

CORPORATE ACCOUNTABILITY: PROSECUTING CORPORATIONS FOR THE COMMISSION OF INTERNATIONAL CRIMES OF ATROCITY

PHOTEINE LAMBRIDIS

I. INTRODUCTION

The complicity of corporations in international crimes is not a new phenomenon, however multinational corporations are increasingly participating in the direct commission of crimes of atrocity.¹ By supplying perpetrators with the necessary tools to commit these crimes, they are fueling ongoing conflicts by state governments and paramilitary groups, and actively profiting from them. For example, a British corporation knowingly supplied Rwanda with arms to kill Tutsis,² a Dutch corporation sold raw materials to Saddam's government for the production of chemical weapons to be deployed against the Kurds,³ and multiple European and U.S. corporations traded weapons, diamonds, and timber that effectively sustained the conflicts in Liberia and Sierra Leone.⁴ Increased globalization and technological growth

* This online annotation was written in the course of the author's tenure as a Staff Editor on the *N.Y.U. Journal of International Law & Politics*.

1. "Atrocity crimes" refers to the three international crimes of genocide, crimes against humanity, and war crimes. These crimes are defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions and their 1977 Additional Protocols, and the 1998 Rome Statute of the International Criminal Court, in addition to other treaties. See United Nations, A Framework of Analysis for Atrocity Crimes (2014), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

2. Matt Wells, *Arms Firm Linked to Rwandan Army Chief*, *The Guardian*, (Feb. 9, 2000), <https://www.theguardian.com/politics/2000/feb/10/ethicalforeignpolicy.foreignpolicy1>.

3. Marten Zwanenburg & Guido den Dekker, *Prosecutor v. Frans van Anraat*, 104 *Am. J. Int'l L.* 86, 86–94 (2010).

4. Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, U.N. Doc. S/2002/1146 (Oct. 16, 2002).

have bolstered corporations' standing as powerful international actors who should be held criminally liable for their involvement in committing and perpetuating atrocity crimes, including genocide, war crimes, and crimes against humanity.

However, due to the absence of international enforcement mechanisms, including substantive criminal laws, corporations can escape criminal liability despite their direct participation in criminal activity. None of the U.N. complaint procedures related to human rights possess mandates to monitor the activities of corporations. Additionally, the International Criminal Court (ICC) lacks jurisdiction over corporate entities, and can therefore only prosecute individual corporate officers, thus failing to attribute criminal accountability to the corporation as a collective entity.⁵ Moreover, regional human rights courts also lack jurisdiction over both corporate entities and individual corporate officers.

Furthermore, a Report for the Office of the U.N. High Commissioner for Human Rights (OHCHR) concluded that domestic judicial mechanisms are also failing to provide legal redress for victims against corporations, due to:

a lack of action on the part of criminal prosecution and law enforcement bodies, significant legal uncertainty surrounding the scope of key liability concepts, unevenness in distribution and use of domestic remedial mechanisms, some political concerns over extraterritorial regulatory and enforcement issues and a general lack of international coordination and cooperation.⁶

Most national legal systems limit corporate liability to civil, tort-based claims. For example, the United States' Alien Tort Statute permits non-U.S. citizens to file civil suit against non-U.S. companies for their involvement in international crimes, although the Supreme Court has recently narrowed its scope for imposing liability.⁷

This annotation will argue that amending the Rome Statute is the

5. See William Schabas, *International Criminal Law and the Business World*, in *La Responsabilité des Entreprises Multinationales en Matière de Droit de l'Homme* (Emmanuel Decaux, ed., 2010) (background history of negotiations regarding the exclusion of corporate entities from ICC jurisdiction).

