

Some thoughts on ways to overcome difficulties in prosecuting corporations

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Thank you to Eurojust for inviting me. The task assigned to me with this presentation is particularly difficult as there are very few cases of actual investigation and/or prosecution of business corporations. It may be too early to talk about recipes or models on how to overcome difficulties when in fact we are just now identifying those difficulties. So I do this presentation with a sense of humility and to share just a few thoughts on the most acute dilemmas prosecutors face and some guiding principles that can help them to deal with those dilemmas.

To do this I will build on previous presentations made at this seminar and use some of the cases that have been explained before. But I will add a bit more of detail on each, and will add one to focus only on three of those cases that are among the ones most advanced in the investigation stage: the Riwal/Lima Holding, the Amesys and the Lundin Petroleum cases.

The Amesys case¹

The facts - When Tripoli was liberated, on August 29, 2011, journalists from the Wall Street Journal entered the building where the Libyan security forces had a centre for monitoring communications of Libyan citizens. They found manuals written in English carrying the logo of Amesys, a French subsidiary of the Bull Group.

In 2007 Amesys had entered into an agreement with the Government of Libya to make technology available for the purpose of intercepting communication, data processing and analysis. Agreements for technological cooperation, and more particularly software installation, included not only the supplying of equipment but also a phase of development, assistance and monitoring of operations.

¹ Based on information provided by FIDH and/or publicly available

On October 19th, 2011, the FIDH and Ligue de droist de l’homme filed a criminal complaint against X, so that the investigating judge can determine the suspects and eventually prosecute. The complainants identifying the company Amesys, a subsidiary of Bull, as the suspect of crimes allegedly committed through the supplying to Gaddafi’s regime of a surveillance system intended to monitor communications of the Libyan population. The case was assigned to the specialized unit in war crimes, crimes against humanity and genocide, recently created within the Paris Tribunal.

In April 2012, the Paris Prosecutor’s office formulated opposition to the opening of the investigation, arguing that the alleged facts could not possibly qualify as criminal acts. The investigating judge appointed for the case had a different opinion and decided to open the investigation. He thought the judicial inquiry would precisely allow the determination of whether or not a crime had been committed and Amesys and its management held as criminally liable. The prosecution appealed this decision. The Paris court of appeal confirmed the opinion of the investigating judge on January 2013 and allowed official investigations.

For the complainants the Paris Prosecutor’s office – who depends on the Ministry of Justice- was obviously reluctant to allow an impartial and independent inquiry into this matter.

On January 10, 2013, five Libyan victims were admitted as civil parties in the judicial investigation. These victims are ready to testify before the investigating judge to explain the conditions under which they were identified, arrested and tortured by the Libyan information services. In the French legal system, the *partie civile* participates, has access to the investigation dossier, collaborates with the gathering of information and evidence. Its participation can eventually support and/or complement the work of the investigating judge. The case is still under investigation.

The Case Against Riwal Group/Lima Holding B.V. for Corporate Complicity in International Crimes

The facts- Lima Holding B.V. is part of the Riwal Group, a Dutch private rental company specializing in the field of vertical transportation. The company rents

out mobile cranes and aerial platforms for use in construction work. In 2006, a Riwal mobile crane was seen constructing the Wall around the West Bank village of Hizma in the Occupied Palestinian Territory (OPT). A year later, Riwal's construction equipment was witnessed again being used to build the Wall next to Al-Khader village in the West Bank. Subsequently, in 2009, residents of the West Bank village of Bruqin saw Riwal aerial cranes constructing factories in the Ariel West settlement industrial zone near their village.

Under international law, the West Bank, including East Jerusalem, is occupied territory. As the Occupying Power, Israel must comply with its legal obligations under international humanitarian law, particularly the Fourth Geneva Convention, and human rights law, including the human rights treaties to which it is party. Israel's settlement policy and the construction of the Wall entail the transfer of its own citizens to the occupied territory,² which amount to grave breaches of the Fourth Geneva Convention. There is an obligation to criminalize Grave breaches under the Fourth Geneva Convention, making them crimes under international law. They are also classified as war crimes under the Statute of the International Criminal Court.

In 2004, an International Court of Justice Advisory Opinion on the Wall held not only that Israel's construction of the Wall in the OPT is unlawful, but also that Israel must stop such construction, dismantle those sections built to date, and provide reparation for the damages it caused.

