

## **Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns.**

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This article argues that the negative impact that transnational corporations may have on the protection and promotion of international human rights can be improved by extending the International Criminal Court's jurisdiction to corporations.

Realising this goal would require that the concerns, including complementarity concerns, expressed by Rome Conference delegates be addressed. This article explores a number of ways to address the complementarity concerns and identifies limitations with those approaches. Given these limitations, if state parties cannot be dissuaded of their complementarity concerns, it is argued that a pragmatic response is to adopt an exception-based approach to including corporations within the ICC's jurisdiction — that is, to extend the ICC's jurisdiction to corporations generally, but specifically exclude corporations registered in state parties that do not recognise corporate criminality for the offences subject of the Rome Statute in their national criminal jurisdictions.

While an exception-based approach would have its own difficulties, it would enable the ICC's jurisdiction to be extended to corporations generally — a significant development for the protection of international human rights.

### **Introduction**

Transnational corporations (TNCs) are major players in a globalised and privatised international economy. Accompanying this economic power is considerable political and social clout. TNCs can use this power to promote human rights by improving a population's economic development (Kinley and Tadaki 2004, 933). However, the same power may enable TNCs to avoid liability for their role, be it direct or indirect, in a range of egregious human rights abuses — including, in the context of militarised commerce, allegations that TNCs have participated in serious international crimes such as genocide, war crimes and crimes against humanity (Joseph 2004, 3).

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Many 'host' states, which are often developing states where TNCs locate their production capabilities, may be unwilling or unable to efficiently regulate the human rights conduct of TNCs within their jurisdiction. A host state may not have the financial or legal resources to regulate a powerful TNC. The host state may be concerned that the TNC will relocate, taking its foreign direct investment with it, if made to account for its human rights conduct. The problem is compounded if the host state has committed human rights violations in which the TNC has been complicit.

A 'home' state, the country in which the TNC's parent company is incorporated, and often a developed state, generally does not act to fill this regulatory gap. In 2008, John Ruggie, the Special Representative of the Secretary General on Human Rights and TNCs (the Special Representative), noted that there is debate about whether home states are required under international law to prevent extraterritorial human rights abuses by their corporations (Ruggie 2008, 7). While there is a view that home states may intervene when there is a jurisdictional basis for doing so (Ruggie 2008, 7), as a practical matter, home states have been disinclined to test the scope of this extraterritorial jurisdiction in connection with the activities of their corporations abroad. Consequently, TNCs remain largely unaccountable for their human rights conduct in host states.

Improving the accountability of TNCs for their human rights conduct in host states is a complex issue, requiring a combination of social, economic and legal responses. One part of the legal response may be to extend the International Criminal Court's (ICC's) jurisdiction to include the direct regulation of corporations.

The ICC has a number of features that suggest it is an appropriate international institution to regulate directly the conduct of TNCs that may amount to an international crime within Art 5 of the Rome Statute.<sup>1</sup> It is a permanent international body with jurisdiction over serious international crimes committed by individual non-state actors. The ICC has in place procedures to receive complaints about alleged crimes; investigate and prosecute crimes; and order the imposition of fines, the confiscation of proceeds of crimes and reparations to victims. Extending the ICC's jurisdiction to corporations would be consistent with the Special Representative's recommendations to strengthen grievance mechanisms against corporations, including the suggestion that the concept of a 'global ombudsman' (Ruggie 2008, 27) be further explored.

Realising such an extension to the ICC's jurisdiction would be a challenging task. A number of the challenges were highlighted during the United Nations Diplomatic

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1 Genocide, crimes against humanity, war crimes and the crime of aggression (to be defined).

Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference) in 1998. State delegates negotiating the provisions of the Rome Statute of the International Criminal Court (the Rome Statute) considered a proposal to extend the ICC's jurisdiction to include corporations. After three weeks of debate, the proposal was withdrawn when it became clear that it would be unsuccessful.

