

Schriften zum Internationalen und
Europäischen Strafrecht

24

Thomas M. Schmidt

Crimes of Business in International Law

Concepts of Individual and Corporate Responsibility for
the Rome Statute of the International Criminal Court



HART
PUBLISHING



Nomos



Schriften zum Internationalen und
Europäischen Strafrecht

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Vol. 24

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This publication was supported by the German National Academic Foundation (Studienstiftung des Deutschen Volkes).

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Hamburg, Univ., Diss., 2015

ISBN: HB (Nomos) 978-3-8487-2544-1
ePDF (Nomos) 978-3-8452-7157-6

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-0690-1

Library of Congress Cataloging-in-Publication Data

Schmidt, Thomas M.

Crimes of Business in International Law

Concepts of Individual and Corporate Responsibility for the Rome Statute of the International Criminal Court

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400 p.

Includes bibliographic references.

ISBN 978-1-5099-0690-1 (hardcover Hart)

1. Edition 2015

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Preface

Academic work on any given topic resembles, to my mind, the never-ending act of encircling an idea; its results are, therefore, but the point of contact at which the baton is passed on from one researcher to the next. In this spirit, I wish to contribute *one* perspective on the law of the Rome Statute of the International Criminal Court, on the idea of ending impunity, hoping that my choice of business actors as this perspective's focal point will enhance the current debate on their (still) prominent involvement in the most serious instances of human rights violations.

Throughout the course of this project I could count on the invaluable support of my family and friends, whom I would like to thank first and foremost. I am also very grateful to Professor Dr. *Florian Jeßberger*, who always had an open ear and an open mind when I was eager to discuss the current state of my work. And without my experiences at the European Center for Constitutional and Human Rights (ECCHR) in strategic litigation of corporate human rights violations this book would have turned out very differently; I am therefore much obliged to *Wolfgang Kaleck* and *Claudia Müller-Hoff* for enabling me to contribute to the Center's important efforts towards global justice. A generous stipend from the German National Academic Foundation (Studienstiftung des Deutschen Volkes) has helped keeping my economic situation in balance and has put me into contact me with inspiring scholars.

After completion of the manuscript in May 2014, I have only been able to selectively integrate more recent jurisprudence and scholarly contributions into the text.

Berlin, June 2015

Thomas M. Schmidt

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AP I	Additional Protocol I to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977
Art.	Article
aStGB	Strafgesetzbuch (Austrian Criminal Code)
BGH	Bundesgerichtshof (German Federal Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Official Collection of German Federal Court Decisions in Criminal Matters)
BrB	Brottsbalken (Swedish Criminal Code)
cf.	conferatur
CLF	Criminal Law Forum
e.g.	exempli gratia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed.	Editor
edn.	Edition
eds.	Editors
EJIL	European Journal of International Law
fCP	Code Pénale (French Criminal Code)
fn.	footnote, footnotes
GA	Goldtdammers Archiv für Strafrecht
gOWiG	Gesetz über Ordnungswidrigkeiten (German Act on Regulatory Offences)
gStGB	Strafgesetzbuch (German Criminal Code)
GYIL	German Yearbook of International Law
i.e.	id est
id.	idem
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

Abbreviations

ICCSt	Rome Statute of the International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICLR	International Criminal Law Review
iCP	Codice Penale (Italian Criminal Code)
ICJS	Statute of the International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defense Forces
ILC	International Law Commission
IMT	International Military Tribunal
IRRC	International Review of the Red Cross
JCE	Joint Criminal Enterprise
JICJ	Journal of International Criminal Justice
lit.	littera
LJIL	Leiden Journal of International Law
MPC	Model Penal Code
NCLR	New Criminal Law Review
NGO	Non-governmental Organization
p.	page
para.	paragraph
paras.	paragraphs
pp.	pages
PTC	Pre-Trial Chamber
RG	Reichsgericht
RPE	Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court / Römisches Statut des Internationalen Strafgerichtshofs
sCP	Código Penal (Spanish Criminal Code)
sq.	sequens
sqq.	sequentes
Strl	Straffeloven (Danish Criminal Code)
TC	Trial Chamber

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
vs.	versus
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

1. Introduction and scope of inquiry

This inquiry into the law of the Rome Statute of the International Criminal Court (RS) takes as its phenomenological point of departure business actors both individual and corporate providing material resources (utilities and funding) towards the commission of genocide, crimes against humanity, and war crimes pursuant to Articles 6 to 8 RS.

1.1. Motives

This point of departure is chosen for two reasons: *First*, the scenario of serious human rights violations in the course of business activity has materialized so frequently that its assessment in legal terms has become a matter of high practical importance for victims and the international community as a whole¹. The most prominent cases of providing utilities are the granting of access to an airstrip by oil extractor *Talisman* used by Sudanese military forces for aerial operations amounting to war crimes and crimes against humanity², the sale of weapons materials to the *Hussein* regime by Dutch business man *van Anraat* deployed against civilians in Iraq and Iran³, of bulldozers to the Israeli Defense Forces by *Caterpillar* used in the killing of civilians and destruction of civilian residences in the Gaza

1 See Schabas (2001), p. 439 (at 456) and for overviews Wells/Elias (2005), p. 141 (at 143 et sqq.); Kaleck/Saage-Maass (2010), p. 699 (at 700 et sqq.).

