

Schriften zum Internationalen und
Europäischen Strafrecht

31

Marie Kuntz

Conceptualising Transnational Corporate Groups for International Criminal Law



Nomos

Schriften zum Internationalen und
Europäischen Strafrecht

Herausgegeben von

Professor Dr. Martin Heger, Humboldt-Universität zu Berlin

Professor Dr. Florian Jeßberger, Universität Hamburg

Professor Dr. Frank Neubacher, M.A., Universität zu Köln

Professor Dr. Helmut Satzger, LMU München

Professor Dr. Gerhard Werle, Humboldt-Universität zu Berlin

Band 31

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Diese Veröffentlichung lag dem Promotionsausschuss Dr. jur. des Fachbereichs Rechtswissenschaften der Universität Bremen als Dissertation vor.

Erstgutachter war Herr Professor Dr. Moritz Renner,

Zweitgutachter war Herr Professor Dr. Graf-Peter Calliess.

Das Kolloquium fand am 18.10.2016 statt.

This publication has been presented to the Doctoral Committee "Dr. jur." of the University of Bremen's law department as a dissertation.

First reviewer was Professor Dr. Moritz Renner,

second reviewer was Dr. Graf-Peter Calliess.

The colloquium took place on 18.10.2016.

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

a.t.: Bremen, Univ., Diss., 2016, OT: Conceptualising Transnational Corporate Groups. A Proposal for International Criminal Law.

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

ISBN 978-3-8487-4094-9 (Print)

978-3-8452-8403-3 (ePDF)

British Library Cataloguing-in-Publication Data

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

ISBN 978-3-8487-4094-9 (Print)

978-3-8452-8403-3 (ePDF)

Library of Congress Cataloging-in-Publication Data

Kuntz, Marie

Conceptualising Transnational Corporate Groups for International Criminal Law

Marie Kuntz

ca. 409 p.

Includes bibliographic references and index.

ISBN 978-3-8487-4094-9 (Print)

978-3-8452-8403-3 (ePDF)

1. Auflage 2017

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Preface

This book is a product of research undertaken at Bremen University and the European University Institute, Florence. It was accepted as a PhD thesis in law in the winter semester 2015/2016.

Throughout the course of this project I could count on the invaluable support of my family, whom I would like to thank first and foremost, most notably my parents Sabine and Dr. Frank Hesselbarth, my husband Professor Dr. Thilo Kuntz, LL.M., and my grandparents Eva-Maria and Dr. Lothar Falk.

A special thank you goes to Dr. Julia Geneuss, LL.M., for being a loyal friend and patient listener.

I am also very grateful to Professor Dr. Moritz Renner, who not only provided me with a position as a research assistant, but also always had an open ear and an open mind. He not only supported my research, but also gave me the opportunity to collaborate in other academic projects. Over the years, I've learned a lot. I thank Professor Dr. Graf-Peter Callies for writing the second expert opinion on my thesis.

I also thank Professor Dr. Florian Jeßberger for his encouragement and Professor Dr. Dr. Stefan Grundmann for co-creating the European Law School. Being a student at the ELS enabled me to study at Université Panthéon Assas, Paris, and King's College, London, and provided ample opportunity to widen my horizon.

In addition, it was very helpful to discuss various aspects of my work with Dr. Insa Jarass, LL.M., Dr. Tom Pleiner, Charlotte Reichow, LL.M., Maître en Droit, and Professor Dr. Andreas Maurer, LL.M.

Bremen, February 2017

Marie Kuntz

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List of Abbreviations

ATS	Alien Tort Statute
BGH	Bundesgerichtshof
BIT	Bilateral Investment Treaty
CA	Her Majesty's Court of Appeal in England, Civil Division
CEO	Chief executive officer
CJEU	Court of Justice of the European Union (consisting of the ECJ and GC)
Commission	Commission of the European Union
EU	European Union
ECJ	European Court of Justice
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
et al.	and other, and others
et seq.	and following
GC	General Court of the European Union
HC	High Court of Justice of England and Wales
HL	House of Lords (United Kingdom)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organisation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OJ C	Official Journal of the European Union Information and Notice
OJ L	Official Journal of the European Union Legislation
p.	page, pages
para	paragraph
paras	paragraphs
PC	Privy Council of the United Kingdom
UDHR	Universal Declaration of Human Rights
UK	United Kingdom, British
UN	United Nations
UNCITRAL	United Nations Commission on International Trade

List of Abbreviations

UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America, United States of American
US SC	United States Supreme Court
US CA	United States Courts of Appeals
US DC	United States District Court
SC	Supreme Court of the United Kingdom
seq.	and following
v	versus

Introduction

IG Farben was heavily involved in the Nazi crimes.¹ IG Farben, a stock corporation, merged corporations including BASF, Hoechst, Bayer and Agfa in 1925 to form the largest corporate group in Europe.² Initially, their merger aimed at merging capital and reducing competition amongst them. Each corporation within the group specialised in different areas.³ IG Farben became gradually involved with the Nazi Regime. For example, Carl Krauch, a member of the board of IG Farben, was also member of an armament staff in Göring's ministry of aviation, since 1938 he was *Wehrwirtschaftsführer* and since 1939 head of the *Reichsamtes für Wirtschafts-ausbau* (Reich Office for Economic Expansion). IG Farben was further involved in Hitler's Four Year Plan of 1936 and benefitted from guaranteed sales and prices.⁴ IG Farben provided the Nazi Regime

