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## Free Kick: FIFA's Unintended Role in Illuminating Jurisdictional Gaps of International Criminal Courts

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# FREE KICK: FIFA'S UNINTENDED ROLE IN ILLUMINATING JURISDICTIONAL GAPS OF INTERNATIONAL CRIMINAL COURTS

*“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”<sup>1</sup>*

## INTRODUCTION

The Fédération Internationale de Football Association (FIFA) is more than just the governing body of the world's most popular sport.<sup>2</sup> For perspective, the organization has more member associations than the General Assembly of the United Nations.<sup>3</sup> Due to the popularity of soccer,<sup>4</sup> FIFA yields almost limitless power, and its position in the international community allows it to influence matters outside of the sport.<sup>5</sup> In fact, FIFA itself proclaims: “[W]e have a responsibility that goes beyond the development of football and the organisation of our competitions. FIFA upholds the respect for human rights and the application

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1. *Rome Charter of the International Criminal Court*, UNITED NATIONS, <http://legal.un.org/icc/general/overview.htm> (last visited Oct. 9, 2016).

2. See FREDERICK O. MUELLER, ROBERT C. CANTU & STEVEN P. VAN CAMP, *CATASTROPHIC INJURIES IN HIGH SCHOOL AND COLLEGE SPORTS* 57 (1996).

3. See Anthony Lopopolo, *Kosovo, Gibraltar Admitted as FIFA Members Ahead of World Cup Qualifying*, SCORE (May 13, 2016), <http://www.thescore.com/uefa/news/1026339> (“FIFA . . . has more members (209) than [the] UN General Assembly (193)”).

4. See *The History of the World Cup*, FIFA, <http://www.fifa.com/world-cup/history/index.html> (last visited Oct. 9, 2016) (“An accumulated audience of over 37 billion people watched the France [19]98 tournament, including approximately 1.3 billion for the final alone.”).

5. See Christina Malliris, *The Dark Side of FIFA: Selected Controversies and the Future of Accountability in the Organization*, SOCCER POL. BLOG, <https://sites.duke.edu/wcwp/tournament-guides/world-cup-2014/fifa-institutional-politics/the-dark-side-of-fifa-controversies-and-the-future/> (last visited Nov. 14, 2015); see also *Building a Better Future*, FIFA (Nov. 20, 2014), <http://www.fifa.com/development/videos/y=2014/m=11/video=building-a-better-future-2477118.html> (stating that “[f]ootball has the power to bring people together and to break down barriers. It gives FIFA a platform to improve standards of education, health and sustainability, and to raise living standards and quality of life across the world.”).

of international norms of behaviour as a principle and part of all our activities.”<sup>6</sup>

With such power and influence has come susceptibility to corruption and financial mismanagement,<sup>7</sup> particularly with respect to hosting and televising the organization’s main event: the FIFA World Cup.<sup>8</sup> This rise of corruption has lasted several decades,<sup>9</sup> and up until the summer of 2015, the popularity of the sport provided a shield against arrests and prosecutions of the FIFA organization and its officials.<sup>10</sup>

On May 27, 2015, however, this once impenetrable armor was pierced when the U.S. Department of Justice (DOJ) announced its indictment of nine high-ranking FIFA officials for their involvement in accepting bribes relating to the broadcast of FIFA matches.<sup>11</sup> Over the span of two decades, these officials received bribes from international marketing agencies totaling

6. *Statement From Jérôme Valcke On Labour Rights In Qatar*, FIFA (Nov. 17, 2011), <http://www.fifa.com/worldcup/news/y=2011/m=11/news=Statement-from-jeromevalcke-labour-rights-qatar-1544426.html>.

7. See Malliris, *supra* note 5.

8. *FIFA Admits To World Cup Hosting Bribes, Asks U.S. Prosecutors For Cash*, ESPN (Mar. 16, 2016), <http://www.espnfc.us/blog/fifa/243/post/2830672/fifa-admits-to-world-cup-hosting-bribes> (stating that FIFA admitted to vote buying for the rights to host past World Cups, albeit without specifically identifying which World Cups were the result of vote buying).

9. See also DAVID LAWLER, FREQUENTLY ASKED QUESTIONS ON ANTI-BRIBERY AND CORRUPTION 40–41 (2012). See generally ANDREW JENNINGS, FOUL!: THE SECRET WORLD OF FIFA (2008).

10. The most recent corruption case being against former FIFA President Joao Havalange. See ELESÁ ZEHENDORFER, CHARISMATIC LEADERSHIP: THE ROLE OF CHARISMA IN THE GLOBAL FINANCIAL CRISIS 97–98 (2016); JENNINGS, *supra* note 9.

11. See Press Release, U.S. Dep’t of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), <http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and> (“The defendants charged in the indictment include high-ranking officials of . . . FIFA . . . as well as leading officials of other soccer governing bodies that operate under the FIFA umbrella. Jeffrey Webb and Jack Warner – the current and former presidents of CONCACAF, the continental confederation under FIFA headquartered in the United States – are among the soccer officials charged with racketeering and bribery offenses. The defendants also include U.S. and South American sports marketing executives who are alleged to have systematically paid and agreed to pay well over \$150 million in bribes and kickbacks to obtain lucrative media and marketing rights to international soccer tournaments.”).

\$150,000,000 USD for media and marketing rights for international soccer tournaments.<sup>12</sup> Attorney General Loretta Lynch utilized FIFA's usage of U.S. financial institutions for laundering money as the basis for personal jurisdiction in the United States.<sup>13</sup> The federal indictment in total contained forty-seven counts involving bribery, fraud, and money laundering.<sup>14</sup> The financial gymnastics used by FIFA officials in aiding their financial corruption included: using fake consulting contracts, sending money through associates working in the financial industry, creating shell companies in tax havens, hiding foreign bank accounts, using safe deposit boxes, and surreptitiously concealing cash through a process known as "bulk cash smuggling."<sup>15</sup>

The DOJ indictment also spawned several other investigations with respect to corruption committed by FIFA officials. For example, in 2015 Switzerland commenced an investigation against FIFA's then-president Sepp Blatter<sup>16</sup> for his alleged criminal mismanagement of FIFA for entering into deals that were disadvantageous to the organization.<sup>17</sup> Thereafter, the FIFA Ethics Committee banned Blatter from soccer for eight years due to ethical violations.<sup>18</sup> Subsequently, a 2016 FIFA election was held in which Gianni Infantino was elected as Blatter's replacement,

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12. See Stephanie Clifford & Matt Apuzzo, *After Indicting 14, U.S. Vows to End Graft in FIFA*, N.Y. TIMES, May 28, 2015, at A1.

13. See *id.*

14. See *id.*; see also Rebecca R. Ruiz et al., *A Hemisphere of Soccer Corruption*, N.Y. TIMES (Dec. 18, 2015), <http://www.nytimes.com/interactive/2015/05/27/sports/soccer/fifa-indictments.html> (detailing the DOJ's investigation resulting in the indictment of over forty individuals from twenty-four different nations around the world).

15. See Clifford & Apuzzo, *supra* note 12. For a general overview of "bulk cash smuggling," see *FAQ: Bulk Cash Smuggling*, IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/bulk-cash-smuggling-center/faq> (last visited Oct. 9, 2016).

16. Shortly after the DOJ investigation, FIFA's then-President, Sepp Blatter, stepped down from his position only three days after winning reelection for his fifth term. See Elliott C. McLaughlin, *Sepp Blatter Stepping Down, Says FIFA Needs 'Profound Overhaul'*, CNN (June 3, 2015), <http://edition.cnn.com/2015/06/02/football/fifa-sepp-blatter-presidency-successor-election/>.

17. See Dan Roan, *FIFA: Sepp Blatter Faces Swiss Criminal Investigation*, BBC (Sept. 25, 2015), <http://www.bbc.com/news/world-europe-34363289>.

18. See Rob Bagchi, *Sepp Blatter and Michel Platini Banned for Eight Years by FIFA*, GUARDIAN (Dec. 21, 2015), <https://www.theguardian.com/football/2015/dec/21/sepp-blatter-michel-platini-banned-from-football-fifa>.

who vowed to “the stakeholders, national associations, leagues, clubs, players and . . . fans [that] you will be proud of FIFA, you will be proud of what FIFA will do for football.”<sup>19</sup> Shortly thereafter, President Infantino was named in the 2016 Panama Papers scandal<sup>20</sup> for his signatures on contracts related to alleged bribery in consideration for television broadcast rights of soccer games in South America, where he served as director of legal services of the Union of European Football Associations, the FIFA division overseeing European soccer.<sup>21</sup>

Alongside the various scandals engulfing FIFA and its officials, in 2015 Switzerland also began investigating alleged vote buying and bribery surrounding the successful bids of Russia and Qatar to host the 2018 and 2022 World Cups respectively.<sup>22</sup> Specifically in the case of the 2022 World Cup, news reports alleged that corruption, through the acceptance of Qatari bribes by FIFA officials in exchange for votes for the country, was the only logical reason for the selection of Qatar as host country for the 2022 World Cup.<sup>23</sup> At the time of the country’s selection, Qatar was ill-equipped to handle the infrastructure requirements

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19. See Andy Swales, *Gianni Infantino Vows to Unify Football After Winning FIFA Presidency Election*, SKY SPORTS (Feb. 27, 2016), <http://www.skysports.com/football/news/11095/10183073/gianni-infantino-time-for-fifa-to-regain-its-respect>.

20. Generally, the Panama Papers scandal relates to the 2016 leak by Mossack Fonseca, a Panamanian law firm, which divulged the identity of wealthy and powerful individuals who used Panama as a tax haven to shield assets for the purpose of tax avoidance. For a brief overview of the scandal, see *Panama Papers Q&A: What is the Scandal About?*, BBC (Apr. 6, 2016), <http://www.bbc.com/news/world-35954224>.

21. See Owen Gibson, *Panama Papers: FIFA President Gianni Infantino Pulled Into Corruption Scandal*, GUARDIAN (Apr. 6, 2016), <http://www.theguardian.com/news/2016/apr/05/panama-papers-pull-fifa-uefa-chief-gianni-infantino-corruption-scandal>.

22. See Office of the Att’y Gen. of Switz., *The Office of the Attorney General of Switzerland Seizes Documents at FIFA*, FED. COUNCIL (May 27, 2015), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-57391.html>.

23. See Nik Cubrilovic, *FIFA’s Impossible, Corrupt Qatar Math: How FIFA Had to Have Known Forced Labor Was Needed for 2022’s Qatari World Cup*, DAILY BEAST (May 31, 2015), <http://www.thedailybeast.com/articles/2015/05/31/fifa-s-impossible-corrupt-qatar-math-how-fifa-had-to-have-known-forced-labor-was-needed-for-2022-s-qatari-world-cup.html>; see also *Last Week Tonight* (HBO television broadcast June 8, 2014); James Montague, *Corruption Allegations Rock Qatar’s Successful 2022 World Cup Bid*, CNN (June 2, 2014), <http://edition.cnn.com/2014/06/02/sport/football/football-qatar->

of hosting the event and had a deplorable track record of abusing migrant workers through its *kafala*<sup>24</sup> system that governs migrant labor.<sup>25</sup> Ultimately, Qatar's winning bid for the 2022 World Cup through vote buying had the practical effect of sanctioning even greater mistreatment of migrant workers who would be needed to build the new infrastructure necessary to host the 2022 World Cup.<sup>26</sup> Currently, under the *kafala* system, migrant workers must pay exorbitant fees to recruiting agencies to secure work placement in Qatar.<sup>27</sup> Upon arrival, Qatari law requires migrant workers to be sponsored by their employers, who wield an inordinate amount of power over these individuals.<sup>28</sup> Practically speaking, the *kafala* system provides the opportunity for migrant workers to be exploited by their employers and subjected to inhumane treatment, which frequently includes confiscation of their passports, nonpayment of wages, inhospitable living conditions, and even death.<sup>29</sup> As a result, one can argue that FIFA's actions in granting Qatar the 2022 World Cup were complicit in human rights violations.<sup>30</sup> The argument would be that FIFA officials acted with indifference toward Qatar's human rights violations in awarding the country the World Cup and knew that mistreatment of migrant workers would likely occur in building the country's infrastructure due to Qatar's checkered treatment of this group in the past.

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world-cup-sunday-times/; *The Five-Year Anniversary of the Baffling 2022 World Cup Vote, the Beginning of FIFA's Reckoning*, VICE SPORTS (Dec. 3, 2015), [https://sports.vice.com/en\\_us/article/the-five-year-anniversary-of-the-baffling-2022-world-cup-vote-the-beginning-of-fifas-reckoning](https://sports.vice.com/en_us/article/the-five-year-anniversary-of-the-baffling-2022-world-cup-vote-the-beginning-of-fifas-reckoning); *FIFA Admits To World Cup Hosting Bribes, Asks U.S. Prosecutors For Cash*, *supra* note 8.