It has been 10 years since the Rome Conference. In that time, there have been various developments suggesting that support for the direct international regulation of corporate human rights conduct is increasing. At the Rome Conference, only one non-governmental organisation (NGO) lobbied the state delegates to include corporations in the ICC's jurisdiction (Clapham 2000, 157). Now various NGOs are calling for corporations to be held legally accountable for their international human rights conduct (Clapham 2006, 195). Increased international concern about the human rights conduct of TNCs is reflected in the various non-binding international agreements entered into since the Rome Conference targeting TNCs' human rights conduct<sup>2</sup> and the reports of the Special Representative (Ruggie 2008, 2007, 2006). In such an environment, there is merit in revisiting the challenge of expanding the ICC's jurisdiction to include corporations, particularly as substantive amendments to the Rome Statute can be made after 1 July 2009.<sup>3</sup>

Any proposal to extend the ICC's jurisdiction to corporations should address the reasons for the proposal's failure at the Rome Conference. There were a number of reasons why the proposal failed, including the concerns that the proposal generated among delegates whose national criminal legal systems did not recognise the concept of corporate criminal liability (Kyriakakis 2005, 106). States that did not recognise corporate criminality expressed concern about how the ICC's complementarity principle<sup>4</sup> would operate if the ICC's jurisdiction included corporations.

This article details the proposal considered at the Rome Conference to extend the ICC's jurisdiction to corporations and discusses the complementarity concerns expressed by some delegates. If the proposal to extend the ICC's jurisdiction to corporations was renewed, the likelihood that complementarity concerns would continue to be a concern for state parties to the Rome Statute is considered.

2 See, for instance, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) and the United Nations Global Compact (2000).

3 Article 121, Rome Statute.

4 The ICC's jurisdiction is complementary to national criminal jurisdictions. Under Art 17 of the Rome Statute, the ICC has jurisdiction when it has been determined that a state is unable or unwilling to act.

A number of ways to address the complementarity concerns are explored and the limitations with those approaches are identified. Given these limitations, if state parties cannot be dissuaded of their complementarity concerns, it is argued that a pragmatic way forward is to adopt an exception-based approach to including corporations within the ICC's jurisdiction — that is, to extend the ICC's jurisdiction to corporations generally, but specifically exclude from the ICC's jurisdiction corporations registered in state parties that do not recognise corporate criminality for the offences subject of the Rome Statute in their national criminal jurisdictions. While an exception-based approach would have its own difficulties, it would enable the ICC's jurisdiction to be extended to corporations generally — a significant development for the protection of international human rights.

### Corporations and the Rome Conference

The draft Rome Statute considered by the delegates at the Rome Conference contained a proposal in Art 23 to extend the ICC's jurisdiction beyond individuals to legal persons:

5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes. [United Nations 1998b, 31.]

Delegates considered the proposal for three weeks. During this period, the French delegate noted that the concept of criminal responsibility of legal persons:

... had met with resistance on the part of many delegations on the grounds that either the legal systems of their countries did not provide for such a concept or that the concept was difficult to apply in the context of an international criminal court. [United Nations 1998c, 133.]

Given such difficulties, the proposal was revised several times, culminating in a working paper that granted the ICC jurisdiction over a 'juridical person', defined as a corporation whose main objective was to 'seek private profit or benefit':

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

- (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
- (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
- (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
- (d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural and the juridical person may be jointly tried. [United Nations 1998d (the Working Paper).]

The Working Paper was withdrawn when it became clear that a majority of delegates would not support it. Reasons for the delegates' lack of support included concerns about how the indictment would be served, who would represent the corporation, how corporate intent would be determined and how evidence would be presented. Some delegates also thought that insufficient negotiating time was available to consider properly the Working Paper (Clapham 2000, 157).

