



New threat of life imprisonment for directors of companies

By Ross Dixon and Chris du Boulay, Hickman & Rose

A decision by the Swedish government to authorise the prosecution of two corporate directors for aggravated crimes against human rights, highlights an emerging new risk for companies doing business in conflict zones. Lundin Petroleum's chief executive and chairman may now be charged with offences that carry a sentence of up to life imprisonment.

The case arises from events in South Sudan between 1997 and 2003, which at the time was in the throes of an armed conflict between the government and the Sudanese People's Liberation Army, as well as other groups.

In 1997 Lundin Petroleum, a Swedish oil company, formed a consortium together with the Malaysian company Petronas, the Austrian company OMV and the Sudanese company Sudapet in order to carry out oil exploration and production in the war-torn region.

According to the European Commission on Oil in Sudan (ECOS) which issued a report in 2010, the oil exploration set off a battle for control of the disputed region resulting in the deaths of 12,000 people; 160,000 people being forcibly displaced; and the destruction of homes, livestock and personal belongings.

The allegations of war crimes made against soldiers and militia on both sides of the conflict are widespread and horrific: murder, rape, enslavement, torture and the use of child soldiers.

Where the individuals committing those atrocities, or the leaders who sanctioned them, can be identified, it is of course right that they be brought to justice wherever they can be found. For this reason, many countries claim a "universal jurisdiction" over serious crimes against international law – such as crimes against humanity, war crimes, genocide and torture – allowing them to prosecute individuals no matter where in the world the offence took place. This recognises the stark reality that in many cases it may be impossible to prosecute the offenders in the country where the crimes took place.

What is highly unusual is for a country to seek to prosecute not the combatants or political leaders, but the directors of a company operating in the region.

Universal jurisdiction laws usually require proof of three elements: causation, knowledge and proximity. Prosecutors would therefore need to prove that the directors' conduct enabled, facilitated or had a substantial effect on the perpetration of crimes by others; that they knew or should have known that

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their conduct would be likely to contribute to the crimes of the perpetrator; and there was sufficient closeness between the directors and the principal perpetrator.

For Lundin, the ECOS report is damning. The government of Sudan had a record of committing international crimes, which was well documented and widely publicised. The report concludes that the company was involved in building infrastructure (including refurbishing an airstrip) that enabled the Sudanese Armed Forces and allied groups to perpetrate crimes, and that Lundin was geographically and commercially close to the human rights abuses committed.

Lundin have made it clear they do not accept the findings in the ECOS report, but after a lengthy period of investigation the Swedish Prosecution Authority now have the authorisation to proceed with charges against the individual directors.

In addition, the company has been notified by the prosecutor that it may be liable to pay a corporate fine, and to forfeiture its economic benefits from the alleged offence in the amount of SEK3.2 billion (approximately £286 million).

The Swedish prosecutor has still to decide whether or not to proceed and, according to Swedish commentators, even if the decision is taken to charge the directors, there will still be significant legal hurdles to overcome. Evidence gathering in South Sudan will no doubt have been challenging, and it may be difficult for prosecutors to establish that directors operating internationally had

sufficient knowledge of what was happening on the ground to be held responsible.

That there were violations of international humanitarian law in South Sudan is widely accepted. However, the Swedish government's decision to give authorisation to prosecute the Lundin directors illustrates the potential breadth of allegations of this nature. With a growing number of jurisdictions ratifying and incorporating such international crimes into domestic law, this ought to be an increasing area of concern for companies and directors operating in regions which are blighted by war or conflict, or which deal with regimes which have a record of committing human rights abuses.

Those directly responsible for international crimes ought to be prosecuted, and it ought to make no difference whether they were the foot soldier or the general, or whether they were wearing combat uniforms or business suits at the time the offences were committed. However, the more indirect the connection between the offence and the individual said to have caused it, the more carefully we must tread before jumping to the conclusion that they should be held criminally responsible.

This is a novel prosecution and developments will undoubtedly be watched carefully by businesses and human rights activists alike.

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