



University of Zagreb  
Faculty of Law

# Serious Economic Crimes as Crimes Against Humanity – A new mandate for the ICC?

Doc.dr.sc. Dr.h.c. Sunčana Roksandić Vidlička

Department of Criminal Law  
Faculty of Law, University of Zagreb, Croatia

# UNICRI/MPI, Freedom from Fear Magazine, ISIS and security

- „...Those who use weapons and resources and violate human rights are as guilty as those who collaborate in business with them. Both groups should face tangible sanctions, investigations and criminal trials”
- Cindy J. Smith, UN Interegional Crime and Justice Research Institute, director



# Core International Crimes

- ICC - Honeymoon phase is over
  - Too complex and difficult to grasp – different nature and contexts
  - International response
  - the *ratio* of ICJ is to primarily deal with **state-sponsored** crimes that states are **unwilling** to prosecute in light of their **involvement**/ or unable to prosecute.
  - political white collar crime



# Role of business (companies)

- Powerful (new) players; richer than countries
- Role of businessman and corporations in atrocities (AIDP)
- UN Charter, Article 24/2 SC- maintenance of peace and security, SC meeting September 10, 2018



# Grand corruption (?)

- Grand corruption cannot be characterized as a Third World Phenomenon, **the problem is global**, depending often on multinational corporations that knowingly exploit, support and profit from kleptocracy, often making huge off-the book payments to corrupt leaders in exchange for deals granting access to natural resources or arms markets. ...

## SECURITY THREAT

(also see Starr, 2007) .... UNICRI .... SC meeting Sep, 10, 2018



# Question

- **Serious and whidespread econimic crimes violate all human rights, devastating consequences, root causes of conflict**

*Could goals of international law/justice be achieved if serious and widespread economic criminal acts that occurred in the process of pre-conflict/conflict/post-conflict are not prosecuted?*

- ICC - Crucial importance for the ICL
- May the goals of the the international criminal law be achieved without the ICC?
- **The application and interpretation of law must be consistent with internationally recognized human rights ( Art. 21(3) ICCSt)**



# Discussion points

- whether **serious economic criminal offences** should be qualified as crimes under international criminal law or **prosecuting** serious and widespread economic offences as crimes against humanity.
- What is **the most appropriate economic offence(s)** to be considered as crime(s) under the international law?
- Accordingly, some possible approaches of **how to address these crimes are articulated**, e.g. amendments to the International Criminal Court's *ratione materiae* jurisdiction or through interpretation of Art. 7(1)(k) of ICCSt



# ICC Preamble

- Recognizing that such grave crimes threaten the peace, security and well-being of the world





# Applicable law Art.21 ICCSt

1. The Court shall apply:

(a) In the first place, **this Statute, Elements of Crimes** and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, **applicable treaties** and the principles and rules of international law, including the established principles of the international law of armed conflict;