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- 1 For a description from the international criminal law point of view see e.g. *F. Jeßberger*, Origins of Individual Criminal Responsibility for Business Activity, *Journal for International Criminal Law* 8 (2010), 783,785 et seq.; *A. Ramasastry*, Corporate Complicity. From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, *Berkeley Journal of International Law* 20 (2012), 91, 106 et seq.
 - 2 For further details on the corporate group, including reasons for its creation and its specific structure, see *A. D. Chandler*, Scale and Scope. The Dynamics of Industrial Capitalism, 1990 p. 564 et seq.; *K. Coleman*, IG Farben and ICI, 1925-53. Strategies of Growth and Survival, 2006 p. 2 et seq.; *P. Hayes*, Industry and Ideology. IG Farben in the Nazi Era, 1987 p. 7 et seq.; *A. Schneckenburger*, Die Geschichte des I.G.-Farben-Konzerns. Bedeutung und Rolle eines Großunternehmens, 1988; *F. ter Meer*, Die I.G. Farben Industrie Akteingesellschaft, 1953 and, briefly, *S. Balke*, Der IG-Farben Prozeß in Nürnberg, *Chemie Ingenieur Technik* 1949, 33.
 - 3 *A. Carstensen*, The Case of I.G. Farben, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung*. NS-Forced Labor: Remembrance and Responsibility, 2002, p. 119-136, 120; *Coleman*, IG Farben and ICI, 1925-53. Strategies of Growth and Survival p. 6 et seq.
 - 4 *Carstensen*, The Case of I.G. Farben, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung*. NS-Forced Labor: Remembrance and Responsibility, p. 123 et seq.; *Coleman*, IG Farben and ICI, 1925-53. Strategies of Growth and Survival p. 68 et seq.; *Hayes*, Industry and Ideology. IG Farben in the Nazi Era p. 141 et seq.; *Jeßberger*, *Journal for*

with huge amounts of explosives and other chemicals such as synthetic fuels and rubber that were used in the Second World War.⁵ DEGESCH,⁶ an IG Farben subsidiary, supplied the gas Zyklon B that was used to carry out mass murders in the concentration camps. IG Farben held 42,5% and was represented in the DEGESCH's supervisory council. Moreover, IG Farben's medicines were tested in medical experiments with concentration camp inmates.⁷ IG Farben's corporate group structure facilitated its involvement in international crimes. Firstly, IG Farben acquired numerous corporations in foreign countries occupied by the German Reich, which amounted to the war crime of plundering of foreign property.⁸ Secondly, IG Farben heavily employed slave workers in its factories. It built a plant in the immediate proximity of Auschwitz that used concentration camp inmates for forced labour.⁹ In order to quickly construct the plant, IG Far-

International Criminal Law 8 (2010), 785. For the role of IG Farben in the preparation for World War Two, see also *D. Eichholtz*, *Zum Anteil des IG-Farben-Konzerns an der Vorbereitung des zweiten Weltkriegs*, *Jahrbuch für Wirtschaftsgeschichte* 10 (1969), 83 et seq.

- 5 *Carstensen*, *The Case of I.G. Farben*, in: *Zumbansen* (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 120; *Coleman*, *IG Farben and ICI, 1925-53. Strategies of Growth and Survival* p. 56 et seq. With regard to synthetic rubber, it was politically forced to supply the national market although the management wanted to focus on international sales of different products: *Carstensen*, *The Case of I.G. Farben*, in: *Zumbansen* (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 124 et seq.; see more generally *Hayes*, *Industry and Ideology. IG Farben in the Nazi Era* p. 163 et seq.
- 6 *Deutsche Gesellschaft für Schädlingsbekämpfung*.
- 7 See Judgment of US Military Tribunal documented in: *H. Radandt*, *Fall 6. Ausgewählte Dokumente und Urteil des IG-Farben-Prozesses*, 1970 p. 256 et seq.; *S. H. Lindner*, *Hoechst. Ein I.G. Farben Werk im Dritten Reich*, 2005 p. 319 et seq.
- 8 This taking over of control of foreign corporations constitutes a systematic plundering of foreign property, contrary to the Hague Convention on Laws and Customs of War on Land (Hague IV) of 18 October 1907. For a description see Judgment of US Military Tribunal documented in: *Radandt*, *Fall 6. Ausgewählte Dokumente und Urteil des IG-Farben-Prozesses* p. 226 et seq.; *Hayes*, *Industry and Ideology. IG Farben in the Nazi Era* p. 219 et seq.; *Schneckenburger*, *Die Geschichte des I.G.-Farben-Konzerns. Bedeutung und Rolle eines Großunternehmens* p. 91 et seq.
- 9 *M. T. Allen*, *The Business of Genocide. The SS, Slave Labor, and the Concentration Camps*, 2002 p. 167 et seq.; *Balke*, *Chemie Ingenieur Technik 1949*,

ben demanded several times further slave workers. For example, it supplied the Nazi regime with construction materials for an extension of the concentration camp in order to receive more concentration camp inmates as workers.¹⁰ Upon request of IG Farben, the SS agreed to select and replace »unproductive« workers immediately.¹¹ From 1942 onwards, inmates working for IG Farben also lived in overcrowded camps at the plant.¹² IG Farben exploited its prisoners heavily by long working hours, physically hard work, maltreatment, malnutrition, poor clothing and sanitary conditions.¹³ In 1948, the US Military Tribunal sitting in Nuremberg convicted IG Farben's top management strata. These »generals in grey suits« were found guilty of war crimes and crimes against humanity.¹⁴ IG Farben itself, however, was not and could not have been accused, even