24. For an in-depth analysis on Qatar's system of governing immigrant labor, also known as *kafala*, see *infra* Part II.

25. Qatar's plan involved importing migrant workers in order to build the new stadiums, bridges, and roads. See Cubrilovic, *supra* note 23.

26. *Id.*

27. See *infra* Part II.A.

28. *Id.*

29. *Id.* A 2015 report by the International Trade Union Confederation (ITUC) suggested that one thousand migrant workers died in Qatar in 2012 and 2013. See *Qatar Rejects 7,000 World Cup Deaths Claim*, SKY NEWS (Dec. 21, 2015), <http://news.sky.com/story/1609799/qatar-rejects-7000-world-cup-deaths-claim>.

30. See *infra* Part IV.

Yet, FIFA's role in exacerbating human right abuses in Qatar may go unpunished if national courts in Qatar, Switzerland,<sup>31</sup> or the United States fail to prosecute the organization or its officials. Currently, the two principal global bodies for hearing criminal actions—the International Criminal Court (ICC) and the U.N.'s International Court of Justice (ICJ)—cannot hear a case against FIFA or its officials because the charters establishing their existence either do not allow organizations like FIFA to be a party<sup>32</sup> or provide too narrow of a jurisdictional basis to hear a case involving individual liability of FIFA officials as accomplices.<sup>33</sup> The Statute of the International Court of Justice (the "ICJ Statute"), which established the ICJ, prevents the court from having personal jurisdiction over the FIFA organization<sup>34</sup> or its officials because they are not state parties.<sup>35</sup> In addition, the Rome Charter of the International Criminal Court (the "Rome Charter"), which created the ICC, prevents the ICC from exercising personal jurisdiction over the FIFA organization<sup>36</sup> because the charter limits personal jurisdiction to natural persons.<sup>37</sup> Further, the ICC would be limited in exercising personal jurisdiction over FIFA officials because they were not directly involved in the commission of human rights crimes in the form

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31. FIFA is headquartered in Switzerland and is subject to the country's laws and regulations. See Roger Pielke Jr., *How Can FIFA be Held Accountable*, 16 SPORT MGMT. REV. 255 (2013).

32. See *infra* Part II.B.

33. *Id.*

34. Despite being structured as an association with a not-for-profit purpose, FIFA made over \$5.7 billion USD in revenue from 2011–2014. See FIFA, FAQ: SETTING THE RECORD STRAIGHT (2014), [http://www.fifa.com/mm/document/tournament/competition/02/36/32/63/faq\\_en\\_neutral.pdf](http://www.fifa.com/mm/document/tournament/competition/02/36/32/63/faq_en_neutral.pdf); FIFA, FINANCIAL REPORT 2014 (2015), [http://www.fifa.com/mm/document/affederation/administration/02/56/80/39/fr2014weben\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/administration/02/56/80/39/fr2014weben_neutral.pdf).

35. See Statute of the International Court of Justice art. 34, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter Statute of the ICJ].

36. See Rome Charter of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Charter]. The French delegation tried to include "legal persons" or "juridical persons" within the list of persons over which the ICC had jurisdiction during the founding stages of the Rome Charter, but its proposal ultimately was not adopted. See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME CHARTER: ISSUES, NEGOTIATIONS, RESULT 199 (Roy S. Lee ed. 1999).

37. See *infra* Part I.B.

of genocide, war crimes, crimes against humanity, or acts of aggression.<sup>38</sup> Instead, FIFA officials would have to be charged as accomplices to Qatari human rights abuses. Recently, the ICC announced that it will begin prosecuting chief executive officers (CEOs) of multinational organizations.<sup>39</sup> Yet, the scope of these prosecutions will be restricted to environmental crimes committed by the CEOs of an organization, which unnecessarily limits the types of activities and the individuals that the ICC would be able to exercise jurisdiction over with respect to accomplice liability. Further, in general, the individual accomplice liability section of the Rome Charter is written too restrictively,<sup>40</sup> which also limits the power of the ICC to exercise jurisdiction over business officials. Consequently, in order to prevent future organizations and their officials from using jurisdictional deficiencies in the international criminal law system to avoid criminal liability, members of the ICC should draft an amendment to the Rome Charter to enhance the jurisdiction of the ICC and to ensnare future liable parties. The solution calls for explicitly adding nonnatural entities (like the FIFA organization) to the personal jurisdiction of the court, adjusting the *mens rea* requirement in the accomplice liability section from “purposely” to “knowingly,” drafting a clear definition of “substantially facilitate” in the *actus reus* section of accomplice liability, and including language that provides for liability when an accomplice buries his or her head in the sand and, by doing so, exacerbates current human rights atrocities.

This Note will examine how FIFA officials’ acceptance of Qatari bribes to host the 2022 World Cup exposed alarming jurisdictional inadequacies of the ICJ and the ICC to adjudicate cases where white-collar crimes<sup>41</sup> lead to human rights abuses. The

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38. “Directly” involves actual participation and ordering or directing others to commit the crimes. See Rome Charter, *supra* note 36, arts. 5–8.

39. See Shehab Khan, *CEOs Can Now Be Tried Under International Law at the Hague for Environmental Crimes*, INDEPENDENT (Sept. 19, 2016), <http://www.independent.co.uk/news/business/news/ceos-hague-international-law-tried-environmental-crimes-icc-a7315866.html>.

40. See *infra* Part III.B.

41. For the purposes of this Note, white-collar crimes refer to acts of deception whose purpose is to achieve an illicit financial gain. Examples include “tax evasion, insider trading, insurance fraud, bribery, embezzlement, and money laundering.” *White Collar Crime*, HG LEGAL RESOURCES, <https://www.hg.org/white-collar-crime.html> (last visited Oct. 9, 2016). These



deficiencies of these global courts provide the potential for future organizations and their officials to exploit jurisdictional nuance in order to avoid being prosecuted for international crimes. Part I of this Note will discuss the two preeminent judicial bodies for adjudicating international crimes: the ICJ and the ICC. Specifically, this Part will discuss the origins of the two courts and the circumstances that led to their creation. It will also articulate the subject matter and personal jurisdiction of the respective courts and their jurisdictional limitations that prevent them from adjudicating cases where white-collar crimes lead to human rights abuses.

Part II will describe the *kafala* system that governs Qatar's migrant worker population and how the system is used by employers, who are required to sponsor and have legal responsibility over migrant workers, to exploit these individuals. This Part continues by addressing FIFA's involvement in Qatar, which stems from a corrupt bidding process where FIFA officials accepted bribes from Qatar in order to secure votes for the country to host the 2022 World Cup. Such white-collar crimes had the effect of sanctioning further abuses of migrant workers, who would be needed to construct new infrastructure necessary to host the World Cup.

Part III will assess how the jurisdictional limitations of both the ICJ and the ICC prevent these global criminal courts from having jurisdiction over organizations like FIFA. The ICC, however, does provide for jurisdiction over individuals who directly or indirectly commit crimes under its jurisdiction, which include human rights abuses. FIFA's involvement in Qatari human rights abuses was indirect (in that, FIFA officials did not exploit migrant workers themselves), so these individuals would need to be prosecuted in the ICC as accomplices under Article 25(3)(c) of the Rome Charter. This Part then analyzes the merits and limitations of prosecuting FIFA officials as accomplices in the ICC and addresses why the FIFA example is important to the international criminal law construct.

Finally, Part IV offers a solution that advocates for explicitly adding nonnatural persons (like the FIFA organization) to the Rome Charter, which will enable the ICC to exercise personal jurisdiction over these entities. The amendment also calls for

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activities are distinguished from traditional crimes like assault, murder, and rape, which are more violent in nature.

tweaking language within the *mens rea* and *actus reus* portions of Article 25 of the Rome Charter in order to broaden the scope of the accomplice liability section. These adjustments will empower the ICC jurisdictionally to hear cases where white-collar crimes lead to violations of international human rights and will help to prevent future organizations and their officials from exploiting jurisdictional inadequacies of global courts to avoid prosecution.

## I. CURRENT JURISDICTION OF GLOBAL CRIMINAL COURTS

This Part will describe the historical impetus and creation of the two global venues for international criminal adjudication: the ICJ and the ICC. It will also articulate the basis for jurisdiction within each venue and the inherent jurisdictional limitations of each court that prevent them from adjudicating crimes where an organization or its officials' white-collar crimes lead to human rights abuses. The failure of the world's two main international criminal courts to have jurisdiction over these types of crimes is problematic because it allows for organizations and their officials to avoid criminal prosecutions internationally. Without the ability to hear such cases, these courts are inherently inept in an age where businesses and organizations operate globally.

### A. *The ICJ*

The idea of having judicial forums for international dispute resolution is not novel but rather traces back to when *ad hoc* tribunals were established by the ancient Greeks and Romans to resolve cross-border disagreements.<sup>42</sup> This concept was reinforced with the rise of state sovereignty<sup>43</sup> and an increase in interstate disputes.<sup>44</sup> The realization of a functional international court, however, did not occur until the creation of the Permanent Court of Arbitration (PCA).<sup>45</sup> The PCA was initiated by Czar Nicholas II of Russia, whose aim was to achieve "the most objective

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42. To see the extensive history leading up to the creation of the ICJ, see MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 6–12 (2002).

43. State sovereignty was attributed to the Peace of Westphalia in 1648. *Id.* at 6.

44. *Id.*

45. The Hague Peace Conferences of 1899 and 1907 called for the creation of the PCA. See RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN, & PHILIPPE

means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.”<sup>46</sup> Among the objectives of the conferences was to build off the momentum of the prior one hundred years, which accounted for a few successful international arbitrations, and to create “the first global mechanism for the settlement of disputes between States.”<sup>47</sup> Despite having some significant limitations, including the inability for the court to exert jurisdiction on its own, the PCA legitimized the idea of international dispute resolution.<sup>48</sup> Together with the PCA’s successor, the Permanent Court of International Justice (PCIJ),<sup>49</sup> these independent tribunals helped shape the modern day ICJ.

The ICJ is inextricably connected to the United Nations. The U.N. as an organization was established through the multilateral treaty known as the Charter of the United Nations (the “U.N. Charter”),<sup>50</sup> which ultimately promulgated the ICJ as a part of the U.N.<sup>51</sup> Additionally, annexed to the U.N. Charter is the ICJ Statute, which “organize[s] the composition and the functioning of the Court.”<sup>52</sup> Under the U.N. Charter, the ICJ is known as a “principal organ” of the U.N.<sup>53</sup> and stands on equal footing with the other five bodies of the organization, including the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, and Secretariat.<sup>54</sup> As the judicial

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SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 10–11 (2010); AMR, *supra* note 42, at 10.

46. *History*, PERMANENT CT. ARB., <https://pca-cpa.org/en/about/introduction/history/> (last visited Oct. 9, 2016).

47. *Id.*

48. *See* AMR, *supra* note 42, at 11–12.

49. *Id.* at 12. In 1922, the PCIJ was created by the Covenant of the League of Nations and served as a predecessor to the ICJ. The work of the PCIJ, which issued twenty-nine opinions and twenty-seven advisory opinions, played an important role in leading to the ICJ as it established “the first permanent international tribunal with general jurisdiction, [and] made possible the clarification of a number of aspects of international law.” *Publications of the Permanent Court of International Justice (1922-1946)*, INT’L CT. JUST., <http://www.icj-cij.org/pcij/> (last visited Oct. 9, 2016).

50. *See* U.N. Charter art. 92.

51. *Id.*

52. *Statute of the Court*, INT’L CT. JUST., <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited Oct. 9, 2016).

53. *See* Statute of the Int’l Court of Justice, *supra* note 35, art. 7, para. 1.

54. *See* U.N. Charter, *supra* note 50, art. 7.

arm<sup>55</sup> of the U.N., the ICJ provides a venue to hear international disputes.<sup>56</sup> In accordance with the ICJ Statute, the ICJ has subject matter jurisdiction over the interpretation of treaties, breaches of international obligations, damages for such breaches, and questions of international law<sup>57</sup> (which, important for context in this Note, includes violations of international law related to migrant workers).<sup>58</sup> The court thus has general subject matter jurisdiction over international disputes, including indirect human rights violations of migrant workers that were allegedly committed by the FIFA organization and its officials.

The ICJ, however, does have limitations.<sup>59</sup> For example, if an issue is considered a domestic matter, or in other words, is

55. *Id.* art. 92.

56. *See* AMR, *supra* note 42, at 12–13.

57. *See* Statute of the ICJ, *supra* note 35, art. 36, para. (2)(a)–(c).

