

INTERNATIONAL CRIMINAL COURT TO PROSECUTE BUSINESS AND HUMAN RIGHTS

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Legal Briefings - By **Antony Crockett**, **Marco de Sousa** and **Jerome Temme**

In what many NGOs are calling a warning shot to company executives and investors, the International Criminal Court (**ICC**) has indicated it will prioritise cases involving the destruction of the environment, illegal exploitation of resources and land-grabbing.

Following [recent calls](#) for international tribunals - including the ICC - to investigate corporate involvement in land-grabbing and environmental destruction committed during peacetime, the ICC's Office of the Prosecutor published a [policy paper](#) outlining its intention to prioritise these cases.

Currently the risk of a company or its executives being prosecuted at the ICC for these crimes seems remote; there are serious practical and jurisdictional hurdles to any prosecution actually taking place. Nonetheless, the reputational risks for a company of being associated with an investigation into any of the crimes that fall within the ICC's jurisdiction - genocide, war crimes and crimes against humanity - could be devastating.

While the ICC has no jurisdiction to prosecute companies, individual company executives can in principle be investigated in connection with corporate complicity in widespread environmental destruction or land-grabbing amounting to a crime against humanity. Such an investigation (and any resulting prosecution) would, however, face a number of considerable legal hurdles.

Hurdle 1 - individual criminal responsibility: Where corporate involvement in land-grabbing, widespread environmental destruction or illegal exploitation of natural resources amounting to an international crime is alleged, it must be established that the relevant executive at that company bears individual criminal responsibility for that crime. This poses considerable practical and evidential hurdles, particularly where the alleged corporate involvement is indirect.

Hurdle 2 – Jurisdiction: the ICC has a limited personal, geographical and temporal jurisdiction. It can only exercise jurisdiction over crimes committed after 1 July 2002 by an individual in the territory of a State Party to the Rome Statute or by nationals of a State Party. Presently, this excludes countries such as the USA, China, India and most of South East Asia, and a number of African states have recently signalled their intention to withdraw from the Court.

Hurdle 3 – Admissibility: The ICC is a court of last resort. Even if the relevant company executive is a national of a State Party, the Prosecutor will only declare a case admissible if the national courts of that State Party are unwilling or unable to prosecute the crime themselves.

Caution: the indirect risks for companies

Although the chances of direct investigation or prosecution seem remote at present, there remain a number of risks for companies in this area.

Reputational risks: any association with an ICC investigation or prosecution could have devastating reputational consequences for a business given the serious gravity of the crimes with which the Court is concerned.

Claims before national courts: More likely than ICC prosecution are civil or criminal claims brought in national courts against corporations or executives. Recent examples include the English High Court litigation against Tate & Lyle relating to alleged land-grabbing in Cambodia and the [potential investigation and litigation of claims](#) relating to climate change against companies in the US.

International soft law instruments: Conduct adversely impacting on human rights that falls short of constituting a crime against humanity may have other consequences for companies. For example, many multinationals are increasingly including in their contracts a requirement that suppliers and other contractors comply with corporate human rights policies. A failure to respect human rights can result in a complaint being brought to one of many [National Contact Points](#) under the OECD Guidelines for Multinational Enterprises or could lead to civil claims being brought against the company in national courts.

This is yet another reminder that corporate conduct harming human rights is subject to increased scrutiny. It highlights the importance for businesses of adhering to international standards such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines, including by conducting human rights due diligence to monitor the impact of their operations on human rights on an ongoing basis.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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