Another reason that the ICC's jurisdiction was not extended to corporations was due to the uncertainty that the proposal created about the operation of the complementary nature of the ICC's jurisdiction when the concept of corporate criminal liability was foreign to a number of states' national legal systems (Ambos 1999, 478). Such concerns were expressed by delegates from states that did not recognise corporate criminality in their national legal frameworks. Concerns about the implications of extending the ICC's mandate to include corporations, when not all states recognised the criminal responsibility of corporations under their national laws, were also expressed by delegates from states, such as Australia, whose national laws did recognise corporate criminality (United Nations 1998c, 133–36).

## The complementarity principle

The ICC is founded on the premise that its jurisdiction will supplement, or be complementary to, states' national criminal jurisdictions.<sup>5</sup> A case is admissible before the ICC when a state is unwilling or unable to conduct a prosecution. The circumstances of inadmissibility are prescribed in Art 17 of the Rome Statute and include:

### Issues of Admissibility

... The Court shall determine that a case is inadmissible where:

- (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute ...

States wanted to avoid a situation whereby it could be argued that because the state was unable to prosecute the corporation, the ICC had authority to pursue the corporation under Art 17. It was suggested that granting the ICC jurisdiction over corporations, when not all states recognised corporate criminality in their national criminal jurisdictions, had the potential to render the complementarity principle unworkable (*Ambos in Kyriakakis 2005, 106*).

## National recognition of corporate criminality

There are 108<sup>6</sup> state parties to the Rome Statute. A proposal to amend the Rome Statute to include corporations within its jurisdiction must be adopted by a two-thirds majority of states parties (Rome Statute, Art 121(3)). The amendment will only enter into force if it is subsequently ratified or accepted by a seven-eighths majority of the state parties (Rome Statute, Art 121(4)).

It is generally recognised that a growing number of states recognise corporate criminality in their national criminal legal systems.<sup>7</sup> However, it is difficult to find exhaustive comparative legal research identifying which of the 108 state parties do not recognise corporate criminality in their national laws. The Special Representative noted that 'research has not been completed on all 104 countries that had ratified

5 See para 10 of the preamble to the Rome Statute and Art 1 of the Rome Statute.

6 As at 18 July 2008.

7 For instance, since the Rome Conference, Belgium, Italy and Switzerland have imposed criminal liability on corporations (*Chiomenti 2005, 8*). See also *Kyriakakis 2008, 117, 151*.

the Rome Statute as of November 2006' (Ruggie 2007, 9). However, Ramasastry and Thompson's 16-country survey<sup>8</sup> provides a useful starting point.

Of the 16 countries surveyed, 11<sup>9</sup> applied notions of criminal liability to corporations. The other five countries<sup>10</sup> did not recognise the concept of corporate criminal liability in their national legal systems. Despite this, two<sup>11</sup> of the five countries have passed statutes making corporations liable for various crimes, including war crimes (Survey Response, Laws of Argentina, 2006), environmental offences, corruption, terrorism and commercial crimes (Ramasastry and Thompson 2006, 13).

Eleven of the countries<sup>12</sup> surveyed have ratified the Rome Statute. Of these 11 countries, Argentina, Germany and Spain do not recognise the concept of corporate criminality (Ramasastry and Thompson 2006, 16). Although limited, this comparative information suggests that addressing complementarity concerns will remain an issue if the proposal to extend the ICC's jurisdiction to corporations is revisited by the Assembly of States Parties, as not all parties to the Rome Statute currently recognise corporate criminality in their domestic legal systems.

Kyriakakis has analysed the complementarity concerns and concluded that the Rome Statute's complementarity principle would not be threatened by a proposal to extend the ICC's jurisdiction to corporations (Kyriakakis 2008, 151). Kyriakakis argues that complementarity concerns, whether understood to be about the adaptability of the complementarity principle or a concern about the discriminatory impact that a proposal to include corporations in the ICC's jurisdiction may have on states that do not recognise corporate criminality in their national legal systems, are not sustainable (Kyriakakis 2008, 122–42). Rather, complementarity concerns are used to disguise underlying state unease about how competing tensions between state sovereignty and the development of international criminal justice would be resolved if the ICC's jurisdiction was extended to corporations (Kyriakakis 2008, 118, 142).

