

FOREWORD

Prosecuting Corporations for Genocide proposes a new horizon for international criminal justice. Via thorough analysis of previous experiences, cases, and moral and legal arguments, Professor Kelly explores the potential of including corporations under the jurisdiction of the International Criminal Court and suggests a viable path for so doing.

Professor Kelly's book opens new avenues in a very new global legal system. In only seventy years, international criminal justice moved from an absolute world innovation created to deal with Nazism into a permanent and independent international system. In 2003, when the International Criminal Court began operations, there were even doubts about the viability of the entire Rome Statute to perform as designed. I had the privilege of being the first Chief Prosecutor of the International Criminal Court and, as such, was privy to the challenges of applying new concepts in international law, the complications of investigating ongoing massive atrocities, and the daunting task of obtaining state cooperation.

From the beginning of my tenure, and in line with the relevance of the topic highlighted here by Professor Kelly, I identified the need to pay attention to those financing and contributing to the commission of the "most serious crimes of concern to the international community as a whole." Experience shows that mass atrocities are committed to gain or retain political power or financial advantage. Disrupting financial or commercial support of the organizations that commit these crimes is a critical aspect of the Office of the Prosecutor's obligation to prevent atrocities, as mandated by the Rome Statute.

Consequently, I devoted resources and explored different venues to investigate such criminal modalities. I discussed the issue with experts with experience in financial investigations, both at the international and national level, including Carla Del Ponte, Mark Pieth, and Jose Ugaz—who investigated the financial crimes of Peruvian President Alberto Fujimori. Our goal was more modest than the one presented by Professor Kelly; we were focusing on individuals aiding or abetting the commission of core crimes under the International Criminal Court's jurisdiction. However, due to jurisdictional restrictions, my office was not able to bring a single case against an individual responsible for genocide through his financial or commercial contribution.

Professor Kelly, far from being intimidated by the obstacles we encountered in presenting a case against individuals, or by the fact that at Rome in 1998 representatives of 160 countries did not include corporate liability in the Statute, outlines in this book a route to accomplish that by laying "the groundwork, both practical

and theoretical, to prosecute corporations for genocide under international law.” His logic seeks to dramatically raise the consequences of complicity to genocide so that “[b]eing the rational profit-centered creatures they are, multinational corporations . . . begin to shy away from involvement in atrocities as a result of the threat of indictment or prosecution as a similar cost-avoiding strategy.”

I applaud his invitation to reopen this much-needed conversation with fresh arguments coined by an experienced mind, which, I imagine, will trigger vigorous debate among lawyers. For instance, Mark Wolf, a federal judge with the U.S. District Court for Massachusetts, goes beyond Professor Kelly’s proposal to focus on financial connections with genocide by proposing the creation of a new international court to prosecute “grand corruption.”¹ Transparency International is also advocating that such crime be included within the jurisdiction of the International Criminal Court. Indeed, I believe that the discussion about the role of corporations and the establishment of global limits is so central to our life today that it should go beyond the legal arena and also include experts from other disciplines as well as political and business leaders.

It is important to cross disciplines and discuss the objections. Structural insights are important. For instance, Samuel Moyn highlights that the idea that “the dignity of each individual will enjoy secure international protection” is recent and contingent.² Moyn considers that this agenda, “promises to penetrate the impregnability of state borders, slowly replacing them with the authority of international law.” He further clarifies that “[t]rue, rights have long existed, but they were from the beginning part of the authority of the state, not invoked to transcend it. . . .”³

Yet, the gap between international relations scholars and international legal experts is so wide in some instances that conversations could speak past one another. Stephen Krasner believes that applying international law is counterproductive and only powerful states could organize the world: “Realists of all types agree that the traditional view of international law held by many lawyers not only ignores or obfuscates power and interests but can be destabilizing and counterproductive . . . Law can matter for realists, but only because it helps to construct a self-enforcing equilibrium through ones that reflect the preferences of the powerful.”⁴ Jack Goldsmith joined Krasner in 2003 in labeling the International Criminal Court as the international idealists’ “long-held dream” and concluded that it “may worsen rather than alleviate human rights catastrophes.”⁵

¹ Mark L. Wolf, *We Need an International Court to Stamp Out Corruption*, WASH. POST, July 22, 2014.

² SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

³ *Id.* at 7.

⁴ Stephen Krasner, *Realist Views of International Law*, 96 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 265–68 (2002).

⁵ Jack Goldsmith and Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003).

Steven Pinker engaged in such cross-disciplinary debate and expressed his surprise at the reasoning among international relationists: “According to an influential theory, tendentiously called ‘realism,’ the absence of a world government consigns nations to a permanent state of Hobbesian anarchy. That means that leaders must act like psychopaths and consider only the national self-interest.” Pinker recognized that “people are self-interested rational animals” but are “guided by moral intuitions supported by emotions, norms and taboos” and also “cognitive animals, who spin out beliefs and use them to guide their actions.”⁶ Following Pinker, the debate on establishing global legal limits should definitively include the Millennials—a new generation born after the Cold War. They are globally connected, with different intuitions, beliefs, and expectations of global standards and global protection; consequently, they can learn about the limits of national institutions and how to improve the international ones.

Forcing us to keep discussing how we are building global institutions and what new international legal standards should be adopted, Professor Kelly’s book should be celebrated as a meaningful part of the search for laying new global foundations for a peaceful coexistence.

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⁶ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011).