35; *J. Borkin*, *The Crime and Punishment of I.G. Farben*, 1978 p. 113 et seq.; *Carstensen*, *The Case of I.G. Farben*, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 126 et seq.; *Hayes*, *Industry and Ideology. IG Farben in the Nazi Era* p. 347 et seq.; *Jeßberger*, *Journal for International Criminal Law* 8 (2010), 793; *B. Puchert*, *Aus der Praxis der IG Farben in Auschwitz-Monowitz*, *Jahrbuch für Wirtschaftsgeschichte* 4 (1963), 203, 204 et seq.; *B. C. Wagner*, *IG Auschwitz. Zwangsarbeit und Vernichtung von Häftlingen des Lagers Monowitz 1941-1945*, 2000.

- 10 *Carstensen*, *The Case of I.G. Farben*, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 129 et seq. with further references.
- 11 *Carstensen*, *The Case of I.G. Farben*, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 134. See in detail *Wagner*, *IG Auschwitz. Zwangsarbeit und Vernichtung von Häftlingen des Lagers Monowitz 1941-1945* p. 163 et seq.
- 12 *Carstensen*, *The Case of I.G. Farben*, in: Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung. NS-Forced Labor: Remembrance and Responsibility*, p. 130 et seq.
- 13 *Wagner*, *IG Auschwitz. Zwangsarbeit und Vernichtung von Häftlingen des Lagers Monowitz 1941-1945* p. 125 et seq. and with regard to »disciplinary measures« 228 et seq.
- 14 *Jeßberger*, *Journal for International Criminal Law* 8 (2010), 788. The trial is documented in: *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vols VII and VIII, Nuernberg, October 1946-April 1949, Washington, D.C., 1953 and partly in *Radandt*, Fall 6. *Ausgewählte Dokumente und Urteil des IG-Farben-Prozesses*.

though the court focused much of its attention on the role of IG Farben in the Nazi Regime.¹⁵

Oil production in Nigeria heavily affected the Nigerian population, notably the Ogoni people living in the Niger delta, while oil revenues went to the central government.¹⁶ The Ogoni people's protest against the pollution and destruction of their livelihoods was met with harsh and brutal violence from Nigeria's military and police. The Ogoni people formed the Movement for Survival of Ogoni People (MOSOP), which was headed by the reknown writer Ken Saro-Wiwa. They formulated the Ogoni Bill of Rights demanding unsuccessfully, inter alia, political rights, the right to protect their environment and a fair share of revenues from the oil production.¹⁷ Mr. Saro-Wiwa and eight other prominent protestors were arrested, sentenced to death by an unfair special military tribunal for the alleged murder of four Ogoni chiefs and were executed on 10 November 1995 by the Nigerian state authorities. The oil production site that polluted the area was operated by Shell Petroleum Development Company of Nigeria Ltd. («Shell Nigeria»). Shell Nigeria is a wholly owned subsidiary of the Shell Petroleum Company, which in turn is ultimately today owned by Royal Dutch Shell plc., a corporation incorporated in England and Wales and headquartered in the Netherlands.¹⁸ Royal Dutch Shell plc., is the head of »a vast, international, vertically integrated network of affiliated but formally independent oil and gas companies.«¹⁹ Shell Nigeria and its parent corporations allegedly gave monetary and logistical support to the Nigerian police and military, bribed witnesses to produce false testimonies and worked with the Nigerian military regime. In sum, they allegedly aided and abetted state violence against the Ogoni people, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary

15 *Ramasastri*, Berkeley Journal of International Law 20 (2012), 106. *Balke*, Chemie Ingenieur Technik 1949, calls IG Farben the true defendants.

16 The environmental damage is documented in *United Nations Environment Programme Environmental Assessment of Ogoniland 2011*, available at: http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf, last visited: 14.01.2017. The report also includes recommendations for the parties involved.

17 The Ogoni Bill of Rights is available at: <http://mosop.org/2015/10/10/ogoni-bill-of-rights/>, last visited: 29.01.2017.

18 For a graphic representation of the relevant corporate group structure, see below Chapter VII B.

19 US CA Second Circuit *Wiwa et al. v Royal Dutch Petroleum et al.* [2000] 226 F.3d 88, 92.

arrest and wrongful death.²⁰ In 1996, the Center for Constitutional Rights with co-counsel from EarthRights International filed a lawsuit on behalf of relatives of the executed activists in the US against Shell Nigeria, Royal Dutch Shell plc. and Shell Nigeria's CEO. They claimed compensation for the families under the Alien Torts Statute, the Torture Victim Protection Act and Racketeer Influenced and Corrupt Organizations Act. The case was settled in 2009 and Shell paid \$15.5 million to the plaintiffs.²¹ Additionally, in September 2002 twelve other Ogoni activists sued Shell Nigeria and its parents with similar claims. This case was finally dismissed for lack of jurisdiction by the US Supreme Court in 2013.²²

A. Research Question and State of Research

The examples given above illustrate that economic organisations have been and are still involved in the commission of international crimes.²³ However, international criminal law does not apply to economic organisations. The Rome Statute of the International Criminal Court (ICC Statute) only provides for jurisdiction for natural persons. Juridical or legal persons, and thus corporations, are outside the realm of the ICC (1.). *De lege ferenda*, many international criminal law scholars propose to include corporations in the ICC Statute.²⁴ But the question of who precisely should be

20 See US DC S.D. New York Plaintiffs' Original Complaint in Case 96.Civ. 8386 *Wiwa et al. v Royal Dutch Petroleum et al.* [1996] paras 1 to 92; US DC S.D. New York Amended Class Action Complaint in Case 02.Civ. 7618 *Kiobel et al. v Royal Dutch Petroleum et al.* [2004] paras 1-113.