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8 The states surveyed where Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.

9 Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States.

10 Argentina, Germany, Indonesia, Spain and the Ukraine.

11 Argentina and Indonesia.

12 Argentina, Australia, Belgium, Canada, France, Germany, Netherlands, Norway, South Africa, Spain and the United Kingdom.

Exploring Kyriakakis's argument is beyond the scope of this article. Whether state parties to the Rome Statute would use complementarity concerns to obfuscate any future debate about extending the ICC's jurisdiction to corporations remains to be seen. However, should state parties rely upon complementarity concerns to thwart any renewed proposal to include corporations in the ICC's jurisdiction, regardless of the reasons underlying those concerns, a means of addressing complementarity concerns would be required.

### **Addressing complementarity concerns**

A number of United Nations conventions recognise corporate criminality at the international level. International conventions including the United Nations Convention for the Suppression of the Financing of Terrorism, the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption (together the Conventions) recognise international offences by legal persons. The Conventions enable each state party to determine how to hold a legal person to account for its actions contrary to the convention, through either criminal, civil or administrative processes. For instance, Art 10 of the United Nations Convention Against Transnational Organized Crime provides:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group ...
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The Conventions enable all states to recognise corporate criminality at the international level, even if the state does not recognise corporate criminality at the national level. Each state party may determine the liability of a corporation in a manner consistent with its national legal system. This approach allows international treaties to be negotiated that regulate international corporate criminal conduct, despite differences in states' national concepts of corporate criminality. A state that does not recognise corporate criminality in its national criminal jurisdiction may still be a party to the Conventions and, by taking effective, proportionate and dissuasive civil or administrative action against a corporation, comply with its obligations under the Conventions.



If the Rome Statute included a similar approach to international corporate offending as found in the Conventions, it would address states' complementarity concerns by allowing a state to pursue a corporation involved in an international crime in a manner that was consistent with its national criminal jurisdiction. The state would determine whether the sanctions against the corporation were to be criminal, civil or administrative.

However, this approach does not take into account a significant difference between the Conventions and the Rome Statute. The Conventions are enforced at the national level. They do not contain direct international enforcement mechanisms. It is not necessary for the Conventions to be concerned with varying state concepts of corporate criminality from an international enforcement perspective. This would be a problem particular to the ICC.

One option that was raised during the preparatory sessions of the Rome Conference was to provide for the civil or administrative liability of legal persons. The possibility of such an approach was flagged in a footnote to Art 23 of the draft Rome Statute:

There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed ... [United Nations 1998b, 31.]

The suggestion that providing for the civil or administrative liability of corporations under the Rome Statute may provide a 'middle ground' raises a threshold question. That is, whether it is appropriate for a state to respond to a human rights violation that amounts to a serious international crime with anything less than a criminal law response.

The prohibition on the crimes within the ICC's jurisdiction is a matter of customary international law. The crimes are also prohibited by a number of international treaties, including the Geneva Conventions and the United Nations Convention on the Prevention and Punishment of Genocide. There is an absolute obligation on states to prosecute grave breaches of the Geneva Conventions.<sup>13</sup> The seriousness

13 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Arts 49 and 50; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Arts 50 and 51; Geneva Convention Relative to the Treatment of Prisoners of War, Arts 130 and 131; and Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Arts 146 and 147.

of grave breaches of the Geneva Conventions is only properly addressed through criminal sanctions.

These factors suggest that only a criminal law response would be appropriate if a corporation was involved in an offence over which the ICC had jurisdiction. If a state responded to an alleged international crime by a corporation with anything less than a criminal prosecution, arguably this would constitute unwillingness or inability to prosecute under Art 17 of the Rome Statute.