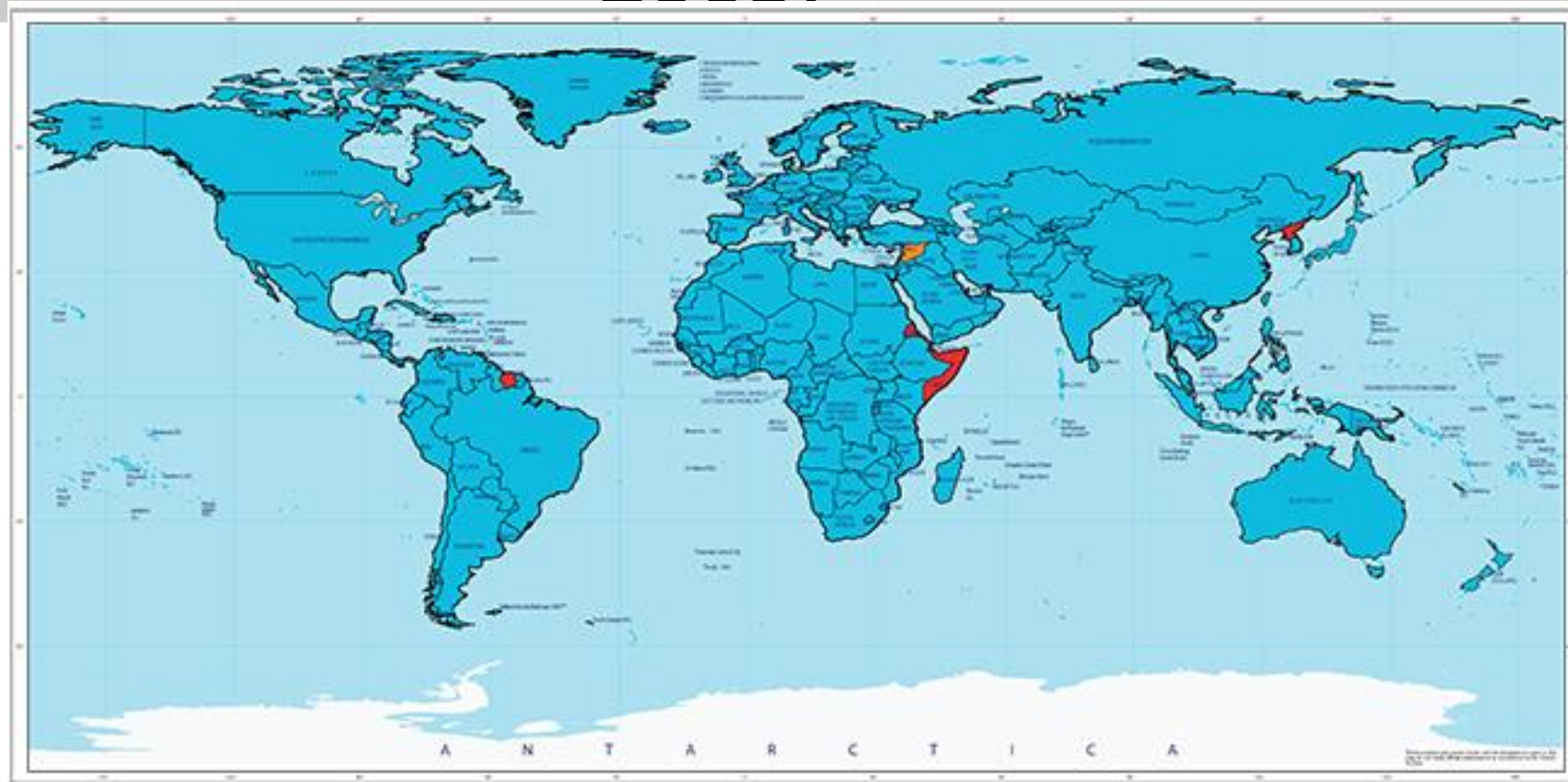
(c) Failing that, **general principles** of law derived by the Court from national laws of legal systems of the world including, as appropriate, **the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.**

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. **The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights,** and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.



# UNCAC, Entry into force: 14 December 2005.



Parties: **186**  
Status as of: **26 June 2018**

- States Parties
- Signatories
- Countries that have not signed or ratified the UNCAC

# UNCAC

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development

Koffi Anan, 2004



# Major downfall – ESCR

- *“Of all domains where state and intergovernmental action on human rights have **failed** to achieve anything more than modest success, the development of effective measures for the prevention and remedying of **violations of economic, social and cultural rights, must surely classify as one of the most glaring.**”*

Leckie (1998)....



