

## Book Review: *Prosecuting Corporations for Genocide*

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## Book Review: *Prosecuting Corporations for Genocide*

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*Prosecuting Corporations for Genocide*

Michael J. Kelly

New York, Oxford University Press, 2016

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*Prosecuting Corporations for Genocide* takes readers “into the thicket of legal conundrums and unhelpful precedents” preventing corporations from being held liable for complicity in massive human rights violations.<sup>1</sup> Michael Kelly, Associate Dean and Professor of Law at Creighton University, is well positioned to describe these thorny challenges. As president of the U.S. National Section of *L'Association Internationale du Droit Pénal* (International Association of Criminal Law), he engages regularly with international legal scholars and judges who advise the United Nations (UN). Kelly directly addresses matters of genocide through his summer law program in Nuremberg. Luis Moreno Ocampo, who wrote the forward to the book, served as the International Criminal Court's first prosecutor and speaks to the need to extend accountability beyond individual perpetrators.

### Corporate Accountability for Genocide: The Challenges

Mass murder is carried out by individuals but cannot occur without the assistance of companies that provide the tools for annihilation. The Holocaust remains the most noted example for the use of I.G. Farben's Zyklon B prussic acid (depicted on the book's cover) in the gas chambers. Other Holocaust-complicit actors include Ford, IBM, BMW, Krupp, Hugo Boss, the French National Railways and many others. Sadly, the modern debates about corporate accountability are not just about historic wrongs; corporate complicity in genocide continues. Kelly offers more contemporary examples such as the chemical companies which furnished Saddam Hussein with the mustard gas, VX, sarin, and tabun needed to slaughter the Kurds, and the Chinese National Petroleum Corporation (CNPC/PetroChina) which catalyzed the genocide in Darfur to clear land designated for oil extraction.

Kelly shows why holding these corporate actors accountable remains arduous even with the Genocide Convention and the existence of the International Criminal Court (ICC).<sup>2</sup> Some legal scholars and human rights activists have hoped the ICC could serve as a tool for such corporate accountability. The ICC opened in 2002 with the aim of holding individuals accountable for genocide and other crimes against humanity. Since its inception, the court has indicted a number of individuals complicit in genocide and other atrocities: Omar al-Bashir for the genocide in Darfur, Sudan, Jean-Pierre Bemba and Thomas Lubanga Dyilo for war crimes and crimes against humanity in Congo, and Joseph Kony for his crimes in Uganda. The ICC has never tried a corporate actor.

Currently, 124 states have ratified the Rome Statute, the court's founding document. Yet because the Rome Statute only endows the court the power to prosecute natural persons, corporations cannot be tried. A *natural person* is a human being. *Legal persons* are private and public

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<sup>1</sup> Michael J. Kelly, *Prosecuting Corporations for Genocide* (New York: Oxford University Press, 2016), 88.

<sup>2</sup> Kelly, *Prosecuting Corporations for Genocide*, 129. On December 9, 1948, the UN General Assembly ratified the Genocide Convention through which participating countries agreed to work to prevent and punish genocidal actors. Despite this agreement, the current 143 participating countries have yet to challenge a complicit corporation. Kelly argues Article 4 of the Genocide Convention could be interpreted to include market actors, but impunity for corporations continues due to (1) lack of jurisdiction, (2) lack of political will, and (3) lack of a well-articulated criminality for corporations under international law.

entities including businesses, governments, and non-governmental organizations. As a result, the corporate actors supplying the tools for murder such as creating poison or poisoned weapons, producing weapons which cause undue suffering, providing the financing, or in some other way facilitating the genocidal effort, remain “accountable to no one.”<sup>3</sup>

There might be a trend towards holding some organizations accountable, at least in local tribunals. For example, in 2000, the International Criminal Tribunal for Rwanda held Radio Télévision Libre des Mille Collines (RTLM) accountable for promoting the hostility that created the context for genocide. The station was not disbanded, but several individuals were held accountable.<sup>4</sup>

Currently, the International Court of Justice (ICJ) exists as the only international legal organization designed to hold *collectives* accountable—in this case, meaning groups rather than individuals. This judicial arm of the United Nations, however, only hears cases involving states. The court, born from the creators of the League of Nations, was created with the intention to resolve disputes between states.<sup>5</sup> As of July 2017, pending cases include conflicts between Nicaragua and Costa Rica as well as the Democratic Republic of Congo and Uganda.