The International Crimes Act³ in the Netherlands prohibits the commission of war crimes and crimes against humanity by Dutch nationals, including companies. Acts that amount to complicity in crimes, such as the facilitation or the aiding or abetting of crimes are also criminalized.

In March 2010, Dutch lawyers instructed by the organisation Al Haq filed a criminal complaint to the Dutch public prosecutor alleging that Dutch company Riwal was complicit in the commission of war crimes and crimes against humanity through its construction of the Wall and illegal settlements in the occupied West Bank.

² Ibid, Article 49(6)

³ International Crimes Act 2003 (Wet Internationale Misdaden), art. 2(2). See also Access to Justice: Human Rights Abuses Involving Corporations- The Netherlands, ICJ, Geneva 2010, p. 7

Riwal was also accused of complicity in the crimes of persecution and *apartheid*, which are punishable under the International Crimes Act, and also of being responsible for acts that were part of widespread and systematic violations of international law committed by Israel against the civilian population.

Dutch Public Prosecutor's Decision- On 14 May 2013, after three years of investigations, the Dutch Public Prosecutor announced the decision to stop investigations of Lima Holding B.V., member of the Riwal Group and owner of the Israeli branch. In analysing the company's conduct, the Prosecutor weighed Riwal's contribution against the entire settlement enterprise including the Wall, and deemed such contribution as minor. The Prosecutor claimed in the decision that the restructuring of the company was sufficient to terminate activities with Israel.

The case against Riwal represents an initial warning to European companies involved in business with Israeli counterparts in the OPT. Among the positive outcomes is the fact that Riwal Executives came under legal and political scrutiny. The publicity and public pressure surrounding the case meant that Riwal took steps to disassociate itself from its subsidiary and its operations in the OPT (now an Israeli company). In the Riwal case, two warnings from the Dutch Ministries of Foreign Affairs and Economic Affairs to the company were not sufficient for the company to take meaningful measures. Action by the prosecutor, seizure of evidence in Riwal's office and its Executives' homes, combined with the inevitable publicity in this kind of cases led to bold company action and change of behaviour.

However, the outcome was not totally satisfactory for the victims. They considered that there was sufficient evidence to prosecute and were ready to help with their testimonies. The ending of investigations left them without a remedy and consecrated- in their view- impunity for this kinds of cases.

The political context and the ascertaining of facts in this case as in others under analysis are particularly challenging. The Riwal case highlights the need for stronger domestic access to justice for Palestinian victims in Israel, which has experienced limitations. The Dutch prosecutor was not totally confident in obtaining the necessary evidence for a conviction, much of which was located in the OPT and Israel and their collection would require cooperation from the relevant authorities as well as important resources. Israel was unlikely to

cooperate with investigations. In weighing all factors, the prosecutor decided not to move forward.

The "case Lundin"

Since June 2010 district public prosecutor Magnus Elving at the office of the International Public Prosecutor in Stockholm has been conducting a preliminary investigation into crimes against international human rights in Sudan during the period 1997 to 2003.⁴ The investigations are not directed to any particular person or entity, for the time being.

The preliminary investigation was initiated because, inter alia, the European Coalition on Oil in Sudan (ECOS) had published a report – *Unpaid Debt* – which questioned whether Swedish companies have in some way been accessories to crimes in southern Sudan during the relevant period. A Member of Parliament also issued a report and is said to have formally brought the complaint.

Magnus Elving himself informed about the progress and methods followed so far- The investigation is being carried out in several stages together with investigators and analysts from the War Crimes Commission at the Swedish National Bureau of Investigation:

- A large body of documents and reports of different kinds has been assembled and analysed.
- Various individuals have been interviewed systematically and in the correct order so as to provide a structure for continued deliberations. This means that experts, witnesses and people who in different ways may have been adversely affected by criminal acts are interviewed first.
- The findings are analysed to produce an assessment as to whether there are reasonable ground to believe an individual or individuals with Swedish connections may be held suspicious of a criminal act.
- During 2012 and 2013 an investigating team from the Sweden Public prosecution office visited South Sudan, with the cooperation of the national government (Ministry of Justice)

⁴ Information taken from *Comments on the preliminary investigation into crimes under international law in Sudan*, http://www.ecosonline.org/news/2012/20120322_Comments_prosecutor_ENG/

- Only when the preliminary investigation is complete will it be possible to assess whether there are reasonable grounds to begin a prosecution against one or more individuals.