# Economic and social rights

- In his State of the Union Address in 1944, *Roosevelt* advocated the adoption of an “Economic Bill of Rights”, emphasizing that “we have come to the clear realization of the fact *that true individual freedom cannot exist without economic security and independence.* *“Necessitous men are not free men”. People who are hungry and out of job are the stuff of which dictatorships are made.*” “all of these rights spell *security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.*”
- Many of economic and social rights which subsequently came to be included in the Universal Declaration of Human Rights and later in the International Covenant on Economic, Social and Cultural rights (Optional Protocol, May 2013);
- INDIVISIBLE



# Transitional justice – ICC

- Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.
- *measures include criminal prosecutions, truth commissions (e.g. the South African Truth and Reconciliation Commission (1995)), reparations programs, and various kinds of institutional reforms.*
- *Lately, truth commissions include violations of economic and social rights*
- *Arab spring*
- *ISIS*



- *In spite of many achievements and occasional exceptions, transitional justice has, like mainstream justice, not yet dealt with economic, social, and cultural rights adequately or systematically. I suggest that transitional justice should take up the challenges to which mainstream justice is reluctant to rise:*

*acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social, and cultural rights.... A comprehensive strategy for transitional justice would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place.*

*Arbour, 2006.*

# Liberia

- Despite its abundant natural resources, including tropical timber, rubber trees and minerals, Liberia has remained one of the poorest countries in the world. Throughout the period of January 1979 – October 2003, **these resources benefited only a small, elite group of Liberians, as well as select foreign traders.** Economic actor and economic activities played a crucial role in contributing to, and benefiting from, armed conflict in Liberia.... Furthermore, **private companies benefited from dealings with corrupt public officials** to obtain lucrative natural resource concessions and exclusive licenses and, in many instances, formed corporate entities with perpetrators of grave human rights violations... **Corporations and private individuals engaged in a host of illegal and anti-competitive activities such as tax evasion, bribery, looting, forced displacement of civilians, money laundering, arms smuggling and illegal price fixing."**
- *TCR, 2009, Introduction, para. 1-4, pg. 1. (established in 2005)*





# TJ- 2011

- *It is increasingly recognized that States marked by ineffective governance, repressive policies, poverty, high rates of violent crime and impunity pose significant threats to international peace and security. **Deep capacity deficits in State justice and security institutions...widespread corruption and political interference, lead to diminishing levels of citizen security and economic opportunity... Transnational organized crime emerges in parallel with increasing instability, ...***

*United Nations S/2011/634, 12 October **2011**, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*

- Tremendous step has been done in last decade culminating with publishing of **UNHR, Office of the High Commissioner's Publication on Transitional Justice and Economic, Social and Cultural Rights in 2014**
- rights that need protection when transitional justice mechanisms are applied with clear examples of national and regional judicial protection of those rights



# MYANMAR

## UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes

by [rohingyakhobor.com](http://rohingyakhobor.com) | Aug 6, 2019 | [UN Fact Finding Mission](#), [United Nations](#) |



# ROOT CAUSE?

- The report, for the first time, establishes in detail the degree to which Myanmar's military has used its own businesses, foreign companies and arms deals to support brutal operations against ethnic groups that constitute serious crimes under international law, bypassing civilian oversight and evading accountability.



# TJ-ICC

- Internal changes in the system of international human rights and security and TJ call for change and adaptation of international criminal law.



# DCR - Ocampo

- ...investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted...
- the activities of companies within DR Congo: the aim of exploiting natural resources - gold, diamonds and oil
- Ocampo's request to state parties to pass on evidence of such illegal transactions to the ICC „has seemingly gone unheard – at least no concrete investigations have been undertaken so far”. Jessberger, 2010. 2019
- UN SC established the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth: 157 companies are directly or indirectly involved in illegal exploitation of natural resources which enables rebel groups to buy arms and commit war crimes and crimes against humanity...



# Sierra Leone

- ...The devils we dance with everyday are not only the criminal actors being prosecuted, but the peripheral players who have been involved in this decade long tragedy. These actors include gun runners, diamond dealers, the Russian and Ukranian mafia, other international criminal organizations, and terrorists, to include Hezbollah and Al Qaeda. All of them were involved in West Africa taking blood diamonds from the mines od eastern Sierra Leone and trading them for cash to buy weapons to sustain the conflicts...The catalyst for this type of non-traditional conflict is impunity and corruption...