2 In US civil court, civil claims based on the Alien Tort Statute have been dismissed for lack of evidence, see International Crimes Database, *The Presbyterian Church Of Sudan, et al. v. Talisman Energy, Inc. And Republic Of The Sudan*, available at <http://www.internationalcrimesdatabase.org/Case/43/Presbyterian-Church-Of-Sudan-v-Talisman-Energy/> (last visited: 30.06.2015) and Beisinghoff (2009), pp. 155, 157 with further references.

3 This case has been the subject of a domestic criminal proceeding in the Netherlands, resulting in the conviction of van Anraat, see Huisman/Sliedregt (2010), p. 803-828 (at 805 et sqq.) as well as International Crimes Database, *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, available at <http://www.internationalcrimesdatabase.org/Case/178/> (last visited 30.06.2015) with further references.

1. Introduction and scope of inquiry

Strip and West Bank⁴, as well as of software and cars to the South African apartheid regime by *International Business Machines (IBM)*, *Mercedes Benz*, *General Motors*, and others, which enabled the regime to track the whereabouts of black citizens and enforce public order against demonstrators⁵. As regards funding, private banks *Barclay* and *UBS* have been accused of granting loans to the South African apartheid regime, loans used to maintain operations of military and police forces⁶. According to Human Rights Watch, mining operator *AngloGold Ashanti* paid «protection money» and freight landing taxes in exchange for access to gold mines to *Lendu* rebel group *Front des Nationalistes et Intégrationnistes (FNI)*, which has been accused of the Kilo massacre of 125 civilians in the Democratic Republic of Congo (DRC)⁷. This list of allegations and unsuccessful litigation attempts is far from conclusive⁸.

4 Civil suits against the Israeli military in Israel and against Caterpillar on the basis of the Alien Tort Statute in the United States have been dismissed, see International Crimes Database, *Cynthia Corrie et al. v. Caterpillar Inc.*, available at <http://www.internationalcrimesdatabase.org/Case/987> (last visited: 30.06.2015) and also *Skinner* (2006) with further references.

5 As of March 2014, civil litigation before US courts has been unsuccessful against all defendants except General Motors, where a settlement was achieved in 2012. The United States Supreme Court has severely limited US jurisdiction for claims based on the Alien Tort Statute's extraterritorial application, see International Crimes Database, *Khulumani et al. v. Barclays National Bank et al.*, and *Lungisile Ntsbeza et al v. Daimler AG et al.*, available at <http://www.internationalcrimesdatabase.org/Case/1155> (last visited: 30.06.2015) with further references.

6 Litigation in US civil court has been unsuccessful against these defendants as well, see International Crimes Database, *Khulumani et al. v. Barclays National Bank et al.*, and *Lungisile Ntsbeza et al v. Daimler AG et al.*, available at <http://www.internationalcrimesdatabase.org/Case/1155> (last visited: 30.06.2015) with further references.

7 Human Rights Watch (2005), pp. 39, 58 et sqq.; Prosansky (2007), p. 236 (at 246).

8 For the abundant scholarship on such instances of business actors' involvement in serious human rights violations, see also Beisinghoff (2009), pp. 129 et sqq.; Huisman (2010); Kaleck/Saage-Maass (2010), p. 699; Stoitchkova (2010), pp. 1 et sqq.; Thurner (2012), pp. 77 et sqq. with further references. In a typological approach, Meyer (2013), p. 56 (at 63 et sqq.) has distinguished five kinds of involvement: the commission of crimes by members of private security operators, the procurement of acts of commission by corporate actors to advance their economic goals, the provision of goods useful to the commission of crimes, the economic cooperation beneficial to regimes whose members commit crimes as well as the funding of acts of commission. This study focuses on the provision of goods and funding.

Prosecutions led by or instigated *via* the complementarity regime of the International Criminal Court (ICC) into similar involvements under the Court's jurisdiction can contribute to closing the «governance gaps»⁹ in existence in the field of human rights violations by business actors¹⁰. Yet, and in spite of promises made by then Prosecutor *Moreno Ocampo* to investigate at least those individuals who have funded the commission of crimes under the Statute¹¹, prosecutions have thus far not materialized¹². Scholars have attributed this lack of prosecutorial vigor also to the demanding mental elements of Article 25 (3) (c) and (d) RS, which, in their view, preclude punishment for such acts of business exchange¹³. *Second*, therefore, the inquiry's phenomenological starting point directs attention to a host of intriguing questions that deal with fundamental concepts of individual criminal responsibility under the Rome Statute: Can individuals in positions remote to the criminal event be held responsible for *committing* crimes and what is the significance of Article 25 (3) RS in this regard? Which are the premises of business leaders' *superior responsibility* to which Article 28 RS refers? Must business activity enjoy special protection from criminal prosecution as a result of its *social value*? And is it conceivable that in the future *corporate business actors* as «abstract entities»¹⁴ are as well held accountable before the International Criminal

9 United Nations Human Rights Council (2008), p. 27.

10 See Stoitchkova (2010), p. 183; Meyer (2013), p. 56 (at 58), and also Kaleck/Saage-Maass (2010), p. 699 (at 709 et sqq.).

