

Corporate Liability under the Rome Statute

David Scheffer*

Can corporate perpetration of genocide, crimes against humanity, and war crimes (atrocities) be investigated and prosecuted before the International Criminal Court (ICC)? The answer is conditionally affirmative with respect to corporate officers responsible for their company's criminal conduct. However, investigation and prosecution of corporations themselves as juridical persons would require complex amendments to the Rome Statute of the ICC.

Corporate officers are already subject to investigation and prosecution by the ICC because the Rome Statute confers personal jurisdiction only over natural persons, particularly if he or she is a national of a "State Party" to the Rome Statute. One corporate executive, Joshua Arap Sang,¹—former head of operations and well-known radio personality of Kass FM in Nairobi, Kenya—recently faced prosecution at the ICC as an indirect co-perpetrator of three counts of crimes against humanity. He was charged with using coded messages in his radio broadcasts to commit murder, forcible transfer, and persecution. His prosecution was in connection with the larger situation being investigated in Kenya for the period between June 1, 2005 and November 26, 2009 and, in particular, the post-election violence of 2007-2008. However, the Trial Chamber vacated the charges against Sang on April 5, 2016.² Two judges, with a third dissenting, found that the Prosecutor had presented insufficient evidence, with one judge explaining that witness interference and political meddling were reasonably likely to intimidate witnesses.³

* David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law at Northwestern Prizker School of Law. He was the U.S. Ambassador at Large for War Crimes Issues (1997-2001) and led the U.S. delegation in the United Nations talks creating the International Criminal Court.

¹ Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <https://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>.

² Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016), https://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0109/related_cases/icc01090111/court_records/chambers/tcVa/Pages/2027.aspx.

³ Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Dissenting Opinion of Judge Herrera Carbuca (Apr. 5, 2016), https://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0109/related_cases/icc01090111/court_records/chambers/tcVa/Pages/2027.aspx.

The ICC will entertain individual criminal responsibility⁴ or superior responsibility⁵ for corporate officers when their actions are part of an overall situation of atrocity crimes that either has been referred⁶ to the Prosecutor by a State Party or the Security Council, or the Prosecutor has initiated an investigation,⁷ approved by the Pre-Trial Chamber, of essentially a situation of atrocity crimes. This means that the isolated commission of, or complicity by, a corporation in genocide, crimes against humanity, war crimes, or even aggression⁸ (once amendments relating to the crime of aggression are procedurally ratified and activated by a sufficient number of States Parties) will only subject corporate officers to ICC scrutiny if the alleged illegal conduct is part of a situation of atrocity crimes that has fallen under the jurisdiction of the Court by virtue of a proper referral or investigation. As of early 2016, this would entail corporate activity in one or more of the situations⁹ currently under either official investigation by the Court (Democratic Republic of the Congo, Uganda, Central African Republic (two situations), Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, Mali, and Georgia) or, for purposes of determining whether an investigation can be launched under the Prosecutor's *proprio motu* powers, preliminary examinations¹⁰ by the Prosecutor of Afghanistan, Burundi, Colombia, Nigeria, Guinea, Iraq, Ukraine, and Palestine. Therefore, corporate officers need not fear ICC jurisdiction while conducting most global corporate activities unless such actions fall within the narrow parameters of a relatively small number of situations of atrocity crimes being officially investigated by the ICC at the time.

However, atrocity crimes arising as a consequence of corporate operations or complicity in government commission of atrocity crimes to facilitate corporate investments might trigger the jurisdiction of the ICC. Tough requirements of personal, territorial, temporal, and subject-matter jurisdiction requirements must still be met, particularly in the context of individual corporate officers who could be investigated and prosecuted, and the situation must also meet the gravity¹¹ threshold required to qualify for the ICC's attention.

It is certainly possible that in the future, a single atrocity crime of relatively limited magnitude, perhaps caused by corporate criminal conduct, may be a situation that merits ICC investigation. The Pre-Trial Chamber's decision of 16 July 2015¹² found factors militating in favor of sufficient gravity in the Israeli Defense Forces' singular attack on the

⁴ Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90.

⁵ *Id.* at art. 28.

⁶ *Id.* at art. 13.

⁷ *Id.* at art. 15.