D.M.Crane, Dancing with the Devil: Prosecuting West Africa Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflict, 2005, Crane while serving as a head prosecutor at the Sierra Leone Special Court.



# Human security

- One of the most widely-cited views of human security came in 2003: the 2003 Final Report of the UN Commission on Human Security.
- The goals mentioned in the 2003 Final Report are often summarized as the “*freedom from fear and want*”



# Security

## Human Security, TJ and ICJ

- protecting the people in violent conflict; supporting the security of people on the move; establishing human security transition fund for post-conflict situations; encouraging fair trade and markets to benefit the extreme poor; working to provide minimum living standards everywhere; according higher priority to ensuring universal access to basic health care; developing an efficient and equitable global system for patent rights; empowering all people with universal basic education; clarifying the need for a global human identity while respecting the freedom of individuals to have diverse identities and affiliations....
- “as with the threat of international crime, one major problem regarding economic security...is the fact that this topic potentially involves or touches upon virtually every person on planet”. Smith, 2010.





# SERAP

- Socio-Economic Rig
- Rights and Accountability Project (SERAP), has petitioned in 20 April 2012 the Prosecutor of ICC to investigate “whether the **widespread and systematic corruption** over the \$6 billion in the fuel subsidy scheme impacted on Nigerians, ... amounted to inhumane acts which intentionally caused great suffering (or serious injury to body or to mental or physical health)” to be considered **as the crime against humanity**, as provided by Article 7 of the Rome Statute of ICC.
- Petition was justified with the explanation that the common denominator of crimes against humanity is that “they are grave affronts to **human security and dignity**... (and cause) uneven consequences against the vulnerable groups of the society”. “**The reported massive corruption has caused so much suffering, and thrown millions of Nigerians deeper into poverty, depriving them their human dignity, and access to resources and capabilities, choices, security and power necessary for enjoyment of legally recognized economic, social and cultural rights**



## Art 41. OTP Policy on Case Selection and Prioritization

- **The impact of the crimes** may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the **social, economic and environmental damage inflicted on the affected communities**. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, **the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land**.



- Article 7

In relation to cases not selected for investigation or prosecution, it should be recalled that the goal of the Statute to combat impunity and prevent the recurrence of violence, as expressed in its preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice

The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.



# REGIONAL RESPONSES

- REGIONAL RESPONSES
- AU corruption, money laundering
- EU
- NATIONAL RESPONSES



# Khulumani case

- “*Apartheid regime in South Africa could not have survived without the business support of certain companies, such as IBM and Ford.*” Both companies were suit, together with *Daimler General Motors and Rheinmetall*, in Khulumani case for aiding and abetting the perpetration of extrajudicial killings, torture, prolonged and arbitrary detention, indiscriminate shooting and rape.
- Dismissed on the jurisdictional basis (Kiobel)
- *Kiobel v. Royal Dutch Petroleum Co.*, 2013, a United States Supreme Court made a decision in which the court found that the Alien Torts Statute presumptively does not apply extraterritorially
- According to national director of the Khulumani Support Group Marjorie Jobson, , “This is not only **a massive blow** for the survivors of apartheid but also **for the world** because the **mechanisms to hold corporations accountable for perpetrating human rights are very weak.**”



# Sanader

- In the judgment against Sanader it was pointed out that he abused his position for **its own enrichment and not for the common good**. According to the judgement (2012/2014), *‘this judgment sends a message to people in power, current and future, that holding a public office must be performed for the common good and in the interest of society!’* ...Sanader’s behavior harmed *‘not only vital strategic interests but also damaged the reputation of Croatia in the world... contributed to apathy and disillusionment of people in the system, created a belief among young people that **the honest labor does not pay, but the violation of the law and the morality of the society does**’*. The judgment emphasized that Sanader was *‘the architect of the system ...that was an illusion of democracy’*