The investigative method is, therefore, the same as in most other criminal investigations – but the time taken is considerably longer because of the complex nature of the investigation.

According to the prosecutor, the investigation aims to answer three central questions:

1. Is it possible to prove that the alleged crimes committed by the army and militia linked to the government against the civilian population in Block 5A took place during the period in question?
2. In this case, were individuals with Swedish connections aware of these crimes?
3. Have these individuals in any way encouraged crime through their “word or deed” – that is to say, have they, through actual measures, decisions, psychological influence or in any other way, supported the perpetrators in their decision to commit criminal acts?

The preliminary assessment of the prosecutor was that– the investigation will take the time it requires.

Reflexion- Analysis

The above examples of three of the most important and most advanced instances of investigation/prosecution of business corporations for crimes under international law show the acute dilemmas that public prosecutors are likely to face in these kind of cases and how difficult to solve them it may be.

Two of those dilemmas relate to the following: first, the exercise of prosecutorial discretion to investigate and/or prosecute or not very serious crimes in the face of external pressure and other circumstances; and secondly, the question of how effectively investigate and/or prosecute serious crimes that may have been committed in third countries and with participation of transnational actors.

The first issue is of particular relevance. One of the key elements of prosecutorial activity is the exercise of prosecutorial discretion. Prosecutors should be able to exercise, with integrity, responsibility and independence, their discretion to

prosecute certain crimes and not others. To do this different elements are taken into account: seriousness of the crime, the likelihood of carrying out an effective investigation and/or prosecution, the resources required and those available, among others. While we understand and respect the exercise of prosecutorial discretion, many people do not understand the particular decisions taken in some of the cases concerning alleged crimes of particular seriousness, and where the margin for prosecutorial discretion is arguably more reduced due to the seriousness of the crimes and the strong public interest in prosecution.

Most of the publicly known cases to date involve big transnational companies in the oil, gas, mining or construction sectors as well as those on information and communication technologies. There are thus big economic and reputational interests at stake for those large companies which translate in economic terms: potential financial losses. The economic interests at stake not only concern the company at issue but also the company home country, because of the employment, taxes and other contributions of the company's operations abroad and at home to the national economy. The same kind of interests apply to the host country, where the company's wholly or partially owned subsidiary operate. There are usually links with diplomatic ties, alliances, broader economic relations and foreign policy objectives. Diplomacy has now an important component of economic/trade diplomacy. When our Presidents/Heads of State visit other countries they frequently are accompanied by businessmen and include in their agendas economic matters. This is not new, and to an extent, it has always been practiced. What is new is that this is increasingly been the subject of public scrutiny.

Thus, when public prosecutors start investigating allegations of serious crimes against transnational companies it is likely that some or many important and powerful people will get upset. Some of them may be involved, or feel even alluded by the fact that certain business practices or operations are shown as questionable. For instance, as a result of allegations against Lundin Petroleum Corp, Talisman Corp and others that had oil operations in South Sudan, all oil operations in that country are now under growing suspicion. Prosecutors may start receiving mostly indirect- but also direct- messages to be "cautious" and to consider the broader implications of their investigations. Some messages may imply that further investigations and prosecutions may in fact be doing more harm than good. Sometimes the messages may be coupled with the increased difficulty to use internal resources to undertake investigations of these proportions.

In the cases we have alluded earlier on, investigations have gone ahead. At least in one of them, the one relation to Amesys, the victims and their representatives say they have grounds to believe there has been political pressure on the prosecutor to oppose to further investigations arguing that the activities under question do not constitute crimes. The investigating judge thought otherwise and decided to continue. This decision was later confirmed by the appeals court.

But external pressure is not the only problem. Sometimes the prosecutor's realisation of the potentially huge ramifications of their investigations may lead to some of them to avoid starting or continuing investigations, especially when their own resources or position is weak. "Don't bite more than you can chew" they may think.

There is no single solution or recipe to deal with these problems and a lot will depend on the circumstances, both external and individual to the prosecutor. However, prosecutors may find guidance from some international principles and norms to take their own decisions or make their choices.