58. Qatar is a member of the International Labour Organization (ILO), which “brings together governments, employers and workers representatives of 187 member States [of the U.N.] to set labour standards, develop policies and devise programmes promoting decent work for all women and men.” *About the ILO*, INT’L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/lang—en/index.htm> (last visited Oct. 9, 2016). Qatar has ratified five ILO conventions, including ones that address “the elimination of forced and compulsory labor . . . .” HUMAN RIGHTS WATCH, BUILDING A BETTER WORLD CUP, PROTECTING MIGRANT WORKERS IN QATAR AHEAD OF FIFA 2022, at 45 (2012), [https://www.hrw.org/sites/default/files/reports/qatar0612webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/qatar0612webwcover_0.pdf) (citations omitted). The ILO Convention on Forced Labor specifically requires members to oversee that employers do not use tactics that constitute forced or compulsory labor, including:

“financial penalties, denunciation to authorities—including police and immigration—and deportation, dismissal from current employment, exclusion from future employment, . . . removal of rights and privileges” . . . physical confinement in the work location, . . . induced indebtedness (by falsification of accounts, excessive interest charges, etc.), deception about types and terms of work, withholding and non-payment of wages, and retention of identity documents or other valuable personal possessions. (citations omitted).

*Id.* at 45. Because certain actions taken by Qatari employers, including withholding and non-payment of wages and retention and confiscation of passports, violate the ILO Convention on Forced Labor, and thus international law, the ICJ in theory would have subject matter jurisdiction over such Qatari human rights abuses. *See infra* Part II.A.

59. The ICJ receives cases through three primary means, all of which include direct consent of the parties: (1) when the parties agree to compulsory

within the confines of a particular state, the U.N. Charter precludes U.N. intervention in the dispute, and, by extension, the ICJ will not be able to hear such a case.<sup>60</sup> Further, while judgments rendered in the ICJ are binding on the state parties of the lawsuit,<sup>61</sup> the ICJ does not allow the states to appeal the decision in the event one party disagrees with the court's verdict.<sup>62</sup> In addition, while the U.N. Charter allows for amendments to ICJ jurisdiction, the procedure is lengthy and rather cumbersome.<sup>63</sup> More importantly, particularly in the context of FIFA, personal jurisdiction is limited to state parties,<sup>64</sup> making individuals and nonnatural persons, like corporations, non-profits, and associations, outside the ambit of ICJ personal jurisdiction.<sup>65</sup>

As a result, while the ICJ may have subject matter jurisdiction over violations of international law related to the rights of migrant workers, the global court presently lacks personal jurisdiction over the FIFA organization or its officials individually because they are not states. Consequently, the ICJ would only have partial jurisdiction over FIFA or its officials, which would preclude the court from adjudicating any issue regarding human rights abuses committed in Qatar.

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jurisdiction, (2) when the parties agree to submit a specific issue to the ICJ, and (3) through a special provision in a treaty which submits the case to the ICJ if the parties cannot reach a peaceful agreement on their own. See Statute of the ICJ, *supra* note 35, art. 36; BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 298–307 (6th ed. 2011). For an extensive analysis of the different methods of case referral and the pros and cons of each, see AMR, *supra* note 42, at 178–92.

60. See AMR, *supra* note 42, at 45.

61. Article 94 of the U.N. Charter states: "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Recourse for failing to follow the ICJ judgment is administered by the Security Council and the Charter empowers it to "make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. Charter, *supra* note 50, art. 94, ¶ 2.

62. See Statute of the ICJ, *supra* note 35, art. 60.

63. An amendment to the Charter requires a supermajority acceptance by members of the General Assembly, followed by its ratification by the Security Council. See U.N. Charter, *supra* note 50, art. 108; Egon Schwelb, *The Process of Amending the Statute of the International Court of Justice*, 64 AM. J. INT'L L. 880, 880–81 (1970).

64. See Statute of the ICJ, *supra* note 35, art. 34. Nevertheless, non-ratifying states of the U.N. Charter may agree to jurisdiction in the ICJ through an agreement. See U.N. Charter, *supra* note 50, art. 36, ¶¶ 4–5.

65. See U.N. Charter, *supra* note 50, art. 34.

### B. The ICC

The creation of the ICC occurred after the Nürnberg trials of World War II, when the U.N. summoned the creation of an International Law Commission (the “Commission”) to “crystallize”<sup>66</sup> the current sentiment of genocide.<sup>67</sup> Among the many tasks of the Commission was creating a statute dedicated to the establishment of an international criminal court and to define certain types of crimes the court would hear.<sup>68</sup> In addition to the work of the Commission, the U.N. created its own committee dedicated to drafting a statute for the creation of an international criminal court, which was completed in 1952.<sup>69</sup>

The process of creating an international criminal court, however, remained stagnant until the creation of *ad hoc* tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the 1990s,<sup>70</sup> which dealt with wide-scale human rights atrocities perpetrated by individuals.<sup>71</sup> The *ad hoc* tribunals were created specifically to adjudicate certain types of

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66. In international law, the collective actions and decrees by states on a particular issue create norms, which represent a general sentiment of the international community on the rules surrounding that topic. “Crystallization” of law refers to capturing and codifying the emerging rule in order to create a body of persuasive international law. See generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758 (2001).

67. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 8 (3d ed. 2007).

68. *Id.* at 8–9.

69. *Id.* at 9. The International Law Commission subsequently finished its version of the statute in 1954.

70. To see the lasting impression of the ICTY on the prosecution of international crimes, see Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT’L L. REV. 1, 35–36, 62–67 (2014) (discussing how the ICTY has handled some of the most complex cases in a cost efficient manner). To see the jurisdictional impact of the ICTR as a forum for hearing international disputes, see Irene C. Lu, *Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal for Rwanda*, 34 U. PA. J. INT’L L. 859, 882–97 (2013).

71. See *Ad-Hoc Tribunals*, INT’L COMMITTEE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>.

crimes, including crimes against humanity, war crimes, and genocide.<sup>72</sup> Despite their inherent limitations,<sup>73</sup> *ad hoc* tribunals were relatively successful<sup>74</sup> because they ultimately provided insight into how an international criminal court could operate procedurally.<sup>75</sup> While imperfect, the *ad hoc* tribunals' success as forums to adjudicate individual liability of international crimes ultimately led to the signing of the Rome Charter<sup>76</sup> and the establishment of the ICC on July 1, 2002.<sup>77</sup>

At first glance, the ICC seems like a viable court to prosecute FIFA officials rather than the FIFA organization because it provides for jurisdiction over crimes perpetrated by individuals.<sup>78</sup> In addition, the ICC is not a judicial organ of the U.N.<sup>79</sup> Rather,

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72. *Id.*

73. The *ad hoc* tribunals raised issues of the definitional scope of crimes and the defendant's right to a fair trial. For other jurisdictional issues raised by the ICTY, see Bartram S. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, in *ENCYCLOPEDIA OF HUMAN RIGHTS* 130 (David P. Forsythe ed., 2009). For a discussion on the lack of redress for victims of Rwandan genocide through the ICTR, see José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT'L L.* 365, 413 (1999). For a discussion on the failure to address competing jurisdictional claims between the ICTR and Rwandan Courts, see *id.* at 417.

74. Compare RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 209 (2004), and GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 73 (1st ed. 1999), with Timothy L. H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 *MELB. U. L. REV.* 635, 637 (1999).

75. See SCHABAS, *supra* note 67, at 13.

76. The final vote was 120 to 7 in favor with 21 abstentions for a treaty establishing an international criminal court. See Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, 6 *HUM. RTS. BRIEF*, no. 1, 1998, at 1, <http://digital-commons.wcl.american.edu/cgi/viewcontent.cgi?article=1557&context=hrbrief>. The ratification of the Rome Charter, however, was far from a smooth process. In the events leading up to the ratification of the Rome Charter, states formed constituencies aligned with their beliefs. See SCHABAS, *supra* note 67, at 18, 21. The political jockeying between the constituencies slowed down the ratification process to the point where the parties almost missed the deadline for ratification. See generally MICHAEL J. STRUET, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGO'S, DISCOURSE, AND AGENCY* 83–131 (2008). See also SCHABAS, *supra* note 67, at 18, 21.

77. See Rome Charter, *supra* note 36.

78. *Id.* art. 25.

79. See Statute of the ICJ, *supra* note 35, art. 7, para. 1.

the ICC is an independent judicial body<sup>80</sup> and is dedicated to adjudicating international crimes on a global scale.<sup>81</sup>

Procedurally, certain protocols must be met before the ICC can adjudicate a case. For example, the court's jurisdiction must first be triggered in one of three ways: (1) the "crimes . . . [are] referred to the Prosecutor by a State Party,"<sup>82</sup> (2) the "crimes [are] referred to the Prosecutor by the [U.N.] Security Council under Chapter VII of the Charter of the United Nations,"<sup>83</sup> or (3) "[t]he Prosecutor . . . initiate[s] an investigation."<sup>84</sup> on his or her own. Further, an additional notice requirement might be needed prior to the court hearing the case, depending on the manner in which jurisdiction is triggered.<sup>85</sup>

Once the court's jurisdiction is triggered, it still has to determine if it has a sufficient jurisdictional basis to hear the case.<sup>86</sup> The ICC has subject matter jurisdiction over crimes described as the "most serious crimes of concern to the international community as a whole"<sup>87</sup> and "unimaginable atrocities that deeply

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80. That being said, the U.N. Security Council can refer cases to the ICC according to Article 13(b) of the Rome Charter and Chapter VII of the U.N. Charter. See *UN Documentation: International Law*, UNITED NATIONS, <http://research.un.org/en/docs/law/courts> (last updated Sept. 22, 2016).

81. For a comprehensive chronology of events leading up to the creation of the ICC, see Int'l Criminal Court, *The ICC at a Glance: What is the ICC?*, in *THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE* 36–39 (2004).

82. Rome Charter, *supra* note 36, art. 13(a).

83. *Id.* art. 13(b).

84. *Id.* art. 13(c). The Prosecutor needs to have a "reasonable basis" to initiate an investigation. See Rome Charter, *supra* note 36, art. 15; see also LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 95 (M. Cherif Bassiouni et al. eds., 2002). The issue whereby the Prosecutor is able to trigger the jurisdiction of the ICC through his or her own initiative was highly contested in the drafting of the Rome Charter due to fear that the Prosecutor would wield too much power. See McCormack & Robertson, *supra* note 74, at 639.

85. For example, if the Security Council triggers ICC jurisdiction, the court will not require the Security Council to additionally obtain consent of said party. But, if the case is referred to the court either by another state or the Prosecutor themselves, the court will ask the referrer to establish both personal jurisdiction of the state and to get consent of the state in question to exercise jurisdiction. See Fowler, *supra* note 76.

86. See Rome Charter, *supra* note 36, art. 19.

87. *Id.* art. 5.



shock the conscience of humanity.”<sup>88</sup> With respect to personal jurisdiction, the Rome Charter enables the ICC to exercise jurisdiction over natural persons who directly<sup>89</sup> or indirectly<sup>90</sup> commit a crime within the subject matter jurisdiction of the court, but excludes unnatural persons like corporations or similarly structured entities.

Limiting the power of the ICC is the principle of deferral to domestic prosecutions through a process known as “complementarity.”<sup>91</sup> In this way, the ICC exercises jurisdiction as a form of last resort when states, who would normally prosecute the matter, are ill-equipped.<sup>92</sup> In addition, inherent in exercising jurisdiction is the mandate that the alleged crime must have occurred subsequent to the Rome Charter entering into force on July 1, 2002.<sup>93</sup>

Ultimately, because the ICC is limited to adjudicating crimes involving natural persons, the court would be unable to exercise jurisdiction over the FIFA organization altogether. On the other hand, the Rome Charter would allow the ICC to exercise jurisdiction over FIFA officials individually for their involvement in Qatari human rights abuses.

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88. *Id.* pmbl. In fact, Article 53(2)(c) of the Rome Charter prevents the Prosecutor from proceeding with a case if, in his or her judgment, the case does not fall within a topic of grave concern. *See* Rome Charter, *supra* note 36, art. 53(2)(c).

89. *See generally* Rome Charter, *supra* note 36, arts. 5–8.

90. *See generally id.* art. 25(3)(c).

91. The ICC defers to domestic courts unless the state is “unwilling” or “unable” to prosecute the matter. *Id.* pmbl. For an explanation of what factors go into determining “unwillingness” or “unable” to prosecute under the Rome Charter, see generally Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 894–95 (2002). *See* Rome Charter, *supra* note 36, art. 17(1)(b).

92. *See Courts of First Resort: Prosecuting International Crimes at the National Level*, INT'L CTR. FOR TRANSITIONAL JUST. (Oct. 24, 2012), <https://www.ictj.org/news/courts-first-resort-prosecuting-international-crimes-national-level>.

93. *See* Rome Charter, *supra* note 36, art. 11(1). Further, the court can only exercise jurisdiction over events that happened after that state ratified the Rome Charter. *Id.* art. 11(2). While this jurisdictional nuance is beyond the scope of this Note, it leads to situations where the ICC cannot exert jurisdiction over crimes if they occur after a state party signed the Rome Charter but before the state ratified it within the home state. *See* SCHABAS, *supra* note 67, at 67.