11 Communications Received by the Office of the Prosecutor of the ICC (16.07.2003): «[...] the Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted. The Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries».

12 Meyer (2013), p. 56 (at 68); Gallmetzer (2010), p. 947 (at 950 et sqq.).

13 Meyer (2013), p. 56 (at 68, 70 et sq.). See also Reggio (2005), p. 623 (at 673); Vest (2010), p. 851 (at 863); Burchard (2010), p. 919 (at 938); Sliedregt (2012), p. 129; Stewart (2012), p. 165 (at 197).

14 See The International Military Tribunal (ed) (1947), p. 223 for the IMT positing that «[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced».

1. Introduction and scope of inquiry

Court? These questions will be the subject of this study¹⁵. They are, I believe, of interest not only to those aiming at the prosecution of business actors; answers are valuable tools also for business actors themselves¹⁶.

1.2. An inter-disciplinary and multi-language approach

To provide robust answers in a context so empirically complex, an inter-disciplinary approach is of the essence: Both the International Criminal Court and scholars in the field have recognized the need to reflect upon the reality structures which characterize central notions of prevailing approaches to the above questions such as «control over the crime» (Article 25 RS) or «effective authority and control» (Article 28 RS). In this regard, organization theory and social psychology can shed light on premises of individual criminal responsibility. The subsequent question of a privilege of business activity in light of its social value leads to the delicate balance between liberty and security struck in each society, often at the time of its

15 Related questions such as incitement to genocide (Article 25 (3) (e) RS) and attempt (Article 25 (3) (f) RS) are interesting subjects for subsequent studies; they are not discussed here. There is, however, merit in the approach taken in 2.4 below for conceiving of both. In particular, the concept of attempt proposed by Ambos (2013), p. 254 and sqq. is crime-specific and therefore dependent upon a deep understanding of the Statute's crimes, which is facilitated by the proposal made below.

16 The International Commission of Jurists has recently stated how increasingly «relevant» international criminal law has become for business corporations: «The Panel believes that as the field of international criminal law develops and as companies operate in new contexts, international criminal law and its implementation in domestic and international jurisdictions will become ever more relevant to companies. [...] [A] wide variety of companies from all sectors – including natural resource extractive industries, infrastructure and engineering companies, financiers, retail and garment businesses and the communications industry – now have either global supply chains or a global presence and find themselves, or their clients or suppliers, operating in the midst of armed conflicts or in countries where crimes against humanity and other gross human rights abuses amounting to crimes under international law occur. *The business transactions of these companies and their relationships with governments, armed groups and other businesses require them to understand what conduct may constitute a crime under international law*», International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability (2008), p. 5 (my emphasis).

inception. This inception has been conceived of by social philosophy. Finally, in light of proposals to extend the Rome Statute's scope beyond individuals to organizations, international criminal law's purpose to prevent acts of genocide, crimes against humanity, and war crimes calls for a concept of punishment which accounts for the reality of such punishment. Here too organization theory and social philosophy can offer guidance on epistemological and ontological premises.

Yet not only insight drawn from *disciplines* other than the science of law matters; insight from contributions to the science of law in *languages* other than English is of similar importance. As the German Council of Sciences and Humanities has aptly expressed, the «academic discipline of law directs its inquiry at an object which is constituted by language, and which is therefore always partly shaped by the cultural context of the language in question. This «rootedness» in culture, which is true for all legal languages, is particularly evident in the field of legal doctrine, which operates with very precise, accurate terms and with vocabulary that is intimately connected to the national legal system. Such context-specific language can thus be difficult to be translated into other languages. In view of these linguistic specificities, German legal scholarship faces great challenges with regard to its internationalisation and Europeanisation»¹⁷. Said challenges apply to the following chapters as well. To the best of my abilities, I therefore strive to make use of a vocabulary that lacks in neither precision nor impartiality as to its meaning in the English-speaking legal community; when concepts are translated from German, French, or Spanish to the English language of this text, I intend to reflect their terminological implications in the translation.

1.3. *The Corrie case example*

As is expected from a theoretical exploration in the practically oriented science of law, insights gained into concepts which chart paths to criminal responsibility under the Rome Statute will be applied to examples throughout the text. These applications, however, cannot replace the subsequent refinement of the concepts devised in real-world scenarios whose empirical complexity regularly precludes an assessment within the scope

17 German Council of Science and Humanities (2013), pp. 71 et sqq.