⁸ Amendments to the Rome Statute of the International Criminal Court, art. 8 *bis* ¶ 1, June 11, 2010, A-38544 U.N.T.S.

⁹ *All Situations*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx

¹⁰ *Id.*

¹¹ International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, (Feb. 29, 2016), [https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf#search=gravity requirements](https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf#search=gravity%20requirements).

¹² Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (Jul. 16, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>.

Mavi Marmara (a Comoros-registered vessel) bound for the Gaza Strip on 31 May 2010, and thus requested the ICC Prosecutor to reconsider her Decision Not to Investigate.¹³

The Article 98(2)¹⁴ non-surrender agreements negotiated and concluded by the United States with over 100 governments prior to 2009,¹⁵ exclusively by the George W. Bush Administration, seek to protect any U.S. national from surrender to the ICC for the purposes of standing trial; facially, these agreements would seem to include corporate officers of U.S. citizenship.¹⁶ As the chief U.S. negotiator of the Rome Statute, I was deeply involved in the negotiation and drafting of Article 98(2), a provision that was originally intended to preserve the rights accorded under status of forces agreements.¹⁷ In their current formulation, the agreements negotiated by the George W. Bush Administration overreach the original intent¹⁸ of Article 98(2), which is that these bilateral agreements would protect only government personnel such as military, diplomatic, and government-employed humanitarian employees, of the “sending State.”¹⁹ The term “sending State” is well understood in treaty law to exclude private actors. In negotiating that provision of the Rome Statute, neither U.S. nor other negotiators had any intent to insulate private corporate officials.

If a government argues that it cannot surrender a corporate executive of U.S. citizenship who is in its custody and has been charged by the ICC because such government must comply with its Article 98(2) obligations with the United States, the ICC judges could sever the wording of the Article 98(2) agreements that purports to exclude a “national” of strictly private character from the government’s obligation to surrender such individual under the Rome Statute. Alternatively, the judges could nullify the entire agreement for the purpose of Article 98(2) protection before the ICC. The obligation to surrender would arise where the government detaining a corporate officer subject to an ICC arrest warrant is either a state party with treaty obligations to cooperate or a non-party state directed to cooperate pursuant to a Security Council referral of a situation to the Prosecutor.

If it were better understood as a risk in corporate circles, the potential exposure of corporate officers to ICC jurisdiction could significantly influence the conduct of multinational corporations in situations of atrocity crimes under investigation by the Prosecutor. But that exercise needs to begin in university instruction and graduate business schools where the future leaders of multinational corporations are educated and trained.

¹³ Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-6-AnxA, Article 53(1) Report (Nov. 6, 2014), http://www.legal-tools.org/uploads/tx_ltpdb/doc1913979_05.pdf.

¹⁴ Rome Statute of the International Criminal Court, *supra* note 4, at art. 98(1).

¹⁵ Bilateral Immunity Agreement Campaign, American Non-Governmental Organizations Coalition for the International Criminal Court, <http://www.amicc.org/usicc/biacampaign>.

¹⁶ The 2002 non-surrender agreement between the United States and Afghanistan has typical language reading, “For purposes of this agreement, ‘persons’ are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.” See BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS, 171 (3rd ed. 2015).

¹⁷ INTERNATIONAL SECURITY ADVISORY BOARD, FINAL REPORT OF THE INTERNATIONAL SECURITY ADVISORY BOARD (ISAB) ON STATUS OF FORCE AGREEMENTS (2015).

¹⁸ DAVID SCHEFFER, ARTICLE 98(2) OF THE ROME STATUTE: AMERICA’S ORIGINAL INTENT 344-50 (2005).

¹⁹ *Id.* at 333.

The larger question, though, looms: why not authorize the ICC to pursue criminal charges directly against corporations as juridical persons? This option was considered and rejected during the U.N. talks leading to the Rome Statute in July 1998.²⁰ I have written extensively in other publications²¹ and *amicus curiae* briefs²² about the reasons for the exclusion of criminal liability for juridical persons from the Rome Statute.²³ In brief, as the court was originally designed to hold natural persons accountable for atrocity crimes, there was too little time to fully consider the proposal. Also, at that time, there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability, which has long been universal. The principle of complementarity under the Rome Statute,²⁴ a principle dependent on compatible criminal law in state party jurisdictions, would have been crippled as a consequence. Finally, the proposal would have imperiled the ratification of the treaty by many governments given the novelty of corporate exposure to criminal liability before the ICC.