International legal options are limited. Therefore, domestic courts most often pursue civil liability cases, meaning liability for legal persons, which includes corporations. Kelly notes, “not all domestic jurisdictions hold corporations criminally liable.”<sup>6</sup> The book includes a table outlining which countries can prosecute corporations under criminal law. Tragically, “most human rights abuses and atrocities tend to occur in the societies least able to deal with them.”<sup>7</sup> Domestic courts are often too weak or too economically enmeshed with corporations to challenge them.

The inability or unwillingness of domestic courts to address corporate actors for complicity in genocide is an increasing concern, especially as international corporations continue to dwarf many countries in which they operate. “Presently, fifty-one of the 100 largest economies in the world are corporations, forty-nine are countries.”<sup>8</sup> Comparing GDP to revenue, Walmart is now larger than 170 countries and Exxon is larger than 150.<sup>9</sup> The ability of a small country and increasingly *any* country, to hold a multinational corporation accountable for complicity in genocide seems tantamount to trying to hold back a giant with a rubber band. Kelly acknowledges the danger of this power differential when he states corporations, “regularly realize vast profits at the expense of local populations through the often empty vessel of corporate governments.”<sup>10</sup> Due to lobbying efforts and sheer force, corporations have increasing rights and few corresponding obligations. In short, they are stronger than those who lobby for their obligations. This book is an audible cry to hold corporations accountable for participation in genocide.

### Legal Precedents for Collective Accountability

Kelly cites the 1648 Treaty of Westphalia as holding states, rather than individuals, accountable when there was interference in other states’ affairs. Thus, he offers it as a precedent for holding other entities, in this case corporations, accountable as collective wholes rather than just their executives.<sup>11</sup> Unfortunately, the seeds planted in the 17th century yielded a disappointing crop of legal precedents for those with their eye on corporate actors.

<sup>3</sup> Ibid., 14.

<sup>4</sup> Three of the RTML leaders faced life imprisonment. The court sentenced the three leaders to thirty years imprisonment. A Gacaca court sentenced RMTL announcer, Valérie Bemeriki to life imprisonment.

<sup>5</sup> League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, accessed February 24, 2018, <http://www.refworld.org/docid/40421d5e4.html>.

<sup>6</sup> Kelly, *Prosecuting Corporations for Genocide*, 73.

<sup>7</sup> Kelly, *Prosecuting Corporations for Genocide*, 177.

<sup>8</sup> Ibid., 4.

<sup>9</sup> Steve Coll, “‘Private Empire’: Author Steve Coll on the State- Like Powers, Influence of Oil Giant ExxonMobil,” *Democracy Now*, May 4, 2012, accessed October 8, 2018, [https://www.democracynow.org/2012/5/4/private\\_empire\\_author\\_steve\\_coll\\_on](https://www.democracynow.org/2012/5/4/private_empire_author_steve_coll_on).

<sup>10</sup> Kelly, *Prosecuting Corporations for Genocide*, 14.

<sup>11</sup> Ibid., 55.

The wake of World War II provides an example of the ongoing struggle. The subsequent Nuremberg trials held roughly a dozen German executives accountable for their companies' support of the Nazi war effort and for the use of slave labor but not for their role in the Holocaust. However, the trials were an important start. The tribunal acknowledged the importance of corporations when it declared Germany could not have waged war without the I.G. Farben corporation.<sup>12</sup> The company was accused of forcing tens of thousands of prisoners into torturous slave labor in factories constructed in and around concentration camps. Because the court tried I.G. Farben executives rather than the company as a whole, attorneys claimed the executives simply followed orders from the German government. Thus, the prosecution struggled to prove the extent of knowledge of individual executives and their participation in the genocidal project. Even when they did prove executive knowledge and participation, the executives skirted significant accountability. Benjamin B. Ferencz, prosecutor in the Nuremberg trials, details the legal arguments in his book *Less Than Slaves*. At the conclusion of these trials, of the executives convicted, no one spent more than eight years in prison and once released, most went on to lead post-war Europe either in government or within the private sector.<sup>13</sup> The corporations remained intact.