## II. QATARI HUMAN RIGHTS ABUSES AND FIFA'S INVOLVEMENT

To host a World Cup, certain infrastructure, like roads, bridges, transportation hubs, and stadiums in which the players will compete, need to be built. At the time Qatar won its bid to host the 2022 World Cup, the country lacked the necessary infrastructure. For example, in anticipation of the World Cup, Qatar needed to build “new hotels, new tunnels, new highways, a new subway system, a new airport, new (air-conditioned) stadiums and entire new cities.”<sup>94</sup> Yet, because Qatar is a nation of only 2.2 million people, many of the construction projects that are required to host the World Cup are being built by migrant workers, who make up 90 percent of Qatar’s population.<sup>95</sup> Currently, Qatar utilizes a system called *kafala*, which governs migrant labor in the country. Simply stated, however, the working conditions for migrant workers in Qatar under *kafala* is likened to modern-day slavery.<sup>96</sup> Workers are forced to live in inhospitable camps that are unsanitary and overcrowded.<sup>97</sup> Further, deceptive practices by recruiters in the migrant workers’ home countries as well as illegal tactics by Qatari employers, such as passport confiscation and threats of nonpayment,<sup>98</sup> exploit these workers and restrict their free movement. This Part will detail the intricacies of the *kafala* system and its effects on migrant workers in Qatar. In addition, this Part will illuminate FIFA’s indirect involvement in Qatari crimes through a corrupt bidding process that ultimately granted Qatar the rights to host the 2022 World Cup.

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94. Cubrilovic, *supra* note 23.

95. *Id.*

96. See Azfar Khan, *Why It's Time to End Kafala*, GUARDIAN (Feb. 26, 2014), <http://www.theguardian.com/global-development/2014/feb/26/time-to-end-kafala>.

97. See Greg Wilesmith & Eric Campbell, *Qatar 2022: World Cup Project Workers Living in Slum Conditions Behind Glitz of Oil-rich Country*, ABC NEWS (July 15, 2015), <http://www.abc.net.au/news/2015-06-02/investigation-into-qatar-2022-reveals-exploitation-of-workers/6511660>.

98. See Owen Gibson, *Migrant Workers Suffer 'Appalling Treatment' in Qatar World Cup Stadiums, Says Amnesty*, GUARDIAN (Mar. 30, 2016), <https://www.theguardian.com/global-development/2016/mar/31/migrant-workers-suffer-appalling-treatment-in-qatar-world-cup-stadiums-says-amnesty>.

### A. *The Kafala System of Labor*

The system by which the state of Qatar exerts control over migrant workers is known as *kafala*. The *kafala* system of labor,<sup>99</sup> which is utilized by Qatar and other members of the Gulf Cooperation Council (GCC) countries, has been called the modern equivalent of indentured servitude,<sup>100</sup> or worse, modern-day slavery.<sup>101</sup> Currently, 70 percent of Qatar's population<sup>102</sup> and 90 percent of its total workforce are migrant workers.<sup>103</sup> The only way by which an entry visa and residence permit are obtained is through sponsorship by a citizen or government agency.<sup>104</sup> Sponsorship is procured through recruiting agencies in the worker's home country,<sup>105</sup> and the applicant is required to pay exorbitant

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99. Along with Qatar, the *kafala* system is still routinely used in other GCC countries, including Bahrain, Kuwait, Oman, Saudi Arabia and the United Arab Emirates, Jordan, and Lebanon. See MIGRANT FORUM IN ASIA, REFORM OF THE KAFALA (SPONSORSHIP) SYSTEM 1 (2012), <http://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>. The system was implemented in the 1950s to procure cheap foreign labor as a replacement for slavery. See Heather E. Murray, *Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries*, 45 CORNELL INT'L L. J. 461, 467 (2012). Initially, the primary purpose of the *kafala* system was to meet the labor demands following the infusion of capital to extract oil. The GCC countries, however, quickly used the system as a tool to control their migrant workforce by requiring employers to sponsor migrant workers before they could work in the country. The sponsorship system thus transferred power, with respect to migrant workers, from the government to the employers, who continue to impose their will on migrant workers by confiscating passports, restricting movement, and subjecting them to inhumane living conditions. See ASIA PAC. MISSION FOR MIGRANTS, KAFALA: IMPACT AND RELATION TO MIGRANT LABOR BONDAGE IN GCC COUNTRIES 24–31 (2014), <http://www.apmigrants.org/articles/publications/Featured%20Researches/Kafala%20Research%202014-FINAL.pdf>.

100. See Richard Morin, *Indentured Servitude in the Persian Gulf*, N.Y. TIMES, Apr. 14, 2013, at SR4; U.S. Dep't of State, Trafficking in Persons Report 2008, 212–13 (2008).

101. See Khan, *supra* note 96.

102. See Mona Chalabi, *Qatar's Migrants: How Have They Changed the Country?*, GUARDIAN, (Sept. 26, 2013), <http://www.theguardian.com/news/datablog/2013/sep/26/qatar-migrants-how-changed-the-country>.

103. *Migrant Workers Propel Qatar's Population to 2.5 Million*, NEW ARAB (Mar. 2, 2016), <https://www.alaraby.co.uk/english/news/2016/3/2/migrant-workers-propel-qatars-population-to-2-5-million>.

104. See Murray, *supra* note 99.

105. See HUMAN RIGHTS WATCH, *supra* note 58, at 28–29. Yet, a 2011 report indicates that often times Qatar is the financial beneficiary of the workers paying recruitment fees and cooks its books deliberately to avoid penalties under

fees to secure a job.<sup>106</sup> Yet, there are no assurances that the applicant will be given the job discussed with the recruitment agency or paid the job's established rate of pay.<sup>107</sup> The natural result is that migrant workers are often underpaid, not paid on time, or face wage deductions.<sup>108</sup>

Further restricting the power of migrant workers in Qatar is the power imbalance between the migrant workers and their employers.<sup>109</sup> Due to the fact that employers assume legal and financial responsibility of the employee, employers frequently confiscate the employees' passports in order to exert control,<sup>110</sup> despite the fact that Qatari Labor Law, which was enacted in 2004, prohibits the confiscation of passports.<sup>111</sup> Employers, known as *kafeel*, hold an inordinate amount of power,<sup>112</sup> evidenced by the fact that employees need their permission in order to quit or change employment.<sup>113</sup> In addition, under the *kafala*

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Qatari Labor Law. See WORLD BANK, THE QATAR-NEPAL REMITTANCE CORRIDOR: ENHANCING THE IMPACT AND INTEGRITY OF REMITTANCE FLOWS BY REDUCING INEFFICIENCIES IN THE MIGRATION PROCESS 9 (2011); HUMAN RIGHTS WATCH, *supra* note 58, at 28–29.

106. Fees can range from hundreds to thousands of dollars to secure the job and up to “100 percent interest on their debt per year.” HUMAN RIGHTS WATCH, *supra* note 58, at 28–29.

107. *Id.* at 31.

108. *Id.* at 34; see also Elizabeth B. Mutisya, *International Corporate Liability: A Solution for the Exploitation of Migrant Workers in Qatar*, 5 WAKE FOREST J. L. & POL'Y 513, 517 (2015).

109. See Froilan T. Malit & George Naufal, *Asymmetric Information Under the Kafala Sponsorship System: Impacts on Foreign Domestic Workers' Income and Employment Status in the GCC Countries* 15–16 (Cornell Univ. ILR School, Working Paper, 2014).

110. See Murray, *supra* note 99.

111. See HUMAN RIGHTS WATCH, *supra* note 58, at 6.

112. Employers are given almost unadulterated power within the *kafala* system over their workers with regards to work-related activities and non-work-related activities, ranging from holding employees' passports and canceling workers' visas to getting a driver's license or opening a checking account. *Id.* at 5; see also Morin, *supra* note 100.

113. See Sam Badger, Giorgio Cafiero, & Foreign Policy in Focus, *Kingdom of Slaves in the Persian Gulf*, NATION (Sept. 16, 2014), <http://www.thenation.com/article/kingdom-slaves-persian-gulf/>.

system, workers often live without basic necessities in substandard “labor camps.”<sup>114</sup> Yet, if employees wish to contest the employers’ actions, they will find little redress as they are prohibited from both organizing<sup>115</sup> and unionizing<sup>116</sup> and are not paid during the interim when they challenge the employer’s actions through court or strike.<sup>117</sup> Further, existing measures to monitor human rights abuses by companies are wholly inadequate.<sup>118</sup> As a result, many have argued that the *kafala* system violates international law because the system encourages human trafficking<sup>119</sup> and forced labor.<sup>120</sup> Others have argued that immigrant workers are trapped in Qatar because they are unable to move freely within the country and their incurred debt in recruitment fees prevent them from leaving the country.<sup>121</sup>

### *B. FIFA’s Involvement in Human Rights Abuses*

FIFA’s fostering of Qatari human rights abuses stems from corruption in the bidding process that led to the selection of Qatar as host country of the 2022 World Cup.<sup>122</sup> The exchange of

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114. See HUMAN RIGHTS WATCH, *supra* note 58, at 13. Sometimes, twenty to thirty workers share a bedroom and one bathroom. Air conditioners also breakdown and take weeks to fix during the summer months, when temperatures reach up to 114 degrees Fahrenheit. See *id.* at 13.

115. See Law No. 14 of 2004 on the Promulgation of Labor Law arts. 116, 120 (Qatar). Further, Qatari Labor Law discriminates against migrant workers because it allows only Qatari citizens to unionize.

116. *Id.* art. 116.

117. HUMAN RIGHTS WATCH, *supra* note 58, at 48.

118. To see an extensive depiction of the economic and cultural barriers migrant employees face to get adequate remedies regarding human rights abuses by their employer, see *id.* at 43–49.

119. See Mutisya, *supra* note 108. For a definition of “human trafficking,” see Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors Under International Human Rights Law*, 17 INT’L. J. REFUGEE L. 394, 396 (2005).

120. See Priyanka Motaparthi, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development*, MIGRANT-RIGHTS (Mar. 11, 2015), <http://www.migrant-rights.org/2015/03/understanding-kafala-an-archaic-law-at-cross-purposes-with-modern-development/>.

121. See Zahir Belounis, *Zahir Belounis: ‘The System in Qatar is Killing Me. Please Speak Up’*, GUARDIAN (Nov. 14, 2013), <https://www.theguardian.com/football/2013/nov/14/zahir-belounis-letter-zinedine-zidane-pep-guardiola-qatar>.

122. See Jack de Menezes, *FIFA Corruption: Qatar and Russia World Cup Bids Under FBI Investigation Following Chuck Blazer’s Bribery Confession*,

bribes for votes has long been the *modus operandi* of FIFA,<sup>123</sup> and was the basis of a 2015 Swiss investigation into FIFA's selection of Qatar.<sup>124</sup> FIFA's contribution to human rights abuses in Qatar, however, is not direct.<sup>125</sup> Rather, FIFA's white-collar crimes, by which FIFA officials accepted Qatari bribes to solidify votes for Qatar, were accepted knowing the existing human rights abuses of migrant workers in Qatar<sup>126</sup> and acknowledging that granting the country the World Cup would amplify those conditions. Thus, by granting Qatar the 2022 World Cup, FIFA, in turn, exacerbated the problem because even more migrant workers would be needed to build the brand new infrastructure.<sup>127</sup>

Amidst allegations of substandard conditions for migrant workers in Qatar, FIFA maintained a position that it valued migrant worker rights and was taking the issue of their abuse seriously.<sup>128</sup> In addition, Federico Addiechi, FIFA's head of sustainability, publicly stated that "FIFA has been integrating hu-

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INDEPENDENT (June 4, 2015), <http://www.independent.co.uk/sport/football/international/fifa-corruption-qatar-and-russia-world-cup-bids-under-fbi-investigation-following-chuck-blazers-10296177.html>.

123. See generally JENNINGS, *supra* note 9.

124. See Euan McKirdy, *Swiss FIFA Corruption Allegations Grow, Cast Hosting of World Cups Further into Doubt*, CNN (July 13, 2015), <http://edition.cnn.com/2015/07/13/football/swiss-fifa-probe-widens/>.

125. See Cork Gaines, *A Staggering Number of Deaths Are Being Blamed on FIFA's Corruption*, BUS. INSIDER (May 28, 2015), <http://www.businessinsider.com/world-sporting-events-deaths-2015-5>.

126. See Cubrilovic, *supra* note 23.

127. See Pete Pattison, *Revealed: Qatar's World Cup 'Slaves'*, INFO. CLEARING HOUSE, <http://www.informationclearinghouse.info/article36349.htm> (last visited Oct. 10, 2016).

