

## Prosecuting Corporations for Genocide

Michael J Kelly

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Corporations have committed atrocities for centuries yet remain immune from prosecution under international criminal law (ICL). In *Prosecuting Corporations for Genocide*, Michael J Kelly argues it is time for corporate impunity to end. Kelly draws on historical and ongoing atrocities throughout his book to prove that corporations will continue to commit atrocities absent an effective deterrent. The reader is led through the legal background of ICL, typical corporate involvement in atrocities, and methods of deterring atrocities, to reach the conclusion that art 25(1) of the *Rome Statute*<sup>1</sup> must be amended to grant the International Criminal Court jurisdiction over corporations.

The concept of subjecting corporations to ICL is not novel; Kelly emphasises throughout his book that the *Genocide Convention*,<sup>2</sup> Nuremberg Trials and *Rome Statute* all were originally intended to include jurisdiction over corporations.<sup>3</sup> However contemporary literature on corporate liability for international crimes is sparse,<sup>4</sup> and usually focuses on domestic prosecutions.<sup>5</sup> This is reflected in a foreword to the book by Luis Moreno Ocampo, Founding Prosecutor of the International Criminal Court, who calls it an ‘invitation to reopen this much-needed conversation with fresh arguments coined by an experienced mind’.<sup>6</sup> Although some of the discussions of criminal law, corporate law and international law are complex,<sup>7</sup> generally legal terms are avoided in the book to make it accessible to those from other fields. The purpose of the book is therefore to establish a solid base from which further scholarly work in a variety of fields can build. Accordingly, its scope is limited to matters of ICL and law reform. Topics such as restorative justice, the economic and political ramifications of corporate liability, and human rights are deliberately avoided.<sup>8</sup>

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>2</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (*‘Genocide Convention’*).

<sup>3</sup> Michael J Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press, 2016) 11, 30–1, 62–5, 71, 98–100, 210.

<sup>4</sup> *Ibid* xiv.

<sup>5</sup> See, eg, Simon O’Connor, ‘Corporations, International Crimes and National Courts: a Norwegian view’ (2012) 94(887) *International Review of the Red Cross* 1007; cf Joanna Kyriakakis, ‘Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge’ (2009) 56(3) *Netherlands International Law Review* 333.

<sup>6</sup> Kelly, above n 3, xiv.

<sup>7</sup> In particular, the discussion of modes of liability in Chapter Four as a matter of criminal law would require a legal background to fully understand.

<sup>8</sup> Kelly, above n 3, 12–13.

A key feature of the book are its case studies. Two damning cases are built against multiple corporations responsible for international crimes. The first case study concerns the genocide of minority groups living in Darfur, Sudan, and the second concerns the genocide of Iraqi Kurds in the 1980s. The second is particularly powerful because it demonstrates how easily corporations can profit from atrocities. In this case, German corporations sold chemical weapons and equipment to Iraq during Saddam Hussein's presidency, which were used to attack Iraqi Kurds.<sup>9</sup> Kelly methodically builds a case against the corporations involved and persuasively argues that their conduct amounts to complicity in genocide.<sup>10</sup> Both case studies describe the events in question in some detail to emphasise the injustice of corporate impunity.

Kelly's case studies are contextualised by an exploration of historical examples of corporations committing atrocities, the conceptual basis for holding corporations liable for crimes, and the international criminal legal system generally. Kelly also discusses alternative options to his proposal and compellingly dismisses them in favour of international prosecution. For example, when ratifying the *Rome Statute*, Canada chose to extend its jurisdiction for international crimes to both natural and legal persons.<sup>11</sup> Kelly praises the extended jurisdiction employed in Canada, but identifies Canada as an 'outlier' because states have generally not followed its lead.<sup>12</sup> Not all states subject corporations to criminal law domestically, and of those that do, few have chosen to subject corporations to prosecution for international crimes.<sup>13</sup> Having dispensed with the possibility of domestic prosecutions, Kelly convincingly concludes that prosecution by the International Criminal Court is the only adequate deterrent to corporate international crimes.

The only element missing from Kelly's book is a proposal for specific amendments to the *Rome Statute*. The argument would have been clearer if an alternative wording of the relevant parts of the *Rome Statute* were included. Additionally, the lack of specificity allows Kelly to overlook some technical legal issues. If Kelly had presented an explicit amendment to art 25(1) of the *Rome Statute* to include 'natural persons and legal entities', difficulties with the proposal would be immediately clear to the reader: legal entities must include corporations, but presumably not states, so how should 'legal entity' be defined? Although the *Draft Articles on State Responsibility* provide some guidance on the classification of entities,<sup>14</sup> this document was not considered in the book. Further, a range

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<sup>9</sup> Ibid 139–46.

<sup>10</sup> Ibid 144–55.

<sup>11</sup> Ibid 173–4.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) art 5.

of other legal issues must be resolved before legal persons could be subjects of the International Criminal Court, including modes of attribution, penalties, changes to evidence rules, and complementarity.<sup>15</sup> These matters are only mentioned peripherally by Kelly. In-depth consideration would have enhanced the argument and guided development more effectively. Nevertheless, Kelly raises a number of counter-arguments to the concept of subjecting corporations to ICL and persuasively rejects them.<sup>16</sup>

Corporate impunity for international crimes is a glaring failure of international law that has been ignored for too long. Fortunately, *Prosecuting Corporations for Genocide* is a forceful argument in favour of developing ICL and is destined to be influential. While more work may be required to successfully subject corporations to ICL in order to deter the commission of atrocities, this book is a solid base from which further research and reform may grow.

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<sup>15</sup> Alexandra Garcia, 'Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg' (2015) 24(1) *Tulane Journal of International & Comparative Law* 97, 121–2.

<sup>16</sup> Kelly, above n 3, ch 7.

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