Yet, many of the key developments in pursuing corporate liability for human rights violations have been through civil litigation under the United States *Alien Torts Claim Act of 1789* and direct liability claims based in tort in common law jurisdictions. Civil litigation can have a positive impact on human rights enforcement, even if the breaches are not treated as crimes. Civil litigation can result in damages being awarded against the corporation and reparations ordered. Civil litigation, or the threat thereof, can damage the corporation's reputation. It may also have a negative effect on how corporate financiers, insurers and shareholders regard the corporation. Through these outcomes, civil litigation can have a valuable deterrent effect.

Administrative procedures can also have an important deterrent effect on corporations. Ruggie notes that administrative mechanisms may have a positive impact on the human rights conduct of corporations. He says that the importance of the institutions responsible for these mechanisms cannot be 'overstated' (Ruggie 2008, 25).

If the role of the ICC is to encourage states to enforce compliance with international law, then a state response to a human rights violation, other than a criminal prosecution, may represent an appropriate and considered response and not merely an unwillingness or inability to prosecute the corporation. It would recognise that a state may prefer to institute civil or administrative proceedings against a corporation for human rights violations, even if the state does recognise corporate criminal liability. In these circumstances, the prosecutor could exercise his or her discretion not to proceed with an investigation in the interests of justice under Art 53(1)(c) of the Rome Statute.

How the ICC applies the complementarity provision would be fundamental to resolving this issue. The approach that the ICC adopts would be influenced by what the ICC understands to be its dominant purpose: to serve the international community or to assist national courts promote compliance with international law (Morris 2000, 178).

The ICC is currently grappling with this issue in the context of truth commissions and national amnesties for serious international crimes that would otherwise fall within

the ICC's jurisdiction.<sup>14</sup> This was a controversial issue during the Rome Conference (McGoldrick 2004, 467) and was not squarely answered by the Rome Statute. Resolution of this issue may provide a useful insight into whether the ICC would regard state non-criminal proceedings against corporations involved in international crimes as an appropriate response, rather than an unwillingness or inability to prosecute under Art 17 of the Rome Statute.

Any proposal to provide for the civil and/or administrative responsibility of corporations under the Rome Statute raises another fundamental issue — namely, would it be appropriate for the ICC itself to provide a non-criminal law response to crimes within the ICC's jurisdiction?

A proposal to include non-criminal proceedings in the Rome Statute for the purpose of addressing states' complementarity concerns would need to identify which corporations would be the subject of any such proceedings. Would it be appropriate for the ICC to have the flexibility to determine whether a corporation should be dealt with criminally or through civil proceedings? Alternatively, would the ICC use civil proceedings rather than criminal proceedings against all corporations, or would the ICC's use of civil proceedings be confined to corporations incorporated in state parties that do not recognise corporate criminality? Such questions would need careful consideration before any such changes were made to the ICC's jurisdiction. Some of the issues that may arise are flagged below.

If the ICC was mandated with a flexible approach to determine when to institute criminal proceedings or civil proceedings against a corporation, the ICC would be able to institute civil proceedings against a corporation that was incorporated in a state that recognised corporate criminality, but had not pursued the corporation.

If the ICC chose to deal with such a corporation through civil proceedings, the ICC's response to the corporation's conduct would be less serious than the criminal proceedings that the state party itself should have instituted against the corporation. The state's national criminal laws would require that the corporation be subject to a criminal prosecution, whereas the international redress would occur through civil proceedings. If the ICC dealt with corporations incorporated in states that recognised corporate criminality through civil proceedings, this would undermine the duty

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14 The draft Regulations of the Office of the Prosecutor include, in book 3 of the operations manual, a proposed section dealing with 'complementarity practice'. Issues to be considered include 'assessment of inability, unwillingness, and complementarity in the judicial process'. The draft regulations are available at <[www.icc-cpi.int/library/organs/otp/draft\\_regulations.pdf](http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf)> [2008, March 28].

international law imposes on states to prosecute certain international crimes within the ICC's jurisdiction. The ICC's proceedings would be inconsistent with, rather than complementary to, the obligation that international law imposed on the state party. Such an outcome would detract from the consistent application of international criminal law.