128. See *Qatar 2022 World Cup Prep Faces Fresh Migrant Worker Abuse Allegations*, ESPN (Mar. 30, 2016), <http://www.espnfc.com/blog/fifa/243/post/2840330/qatar-migrant-worker-abuses-alleged-by-amnesty-international>; see also Owen Gibson, *FIFA Faces 'Tough Decision' Over Qatar World Cup If Human Rights Abuses Continue*, GUARDIAN (Apr. 14, 2016), <http://www.theguardian.com/football/2016/apr/14/fifa-qatar-world-cup-report-human-rights> ("FIFA [is] 'fully committed to respecting human rights' and that '[t]his is an ongoing process and of course challenges remain but FIFA is committed to playing its part in ensuring respect for human rights and to being a leader among international sports organisations in this important area.'").

man rights components in different aspects of its work, processes, and activities for many years.”<sup>129</sup> He also questioned a 2016 Amnesty International report that addressed the abuse of migrant workers employed on FIFA-related projects, stating: “The tone of Amnesty International’s latest assertions paint a misleading picture and do nothing to contribute to our efforts.”<sup>130</sup> FIFA’s efforts to curb Qatari abuses included a meeting with the International Trade Union Confederation (ITUC)<sup>131</sup> in 2011 to discuss its role in working with both the organization and the Qatari government to address Qatari labor issues.<sup>132</sup> In the same meeting, FIFA also agreed that granting of future World Cups would be dependent, in part, on a new labor-related criteria.<sup>133</sup> Further, FIFA facilitated the issuance of a Workers’ Charter in 2013, which aimed to ensure the fair treatment of workers, and more substantively, the implementation of the Workers’ Welfare Standards document in 2014, which set out “mandatory, contractually binding rules that ensure that contractors and subcontractors working on . . . projects operat[e] in line with the principles and values outlined in the Workers’ Charter.”<sup>134</sup> With these guidelines and provisions, FIFA believed it had put a system in place to improve the conditions for migrant workers employed on FIFA construction projects.<sup>135</sup>

FIFA selected Qatar as the host country for the 2022 World Cup, however, despite its own internal evaluation committee report suggesting that Qatar was unprepared to host due to a lack

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129. *Qatar 2022 World Cup Prep Faces Fresh Migrant Worker Abuse Allegations*, *supra* note 128.

130. *Id.*

131. The ITUC is an international trade federation whose object is for the “promotion and defence of workers’ rights and interests, through international cooperation between trade unions, global campaigning and advocacy within the major global institutions.” *About Us*, INT’L TRADE UNION CONFEDERATION, <http://www.ituc-csi.org/about-us> (last visited Oct. 9, 2016).

132. *See Statement From Jérôme Valcke On Labour Rights In Qatar*, *supra* note 6.

133. *Id.*

134. *FIFA Statement on Amnesty International’s Report on Qatar*, FIFA (Dec. 1, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=12/news=fifa-statement-on-amnesty-international-s-report-on-qatar-2741494.html>.

135. *See FIFA Statement on Latest Amnesty International Report on Qatar*, FIFA (Mar. 31, 2016), <http://www.fifa.com/worldcup/news/y=2016/m=3/news=fifa-statement-on-latest-amnesty-international-report-on-qatar-2773473.html>.

of existing infrastructure.<sup>136</sup> FIFA advises countries who are bidding to host future World Cups to provide sixteen potential venues for which games will be played.<sup>137</sup> At the time of Qatar's proposal, the country had three.<sup>138</sup> Coupled with glaring insufficiencies in roads and bridges to get from one venue to the next, Qatar was ill-equipped to deal with the massive infrastructure hurdles it would face in hosting a World Cup.<sup>139</sup>

Further, FIFA chose Qatar to host the 2022 World Cup despite knowing Qatar's abuse of migrant workers through the *kafala* system. FIFA's corrupt bidding process allegedly exacerbated the migrant worker situation in Qatar because it orchestrated a situation where many more workers would be abused through the construction projects that would be undertaken to host the World Cup in Qatar. Currently, a case involving the white-collar crimes of FIFA officials can be heard in the domestic courts of the United States and Switzerland.<sup>140</sup> Furthermore, a case centered on the human rights abuses of migrant workers can take

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136. See Cubrilovic, *supra* note 23.

137. *Id.*

138. *Id.*

139. *Id.*

140. A case like FIFA's can be heard in the domestic courts of Switzerland, where FIFA is incorporated, the United States, where the financial institutions were utilized, and Qatar, where the alleged abuses occurred. The European Court of Human Rights (ECtHR), which is a regional court, may also have jurisdiction over the FIFA organization. For such an argument, see Michael B. Engle, *A CN Tower Over Qatar: An Analysis of the Use of Slave Labor in Preparation for the 2022 FIFA Men's World Cup and how the European Court of Human Rights Can Stop It*, 32 HOFSTRA LAB. & EMP. L. J. 177 (2014). The jurisdictional scope of the ECtHR, however, is limited to addressing human rights violations of the European Convention on Human Rights (ECHR) and crimes committed by one of the forty-seven members who make up the Council of Europe. See *ECHR in 50 Questions*, EUR. CT. HUM. RTS. 1, 3 (Feb. 2014), [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf). Thus, it is not a truly global adjudicative body like the ICJ or the ICC. In addition, under the ECHR, "both individual and inter-state applications can only be brought against states. Any applications against individuals or companies are systematically rejected," which further limits the jurisdiction of the ECtHR. Jörg Polakiewicz, *Corporate Responsibility to Respect Human Rights – Challenges and Opportunities for Europe and Japan* 8 (Nagoya Univ. Ctr. for Asian Legal Exch. Discussion Paper No. 9, 2012), [http://cale.law.nagoya-u.ac.jp/\\_src/sc618/CALE20DP20No.209-121010.pdf](http://cale.law.nagoya-u.ac.jp/_src/sc618/CALE20DP20No.209-121010.pdf). For a discussion on the different ways the FIFA organization can be held accountable, see Roger Pielke Jr., *supra* note 31.



place in Qatar, where the abuse occurred.<sup>141</sup> Yet, the ICJ and the ICC, the most important international venues with respect to hearing criminal actions, both have jurisdictional flaws, leading to a situation where neither court is currently able to hear a case where white-collar crimes led to human rights abuses elsewhere.<sup>142</sup> As a result, the abuse of migrant workers in Qatar will persist in the wake of this jurisdictional gap if domestic courts do not intervene.

### III. WHY THE FIFA CASE IS IMPORTANT TO INTERNATIONAL CRIMINAL LAW

Both the ICJ and the ICC are unable to adjudicate matters involving white-collar crimes that lead to human rights abuses. This Part begins by summarizing the jurisdictional problems of the ICJ, which has general subject matter jurisdiction over international disputes, including human rights violations, but limits personal jurisdiction to only states.<sup>143</sup> This would prevent the ICJ from having personal jurisdiction over both the FIFA organization and its officials individually. This Part continues by analyzing the jurisdictional issues of the ICC, which limits subject matter jurisdiction to grave international crimes.<sup>144</sup> Further, personal jurisdiction under the ICC is limited to natural persons,<sup>145</sup> meaning that the ICC would be precluded from exercising jurisdiction over nonnatural persons like the FIFA organization. The result is that an international criminal case against FIFA would need to be against FIFA officials in the ICC. Because FIFA officials did not directly commit the human rights violations against migrant workers, FIFA officials would need to be charged as accomplices under Article 25(3)(c) of the Rome Charter. This Part then analyzes the merits and limitations of prosecuting FIFA officials as accomplices in the ICC. Finally, this Part concludes with a brief discussion describing why FIFA's indirect involvement in Qatari human rights abuses is important in the context of adjudicating international crimes.

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141. See *Qatar: Promotion of the Rule of Law and Human Rights*, UNITED NATIONS, <https://www.un.org/ruleoflaw/blog/portfolio-items/qatar-promotion-and-protection-of-human-rights/> (last visited Oct. 9, 2016).

142. See *infra* Part III.C.

143. See Statute of the ICJ, *supra* note 35, art. 34.

144. See Rome Charter, *supra* note 36, art. 5; see also Statute of the ICJ, *supra* note 35, pmbl.

145. See Rome Charter, *supra* note 36, art. 25(1).

### A. *Jurisdictional Failures of the ICJ*

Under the ICJ Statute, the ICJ has general subject matter jurisdiction over international law disputes. This includes questions of international law, breaches of international obligations, and damages for such breaches, including human rights violations.<sup>146</sup> The ICJ, however, must also exercise personal jurisdiction over the parties in order to adjudicate the dispute before it. Yet, under the ICJ Statute, the ICJ lacks jurisdiction over both the FIFA organization and its officials individually because both the entity and the individuals are not states, which is required under the treaty.<sup>147</sup> As a result, the ICJ would only have partial jurisdiction over the FIFA organization or its officials and, thus, would be unable to adjudicate a case involving white-collar crimes that led to human rights abuses in Qatar.

### B. *Jurisdictional Failures of the ICC*

Under the Rome Charter, the ICC has subject matter jurisdiction over crimes that are considered most serious to the international community.<sup>148</sup> These atrocities include genocide, crimes against humanity, war crimes, and acts of aggression.<sup>149</sup> As a result, the types of crimes that the ICC can hear are limited, unlike the ICJ, which has a broader scope with respect to subject matter jurisdiction. Complicating the matter further, the ICC, thus far, has not adjudicated a case in which white-collar crimes (which the ICC does not have subject matter jurisdiction over) led to human rights abuses (which the court does have subject matter jurisdiction over). As a result, it is unclear whether the ICC would have subject matter jurisdiction if a case against FIFA or its officials were referred to the Prosecutor of the ICC.

With respect to personal jurisdiction, the ICC provides for personal jurisdiction over individuals who commit crimes either directly<sup>150</sup> or as an accomplice indirectly involved.<sup>151</sup> Personal jurisdiction, however, is limited to natural persons, meaning that the ICC would only be able to exercise jurisdiction over FIFA

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146. See Statute of the ICJ, *supra* note 35, art. 36, para. (2)(a)–(c).

147. *Id.* art. 34.

148. See *id.* pmb1; Rome Charter, *supra* note 36, art. 5.

149. See Rome Charter, *supra* note 36, art. 5.

150. *Id.* art. 25(a)–(b).

151. *Id.* art. 25(3)(c).

officials and not over nonnatural entities like the FIFA organization.<sup>152</sup> Further, FIFA officials' participation in Qatari human rights abuses was not direct. Rather, their contributions consisted of accepting bribes with knowledge of existing human rights abuses in Qatar in order to solidify votes for the country to host the 2022 World Cup.<sup>153</sup> This provided the opportunity for more migrant workers to be abused under *kafala* through the construction of new infrastructure necessary to host the World Cup.<sup>154</sup> As a result, a case against FIFA in the ICC would have to be against FIFA officials who accepted the bribes as accomplices indirectly involved in Qatari human rights abuses of migrant workers.

### C. Accomplice Liability of the ICC

Assuming for now that both subject matter and personal jurisdiction are met in a hypothetical case against FIFA officials, the applicable portion of the Rome Charter to prosecute them as accomplices is Article 25(3)(c). This section states: "For the purpose of facilitating the commission of such a crime, [the individual] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."<sup>155</sup> Ultimately, the Prosecutor of the ICC would need to show that Qatari crimes were committed by someone other than FIFA officials and that, in accepting bribes, FIFA officials had both the requisite *actus reus* and *mens rea*<sup>156</sup> in committing their complicit acts.

#### 1. Actus Reus

To date, the ICC has not determined what acts are sufficient in proving the *actus reus* component of accomplice liability under

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152. See *supra* Part I.B.

153. See *supra* Part II.B.

154. *Id.*

155. Rome Charter, *supra* note 36, art. 25(3)(c).

156. According to Black's Law Dictionary, *actus reus* is the prohibited conduct of the crime. See *Actus Reus*, BLACK'S LAW DICTIONARY (10th ed. 2014). *Mens rea* relates to having a guilty mind when committing the crime. See *Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the international context, however, there are no universal definitions for *actus reus* and *mens rea*. See Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. OF INT'L L. 144, 148–49 (1999).

its jurisdiction.<sup>157</sup> As a result, the ICC would likely lean on prior tribunals and their adjudications of what constitutes “complicit acts”<sup>158</sup> in order to define the scope of *actus reus* with regards to accomplice liability. This exercise may prove to be challenging, however, because prior tribunals have utilized different standards (and even courts within the same tribunal have used different standards), which has led to different results as to which acts constitute complicit acts for accomplice liability.<sup>159</sup> For example, the ICTY and the ICTR have articulated, as in the Rome Charter, that in order to prove accomplice liability, the actions must “provid[e] the means” to facilitate the crime through supplies or knowledge.<sup>160</sup> Yet, the ICTY and the ICTR have also more liberally interpreted silent approval of the underlying crime as a sufficient act under the “approving spectator” standard, in which accomplice liability is proved through a combination of presence and support.<sup>161</sup> Under this standard, the accomplice must have presence in the state where the crime occurs either by physically being in the state or from afar and, through his or her position of power, incites or encourages the underlying crime to take place.<sup>162</sup> Overall, in order to prove *actus reus*, the complicit acts, through whichever test the court uses, need to have a “substantial effect” on the underlying crime.<sup>163</sup> Yet, because a clear definition of “substantial effect” does not exist, this determination requires a case-by-case inquiry by the court.<sup>164</sup>

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157. See Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility Under International Law*, 8 J. INT'L CRIM. JUST. 851, 858 (2010).