21 US DC S.D. New York Settlement Agreement in Case 96.Civ. 8386, Case 01 Civ. 1909 and Case 04 Civ. 2665 *Wiwa et al. v Shell Petroleum et al.* [2009].

22 US SC *Kiobel et al. v Royal Dutch Petroleum et al.* [2013] 133 SCt 1659.

23 For a description of different forms of involvement see e.g.: *F. Meyer*, *Multinationale Unternehmen und das Völkerstrafrecht*, ZStrR 2013, 56, 63 et seq.

24 See e.g. *J. Adam*, *Die Strafbarkeit juristischer Personen im Völkerstrafrecht*, 2015 p. 203 et seq.; *K. Haigh*, *Extending the International Criminal Court's Jurisdiction to Corporations. Overcoming Complementarity Concerns*, Australian Journal of Human Rights 14 (2008), 199 et seq.; *L. van den Herik*, *Subjecting Corporations to the ICC Regime. Analyzing the Legal Counterarguments*, in: Burchard et al (eds.), *The Review Conference and the Future of the International Criminal Court*, 2010, p. 155-174; *M. Kremnitzer*, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal*

held responsible is barely ever raised. Authors either make no mention of the details concerning the object of regulation or they simply refer to national corporate law (2.).

The examples above also illustrate that economic actors often form transnational corporate groups. Transnational corporate groups are characteristically active in multiple countries. Their production unit might be located and incorporated in one country; their distribution and marketing unit in a second country; and their headquarters, defining the overall corporate group strategy, in a third country. National corporate law however, does not perceive the corporate group as a legal person. Thus, referring to national corporate law for a definition would exclude transnational corporate groups from the ICC Statute (3.). It would exclude an economic actor that, as the examples have shown, has participated in international crimes. Moreover, it would exclude an economic actor that is factually an important international actor.²⁵ Not only do some transnational corporate

Law, *Journal of International Criminal Justice* 8 (2010), 909, 912 et seq.; *J. Kyriakakis*, Corporations and the International Criminal Court. The Complementarity Objection Stripped Bare, *Criminal Law Forum* 19 (2007), 115, et seq.; *J. Kyriakakis*, Corporate Criminal Liability and the ICC Statute. The Comparative Law Challenge, *Northwestern Interdisciplinary Law Review* 56 (2009), 333, et seq.; *M. Punch*, Why Corporations Kill and Get away With it. The Failure of Law to Cope With Crime in Organizations, in: *Nollkaemper/van der Wilt* (eds.), *System Criminality in International Law*, 2009, p. 42-68; *Ramasastri*, *Berkeley Journal of International Law* 20 (2012), 91 et seq.; *R. C. Slye*, Corporations, Veils, and International Criminal Liability, *Brooklyn Journal of International Law* 33 (2008), 955, 959 et seq.; *C. Wells*, Corporations and Criminal Responsibility, 2nd ed., 2001. For an enumeration of different, rather non-legal, political arguments for and against the inclusion (such as the political unwillingness to prosecute corporations, the length of the proceedings and the appropriate punishment), see *D. M. Amann*, Capital Punishment. Corporate Criminal Liability for Gross Violations of Human Rights, *Hastings International & Comparative Law Review* 24 (2001), 327, 333 et seq.

25 Through Business and Industry Non-governmental Organizations (BINGOs), transnational corporate groups can participate as non-state observers at international treaty-developing meetings. See the examples of *A. Telesetsky*, Co-Regulation and the Role of Transnational Corporations as Subjects in Implementing International Environmental Law, in: *Byrnes et al* (eds.), *International Law in the New Age of Globalization*, 2013, p. 287-319, 292 et seq. See also *S. Anderes*, *Fremde im eigenen Land. Die Haftbarkeit transnationaler Unternehmen für Menschenrechtsverletzungen an indigenen Völkern*, 2000 p. 109 et seq.

groups have larger turnovers than many states,²⁶ they also often take on state-like functions in developing countries.²⁷ With the help of their corporate group structure, transnational corporate groups can act globally and transcend national borders. Hence, there is an important argument for including transnational corporate groups as potential objects of regulation in international criminal law. In general, it is a prerequisite to have a concept of the potential object of regulation in order for a discussion on the inclusion of economic organisations in the ICC Statute to take place. This thesis will try to fill that gap and provide such a concept of transnational corporate groups. This concept has to pay due regard to the specific needs of international criminal law. These needs favour a concept that is independent from national law and that includes transnational corporate groups as addressees in their own right (4.).

1. Status Quo in International Criminal Law

Cassese defines international criminal law as

»a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, in-

26 *P. Fischer*, Transnational Enterprises, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, 2000, p. 921-926, 926; *J. E. Stiglitz*, Multinational Corporations. Balancing Rights and Responsibilities, *Proceedings of the Annual Meeting of the American Society of International Law* 101 (2007), 3, 16.

