Individual Criminal Responsibility and Mining Companies

The application of International Criminal Law to corporate activity

Dr William Wiley
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- Managing Director of Tsamota Ltd
- Canadian Armed Forces, Canadian War-Crimes Section, International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and Legal Advisor to the Iraqi High Tribunal
1. Corporate accountability in the current environment
2. Corporate accountability in International Criminal Law
3. Prosecution and Jurisdiction
4. Scenarios
5. Solutions
6. Concluding remarks
1. Corporate accountability in the current environment

- Growing pressure from society to hold companies and their leaders accountable
- Avenues of ‘liability’
  - Civil litigation (*Kiobel*; *HudBay*)
  - Reputational risks under ‘soft law’
- Criminal Liability: a third avenue
2. Corporate accountability in International Criminal Law

- Foundations of International Criminal Law
- Main offences:
  - War crimes
  - Crimes against humanity
  - Genocide
  - Other gross human rights abuses amount to crimes under international law (e.g., apartheid)
2. Corporate accountability in International Criminal Law (cont.)

- Modes of liability:
  - Ordering
  - Aiding and abetting
  - Common Purpose
  - Superior / Command Responsibility

- Actus Reus / Mens Rea
Genesis of international criminal liability for corporate conduct

- *Flick; Farben*
  - Slave labour
  - Plunder
  - Supporting a Criminal Organisation

- *Krupp*
  - Murder; extermination; torture; slave labour

- *Zyklon B*
  - Aiding and abetting murder
The Expanding Web of International Criminal Liability: Recent Cases

- **Van Anraat Case (2009)**
  - Dutch dealer of chemicals used in chemical weapons in Iraq war
  - Convicted of complicity to war crimes
  - Sentenced to 17 years imprisonment
  - “…the Defendant must have at least known that it was to be expected that the produced mustard case would be implemented on the battlefield.”

- **Van Kouwenhoven Case (Ongoing)**
  - Dutch dealer of timber in Liberia
  - Accused of participation of massacre of civilians through hired security services

- **Danzer Group (Ongoing)**
  - Senior manager of German timber company accused of responsibility over human rights abuses against Congolese community
  - Ongoing investigation on the duty to ensure that local security forces do not commit sexual violence and other human rights abuses.
3. Prosecution and Jurisdiction

- Prosecution
  - ICC
  - *Ad Hoc* Tribunals
  - Domestic Courts

- Jurisdiction
  - Principle of Universality
  - Domestic Law
4. Scenarios

- **Scenario A:**
  - MineCo operates a mine in south-eastern DRC where its operations are under threat by local militia
  - MineCo calls in government forces to establish order and provides transportation to government forces
  - Government forces commit crimes during its operation
  - Same scenario can apply to private security corporations

- **Scenario B:**
  - MineCo operates a mine in Mali where artisanal miners are present and working in dangerous conditions
  - MineCo calls in Secure Corp (a private security firm) to relocate artisanal miners
  - Secure Corp engages in the unlawful use of force during its operations, committing the war crime of forced deportation during its operation

- **Scenario C:**
  - MineCo operates a mine in South Africa.
  - A wild cat strike erupts and MineCo calls in Secure Corp (a private security firm) to manage labour unrest
  - In the course of re-establishing order, armed Secure Corp employees shoot and kill 8 MineCo workers
Solutions

- Security and Human Rights Assurance
- Security and Human Rights Training
- Investigations of Alleged Human Rights Abuses and Security Force Violations

Dr William Wiley
wiley@tsamota.com
Conclusion

Liability under International Criminal Law for corporate activities is a very well-established and tangible risk for operators in the extractive resources industries.

The conviction of individuals for international offences perpetrated by omission is commonplace.

Companies should include the risk of criminal prosecution of their officials as any part of a general risk assessment strategy.
Tsamota Security Assurance Services

Tsamota is a security and justice sector consultancy that works in the field alongside its clients to mitigate physical, reputational, legal and financial risks.

Tsamota is comprised of experts drawn from the ranks of the UN, the International Criminal Court and national police, military and intelligence forces. The natural-resources team has extensive on-the-ground experience and includes recognised experts in the fields of International Criminal Law and security management. As such, the firm offers clients a deep knowledge of the security issues faced by natural-resource companies as well as the legal context in which clients and their associated government and private security forces operate.

In addition to its private sector practice, Tsamota delivers investigative and justice reform services on behalf of public sector clients in some of the world’s most challenging jurisdictions. Current clients include the UN, EU, UK and US governments.

Dr William Wiley
wiley@tsamota.com