158. For the elements and forms of *actus reus* within decisions of tribunals, see IRYNA MARCHUK, *THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE LAW ANALYSIS* 220–30 (2014).

159. See SARAH FINNIN, *ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLE 25(3)(B) AND (C) OF THE ROME CHARTER OF THE INTERNATIONAL CRIMINAL COURT* 72–89 (2012); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶¶ 482–85 (Special Court for Sierra Leone May 18, 2012) (stating that *actus reus* in accomplice liability can include an omission of action as well as tangible acts).

160. Actions that have been shown to “provid[e] the means” to help the underlying crime take place include providing materials, knowledge, and money. See, e.g., FINNIN, *supra* note 159, at 81–82.

161. See, e.g., *id.* at 77–78, 83.

162. *Id.*

163. *Id.* at 126–28.

164. See INT'L COMM'N OF JURISTS, 2 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, *CRIMINAL LAW AND INTERNATIONAL CRIMES* 19 (2008) [herein-

In regards to crimes within the ICC's subject matter jurisdiction, the Rome Charter generally requires the court to hear the gravest types of crimes.<sup>165</sup> The Rome Charter, however, is silent as to how serious the acts that aid and abet the commission of these grave crimes have to be in order to satisfy the *actus reus* portion of accomplice liability. Julia Graff summarizes this point as follows:

By analogy, if a company operating in the D[emocratic] R[epublic] [of] C[ongo] trades weapons for diamonds, the ICC might deem such weapons the means for the commission of a crime. However, if a corporation purchases diamonds from a rebel group or a state whose military uses the revenue to purchase arms for use against civilians, will the purchase money itself fall within the definition of "means of commission" or "contribution" to the crime?<sup>166</sup>

While this hypothetical cannot apply to organizations because the ICC only has personal jurisdiction over natural persons, the same problem exists with respect to individual accomplices in determining whether their acts are sufficient to be complicit in the commission of a crime under the Rome Charter.

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after INT'L COMM'N OF JURISTS 2], <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf>; Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for Trading with the Enemy's of Mankind*, 5 INT'L CRIM. L. REV. 623, 671 (2005); see also *Report of the International Law Commission on the Work of its Forty-eighth Session*, [1996] 2 Y.B. Int'l L. Comm'n 18, 21, U.N. Doc. A/51/10 [hereinafter *ILC Report*] (articulating the language of the *mens rea* of "knowingly" to include acts that "assist[] directly and substantially, in the commission of such a crime."). In interpreting "substantial," however, the Trial Chamber of the ICTY stated that the underlying crime would not have occurred in the same fashion had it not been for the accomplice's involvement. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 688, 691–92 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 326 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234–35 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

165. See Rome Charter, *supra* note 36, pmbl.

166. Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF 23, 26 (2004).

Recently, the ICC announced that it will be prosecuting CEOs, whose business commits environmental crimes, as accomplices.<sup>167</sup> Such activities include “land grabbing, a practice that has seen multinationals take over large areas of foreign land to exploit its natural resources without benefiting the local inhabitants.”<sup>168</sup> Similarly, “CEOs whose businesses are found to be complicit in razing tropical rainforests, poisoning water supplies or seizing land will face prosecution.”<sup>169</sup> These future prosecutions will provide insight as to the types of acts that will satisfy the *actus reus* prong of accomplice liability (albeit, only with respect to environmental crimes).

Ultimately, FIFA’s officials neither implemented the *kafala* system in Qatar nor “provide[d] the means” through direct supplies,<sup>170</sup> finances,<sup>171</sup> or knowledge to support the *kafala* system. The *kafala* system has been in place since the 1950s and preceded FIFA’s granting of hosting rights to Qatar.<sup>172</sup> FIFA officials’ acceptance of bribes equally did not “provide the means” for Qatar to commit human rights abuses through materials, money, or knowledge, unless the ICC accepts the unpersuasive argument that accepting bribes facilitated the *kafala* system to work effectively. In other words, the court would have to find that, by selecting Qatar to host the 2022 World Cup through vote buying, the officials indirectly supported the *kafala* system and, as such, made it easier for Qatari employers to abuse migrant workers. Yet, that is not the case here. FIFA officials did not make it easier for Qatar to commit human rights abuses. Rather, by accepting bribes, FIFA officials made an existing condition, the *kafala* system, worse because they provided for more *opportunities* for Qatar to commit human rights abuses.

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167. See Khan, *supra* note 39.

168. *Id.*

169. *Id.*

170. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 533, 536 (Sept. 2, 1998).

171. See United States v. Flick et al., in VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW [T.W.C.] NO. 10, at 1216 (1949–1953); Craig Forcese, *Deterring “ Militarized Commerce ”: The Prospect of Liability for “ Privatized ” Human Rights Abuses*, 31 OTTAWA L. REV. 171, 174–77, 185 (2000) (describing a situation in Colombia where British Petroleum, a British owned corporation, knowingly paid a “ war tax ” in Colombia to the Colombian government, who was known to have committed numerous human rights abuses in the past, in order to protect its oil reserves).

172. See Morin, *supra* note 100.

A stronger argument to satisfy *actus reus* would be under the more liberal approving spectator standard, where the Prosecutor would show that FIFA officials had a presence<sup>173</sup> in Qatar when it granted the country the 2022 World Cup, was aware of the use of immigrant workers,<sup>174</sup> and encouraged the human rights abuses by being willfully blind to existing conditions when they accepted the bribes. Ultimately, a hypothetical case against FIFA officials as accomplices would be one of first impression for the ICC. Complicating matters further is the fact that the Rome Charter does not provide directives through expanded definitions of the terms within Article 25.<sup>175</sup> Thus, the ICC will need to rely on the broken rudder of prior tribunals' different tests to steer it in determining accomplice liability through white-collar acts.

## 2. Mens Rea

In addition to proving *actus reus*, the Prosecutor of the ICC would also have to establish *mens rea*, or the mental component of the crime, in order to prove accomplice liability.<sup>176</sup> Generally, to prove *mens rea* for any crime under the ICC, the Prosecutor must prove the actor committed the crime with both intent and knowledge,<sup>177</sup> unless otherwise provided.<sup>178</sup> Such "intent" manifests when the actor either wants to participate in the alleged conduct, wants to cause a particular outcome, or is aware that it will occur in the ordinary course of events.<sup>179</sup> "Knowledge" includes awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.<sup>180</sup> Ironically,

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173. See FINNIN, *supra* note 159, at 77–78, 83.

174. See Cubrilovic, *supra* note 23.

175. See FINNIN, *supra* note 159, at 72.

176. With regards to ICTR discussion of *mens rea* of accomplice liability, see Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 538–43 (Sept. 2, 1998). To see ICTY discussion of *mens rea* of accomplice liability, see Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (holding that the defendant was an accomplice in a joint criminal enterprise); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

177. See Rome Charter, *supra* note 36, art. 30(1).

178. *Id.*

179. *Id.* art. 30(2)(a)–(b); see also FINNIN, *supra* note 159, at 163.

180. See Rome Charter, *supra* note 36, art. 30(3).

had intent and knowledge applied to Article 25(3)(c), FIFA officials likely would be guilty as accomplices.<sup>181</sup> Nevertheless, when the analysis shifts to the *mens rea* of accomplice liability under Article 25(3)(c), the statute creates a new burden of proving that the actions of the accomplice were done “purposely.”<sup>182</sup> The language and meaning of “purposely” is yet to be addressed by the ICC.<sup>183</sup> Traditionally in the international context, a treaty is interpreted according to the plain meaning of its terms.<sup>184</sup> Currently, while variations exist among common law and civil law countries in interpreting “purposely,” there is general harmony that the plain reading of the term “purposely” means that the person committing the crime desires to cause a particular outcome of the crime.<sup>185</sup> In applying that standard to FIFA officials,

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181. This is assuming of course that the *actus reus* component has been satisfied. According to the Model Penal Code, a person acts with knowledge when he or she is practically certain that the action will lead to a particular result. See MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 1985). Here, it is likely that at the time FIFA officials accepted Qatari bribes, they saw as highly probable that Qatari human rights conditions would get worse because the infrastructure needed to build stadiums and roads for the World Cup would require more workers, and the situation would provide more opportunities for abuse. Such acts and their attendant circumstances would fit nicely within Article 30(2)(b) of the Rome Charter, which takes on a *mens rea* of “knowingly” with regard to intent of the perpetrator. See Rome Charter, *supra* note 36, art. 30(2)(b); FINNIN, *supra* note 159, at 166.

182. See Rome Charter, *supra* note 36, art. 25(3)(c); DESISLAVA STOITCHKOVA, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW 107 (2010). Yet, this language varies significantly with the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which was used by the International Law Commission in drafting the Rome Charter. The Draft Code advocated for “knowledge” as the appropriate *mens rea* and not “purposely” as it is written in the statute. See *ILC Report*, *supra* note 164, at 21.

183. See Sabine Michalowski, *The Mens Rea Standard for Corporate Aiding and Abetting Liability—Conclusions From International Criminal Law*, 18 UCLA J. INT’L L. & FOR. AFF. 237, 257 (2014). This is because the ICC has not prosecuted a case involving complicit liability. See *Information Regarding the Potential Liability of Businesspersons for Atrocity Crimes Under the Rome Charter*, AM. NON-GOV’T ORG. COAL. FOR INT’L CRIM. CT. (Mar. 1, 2016, 2:58 AM), <http://www.amicc.org/docs/ICCandBusTrans.pdf> (stating that “the Prosecutor of the ICC has not yet begun any formal investigations” for individual liability and, thus derivatively, has not addressed the language of “purposely” in the accomplice liability section of the Rome Charter).

184. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

185. See, e.g., MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 63-64 (2009); see also Nicola Pisani, *The Mental Element in International Crime*,



the Prosecutor of the ICC would have to prove that they acted with a desire to bring about the Qatari human rights abuses of the migrant worker population through the *kafala* system. Further, if actions are shown to have been done “purposely,”<sup>186</sup> the Prosecutor must then show that such actions were done to facilitate, or make it easier for, the Qatari government to abuse immigrant workers.<sup>187</sup> Such language creates an unrealistically high burden in proving the *mens rea* component in accomplice liability, particularly in white-collar criminal actions because, in more cases than not, the intentions of businesses are financially motivated<sup>188</sup> and not to commit international crimes.<sup>189</sup>

More importantly, the language leaves a jurisdictional gap for when an individual may not share the intent to participate in human rights abuses or to facilitate said abuses,<sup>190</sup> but who blatantly disregards the social environment of another country,

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in 2 ESSAYS ON THE ROME CHARTER OF THE INTERNATIONAL CRIMINAL COURT 126 (Flavia Lattanzi & William Schabas eds., 2004); *Criminal Code Act 1995* (Cth) div 5.2(1) (Austl.); ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 171–72 (6th ed. 2009).

186. Such a purpose can be shown either as a direct or secondary purpose. See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 312 (2008).

187. See Rome Charter, *supra* note 36, art. 25(3)(c).

188. See STOITCHKOVA, *supra* note 182, at 103–05.

189. It would also be difficult to prove the motivation of a nonnatural individual (in this case, of an organization). See Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?*, AM. BAR ASS'N 10–11 (2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/best\\_practices.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf); see also Gabriele Marcotti, *How Can FIFA Seek Restitution From Itself And Its Member Federations?*, ESPN (Mar. 16, 2016), <http://www.espnfc.com/blog/espnfc-united/68/post/2830525/fifa-seeks-restitution-for-lost-revenue-gab-marcotti-q-and-a> (stating that “organizations cannot conspire.”).

190. For an analysis discussing the harmonization of the knowledge standard with the “purposely” language in the Rome Charter, see Michalowski, *supra* note 183, at 243–44; James G. Stewart, *An Important New Orthodoxy on Complicity in the ICC Statute?*, JAMES G. STEWART BLOG (Jan. 21, 2015), <http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/> (Sarah Finnin & Nema Milaninia argument). For an argument discussing why the *mens rea* of “purposely” should include actions of the complicit actor done in furtherance of an ulterior motive not coinciding with the intent of the primary actor’s secondary motives, see Cassel, *supra* note 186. For a position advocating that the difference between the “knowingly” and “purposely” *mens rea* is mere semantics because the analysis of accomplice liability

thereby exacerbating existing human rights abuses in that country. White-collar crimes like bribery fall short of the “purposely” language in the Rome Charter and allow individuals to skirt the ICC’s jurisdictional reach. Thus, some authorship advocates for reading “purposely” expansively to include a complicit actor’s actions irrespective of sharing the same intent as the primary actor.<sup>191</sup> Such a view, however, is not considered a norm of international law.<sup>192</sup>

#### *D. The Effects of No Jurisdiction*

Under the construct of international criminal adjudications, both the ICJ and the ICC have jurisdictional flaws with respect to hearing cases where white-collar crimes led to human rights abuses. The ICJ has general subject matter jurisdiction over international disputes but fails to have personal jurisdiction over FIFA or its officials because they are not states.<sup>193</sup> Similarly, the ICC lacks personal jurisdiction over FIFA as an organization because the Rome Charter provides that only natural persons can be subject to a suit.<sup>194</sup> Further, the ICC’s subject matter jurisdiction is limited to genocide, war crimes, crimes against humanity, and acts of aggression.<sup>195</sup> The white-collar crimes of FIFA officials, in accepting bribes for votes, are thus outside the ambit of

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will remain the same irrespective of which *mens rea* is used, see INT’L COMM’N OF JURISTS 2, *supra* note 164, at 22–24.