After discussing the important attempts at Nuremberg, albeit with disappointing results, Kelly carries the thread of legal attempts through the 21st century. He provides an important and thorough description of contemporary attempts to use the U.S. Alien Tort Statute (ATS) to hold subsidiaries of U.S.-based corporations liable for atrocities performed abroad. In the 2013 *Kiobel* decision, the U.S. Supreme Court ruled against using the ATS in the case of Royal Dutch Petroleum for its alleged acts of torture, murder, and extradition of protesting workers in Nigeria. While many human rights advocates considered the U.S. Supreme Court's ruling a major blow to human rights, Kelly considers the blow only deafening rather than deadening. The U.S. Supreme Court ruled against the prosecution because of issues of extraterritoriality, not because the ATS cannot be used against corporations.<sup>14</sup>

### Case Studies: Sudan and Iraq

Kelly's studies of Sudan and Iraq in Chapter 5 consider still unaccounted-for cases of corporate complicity in large-scale genocide. In the case of Darfur, Kelly considers the complicity of the Chinese National Petroleum Corporation (CNPC), which facilitated the forced removal, often through murder, of people living on the lands CNPC had slated for business. The company, an instigator or at least an advocate of the genocide, was never held legally accountable. To skirt potential accountability and attract foreign investment in spite of its behavior, the company rebranded itself into PetroChina. Kelly shines the light on individuals as well when he notes Warren Buffett's Berkshire Hathaway's heavy investment in PetroChina. Eventually Berkshire Hathaway divested but news sources reported that the company's decision, "was 100 percent a decision based on valuation" rather than ethics.<sup>15</sup>

Kelly also explores German chemical corporations' complicity in the Kurdish genocide, a number of which supplied Saddam Hussein with the chemicals he needed. Kelly acknowledges the German State's inaction. He says the German government has no incentive, other than moral, to do so. Here we see domestic courts, even in wealthy countries with strong infrastructure, shying away from holding their corporations accountable. In weaker states, the tendency to look the other way is only amplified.

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<sup>12</sup> For more about these and other German corporate proceedings see Benjamin Ferencz's *Less Than Slaves*. Regarding I.G. Farben specifically, the Nuremberg court concluded that, "Auschwitz was financed and owned by Farben". Benjamin B. Ferencz, *Less Than Slaves* (Cambridge: Harvard University Press, 1979), xix.

<sup>13</sup> Kelly argues the U.S. adoption of the Truman Doctrine (1945-46) further protected industrialists.

<sup>14</sup> Without the ATS, human rights lawyers now use the Crime Victims' Rights Act of 2004 and the Torture Victim Protection Act of 1991.

<sup>15</sup> Jonathan Stempel, "Buffet Says Has Sold Entire PetroChina stake," Reuters.com, October 18, 2007, accessed October 17, 2018, <https://www.reuters.com/article/us-berkshire-petrochina/buffett-says-has-sold-entire-petrochina-stake-idUSWE1177020071018?feedType=RSS&feedName=businessNews&rpc=23&sp=true>

### A Way Forward

Kelly does more than outline the challenges of holding corporations accountable, he proposes a way forward. While most abuses occur locally, Kelly recommends first amending the existing international legal system because international law provides (1) uniformity of treatment, (2) protection of vulnerable societies, (3) deterrence, (4) victim assistance, and (5) the development of international criminal law.<sup>16</sup> Kelly recommends amending the Rome Statute to enable the ICC to hold both legal persons and natural persons accountable. Kelly claims the ICC only omitted legal persons because of time constraints but the increasing size and ongoing role of corporations suggest it is time to revisit the issue. He offers Canada as a model, as Canadian law can “assert criminal jurisdiction over corporations for complicity in genocide.”<sup>17</sup> By including corporations, Kelly considers this an amendment to the Rome Statute by Canadian courts.<sup>18</sup>

Kelly acknowledges the challenges to changing the ICC. There remains the problem of sovereign immunity for state-run enterprises. The United States, China, and Russia have not ratified the Rome Statute, all of which house the parent companies of powerful multinational corporations. Additionally, Article 30 requires proof of “knowledge and intent,” which remains hard to prove for collectives.<sup>19</sup> Finally, Kelly argues that the Rome Statute is at odds with customary international law over definitions of *mens rea*, a guilty mind. These issues could stymie the ICC’s efforts to hold a corporation criminally liable. To this list, I add the questionable capacity of the ICC to take on more cases. Presently, the court struggles under the weight of individual convictions which can take years and cost millions of dollars. If we were instead to use the ICJ, the judicial arm of the United Nations, the UN General Assembly would start the process by making a formal request for the ICJ to consider the issue of corporations.

### Addressing Counterarguments

To end what has largely become legal impunity for corporate complicity in genocide, those wishing hold corporations more fully accountable, Kelly provides some guidance as to how to respond to these counterarguments. Some will argue that companies are not subject to international law or the Geneva Conventions. To this, Kelly replies that international customary law considers genocide a matter of *jus cogens*, a non-negotiable. He says “under international customary law, any country can try a perpetrator for genocide.”<sup>20</sup> Some may argue that market forces deter bad behavior; participation in genocide would ultimately be bad business as it would devastate and destroy workforces and disrupt markets. Kelly responds by claiming market forces might deter complicity *if* corporate officers played the long-game. Because many contemporary companies focus on quarterly profits and have high turnover, short-term profits outweigh long-term good business strategy.