27 They often build basic infrastructure such as roads and electricity networks or (co)fund social programmes and education schemes in the host state regions where they are active: *Telesetsky*, Co-Regulation and the Role of Transnational Corporations as Subjects in Implementing International Environmental Law, in: Byrnes et al (eds.), *International Law in the New Age of Globalization*, p. 287; *G. Kelley*, Multilateral Investment Treaties. A Balanced Approach to Multinational Corporations, *Columbia Journal of Transnational Law* 39 (2001), 483, 508 et seq. See e.g. <http://www.shell.com/global/environment-society/society/our-neighbours.html> (last visited: 16.01.2017); <https://www.saint-gobain.com/en/commitments> (last visited: 16.01.2017). For the challenges and public policy dilemmas, see *UNCTAD World Investment Report 2014. Investing in the SDGs. An Action Plan*, available at: http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf (last visited: 06.01.2017) p. xxvi et seq., 136 et seq.

ternational terrorism) and to make those persons who engage in such conduct criminally liable».²⁸

It comprises substantive and procedural law.²⁹ It is a body of public international law that directly enshrines criminal responsibility for individuals.³⁰ These concern so-called »core crimes«, meaning those crimes that are directly criminal under international law and that are also prosecuted on an international level.³¹ Legal sources of international criminal law are those of international law in general,³² namely the ICC Statute as the main source³³ as well as customary international criminal law.³⁴ The ICC is competent to hear cases concerning genocide (Article 6), crimes against

28 *A. G. Cassese, Paola*, Cassese's International Criminal Law, 3rd ed., 2013 p. 3. For a narrower definition, see *G. Werle and F. Jeßberger*, Principles of International Criminal Law, para 89: »all norms that establish, exclude or otherwise regulate responsibility for crimes under international law« and paras 125 et seq.; *Meyer*, ZStrR 2013, 58 et seq. For the present project there is no need to decide on one of the concepts, as the definition of corporate groups would be usable both for core crimes as well as for so-called treaty-crimes that are not punishable on the international level. See also *G. W. B. Thurner*, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen, 2012 p. 232.

29 *Cassese*, Cassese's International Criminal Law p. 3.

30 *Werle and Jeßberger*, Principles of International Criminal Law, para 93. Sanctions are imprisonment or fines.

31 For the evolution, see *Cassese*, Cassese's International Criminal Law p. 19 et seq. He argues that proper international crimes violate (i) rules of customary international law or treaty provisions, (ii) which are intended to protect values of the whole international community and (iii) whose repression is of universal interest.

32 *Werle and Jeßberger*, Principles of International Criminal Law, para 136. For sources of international law, see Article 38 (I) Statute of the International Court of Justice; *H. Thirlway*, The Sources of International Law, in: Evans (ed.), International Law, 2010, p. 95-121.

33 *Werle and Jeßberger*, Principles of International Criminal Law, para 155.

34 ICTY Appeals Chamber Decision on Interlocutory Appeal on Jurisdiction Case IT-94-1 *Prosecutor v. Tadic* [1995] para 99; *Werle and Jeßberger*, Principles of International Criminal Law, para 157. Provisions of the ICTY and ICTR Statutes can be seen as determinations of customary international law: para 157 et seq.

humanity (Article 7), war crimes (Article 8), and, from 2017 onwards, cases concerning the crime of aggression (Article 8 bis).³⁵

According to Article 25 (1) ICC Statute, the ICC only has jurisdiction over natural persons.³⁶ Thus, while individual employees or corporate directors might be prosecuted before the ICC, the ICC cannot hold the corporation itself liable.³⁷ Government actors as well as private persons can commit international crimes.³⁸ A quotation frequently cited against corporate responsibility is the statement from the Nuremberg Tribunal that »crimes against international law are committed by men, not by abstract legal entities«. ³⁹ This quotation has to be seen in its context; it meant that individuals could not hide behind the state bureaucracy. Rather than excluding corporate criminality, it has to be seen as «a victory over the Act of State doctrine». ⁴⁰ As a consequence, this statement does not negate the possibility of corporate criminal liability for international crimes.

Individual responsibility is one of the foundations of international criminal law. ⁴¹ It creates the framework within which criminal responsibility can be legitimately attributed. ⁴² The principle of individual criminal re-

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- 35 For the Kampala Conference leading to a definition of the crime of aggression, see *C. Kreß and L. von Holtendorff*, *The Kampala Compromise on the Crime of Aggression*, *Journal of International Criminal Justice* 8 (2010), 1179 et seq.
- 36 Article 1 ICC Statute only talks of »persons« without the attribute »natural«.
- 37 *A. Eser*, *Individual Criminal Responsibility*, in: Cassese et al (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, 2002, p. 767-822, 778; *Kyriakakis*, *Criminal Law Forum* 19 (2007), 116.
- 38 *A. Clapham*, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons. Lessons from the Rome Conference on an International Criminal Court*, in: Kamminga (ed.), *Liability of Multinational Corporations under International Law*, 2000, p. 139, 143. The crime of aggression is a so-called »leadership crime« and has a limited range of potential perpetrators: *Werle and Jeßberger*, *Principles of International Criminal Law*, para 514.
- 39 *Trial of the Major War Criminals before the International Military Tribunal, Nuernberg, 1947*, p. 223.
- 40 *E. van Sliedregt*, *Criminal Responsibility in International Law*, *European Journal of Crime, Criminal Law and Criminal Justice* 14 (2006), 81, 84. See also *van den Herik*, *Subjecting Corporations to the ICC Regime. Analyzing the Legal Counterarguments*, in: Burchard et al (eds.), *The Review Conference and the Future of the International Criminal Court*, p. 158 et seq.
- 41 *K. Ambos*, *Treatise on International Criminal Law*, 2013 p. 84.
- 42 *B. Burghardt*, *Modes of Participation and their Role in a General Concept of Crimes under International Law*, in: Burchard et al (eds.), *The Review Conference and the Future of the International Criminal Court. Proceedings of*