This situation would be avoided if the Rome Statute did not permit civil proceedings to be used by the ICC when the corporation was registered in a state that recognised corporate criminality. Alternatively, the Office of the Prosecutor could introduce guidelines specifying that it would not use civil proceedings against a corporation incorporated in a state that recognised corporate criminality.

The outcome of either approach would be that there was no flexibility available to the ICC when determining how to proceed against a corporation. If the corporation was incorporated in a state that recognised corporate criminality, the ICC would only be able to pursue it through criminal proceedings. The ICC's non-criminal proceedings would be limited to those corporations registered in states that did not recognise corporate criminality in their national criminal jurisdictions. On this approach, the ICC's jurisdiction would be consistent with the jurisdiction of the state of incorporation. However, it would significantly limit the number of corporations that would be eligible to be defendants in any civil proceedings conducted by the ICC.

State parties would have to resolve complex issues such as negotiating and agreeing upon the precise form of the civil proceedings to be incorporated into the Rome Statute.<sup>15</sup> The existing Rules of Procedure and Evidence govern the conduct of criminal matters before the ICC. If civil proceedings were included in the Rome Statute, it would be necessary to develop a separate procedural and evidentiary framework appropriate to the civil proceedings. It is reasonable to expect that, at a minimum, this task would be as complex as negotiating the ICC's existing Rules of

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15 Potential models would include providing for civil proceedings to compensate individuals or classes of individuals who suffered harm as a result of the corporation's activities or adopting an approach modelled on Australian regulatory proceedings known as civil penalty proceedings. The United Kingdom, the United States and New Zealand also use proceedings similar to civil penalty proceedings to regulate certain aspects of corporate conduct. In Germany, a corporation may be fined when a prescribed individual commits an offence by breaching the duties of the corporation (Ramasastry and Thompson 2006, 13).

Procedure and Evidence. State parties may consider that it would be impractical to devote resources to developing and implementing civil proceedings that could only be used against a relatively small number of corporations.

Other issues would have to be resolved. For instance, how would the ICC, a *criminal* court, hear civil proceedings? In many national systems, civil proceedings are heard in a court of civil jurisdiction that is physically distinct from the criminal courts and presided over by judges experienced in the application of civil rule and procedure. If ICC judges presided over civil proceedings in the precincts of the ICC, it may foster the perception that the proceedings were indistinguishable from criminal proceedings. It may be necessary to appoint judges experienced in civil procedure to preside over civil proceedings. Similarly, lawyers and investigators experienced in conducting complex civil proceedings may have to be engaged.

### **An exception-based approach?**

If state parties determined that creating a 'middle ground' was inappropriate and impractical, an alternative approach may be to extend the ICC's jurisdiction to all corporations but create a specific exception for corporations incorporated in states that did not recognise corporate criminality. Any exception-based approach would have to be contained in the amendments to the Rome Statute that extended the ICC's jurisdiction to corporations as reservations to the Rome Statute are prohibited under Art 120.

The exception could be contained in the definition of 'corporation' that would be inserted into the Rome Statute. There is some precedent for excluding certain corporations from the proposed extension to the ICC's jurisdiction. The Working Paper excluded state corporations, public international bodies and non-profit organisation from the definition of juridical person (United Nations 1998d). On this approach, the exceptions would be expanded to exclude corporations incorporated in state parties that did not recognise corporate criminality for the crimes in Art 5 of the Rome Statute.