Kelly also offers some tactical advice for those who have the opportunity to formulate legal cases against complicit corporations, because even when lawyers have a court in which to pursue their case, they run into numerous challenges. Corporate participants in genocide tend to aid and abet rather than instigate genocide. Furthermore, the seat of the soul of corporate entities remains difficult to locate.<sup>21</sup> The defense will likely claim that people commit crimes, not companies, and that corporations cannot have *mens rea*. To deal with these challenges, Kelly advocates first aiming to hold the corporation accountable as a whole. This allows the prosecution to prove the responsibility of the corporation and then show how each person fits into the overall “mosaic.”<sup>22</sup> Corporations could be held accountable by applying vicarious liability, which argues that just as states must be responsible for their citizens’ actions, corporations ought to be liable for their

<sup>16</sup> Kelly, *Prosecuting Corporations for Genocide*, 175.

<sup>17</sup> *Ibid.*, 126.

<sup>18</sup> *Ibid.*, 127.

<sup>19</sup> *Ibid.*, 79.

<sup>20</sup> *Ibid.*, 161.

<sup>21</sup> John C. Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment,” *Michigan Law Review* 79, no. 3 (1981), 386-459.

<sup>22</sup> Kelly, *Prosecuting Corporations for Genocide*, 38.



employees' actions. The command responsibility—the legal doctrine of hierarchical accountability for crimes against humanity and also be employed. Command responsibility was used to hold the *Schutzstaffel* (the Nazi S.S.) accountable during World War II for the behavior of agents could be used to expand executive responsibility for company agents. In this way, the corporate whole could become accountable for the actions of a few agents or executives.

### Limits of the Law

Some readers may wonder: Even if we had courts and effective legal cases, what could law really promise regarding deterrence and support for victims? Kelly argues that the “threat of prosecution for international crimes would have an immense deterrent effect.”<sup>23</sup> He cites several examples of individuals made nervous by potential prosecution including Henry Kissinger for his role in Cambodia. Yet, individuals continue to incite and participate in genocide in spite of the ICC's work. Why would corporate actors be more likely to be deterred, especially if companies focus on quarterly profits and executive teams turn over with some frequency? Most executives can still leave the company without facing much personal accountability. Rex Tillerson, the former CEO of Exxon, was never held accountable for the company's atrocities in Aceh, Indonesia during his tenure. In 2017, he found himself the U.S. Secretary of State.

Even if we unseated complicit executives, would long-term change last without a change in the corporate culture which makes profits the goal at all costs? Companies have an ethos, a *habitus*, which carries on with or without various individuals. The South African Truth and Reconciliation Commission, for example, highlighted the role of Ford and IBM, both Holocaust-complicit companies, in perpetuating apartheid. In 2011, AG Siemens used slave labor to produce gas chambers during the war and found itself accused by the U.S. Department of Justice of engaging in a decade-long, one-billion-dollar bribery scheme involving senior officials in Argentina to produce identity cards.<sup>24</sup> During World War II, Barclays Bank operated in France and offered up information about Jewish employees and helped finance the Nazi war effort. The bank also housed the plundered gains of Jews taken to the Drancy transit camp in France shortly before they were shipped to Auschwitz. The manager of the French division, Marcel Cheradame, continued his post after the war into retirement. In June 2017, United Kingdom authorities charged Barclays, its former chief executive, and other senior officials with fraud relating to the 2008 financial crisis.<sup>25</sup> Even if not at a genocidal level, their acts of fraud and bribery disrupted world markets and facilitated a global recession. Did the ethos of these companies change after World War II? The question of how to transform the corporate ethos remains.

Even if deterrence worked and company ethos could be transformed, it remains unclear how often current fines paid by corporations find their way to victims. In the case of Chiquita, the \$25 million fine for the company's fiscal support of a terrorist paramilitary organization was paid to the U.S. Department of Justice rather than to decimated families in Colombia.<sup>26</sup>

With the questionable ability of legal fines to support victims, deter complicity in genocide, and change corporate values, Kelly's book made me wonder about the possibility of having a “death penalty” for corporations. Threat of dissolution could have a greater deterrent effect, eliminate impunity most executives still maintain, and encourage employees to resign or shareholders to divest when crimes against humanity become visible. If not the death penalty, then at least extradite the subsidiary from the site of conflict. Kelly is concerned if companies pull out after violence. When businesses leave, innocent people lose jobs and a country's already-fragile

<sup>23</sup> *Ibid.*, 10.