191. See Hans Vest, *supra* note 157, at 861. For a general example using the *Zyklon B* case, see Kristian Kühl, STRAFRECHT. ALLGEMEINER TEIL 74 (5th ed. 2005); see also INT’L COMM’N OF JURISTS, 1 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, FACING THE FACTS AND CHARTING A LEGAL PATH 22 (2008) [hereinafter INT’L COMM’N OF JURISTS 1], <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf> (stating that the “purposely” requirement is irrelevant if a reasonable company, in doing its due diligence, would have known about a particular risk in supplying the goods or services to the underlying criminal actor).

192. Compare Stewart, *supra* note 190, and Thomas Weigend, *How to Interpret Complicity in the ICC Statute*, JAMES G. STEWART BLOG (Dec. 15, 2014), <http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/>, with Adil Ahmad Haque, *The U.S. Model Penal Code’s Significance for Complicity in the ICC Statute: An American View*, JAMES G. STEWART BLOG (Dec. 13, 2014), <http://jamesgstewart.com/the-u-s-model-penal-codes-significance-for-complicity-in-the-icc-statute-an-american-view/>.

193. See *supra* Part I.A.

194. See Rome Charter, *supra* note 36, art. 25(1).

195. See *supra* Part I.B.

the subject matter jurisdiction of the ICC,<sup>196</sup> despite the argument that their bribes indirectly led to systematic abuse of migrant workers in Qatar<sup>197</sup> (which the court would have subject matter jurisdiction over).

In addition, high thresholds in proving accomplice liability under the Rome Charter further limit the existing jurisdiction of the ICC to prosecute individuals.<sup>198</sup> Further, while the ICC recently announced that it would be prosecuting CEOs whose businesses are complicit in human rights violations, these prosecutions are limited to environmental crimes,<sup>199</sup> which restricts the types of acts for which CEOs specifically can be held liable as accomplices in the ICC. This leaves the ICC particularly vulnerable as a court that is unprepared in the global corporate age<sup>200</sup> because it contains jurisdictional inadequacies and its default

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196. Ironically, the ICC itself has said in the past that white-collar crimes may lead to an individual being liable under the ICC but has failed to prosecute such a case. With respect to illegal mining operations in the Democratic Republic of Congo, Prosecutor Moreno-Ocampo stated: "Those who direct mining operations, sell diamonds or gold extracted in these conditions, *launder the dirty money* or provide weapons could also be authors of the crimes, even if they are based in other countries." Luis Moreno-Ocampo, Prosecutor of the ICC, Second Assembly of State Parties to the Rome Charter of the International Criminal Court: Report of the Prosecutor of the ICC (Sept. 3, 2003), [http://legal.un.org/icc/asp/2ndsession/ocampo\\_statement\\_8sep\(e\).pdf](http://legal.un.org/icc/asp/2ndsession/ocampo_statement_8sep(e).pdf) (emphasis added); see also Presentation by the Chief Prosecutor on the Occasion of the Press Conference of 16 July 2003 (ICC-OTP-20030724-28), <http://www.icc-cpi.int/Menus/Go?id=045f8e37-f401-44eb-8219-531fae932e86&lan=en-GB>. Additionally, there has been a push, especially by the Obama administration, for viewing white-collar crimes that lead to humanitarian crimes as an international crime. Other organizations, however, do not share the same sentiment. See Richard L. Cassin, *The Obama Doctrine*, FCPA BLOG (June 2, 2010, 7:22 AM), <http://www.fcpablog.com/blog/2010/6/2/the-obama-doctrine.html>; see also Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUST. 466, 475 (2006) (arguing that corrupt acts should be considered a part of crimes against humanity).

197. See *supra* Part II.B.

198. See *supra* Part III.C.

199. See Khan, *supra* note 39.

200. This comes to light even further given the ruling in the U.S. Supreme Court case *Kiobel*, where the court declined to exercise jurisdiction under the Alien Tort Statute over a corporation for human rights abuses committed exclusively outside the United States, thus limiting the scope of when corporations can be held liable. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1677 (2013).

position is to defer to domestic prosecutions.<sup>201</sup> The FIFA example brings to the forefront a situation that may present itself with more frequency moving forward with the rise of global corporations: when neither the ICJ nor the ICC will be able to prosecute cases where organizations or their officials have a hand in human rights abuses abroad.

Acknowledging the jurisdictional deficiencies of the ICJ and the ICC, organizations and their officials, nonetheless, have been sued in the past in domestic courts and tribunals for their involvement in human rights abuses. For example, domestic courts of individual nations have exercised jurisdiction over organizations for their direct involvement in human rights abuses for supplying technology, goods, or services, and providing financial or logistical assistance.<sup>202</sup> That said, only a handful of countries have legislated personal jurisdiction over organizations under their laws.<sup>203</sup> Further, prosecutors in these nations have been reluctant to prosecute cases involving corporate liability because of the political ramifications that would ensue.<sup>204</sup> Ultimately, one would think that the domestic courts where the

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201. See El Zeidy, *supra* note 91, at 899.

202. See generally JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 17–23 (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

203. See Cassel, *supra* note 186, at 322; See ZERK, *supra* note 202, at 32.

204. For example, Burmese citizens sought to hold Total Fina Elf, a French oil company, responsible as accomplices for aiding the Burmese military kidnap individuals to erect a pipeline in Burma. See Jodie A. Kirshner, *A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses*, 13 NW. J. OF INT'L HUM. RTS. 1, 14 (2015). At the time, Belgium provided for jurisdiction over all humanitarian claims, even if they did not relate to Belgium, and accepted the Total Fina Elf case. *Id.* at 15. The United States did not approve of Belgium's actions, and

[i]n the aftermath of other controversial claims against high-ranking foreign officials, . . . the U.S. threatened to move the N[orth] A[tlantic] T[reaty] O[rganization] headquarters out of Brussels unless Belgium revoked the rules. Without the extraterritorial jurisdiction that they had offered, the Belgian court could no longer adjudicate the case against Total. It could not pursue allegations brought by Burmese citizens against a French company for abuses in Burma.

*Id.* at 15–16.

harm occurred would provide the best forum to adjudicate disputes involving business involvement in human rights abuses because that is where the relevant evidence and witnesses are likely to be. Domestic prosecutions against organizations, however, remain rare because of the difficulty in proving human rights abuses and the expense of maintaining a suit against a large multinational entity.<sup>205</sup> As a result, organizations have been able to escape liability, even in properly situated domestic courts.

At the international level, cases addressing business involvement in human rights abuses is even rarer. The International Military Tribunal (IMT) at Nürnberg addressed a few instances where business officials served as accomplices to crimes committed by the Hitler regime during World War II. The charter establishing the jurisdiction of the IMT provided for subject matter jurisdiction over crimes against peace, war crimes, and crimes against humanity.<sup>206</sup> This allowed the tribunal to prosecute business officials who had financial commitments to the Nazi regime,<sup>207</sup> provided loans for the operation of concentration camps,<sup>208</sup> and supplied poisonous gas for use in extermination chambers.<sup>209</sup> For example, in *Flick*, two businessmen were convicted of aiding and abetting criminal activities by providing large financial contributions to the Schutzstaffel (“SS”), who carried out the mass exterminations of Jews, among others.<sup>210</sup> The IMT reasoned that “[a]n organization which on a large scale is responsible for such crimes can be nothing else than criminal,”

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205. See GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 18 (2013), <http://icar.ngo/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf>.

206. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6 (a)–(c), Aug. 8, 1945, 82 U.N.T.S. 279.

207. See *United States v. Flick et al.*, in *VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW [T.W.C.]* No. 10, at 103 (1949–1953).

208. See *United States v. Ernst von Weizsaecker et al. (Ministries Case)*, in *XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW [T.W.C.]* No. 10, at 850–51 (1949–1953).

209. See *Trial of Bruno Tesch and Two Others (Zyklon B case)*, in *1 U.N. WAR CRIMES COMMISSION LAW REPORTS OF WAR CRIMINALS* 101 (1947–1949); see also Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 *J. INT'L CRIM. JUST.* 803, 816 (2010).

210. See *Flick*, VI T.W.C. at 1189.

and that “[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”<sup>211</sup> In *Ministries*, however, the IMT came to the opposite conclusion, despite similar facts. Defendant Karl Rasche was a high-ranking board member of Dresdner Bank, and was convicted for, *inter alia*, providing loans to the SS with knowledge that the money would be used to support enterprises that operated resettlement programs and concentration camps.<sup>212</sup> The IMT found that, with respect to the resettlement programs, Rasche simply was trying to generate a profit and thus could “well be condemned from a moral standpoint” but whose activities could “hardly be said to be a crime.”<sup>213</sup> With respect to financially supporting concentration camps, the IMT ruled that Rasche was not guilty, stating: “Our [IMT’s] duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.”<sup>214</sup> Finally, in *Zyklon B*, corporate businessmen Bruno Tesch and Karl Weinbacher worked for the company Tesch & Stabenow, who knowingly supplied Nazi concentration camps with poisonous gas used in gas chambers.<sup>215</sup> The defendants were convicted of aiding and abetting murder by the Nazi regime and sentenced to death by hanging.<sup>216</sup> As a result, while only representing a handful of examples, these cases provide a glimpse into the prosecution of business involvement in human rights abuses at the international level.

More recently, the ICTY and ICTR were established to address human rights concerns in the former Yugoslavia and Rwanda respectively.<sup>217</sup> The U.N. Security Council established the ICTY

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211. *Id.* at 1217.

212. *Ernst von Weizsaecker et al.*, XIV T.W.C. at 620.

213. *Id.* at 621.

214. *Id.*

215. See Trial of Bruno Tesch and Two Others (*Zyklon B* case), in 1 U.N. WAR CRIMES COMMISSION LAW REPORTS OF WAR CRIMINALS 101 (1947–1949).

216. *Id.* at 100.

217. See Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT’L J. OF HUM. RTS. 349, 350 (2005).

tribunal *ad hoc* under Chapter VII of the U.N. Charter<sup>218</sup> for crimes committed between January 1, 1991 and a date to be determined later by the Security Council.<sup>219</sup> The court ultimately had subject matter jurisdiction over grave breaches of the 1949 Geneva Convention, violations of laws or customs of war, genocide, and crimes against humanity.<sup>220</sup> Similarly, the ICTR was established *ad hoc* under Chapter VII of the U.N. Charter and had jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for crimes committed in the 1994 calendar year.<sup>221</sup>

Unlike the IMT, however, to date, both the ICTY and the ICTR have not addressed business involvement in human rights abuses.<sup>222</sup> This is due to the fact that the statutes establishing both the ICTY and the ICTR allow personal jurisdiction only over natural persons.<sup>223</sup> Further, as adjudicative bodies, the tribunals (including the IMT) were created to be temporary, with the purpose of addressing temporal crimes within a specific date range and on specific issues local to that region.<sup>224</sup> So, while the tribunals served, and continue to serve, as large judicial bodies to adjudicate crimes similar to what the ICJ or the ICC might hear, their temporary nature and localized jurisdiction limit their impact as a global adjudicative body for international crimes.

The ICC and the ICJ on the other hand are unique judicial bodies because of their roles as global forums for adjudicating international criminal disputes. In light of the problems with domestic courts (which often times fail to exercise jurisdiction over organizations through abuse of discretion or because of lack of

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218. See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, S.C. Res. 827, U.N. Doc. S/RES/ 1325 (May 25, 1993) [hereinafter ICTY Statute].

219. See S.C. Res. 827, ¶ 2 (May 25, 1993).

220. See ICTY Statute, *supra* note 218, arts. 2–5.

221. See Statute of the International Tribunal for Rwanda arts. 2–4, 7, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

222. See Vest, *supra* note 157, at 858; see also Ellen S. Podgor, “Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 GA. J. OF INT’L & COMP. L. 1, 1 n.6 (2002).

223. See ICTY Statute, *supra* note 218, art. 6; ICTR Statute, *supra* note 221, art. 5.

224. See Lilian A. Barria & Steven D. Roper, *supra* note 217, at 353–55.

legislation addressing jurisdiction over businesses) and tribunals (who are created to be temporary and only address local issues), the existing jurisdictional inadequacies between the ICJ and ICC loom larger in case these forums cannot or choose not to prosecute. If such a problem continues to persist, it will provide an avenue that organizations and its officials can use to escape liability for their role in human rights abuses. Thus, FIFA's involvement with Qatar is important because it highlights a glaring weakness in the construct of international criminal adjudication.