An unqualified exclusion would be inappropriate as a state's approach to corporate criminality may change over time. The exception should also recognise that while, as a general principle, a state may not recognise the concept of corporate criminality, it can introduce legislation that imposes liability on a corporation for crimes the subject of the Rome Statute. This approach would ensure that states that have imposed specific criminal liability on corporations for crimes otherwise within the ICC's mandate would be subject to the ICC's jurisdiction, even if the state did not generally recognise corporate criminality. As discussed above, Argentina does

not generally recognise corporate criminality. On a broad exception approach, Argentinean corporations would not be subject to the ICC's jurisdiction. However, if the exception recognised that a state may create exceptions to the non-recognition of corporate criminality, Argentinean corporations involved in war crimes would fall within the ICC's jurisdiction because Argentina has passed 'special criminal laws' imposing liability on legal persons for war crimes (Survey Response Laws of Argentina 2006, 4).

As an example, by adapting the definition of juridical person contained in the Working Proposal, an exception designed to address state's complementarity concerns could be drafted in the following terms:

For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real, or dominant objective is seeking private profit or benefit that:

- (a) was incorporated in a State Party which, at the time of the alleged offence(s), recognised in its national criminal jurisdiction the criminal responsibility of juridical persons for the alleged offence(s) under article 5 of the Rome Statute; and
- (b) is not a State or other public body in the exercise of State authority; or
- (c) is not a public international body; or
- (d) is not an organization registered under the national law of a State as a non-profit organisation.

Amendments to Art 17 and Art 19 of the Rome Statute would be required if an exception-based approach to addressing states' complementarity concerns was adopted. Article 17, dealing with issues of admissibility, would require the inclusion of a subparagraph providing that the ICC should determine that a case was inadmissible where the corporation concerned was incorporated in a state party that, at the time of the alleged offence(s), did not recognise in its national criminal jurisdiction the criminal responsibility of corporations for the alleged offence(s) contained in Art 5 of the Rome Statute.

Whether the state did recognise the relevant offence at the material time would be a question of fact to be determined by the ICC in accordance with Art 19(1)<sup>16</sup> of the Rome Statute. Nevertheless, it would be prudent to amend Art 19(2) to include a subparagraph granting both the state in which the corporation was incorporated and the corporation itself standing to challenge the admissibility of the case before the ICC on the basis that the state did not recognise the alleged corporate criminality at the material time, for example:

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16 Challenges to the jurisdiction of the court or the admissibility of a case.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 [as amended] or challenges to the jurisdiction of the Court may be made by: ...
  - (e) A State in which the juridical person was incorporated, on the ground that at the time of the alleged offence(s) under article 5 of the Rome Statute the State did not recognise the criminal responsibility of juridical persons for the alleged offence(s) in its national criminal jurisdiction.
  - (f) An accused juridical person on the ground that at the time of the alleged offence(s) the juridical person's State of incorporation did not recognise the criminal responsibility of juridical persons for the alleged offence(s) under article 5 of the Rome Statute in the State's national criminal jurisdiction.

Article 19 cl 5, would also require amendment to provide that the state and/or corporation brought the challenge at the 'earliest opportunity'. Article 82 currently provides that 'either party' may appeal a 'decision with respect to jurisdiction or admissibility'. This wording is sufficiently broad to ensure that a decision by the Pre-Trial Chamber or the ICC<sup>17</sup> on the application of an exception-based approach could be appealed without requiring a specific amendment.

The exception-based approach could be varied in a number of ways. It could be narrowed to exclude the ICC's jurisdiction only when a state that does not recognise corporate criminality for the purposes of Art 5 of the Rome Statute prosecuted the individuals involved in the corporation for the offence (Kyriakakis 2008, 129). Alternatively, the exception-based approach could adopt some of the features of the Conventions, such that states that did not recognise corporate criminality were excluded from the ICC's jurisdiction if the state had instituted civil or administrative proceedings against the corporation in connection with the offence.

Concerns may be raised that an exception-based approach, in whatever form, ought not to be pursued, as it would undermine the ICC's 'progressive purpose' and create a safe haven that would provide impunity for offending corporations (Kyriakakis 2008, 130). These are legitimate concerns. However, they must be balanced against the advantages of formulating a proposal that would result in most corporations being included in the Rome Statute when complementarity concerns would otherwise present an obstacle to achieving this aim.