<sup>24</sup> U.S. Department of Justice, “Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme,” *Justice News*, December 13, 2011, accessed October 17, 2018, <https://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe>.

<sup>25</sup> Caroline Binham, “Barclays and Former Executives Charged with Crisis-Era Fraud,” *The Financial Times*, June 20, 2017.

<sup>26</sup> The U.S. Department of Justice website reporting the settlement announced the company's \$25 million fine and the requirement to abide various ethics provisions. The announcement, and all subsequent major news sources, all neglect to mention *where* the \$25 million went. U.S. Department of Justice, “Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine,” March 19, 2007, accessed July 28, 2017, [https://www.justice.gov/archive/opa/pr/2007/March/07\\_nsd\\_161.html](https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html).

infrastructure weakens, This, in turn, decreases foreign investments and the context is ripe again for more violence.<sup>27</sup> Clearly, by showing readers the existing legal topography, Kelly's work can spark some interesting debates and perhaps some changes in the law. In the interim, however, we may need to rely on the power of public pressure and corporate goodwill.

### Extralegal Approaches

Kelly's title makes it clear that his book addresses the law's ability to hold corporations accountable. That said, it warrants acknowledging the extralegal approaches available. While Kelly claims corporate ethics (voluntary standards of corporate social responsibility) prove insufficient to curtail corporate behavior, he attributes the "weight of negative opinion" to halting the torturous practices of the Dutch East and British East India companies. He also points to South Africa's Truth and Reconciliation Commission's powerful acknowledgment of specific corporations, such as IBM and Ford, without whom apartheid would have been difficult to sustain. Truth and reconciliation commissions lack the teeth of a court because they cannot demand compensation, although they do contribute to social pressure which could lead to settlements.

The corporate social responsibility movement, by contrast, encourages companies to uphold global human rights standards voluntarily. The United Nations Global Compact led by John Ruggie and Georg Kell, adopted in August 2005, encourages commitment to human rights via a non-binding pact to ten guiding principles which include protecting human rights, eschewing complicity in human rights violations, and prohibiting child labor and corruption. In responding to the question, "Does the UN Compact have teeth?", the Compact describes itself as, "more like a guide than a watch dog."<sup>28</sup> The Global Compact currently serves as a guide to over 9,000 corporate signatories all listed on the UN website.

Other powerful influencers not mentioned in the book are private sector social responsibility ratings. The Corporate Human Rights Benchmark, for example, assesses 100 of the largest publicly traded companies according to various human rights indicators. This report and other similar reports prompt investor action and, at times, consumer boycotts. Another powerful corporate influencer not mentioned is investigative reporting. Nestle has radically improved its human rights record since a documentary, *The Dark Side of Chocolate*, proved the child slave trade active in the cocoa industry. *60 Minutes* and *Frontline* have aired unforgettable reports about Chiquita and Firestone respectively. Kelly's own naming and shaming of corporate actors throughout the book suggests he considers there to be some power in naming and shaming, either as a means of correcting behavior or preventing future human rights violations. These extralegal approaches may be the only tools at hand until the International Criminal Court expands the Rome Statute to include legal persons, the U.S. Supreme Court gives the green light to holding subsidiaries accountable for actions abroad, and domestic courts in states where the atrocities occurred have the political will and infrastructure to try corporations. Kelly could engage transitional justice and genocide scholars even more if he discussed the systems of corruption that deter these domestic courts from holding companies accountable. Regardless, *Prosecuting Corporations for Genocide* is a must-read for anyone interested in the intersection of corporate accountability and genocide. Kelly's book is timely, relevant, and speaks to the increasingly dominant player in world events: the corporation.

*Prosecuting Corporations for Genocide* provides a guide for those wishing to expand the reach of international courts to corporate actors and for legal professionals preparing cases against them in domestic courts. As such, this book will interest legal scholars, legal professionals, and law students as well as those interested in human rights, conflict resolution, and transitional justice. I used the book, for example, in a Grinnell College course entitled "The Role of Market Actors in Mass Atrocity." Students raved about Kelly's clear writing, organized arguments, and willingness to take a stand.

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<sup>27</sup> Kelly, *Prosecuting Corporations for Genocide*, 164.

<sup>28</sup> United Nations, *Global Compact: Frequently Asked Questions*, accessed July 28, 2017, <https://www.unglobalcompact.org/about/faq>.