corporate crimes do not go unpunished. This will benefit victims and their representatives, human rights defenders, lawyers and law-abiding corporate actors.

All materials relating to the Project and the *Principles* are also available on the Project website at www.commercehumanrights.org.