Today, the global landscape regarding corporate criminal liability in national jurisdictions has changed,²⁵ including in many of the States Parties to the Rome Statute. Theoretically, the exercise of complementarity, while still problematic in some jurisdictions, will become more plausible in the event the Rome Statute is amended to embrace corporate liability and a significant number of States Parties transform their own national criminal codes to cover juridical persons in the commission of, or complicity in, atrocity crimes.

Obtaining approval for amendments to the Rome Statute that would extend the ICC's jurisdiction over juridical persons would be extremely difficult to achieve diplomatically. Nations with economies that are fueled by multinational corporations, either as home states or host states, would likely oppose efforts to expose these companies to criminal liability before the ICC. The potential economic cost of a finding of corporate criminal liability, or even the possibility of an ICC investigation in the future, could have devastating impacts on a nation's economy.

Nonetheless, there is value in contemplating the possible phrasing of an amendment to the Rome Statute intended to extend the Court's personal jurisdiction over juridical persons. Article 25(1)²⁶ could be amended to read: "The Court shall have jurisdiction over natural *and juridical persons* pursuant to this Statute" (new wording in italics). For good

²⁰ Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 189, 100 (Roy Lee ed., 1999).

²¹ David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 *BERKLEY J. OF INT'L L.* 334 (2011).

²² Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

²³ DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 203 (2012).

²⁴ WILLIAM SCHABAS, *INTERNATIONAL CRIMINAL COURT* 190-199 (4th ed. 2011).

²⁵ Supplemental Brief of Ambassador David J. Scheffer, *supra* note 22, at 13-26.

²⁶ Rome Statute of the International Criminal Court, *supra* note 4, at art. 25(1).

measure, the second sentence of Article 1²⁷ could be amended to read: “It shall be a permanent institution and shall have the power to exercise its jurisdiction over *natural and juridical persons* for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. *Any use of ‘person’ or ‘persons’ or the ‘accused’ in this Statute shall mean a natural or juridical person unless the text connotes an exclusive usage.*” (new wording in italics)

Beyond those two amendments, careful consideration would have to be made to distinguish, if necessary, between natural and juridical persons for purposes of production of evidence, the exercise of due process rights, proper physical presence of the defendant (which natural person would appear on behalf of the corporation) in relevant proceedings, state cooperation requirements unique to corporations, and discerning which penalties are available and enforceable against corporations in the event of a guilty judgment. Any group of amendments covering juridical persons in the Rome Statute would require approval by two-thirds of the States Parties pursuant to Article 121(3)²⁸ and, if that hurdle is passed, then such amendments would have to be ratified or accepted by seven-eighths of the States Parties in order to come into force pursuant to Article 121(4).²⁹

It might be possible to avoid these stringent amendment requirements by negotiating a protocol to the Rome Statute that would permit States Parties that ratify or accept it to “opt in” to coverage of juridical persons. However, such a protocol may be very difficult to negotiate as it would still have to transform the Rome Statute radically to cover juridical persons only for those States Parties ratifying or accepting the protocol. The protocol itself would have to largely mirror the complex amendments required for a comprehensive overhaul of the Rome Statute described above, and may still need to be initially adopted by two-thirds of the States Parties pursuant to Article 121(3).

Corporate accountability for atrocity crimes may be more pragmatically accomplished through 1) the investigation of corporate officers under existing Rome Statute powers where the ICC is exercising jurisdiction over a relevant situation, and 2) the further development of national criminal codes covering corporate commission of, or complicity in, atrocity crimes. Governments that have modernized their criminal codes to include corporate accountability for atrocity crimes may one day find it useful to create a treaty-based multilateral tribunal on atrocity crimes with clear jurisdiction to adjudicate criminal complaints, and perhaps also civil claims, against juridical persons. If they choose to rebuild the ICC as the international forum in which to adjudicate such corporate crimes, then the tribunal carpentry required to indict corporations may prove quite daunting to master.

²⁷ *Id.* at art. 1.

²⁸ *Id.* at art. 121(3).

²⁹ *Id.* at art. 121(4).