6. Jennifer Zerk, *Towards a Fairer and More Effective System of Domestic Law Remedies: A Report Prepared for the Office of the U.N. High Commissioner for Human Rights*, at 9 (2013), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

7. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding that under the Alien Tort Statute, there is a presumption against extraterritorial application of U.S. law).

best option for prosecuting corporate entities for their direct participation in crimes of atrocity by acting as the impetus for legislation at the national level. The annotation proceeds as follows: Section II discusses how current customary international law has yet to impose significant legal obligations on corporate entities. Section III explores the Tatmadaw's commission of crimes of atrocity in Myanmar as an example of how foreign corporations can directly facilitate the commission of international crimes and entirely escape liability. Section IV briefly notes why soft law is an insufficient mechanism for holding corporate entities accountable. Section V concludes by elaborating upon how the Rome Statute can form the authoritative basis for applying international criminal law to corporations and how the ICC can motivate the expansion of corporate liability for international crimes of atrocity at the national level.

II. THE SOURCE OF CORPORATE LIABILITY IN CUSTOMARY INTERNATIONAL LAW

Due to the state-centered design of the international legal system, states are the sole subjects capable of bearing international legal obligations and non-state actors such as corporations generally lack the legal personality required for legal obligations to be imposed upon them.⁸ In the 2017 U.S. Supreme Court opinion *Jesner v. Arab Bank*, Justice Kennedy found that there was no specific, universal, and obligatory norm of corporate liability under prevailing international law.⁹ Scholars have posited that states resist imposing and enforcing direct legal obligations on corporations because to do so would represent a significant disempowerment of states, who are reluctant to share their position as sovereigns with corporations at the international level.¹⁰

However, this analysis of international law has faced criticism. In particular, Rosalyn Higgins described the traditional theory as “an intellectual prison of our own choosing,” and instead argued that corporations should be considered “participants” in the international legal system.¹¹ Furthermore, the Nuremberg Tribunal, in its prosecution of

8. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L. J.* 443, 452–54, (2001).

9. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1390–91 (2018).

10. Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 *Colum. J. Transnat'l L.* 927, 950 (2005).

11. Rosalyn Higgins, *Problems And Process: International Law And How We Use It* 49 (1994).

officers and directors of corporations who were complicit in the Nazi regime, rejected the notion that international law was only concerned with state actions.¹² More recently, in July 2014 the Appeals Chamber of the ad hoc Special Tribunal for Lebanon decided in two cases that the tribunal had jurisdiction over the corporations New TV S.A.L. and Akhbar Beirut S.A.L. for the offense of contempt of court, the first time that an international criminal tribunal asserted jurisdiction over corporate entities.¹³ Additionally, Sir Hersch Lauterpacht, a prominent judge at the International Court of Justice (ICJ), reasons that developments in international legal systems, such as the dispute settlement mechanisms in investment treaties, provide evidence that corporations do possess international legal personality.¹⁴ Domestic jurisdictions are also increasingly recognizing and establishing criminal liability for corporations in their national laws. In 2016, a European Parliament resolution called on European member states to establish criminal liability for business enterprises that commit offenses constituting serious human rights abuses.¹⁵

III. CORPORATE CRIMES OF ATROCITY: MYANMAR AS A CASE STUDY

The Rohingya Muslim population in Myanmar remain the target of attacks by the Tatmadaw, the official name for the Myanmar military, and other Myanmar government authorities. Through killings, rapes, torture, forced displacement and other human rights violations, the Tatmadaw are attempting to erase the Rohingya's identity and remove them from Myanmar.¹⁶ In 2019, the U.N. Human Rights Council's Independent Fact-Finding Mission (FFM) concluded that these

12. For an overview, see Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 *Case W. Res. J. Int'l L.* 49 (2018).

13. See Caroline Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law*, 49 *Geo. Wash. Int'l L. Rev.* 351, 379–381 (2017) (discussing the implications of the Special Tribunal for Lebanon case, *Al Jadeed S.A.L. and Karma AlKhayat* case).

14. Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 *Ind. J. Global Legal Stud.* 259, 274 (1997).

15. OJ C 2018 215/125 *Corporate Liability for serious human rights abuses in third countries*, European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries.

16. Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.5, (Sept. 16, 2019).

acts constitute a widespread and systematic attack against the Rohingya, amounting to crimes against humanity, with reasonable grounds to infer genocidal intent on the part of Myanmar.¹⁷ In a subsequent report, the FFM recommended that “no business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into an economic or financial relationship with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them or their individual members.”¹⁸ Through their foreign commercial ties, the Tatmadaw are able to draw on alternative sources of revenue outside of the official military budget. As a result, foreign companies are contributing to violations of human rights law and international humanitarian law by continuing to do business with the Tatmadaw, or any corporate entity owned or controlled by them, effectively strengthening their military operation.¹⁹ The FFM concluded that fourteen foreign companies have joint ventures and at least forty-four foreign companies have other forms of commercial ties with Tatmadaw businesses.²⁰ Additionally, at least fourteen foreign companies from seven states have provided arms and related equipment to the Tatmadaw since 2016, including China, Russia, and Israel.²¹ Consequently, the FFM called on foreign corporations to sever all financial ties with the Myanmar military, to ensure its financial isolation.²²

Burma Campaign UK, a human rights advocacy organization, continues to publicize and update a “Dirty List” consisting of corporations who maintain commercial ties to the Myanmar military.²³ In response to the FFM report, Newtec, a Belgian satellite communications company, was the first to announce its severance of ties with the Tatmadaw, stating that it would cease commercial ties with Mytel, a local mobile phone operator that is partially owned by the military.²⁴ Newtec's decision was likely prompted by political pressure and negative publicity, and other corporations have followed suit, including

17. *Id.*

18. Human Rights Council, *The Economic Interests of the Myanmar Military*, Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/42/CRP.3, (Aug. 5, 2019).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Burma Campaign UK, *The Dirty List*, <https://burmacampaign.org.uk/take-action/dirty-list/>.

24. Joshua Carroll, *Belgian Company on 'Dirty List' Cuts Ties With Myanmar Military*, VOA News (Aug. 12, 2019) <https://www.voanews.com/east-asia-pacific/belgian-company-dirty-list-cuts-ties-myanmar-military>.

Western Union, a large financial services company that contracted with Myawaddy Bank, a subsidiary of the Tatmadaw business conglomerate Union of Myanmar Economic Holdings Ltd.²⁵ Nonetheless, other corporations continue to contribute to the Myanmar military without fear of facing criminal liability.

IV. SOFT LAW IS AN INSUFFICIENT ACCOUNTABILITY MECHANISM

In 2011, the U.N. Guiding Principles on Business and Human Rights were adopted with overwhelming support by state governments and corporations.²⁶ However, this support is largely due to the absence in those Principles of any binding legal obligations or enforcement mechanisms. The Guiding Principles serve as a source of normative content by declaring "a global standard of expected conduct for all business enterprises wherever they operate" and further elaborate upon the implications of existing standards and practices for corporations and states.²⁷ Consequently, without mandatory rules and responsibilities, efficient monitoring, or the possibility of enforcement through sanctions, the U.N. Guiding Principles remain toothless, lacking the ability to serve as an international mechanism capable of holding corporations responsible for their criminal actions.

V. ICC REFORM AS A SOLUTION

Although the existence of corporate liability for crimes of atrocity and other human rights abuses under customary international law is still in dispute, the ICC could bypass this question and give itself express jurisdiction to prosecute corporations by amending the Rome Statute. However, amending the Statute would likely involve politically challenging negotiations amongst States Parties, and any amendments would require approval by at least two thirds of States Parties pursuant to Article 121(3) of the Rome Statute.²⁸ Additionally, given the ICC's limited resources and strict admissibility requirements for acquiring jurisdiction over international crimes, there is a question of whether the

25. Kyaw Ye Lynn, Western Union 'cuts ties' with Myanmar military's bank, Anadolu Agency (Jan. 8, 2020),

<https://www.aa.com.tr/en/asia-pacific/western-union-cuts-ties-with-myanmar-militarys-bank/1696236>.