sponsibility is rooted in the national criminal law traditions and contains two basic elements: »(i) personal fault, for (ii) one's own conduct.«⁴³ Van Sliedregt has shown that the principle of individual responsibility can adapt to »the demands of a changed society where collective actors interact like individuals and crime is highly organised and carried out on a large scale.«⁴⁴ International crimes are prime examples of large-scale and organised crime. This collective context in connection with individual criminal responsibility leads to »peculiar structures of imputation of international crimes«:⁴⁵ On the one hand, a person must have committed a concrete action of a person that leads to a concrete crime. On the other hand, this action has to take place within a »supra-individual criminal context«.⁴⁶ This so-called contextual element, for example the widespread attack in crimes against humanity, mirrors the collective nature of international crimes.⁴⁷

the First AIDP Symposium for Young Penalists in Tübingen, Germany, Co-organized by the AIDP YP Committee, 2010, p. 81-94, 84; *K. J. Fisher*, *Moral Accountability and International Criminal Law*, 2012 p. 68.

43 *van Sliedregt*, *European Journal of Crime, Criminal Law and Criminal Justice* 14 (2006), 83.

44 *van Sliedregt*, *European Journal of Crime, Criminal Law and Criminal Justice* 14 (2006), 84.

45 *Ambos*, *Treatise on International Criminal Law* p. 85. See similarly *K. Marxen*, *Beteiligung an schwerem systematischen Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre*, in: Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, 1998, p. 220-236, 226 et seq.; *J. Vogel*, *Individuelle Verantwortlichkeit im Völkerstrafrecht*, *Zeitschrift für die gesamte Strafrechtswissenschaft* 114 (2002), 403, 409 et seq. For a detailed analysis how the different forms of participation can respond to mass atrocities, see *M. Osiel*, *The Banality of Good. Aligning Incentives against Mass Atrocity*, *Columbia Law Review* 105 (2005), 1751.

46 *Ambos*, *Treatise on International Criminal Law* p. 85. See also *Slye*, *Brooklyn Journal of International Law* 33 (2008), 960.

47 *Ambos*, *Treatise on International Criminal Law* p. 85; *Marxen*, *Beteiligung an schwerem systematischen Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre*, in: Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, p. 228.

2. Discussion on Corporations

While international criminal law is *de lege lata* restricted to natural persons, there is a widespread debate as to whether corporations should be included in the realm of international criminal law. No decision was reached on this issue at the Rome Conference (a.). Since then it has attracted academic attention, with arguments against the inclusion of corporations mainly coming from German criminal law tradition (b.). The discussion focusses solely on international and criminal law aspects and neglects to define its potential object of regulation (c.).

a. Origins: The Rome Conference

The French delegation to the diplomatic conference establishing the ICC in Rome proposed to include »juridical persons« in the realm of the ICC Statute. This proposal was discussed in the first Committee of the Whole and the response was divided.⁴⁸ Some states⁴⁹ expressed support for the proposal; others⁵⁰ opposed the proposition right from the beginning; and a third group⁵¹ saw it necessary to amend the proposition. The proposal was sent to the Working Group on General Principles and France, a civil law country, with the help of the Solomon Islands, a common law country, held informal consultations to negotiate a new formulation.⁵² After three

48 *Clapham*, The Question of Jurisdiction Under International Criminal Law Over Legal Persons. Lessons from the Rome Conference on an International Criminal Court, in: Kamminga (ed.), *Liability of Multinational Corporations under International Law*, p. 146; *M. Karavias*, Corporate Obligations under International Law, 2013 p. 99 et seq.; *T. M. Schmidt*, Crimes of Business in International Law. Concepts of individual and corporate responsibility for the Rome Statute of the International Criminal Court, 2015 p. 370 et seq.

49 Jordan, Tunisia, Tanzania, Algeria and South Korea.

50 Australia, China, Argentina, Sweden, Lebanon, Mexico, Thailand, Venezuela, Denmark, Syria, Greece, Portugal, Egypt, Poland, Slovenia, El Salvador and Yemen.

51 Ukraine, Cuba, Japan, Kenya and Singapore.

52 *Clapham*, The Question of Jurisdiction Under International Criminal Law Over Legal Persons. Lessons from the Rome Conference on an International Criminal Court, in: Kamminga (ed.), *Liability of Multinational Corporations under International Law*, p. 147. For the different proposals, see also: *Haigh*, Australian Journal of Human Rights 14 (2008), 202 et seq.

weeks of negotiation, despite many different propositions and circulating texts, no consensus was reached.⁵³ The final proposal was rather restrictive -it suggested prosecuting corporations only accessorially. Before prosecuting a corporation, a natural person that has been »in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed«⁵⁴ must be prosecuted for crimes that were committed »on behalf of, and with the explicit consent of, the corporation«.⁵⁵

There are some aspects relevant for the thesis to be taken from the discussions that were had during the Rome Conference. Firstly, scholars have embraced the proposed nexus of individual and corporate responsibility. According to Kamminga, principles of fairness and effectiveness require that a corporation be held responsible if its acts would amount to a conviction if those acts were carried out by a natural person.⁵⁶ For van der Wilt, this nexus would help to draw a fair line limiting the responsibility for »normal and seemingly legitimate corporate activity«.⁵⁷

53 *Clapham*, The Question of Jurisdiction Under International Criminal Law Over Legal Persons. Lessons from the Rome Conference on an International Criminal Court, in: Kamminga (ed.), Liability of Multinational Corporations under International Law, p. 148; *Meyer*, ZStrR 2013, 67 et seq.; *R. C. Thompson, A. Ramasastry and M. B. Taylor*, Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes, Washington International Law Review (2009), 841, 871; *Thurner*, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen p. 23.