# CORPORATE RESPONSIBILITY IN WAR CRIMES, A NEW LEGAL BATTLEFIELD

- a French court dismissed a charge against **Lafarge** of complicity in crimes against humanity in Syria (November 2019)
- charges are based on facts occurring between 2011 and 2014 when Lafarge decided to maintain its business activities in Syria in the midst of the Syrian Civil War (Lafarge, its Syrian subsidiary, two senior executives at the time and its current CEO .
- The company allegedly bought raw material from diverse jihadists groups, among which ISIS (Islamic State of Iraq and the Levant), and allegedly negotiated safe passage of its workers and products in exchange for compensations amounting to 13 million euros.
- “financing terrorism”, “violation of an embargo” and “endangering the lives” of former employees of Lafarge’s Jalabiya plant in Syria (Lafarge)



- Lundin Petroleum, a Swedish company whose top executives are facing prosecution in Sweden for allegedly aiding and abetting war crimes in Sudan.





# Netherlands

- Guus Kouwenhoven
  - delivering weapons to Liberian dictator Charles Taylor in 2000 and 2002 in return for special treatment for his timber company.
  - aiding and abetting war crimes (18.12.2018, arrested on 18 March 2005)



# Possible (transitional) economic crimes under international law

1. *Economic crimes as serious violations of ICESCR/1966*
2. *Crimes against Future Generations*
3. *Economic Opression*
4. *Indigenous Spoliation*
5. *Illegal Enrichment*
6. *Grand Corruption/UNCAC crimes*
7. *Considered as Crimes against Humanity (other inhumane acts);*
8. *(Crimes against humanity; War crimes, (e.g. pillage); Genocide)? ALREADY*



# Crimes against humanity, Art. 7 ICC

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Murder, Extermination, Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;



- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.



# ICL?

- Mental element – intent or knowledge?
- Aiding and abetting standard – with the purpose, significant contribution etc?
- Causation/contribution



# Alternatives

- Regional criminal justice – African Court
- EU- EPPO
- New design: Creation of the new International Anti-Corruption Criminal Court
- Enhancing other TJ mechanism – truth commissions; national prosecutions?



...

- Transparency of prosecutorial selectivity
- Diminishing the political influence? *Realpolitik*
- Stronger link to the UN system? Economic sanctions
- Amending *ratione materiae* jurisdiction:
  - Crimes against future generations, famine, crimes against humanity, indigenous spoliation...
- Prosecution of other crimes as „other inhumane acts”
- Leave it as it is?



# Movement outside of icl

## Oslo Outcome Statement on Corruption involving Vast Quantities of Assets (June 14, 2019)

- Rec. 46: innovative ideas to end impunity should be explored and some proposals could be further analysed and discussed in more detail, including, for example, the establishment of regional mechanisms for prosecution, or international mechanisms, such as establishing an international anti-corruption court, with respect for the sovereignty of States.





# Rec. 47

- Other innovative ideas which could be further analysed and discussed were, with respect the sovereignty of States, for example, the establishment of an international special rapporteur for anti-corruption, the development of a protocol to UNCAC on corruption involving VQA, **exploring the possibility of extending the jurisdiction of the International Criminal Court to include corruption involving VQA**, creating international commissions against corruption and impunity,



# Too big to prosecute

If you want to indict industrialists who helped to rearm Germany, you will have to indict your own too. The Opel Werke, for instance, who did nothing but war production, were owned by your General Motors.—No, that is no way to go about it. You cannot indict industrialists.

*(Hjalmer Horace Greeley Schacht,  
war crimes defendant,  
International Military Tribunal at Nuremberg)*

•

Jacobson, (2005)



- Serious (systematic and whidespread)
- Economic offence –UNCAC crimes:
- Bussinesman – aiding and abeting



Thank you for  
your attention!



University of Zagreb  
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[suncana.roksandic@pravo.hr](mailto:suncana.roksandic@pravo.hr)