26. Office of the United Nations High Commissioner for Human Rights, Guiding Principles on Business and Human Rights (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

27. *Id.*

28. Rome Statute of the International Criminal Court, art. 121(3), July 17, 1998, 2187 U.N.T.S. 3, entered into force 1 July 2002.

benefit of extending the ICC's jurisdiction over corporate entities including corporations exceeds the diplomatic and political costs. Amending the Rome Statute or negotiating an optional protocol to the Statute would require extensive treaty negotiations to which many States Parties would be reluctant to agree, particularly states whose economies rely on the profitability of multinational corporations.²⁹ Shielding their corporations from international criminal liability before the ICC would therefore be in many states' best interest nationally. Additionally, the ICC has limited resources and thus prosecutes only the most serious international crimes. The ICC's Office of the Prosecutor may therefore choose not to prioritize corporations when issuing indictments, since they tend to play more supportive roles in the commission of crimes, and instead focus on individuals with greater and more direct responsibility.

In order to provide the ICC with the political cover to amend the Rome Statute, the ICJ could issue an advisory opinion at the request of either the General Assembly or another organ or agency of the U.N.³⁰ The ICJ has previously issued opinions regarding questions that implicate the 1948 Genocide Convention, though none have involved corporations.³¹ If the ICJ were to affirm the legality of prosecuting corporate entities for crimes of atrocity (i.e. genocide, war crimes, and crimes against humanity), this would provide the legal impetus for States Parties to the Rome Statute to amend the treaty to enable the prosecution of corporations at the ICC.³²

The significance of such an amendment to the Rome Statute does not exclusively rest in the prosecution of corporations at the ICC. Before prosecution and adjudication of corporate crimes at the ICC can be pursued, additional procedural reform and expansion of jurisdictional requirements will likely be required. However, the benefit of an initial amendment to the Rome Statute is derived from the ICC's influence at the national level. Many domestic legal systems reference and import the Rome Statute's language into their own criminal law.

29. See David Scheffer, *Corporate Liability Under the Rome Statute*, *Harv. Int'l L. J.* (2016) <https://harvardilj.org/2016/07/corporate-liability-under-the-rome-statute/>.

30. Statute of the International Court of Justice art. 65, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

31. See e.g., *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Rep. 1951 (May 28), p. 15.

32. Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 *Harv. L. & Pol'y Rev.* 339, 363 (2019).

Consequently, the Rome Statute can form the authoritative basis for applying international criminal law to corporate entities and prosecuting corporations in national courts. Moreover, the expansion of corporate liability for crimes of atrocity at both the national level and at the ICC would contribute to the norm-building that is essential for criminalizing corporate activities under customary international law.³³ Therefore, in the short term, it may be more pragmatic to utilize the ICC and the Rome Statute system as a tool to spur the modernization of national criminal codes by requiring States Parties to impose criminal liability upon corporations who actively participate in the commission of atrocity crimes.

VI. CONCLUSION

Without the ability to prosecute corporations as collective entities, there is an accountability gap within the legal framework of international criminal law. By prosecuting only corporate officers and employees as individuals, the law fails to account for the collective dynamics, culture, and structure of a corporation that often enables it to commit crimes that officers and employees would otherwise be incapable of committing individually. Furthermore, it is often difficult to pinpoint the specific contributions of each individual within the larger enterprise, and the sole actions of individual corporate officers may be insufficient to establish liability, particularly if they act with the intent to further the interests of the corporation. Although domestic courts have taken steps to hold corporate officers criminally liable and have imposed civil liability upon some corporations for their contributions in the commission of crimes of atrocity, without further legal reform, international criminal tribunals remain constrained from prosecuting corporations. In the absence of international legal authority for corporate criminal liability, national governments lack the impetus to enact legislation that imposes criminal liability upon their corporate entities for acts they have committed outside of their borders. Criminal indictment of a corporation damages its corporate image and thus creates the negative stigmatizing effect and censure that is needed in order to engender a greater sense of corporate responsibility. As multinational corporations grow more powerful, States Parties to the ICC have the opportunity to enact change at the international level to empower both international criminal tribunals and national governments to hold corporations criminally liable for their complicity in crimes of atrocity.

33. See Marie Davoise, *All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute*, *Opinio Juris* (July 25, 2019), <https://perma.cc/5RU2-YFJ6>.