54 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* UN Doc A/CONF.183/C.1/WGGP/L.6, 3. July 1998, Official Records Volume III p. 252.

55 *Ambos*, Treatise on International Criminal Law p. 144; *Karavias*, Corporate Obligations under International Law p. 100; *H. van der Wilt*, Corporate Criminal Responsibility for International Crimes. Exploring the Possibilities, Chinese Journal of International Law 12 (2013), 43, 47.

56 *M. T. Kamminga*, Holding Multinational Corporations Accountable for Human Rights Abuses. A Challenge for the EC, in: Alston (ed.), The EU and Human Rights, 1999, p. 553-569, 560 et seq. *Ambos* predicts that an inclusion of corporations in the realm of the ICC Statute would detract the Court from its primary focus, individuals: *K. Ambos*, Commentary on the Rome Statute of the International Criminal Court, Article 25 ICC para 4; *Ambos*, Treatise on International Criminal Law p. 144. Similarly *Meyer*, ZStrR 2013, 84 et seq.

57 *van der Wilt*, Chinese Journal of International Law 12 (2013), 67.

Secondly, for Clapham, the lengthy discussions of the proposals »demonstrated how far the concept had developed«. ⁵⁸ Similarly, Ruggie still sees room for development in corporate criminal responsibility. ⁵⁹ On a national level, in addition to common law countries, major civil law countries such as France and Spain now include corporations in their national criminal laws. Despite Ambos still claiming that there was no international consensus on corporate criminal liability amongst »all major criminal law systems«, ⁶⁰ there has been a major shift towards holding corporations criminally liable. There seems to be widespread consensus on corporate criminal liability nowadays. ⁶¹ Germany is one of the few states

58 *Clapham*, The Question of Jurisdiction Under International Criminal Law Over Legal Persons. Lessons from the Rome Conference on an International Criminal Court, in: Kamminga (ed.), Liability of Multinational Corporations under International Law, p. 148. See also *Thurner*, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen p. 236 et seq.

59 »Nevertheless, just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today.« *Ruggie*, Business and Human Rights. Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/4/35, 19 February 2007, para 21.

60 *Ambos*, Treatise on International Criminal Law p. 144.

61 *van den Herik*, Subjecting Corporations to the ICC Regime. Analyzing the Legal Counterarguments, in: Burchard et al (eds.), The Review Conference and the Future of the International Criminal Court, p. 168; *Punch*, Why Corporations Kill and Get away With it. The Failure of Law to Cope with Crime in Organizations, in: Nollkaemper/van der Wilt (eds.), System Criminality in International Law, p. 45; *Ruggie*, Business and Human Rights. Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/4/35, 19 February 2007, para 23. For an overview of the different concepts of criminal corporate liability, see e.g.: *H. T. de Doelder, Klaus*, La Criminalisation du Comportement Collectif. Criminal Liability of Corporations, 1996; *Meyer*, ZStrR 2013, 77 et seq. *Tiedemann* distinguishes those legal orders that follow a pragmatic approach, which will sanction fictive entities criminally, and those that stress doctrinal concerns, which will limit themselves to administrative sanctions: *K. Tiedemann*, La Criminalisation du Comportement Collectif, in: de Doelder (ed.), La criminalisation du comportement collectif. Criminal Liability of Corporations, 1996, p. 11-29, 20 et seq.

that still does not hold corporations criminally liable.⁶² There, the Code on Administrative Infractions (*Gesetz über Ordnungswidrigkeiten* OWiG) basically fulfils the criminal law functions of corporate criminal responsibility.⁶³ The OWiG assigns financial responsibility to corporations for acts either carried out by their agents⁶⁴ or, in the case of failure of supervision, by employees.⁶⁵ Under specific circumstances, namely tight control of the subsidiary, some authors extend the parent's duty of supervision to the whole corporate group.⁶⁶ Then, the parent corporation would be responsi-

62 *Ambos*, Treatise on International Criminal Law p. 144 footnote 361; *A. Ramasastry and R. C. Thompson*, Commerce, Crime and Conflict, Fafo-Report No. 536, available at: http://fafo.no/media/com_netsukii/536.pdf, last visited: 29.01.2017. 13 et seq. call the domestic possibilities of prosecuting »business entities« for their involvement in international crimes a »potential web of liability« (at p. 27); *D. Stoitchkova*, Towards Corporate Liability in International Criminal Law, 2010 p. 113 et seq. See the overview at *Kyriakakis*, North-western Interdisciplinary Law Review 56 (2009), 336 et seq. She mentions Brazil, Bulgaria, Luxemburg, the Slovak Republic, Greece, Hungary, Mexico, Sweden, Italy and the Ukraine as other examples. *T. Weigend*, *Societas delinquere non potest? A German Perspective*, Journal of International Criminal Justice 6 (2008), 927, 930 argues that Kant's »individualistic understanding of responsibility« and Savigny's legal fiction theory of corporations are the theoretical underpinnings for limiting criminal responsibility to natural persons in the German Penal Code of 1870. However, the individualistic understanding of responsibility was also embraced in France after the French Revolution: *G. Stessens*, Corporate Criminal Liability. A Comprehensive Perspective, International and Comparative Law Quarterly 43 (1994), 494.