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17 Under Art 19 cl 6, challenges to the ICC's jurisdiction or the admissibility of a case shall be heard by the Pre-Trial Chamber before the charges are confirmed. Once the charges have been confirmed, the challenge will be heard by the Trial Chamber.

Including most corporations within the ICC's jurisdiction would be consistent with the ICC's 'progressive purpose'. It would represent a major development in further realising the ICC's goal of preventing and punishing serious international crimes. It may also reduce the likelihood that state parties that did not recognise corporate criminality would withdraw from the Rome Statute if their corporations were not exempt from any extensions of the ICC's jurisdiction to corporations.<sup>18</sup>

Any risk that an exception-based approach would encourage the creation of corporate safe havens would be a minimal risk. The trend towards recognising corporate criminality in all national criminal jurisdictions (Chiomenti 2005, 8; Ruggie 2007, 9) suggests that over time the states and corporations falling within an exception to corporate liability under the Rome Statute would decrease. In addition, a decision by a corporation to relocate to, or register in, a potential corporate safe haven is unlikely to be solely driven by the possibility of availing itself of an ICC exception to corporate criminal responsibility for involvement in serious international crimes, particularly as the exception would be unlikely to operate retrospectively. While it would vary according to the particular circumstances of each corporation, the Rome Statute exception would be only one factor in a corporate decision to locate in a jurisdiction exempt from the ICC's mandate.

## **Conclusion**

Until the Assembly of States Parties considers any renewed proposal to extend the ICC's jurisdiction to include corporations, it is not possible to assess the resolve with which state parties will argue that complementarity concerns prevent corporations being included in the ICC's jurisdiction.

It is possible that states may be dissuaded of their complementarity concerns such that state parties would be willing to extend the ICC's jurisdiction to corporations. However, if this does not occur, an alternative approach would be required if there was to be any possibility of extending the scope of the ICC's jurisdiction to corporations.

Incorporating into the Rome Statute the approach in the Conventions of recognising criminal, civil or administrative redress for corporate wrongs is problematic, as the ICC does not have the capacity to directly enforce non-criminal remedies. Providing the

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18 If an amendment is accepted by a majority of state parties, any state party that has not accepted the amendment may withdraw from the Rome Statute under Art 121. The notice of the withdrawal must be given within one year of the amendment coming to effect and is effective immediately.



ICC with the jurisdiction to pursue a 'middle ground' in connection with corporations could be restricted to corporations registered in states that did not recognise corporate criminality. Any other approach would create the situation whereby the ICC's jurisdiction would be inconsistent with, rather than complementary to, the obligation on the state party to institute criminal proceedings against the offending corporation, when the state recognised the concept of corporate criminality. It would be inappropriate if the ICC itself instituted non-criminal proceedings against the corporation in those circumstances.

This incongruity would be avoided if any potential non-criminal proceedings were limited to corporations that were incorporated in states that did not recognise corporate criminality. However, this would limit the number of corporations that would be potential defendants in non-criminal proceedings instituted by the ICC as an increasing number of states recognise corporate criminality. In such circumstances, state parties to the Rome Statute may be reluctant to negotiate the various legal complexities of incorporating a non-criminal procedure into the Rome Statute when only a limited number of corporations would be eligible to appear as defendants in such proceedings.

Given these considerations, an exception-based approach that excludes from the ICC's jurisdiction any corporation that is incorporated in a state party that does not recognise corporate criminality for the purposes of the Rome Statute may be the only means by which it is possible to extend the ICC's reach to the majority of corporations.

The exception approach is not ideal. It has limitations and potential risks. Its advantage is that it presents a means of circumventing state parties' complementarity concerns. In doing so, it may enable the ICC's jurisdiction to be extended to most TNCs, realising a major development in ending corporate impunity for serious international crimes. ●

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