#### IV. PROPOSED SOLUTION

Under the current structure, so long as domestic courts do not prosecute organizations or their officials, they will be allowed to act with impunity internationally due to jurisdictional nuance among the ICJ and the ICC.<sup>225</sup> The ICJ, due to its ties to the U.N., however, is unlikely to extend its reach beyond the scope of handling disputes amongst states (barring some unforeseen change in events) because the U.N., and by extension the ICJ, were promulgated in the advent of World War II to maintain international peace and security between states.<sup>226</sup>

Instead, an amendment to the Rome Charter, which already has jurisdiction over individuals included in the treaty,<sup>227</sup> would allow for more meaningful changes to extend its jurisdiction. Several authors have already advocated for changes to the ICC to make it a stronger adjudicative body.<sup>228</sup> Amending the Rome Charter to extend the jurisdictional reach of the ICC, particularly with respect to accomplice liability, will empower the court

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225. See INT'L COMM'N OF JURISTS 2, *supra* note 164, at 56; see also STOITCHKOVA, *supra* note 182, at 18–19 (stating that business involvement in human rights crimes is an important and pressing issue).

226. See U.N. Charter, *supra* note 50, art. 1.

227. See Rome Charter, *supra* note 36, art. 25(3)(c).

228. See Michael Anderson, *International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction*, 53 VA. J. INT'L L. 763, 781 (2013); Sonali B. Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 351, 381–86 (2002) (pointing out specifically that the ICC is currently failing to adequately address crimes of genocide); Richard L. Cassin, *Should 'Grand Corruption' Be a Crime Against Humanity?*, FCPA BLOG (Aug. 22, 2012, 2:28 AM), <http://www.fcpa-blog.com/blog/2012/8/22/should-grand-corruption-be-a-crime-against-humanity.html>.



and ensnare business officials whose conduct is beyond the reach of the court's current jurisdiction.<sup>229</sup> In addition, amending the Rome Charter to explicitly include business entities as persons subject to the personal jurisdiction of the ICC would extend the jurisdiction of the court by allowing it to hear cases involving nonnatural persons such as FIFA.

Several administrative obstacles, however, make amending the Rome Charter an inherently difficult and lengthy procedure.<sup>230</sup> Further, the issue of whether organizations should be held liable as a person under the ICC was discussed in the meetings leading up to the ratification of the Rome Charter but failed to garner a consensus.<sup>231</sup> Yet, the fact that business liability was contemplated in the months leading up to the Rome Charter indicates that this issue was and continues to be important. In fact, the failure for the parties to reach a consensus on how business entities should be treated with respect to liability under the ICC represents an implicit acknowledgment that this issue deserves more attention. And it will continue to be prevalent so

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229. For descriptions of how businesses can be held criminally and civilly liable, see INT'L COMM'N OF JURISTS 2, *supra* note 164, at 37–43; see also Wolfgang Kaleck & Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. OF INT'L CRIM. JUST. 699, 700–09 (2010).

230. See Shah, *supra* note 228, at 381–83.

231. This decision was arrived at as follows:

During negotiations of the Rome Statute, the participating states contemplated including legal persons under the ambit of the ICC. The French delegation put forward a proposal suggesting that criminal organizations, such as those mentioned in the Nuremberg trials, should be identified as illegal and closed down or dissolved. Weeks of negotiations followed and the parties put together a draft text on legal persons. The draft text contained language that allowed the ICC to have jurisdiction over legal persons, other than states, when the crimes were committed on behalf of, or by agents or representatives of, the legal person. In the end, however, the final working paper produced by the consulting states changed the focus from legal persons to juridical persons to highlight the importance of individual prosecutions over prosecutions of legal entities (citations omitted).

Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for extraterritorial Abuses*, 26 NW. J. OF INT'L L. & BUS. 43, 58–59 (2005).

long as the current business landscape continues to shift from mom-and-pop stores to multinational businesses whose activities transcend physical borders and have the ability to assist the commission of crimes around the globe with relative ease.<sup>232</sup>

As a result, Article 25 of the Rome Charter should be amended as a way to strengthen the ICC. The amendment would require three separate aspects, all of which will clarify the language in the accomplice liability section of the Rome Charter, which in turn will expand the scope of jurisdiction of the court. First, an amendment should specifically include organizations and similar entities within the definition of a “person” that the court has personal jurisdiction over. Second, the amendment should lower the *mens rea* requirement from “purposely” to “knowingly.” This section would also include language that provides for liability when an accomplice buries his or her head in the sand and, by doing so, exacerbates current human rights atrocities. Thus, the added language accounts for situations when an accomplice does not share the same intent as the underlying criminal. Lastly, a clear definition of “substantially facilitate” should be drafted in the *actus reus* portion of the accomplice liability section in order to provide specific criteria of the types of acts that are sufficient to satisfy the *actus reus* requirement. In proposed form, the amendment to Article 25 would read as follows:

1. The Court shall have jurisdiction over natural and nonnatural persons pursuant to this Statute.

...

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person:

...

(c) Knowingly commits an act that aids or abets a crime within the jurisdiction of the court. Such an act must substantially facilitate the commission or attempted commission of a crime under this Charter, and may include acts that exacerbate ongoing crimes over which this court has jurisdiction.

...

5. For the purpose of paragraph (3)(c):

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232. See STOITCHKOVA, *supra* note 182, at 1, 4; see also INT’L COMM’N OF JURISTS 2, *supra* note 164, at 5.

(a) "Knowingly" within the meaning of this statute includes both actual or constructive knowledge and reckless disregard of the end result of the act when there was reason to believe, at the time of the complicit act, that the actor suspected a risk and nonetheless proceeded with the act.<sup>233</sup>

(b) "Substantially facilitate" within the meaning of this statute can be accomplished both directly and indirectly<sup>234</sup> and includes conduct that:

(1) enables the crime to occur;

(2) exacerbates the crime; or

(3) alters the way in which the crime is carried out.<sup>235</sup>

This proposed language to the amendment overcomes several limitations within the language of the accomplice liability portion of the Rome Charter. First, proposed Article 25(1) explicitly includes nonnatural persons such as corporations and similarly structured organizations within the jurisdiction of the court.<sup>236</sup> As a result, the inclusion of businesses in the Rome Charter allows the ICC to have personal jurisdiction over them<sup>237</sup> and would eliminate the dilemma of the court only having jurisdiction over natural persons.<sup>238</sup>

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233. Expansions of definitions are already present in the Rome Charter, particularly in Article 7, which add to the definition of crimes against humanity. See Rome Charter, *supra* note 36, art. 7(2)(a)–(i); see, e.g., Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

234. See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 102–03 (2002).

235. See INT'L COMM'N OF JURISTS 1, *supra* note 191, at 10–13.

236. An inherent obstacle is how to adduce liability of an entity that is unnatural such as a corporation. See INT'L COMM'N OF JURISTS 2, *supra* note 164, at 56, 58. Several tests taken from domestic law adjudications in determining corporate criminal liability, however, provide sufficient off-the-shelf solutions to this conceptually difficult task. Such approaches include aggregation, proactive and reactive fault, corporate ethos, and constructive corporate fault. See STOITCHKOVA, *supra* note 182, at 113–21.

237. While incorporating businesses into the definition of persons over which the court could exercise jurisdiction, the court would remain subject to complementarity requirements under the Rome Charter. See Rome Charter, *supra* note 36, pmb1.

238. See *Information Regarding the Potential Liability of Businesspersons for Atrocity Crimes Under the Rome Charter*, *supra* note 183.

Second, the new language in amended Article 25(3)(c) lowers the *mens rea* of accomplices from “purposely” to “knowingly.” The adjustment in *mens rea* is to accommodate actions the court is likely to face with regards to accomplice liability: those who want to engage with the criminal actors, but who do not necessarily desire to bring about the crime.<sup>239</sup> With this alteration, the new language accounts for the *mens rea* of accomplices who do not share the intent of the individual committing the crime.<sup>240</sup> Further, the “knowingly” *mens rea* standard is already articulated as the default for crimes in the Rome Charter under Article 30(3).<sup>241</sup> As a result, the lowered *mens rea* standard would not prevent the court from hearing the gravest types of crimes known to the international community as was intended for the ICC.<sup>242</sup>

Third, the amended accomplice liability section provides for an expanded definition of “substantially facilitate,” which, thus far, has had an amorphous definition in the international community with respect to what type of actions significantly impact the commission of a crime.<sup>243</sup> Using the modifier of substantial for facilitation reiterates the language that cases have used and the preparatory committee advocated for in determining accomplice liability.<sup>244</sup> At the same time, the expanded definition provides specific elements that will have to be met in order to satisfy the

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239. See, e.g., Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment ¶¶ 539–41 (Sept. 2, 1998).

240. See *supra* Part III.C.2.

241. See Rome Charter, *supra* note 36, art. 30(3).

242. *Id.* pmb1.

243. See Reggio, *supra* note 164; see also Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 162 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 234–35 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Kamuhanda, ICTR-95-94A-T, Judgment and Sentence, ¶ 597 (Jan. 22, 2004).

244. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 688, 691–92 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also *ILC Report*, *supra* note 164, at 21 (regarding the *mens rea* of accomplice liability, the preparatory committee stated that “an individual who ‘aids, abets or otherwise assists’ in the commission of a crime by another individual incurs responsibility for that crime if certain criteria are met. The accomplice must knowingly provide assistance to the perpetrator of the crime.”); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 691–92 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Furundžija, Case No. IT-96-21-T at ¶ 448.

*actus reus* requirement and will likely lead to less ambiguity moving forward. The elements within the expanded definition are taken from the influential International Commission of Jurists,<sup>245</sup> whose sole purpose in creating its panel of experts was to determine the scope of when corporations can be held liable with respect to human rights violations.<sup>246</sup> The panel's determinations, while not a crystallization of current international law,<sup>247</sup> nonetheless carries significant weight with respect to answering the question of which business activities make them accountable in the perpetuation of human rights violations.<sup>248</sup>

Lastly, the new language for the statute attaches jurisdiction to situations where the accomplice is aware of existing human rights violations elsewhere but acts nonetheless, thereby exacerbating current conditions within that country. Moving forward, businesses and their officials will not be able to simply bury their head in the sand to counteract the higher *mens rea* of "purposely." This will provide an incentive for businesses and their officials to act morally when engaging in business abroad, while also allowing for the ICC to hear crimes of concern to the international community.<sup>249</sup> Such propositions broaden the jurisdictional scope of the ICC while not extending potential liability for accomplices too far.

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245. The International Commission of Jurists, while only one group, is an influential one. It serves as a consultant with regard to human rights to the U.N. Economic and Social Council, the Council of Europe, and the African Council, and has close ties to the Americas. See INT'L COMM'N OF JURISTS 1, *supra* note 191, at Preface; see also *About the ICJ*, INT'L COMMISSION JURISTS, <http://www.icj.org/about/> (last visited Oct. 9, 2016).

246. See INT'L COMM'N OF JURISTS 1, *supra* note 191, at Forward.

247. In fact, corporations have been active in counteracting such sentiment through lobbying members of the U.N. with respect to promoting nonbinding rules on corporations rather than imposing voluntary restrictions on behavior. See Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* 5 (Glob. Policy Forum, Working Paper, 2014), [https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate\\_Influence\\_on\\_the\\_Business\\_and\\_Human\\_Rights\\_Agenda.pdf](https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf).

248. In other areas, nongovernmental organizations have the ability to influence major change in the responsibilities of others. See generally Ann Marie Clark, *Non-Governmental Organizations and Their Influence on International Society*, 48 J. INT'L AFF. 507, 512–14 (1995).

249. See Rome Charter, *supra* note 36, pmbl.

## CONCLUSION

FIFA's selection of Qatar to host the 2022 World Cup has done more than simply perpetuate the greedy stereotype that characterizes massive multinational organizations. FIFA officials' furtherance of human rights abuses through the acceptance of vote buying has illuminated the jurisdictional inadequacies of major international courts with respect to adjudicating crimes perpetrated by businesses and their officials. Ultimately, the failure of the ICJ and the ICC to possess both complete and meaningful jurisdiction over parties like FIFA as an organization or its officials poses a major concern for the future because it prevents these parties from being haled into international criminal courts and allows their involvement with human rights abuses to go unpunished at the international level. While these courts were intended to have limited jurisdiction, they were not necessarily created to be impotent. As a result, an amendment to Article 25 of the Rome Charter that expands the personal jurisdiction of the court to include nonnatural persons, lowers the *mens rea* standard from "purposely" to "knowingly," and clarifies the definition of "substantially facilitate" in the *actus reus* portion of the Article will bolster the jurisdictional reach of the ICC in today's global age of business. In turn, this will help prevent future organizations or their individuals from getting a "free kick" on their illegal international activities.

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