Firstly, the United Nations Guidelines on the Role of Prosecutors and, most clearly, the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (Standards), acknowledge the principle of integrity and impartiality should guide prosecutorial work as part of the justice system. This means that prosecutors should exercise their functions with objectivity, impartiality and in professionalism. Principle 2.1 of the "Standards" provide: "The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference". On the principle of impartiality, the "Standards" state that prosecutors shall, inter alia, "remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest" (3.b)

Secondly, the interest of justice requires action to fight against impunity, and this is particularly strong in cases of crimes under international law, which are especially serious crimes the punishment of which is of concern for the international community. On the need to eradicate impunity, the United Nations and the Council of Europe have adopted sets of principles and guidelines to which a prosecutor may refer for guidance. Notably, the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

and the Council of Europe Guidelines on Eradicating impunity for serious human rights violations, restate the urgency of taking action.

A practical way to deal with dilemmas relating to the exercise of prosecutorial discretion, when that is permitted under national law, could include better communication with civil society, victims, their representatives and other relevant stakeholders who can help mobilise public opinion in support to fair and impartial prosecutorial action. A public relations strategy, with due regard to the duty of confidentiality, could be seen as an important part now of all prosecutorial action. In case of external pressure, including to partner investigators or prosecutors in other countries, it would also be important to have links with protective mechanisms such as the UN Special Rapporteur on the independence of judges and lawyers, or the ICJ Centre for the Independence of judges and lawyers.

The second set of issues is related to the practical difficulties to carry out a successful investigation in the circumstances. This is also linked to the potential decision to continue investigation and/or to prosecute. In fact, this has been one of the most important problems. If we look at the cases relating to Lundin or Riwal we may realise that in those cases the difficulties of having access to the areas where the crimes were allegedly committed or the victims live is of paramount importance. In the first case, the prosecutor took the decision not to continue on the basis that cooperation of the territorial State (Israel) could not be reasonably secured to have access to the territory where the alleged victims live and the events took place. The prosecutor also stated that the investigations so far had already performed a useful function and the company at issue had stopped its behaviour and disengaged from operations in the OPT.

In the Riwal/Lima Holding case, the prosecutor did do a lot to obtain the necessary evidence: it raided the offices of the company and also the domiciles of the company managers. These actions attracted media attention and were sufficient pressure on the company's reputation for it to change course.

In the case of Lundin, the situation seems to be inverted. In this case the prosecutor has managed to carry out investigations in South Sudan, obtained the cooperation of authorities there at the highest levels and continues with investigations (interviews, gathering documents, identifying actors and roles). Reconstructing the events that happened so many years ago and involved people, some of who are no longer there, is a complex and long exercise as we know

from experience relating to other international crimes. Although prosecutor Magnus Elving has not yet raided the company or managers' offices, the company is on notice and has promised full cooperation.

Obtaining cooperation from other jurisdictions- the prosecutorial or investigative authorities in other countries- is something that depends on the existing legal framework- including international treaties-, but also mostly on the good will of the concerned government or authorities. And this is one of the most important challenges. In some cases it may be that the prosecutor or judge in the concerned jurisdiction is willing to cooperate but the executive officials refuse. For instance, in the case of South Sudan government officials facilitated everything. In the case of Israel, there was not a hint of cooperation. In this regard, it should be recalled that international guidelines also call for the provision of "assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation". (standards 5.b)

Cooperation between the prosecutors' offices and civil society groups is also of vital importance. Most cases are initially investigated by NGOs, they have the contacts and know the field, and have close ties with the victims. There is a strong case for cooperation with civil society organisations (confessional groups, human rights NGOs, campaigning groups).

Finally, in relation to a comment that unlike natural persons legal entities such as business corporations do not move or flee jurisdictions I would like to state that in fact they can and actually "flee" from jurisdictions when the liability they face in those jurisdictions is too high. The example of the Canadian company Hudbay Minerals Inc and its subsidiary in Guatemala is a case in point. The Guatemalan subsidiary has been accused of murder and sexual rape performed through its security guards against locals demonstrating against its operations. The Guatemalan company has since been sold to Russian investors who are based now in Cyprus. Guatemalan law does not recognise criminal liability for legal entities and the victims were ready to take action against the parent company in Canada. They may also consider now their chances in Cyprus.

Thank you for your attention.

30 November 2013