63 *Weigend*, Journal of International Criminal Justice 6 (2008), 931. See also *B. Swart*, International Trends towards Establishing some Form of Punishment for Corporations, Journal of International Criminal Justice 6 (2008), 947, 950: »a well developed and effective system for imposing repressive sanctions other than criminal on corporations«.

64 See Section 30 OWiG.

65 See Section 130 (1) OWiG.

66 Left open in BGH Ruling *Transportbeton-Vertrieb* [1981] WuW/E 1871, 1876. Pro (an economic point of view is warranted): BKartA Decision Case B1-200/06 *Etex Holding* [2009]. This part was explicitly not reversed in 2012 (see case report available at: <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2012/B1-200-06.html>, last visited: 16.01.2017); *N. Bunting*, Konzernweite Compliance. Pflicht oder Kür?, ZIP 2012, 1542, 1545 et seq.; *M. Mansdörfer and S. Timmerbeil*, Zurechnung und Haftungsdurchgriff im Konzern - Eine rechtsgebietübergreifende Betrachtung, WM 2004, 362, 368; KölnKomm OWiG-K. *Rogall* § 130 OWiG para 27 with further references. Contra (The parent is not the owner (*Inhaber*) of the under-

ble for failing to prevent the subsidiary's infraction. Section 30 (4) OWiG allows for the prosecution of legal persons without identifying a specific individual person.

b. Focus on National Criminal Law Theory

On an international level, corporate responsibility is still widely discussed. The arguments put forward are developed on the basis of the writers' respective national backgrounds. They are exchanged with strong reference to the theoretical concepts that underpin the rationale of their national criminal laws.⁶⁷ Little attention is given to the concept of a corporation or the question of whether transnational corporate groups should be included.

For example, critics mainly argue that in fact only natural persons, and not legal entities, can act.⁶⁸ On the contrary, many legal orders acknowledge corporate acts.⁶⁹ In international criminal law (Article 25 (3)

taking (*Unternehmen, Betrieb*) and thus not an addressee of the relevant duties): *J. Koch*, Der kartellrechtliche Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 554, 570 et seq.; *J. Koch*, Compliance-Pflichten im Unternehmensverbund, WM 2009, 1013, 117 et seq.; *J. Koch and R. Harnos*, Der Konzern als Außengesellschaft bürgerlichen Rechts?, in: Eisele et al (eds.), Der Sanktionsdurchgriff im Unternehmensverbund, 2014, p. 171-188, 174 et seq.; *A. Tschierschke*, Ein Überblick über den Sanktionsdurchgriff in Unternehmensverbindungen de lege lata und de lege ferenda, in: Eisele et al (eds.), Der Sanktionsdurchgriff im Unternehmensverbund, 2014, p. 137-151, 140 et seq.; *D. Verse*, Compliance im Konzern. Zur Legalitätskontrollpflicht der Geschäftsleiter einer Konzernobergesellschaft, ZHR 175 (2011), 401, 410.

67 *L. van den Herik*, Corporations as Future Subjects of the International Criminal Court. An Exploration of the Counterarguments and Consequences, in: Stahn/van den Herik (eds.), Future Perspectives on International Criminal Justice, 2010, p. 350-368, 362 et seq.; *S. L. Seck*, Collective Responsibility and Transnational Corporate Conduct, in: Isaacs/Vernon (eds.), Accountability for Collective Wrongdoing, 2011, p. 140-168, 143; *V. Todarello*, Corporations Don't Kill People. People Do. Exploring The Goals Of The United Kingdom's Corporate Homicide Bill, New York Law School Journal of Human Rights 19 (2003), 481, 486; *Weigend*, Journal of International Criminal Justice 6 (2008), 931 et seq. For a policy perspective, see *Schmidt*, Crimes of Business in International Law. Concepts of individual and corporate responsibility for the Rome Statute of the International Criminal Court p. 372 et seq.

68 *Weigend*, Journal of International Criminal Justice 6 (2008), 934.

69 *van den Herik*, Corporations as Future Subjects of the International Criminal Court. An Exploration of the Counterarguments and Consequences, in: Stahn/

(a) third alternative ICC Statute) the theory of *Tatherrschaft* (organisational dominance)⁷⁰ is used to prosecute as perpetrators those that act in the background - planning the crime and deciding whether and how it is going to be executed.⁷¹ This theory paves the way to perceiving corpora-

van den Herik (eds.), *Future Perspectives on International Criminal Justice*, p. 168, 364; *Kremnitzer*, *Journal of International Criminal Justice* 8 (2010), 913. For the dynamics with a collective entity in general and corporations in particular, see *Punch*, *Why Corporations Kill and Get away With it. The Failure of Law to Cope With Crime in Organizations*, in: Nollkaemper/van der Wilt (eds.), *System Criminality in International Law*, p. 42 et seq. For a philosophical point of view, see *P. A. French*, *Collective and Corporate Responsibility*, 1984 p. 40 et seq. For a brief overview on the individualist and collectivist standpoint, see *P. Q. Saunders*, *Rethinking Corporate Human Rights Accountability*, *Tulane Law Review* 89 (2015), 603, 634. *Todarello*, *New York Law School Journal of Human Rights* 19 (2003), 486 argues that criminal acts by employees are *ultra vires* and cannot be attributed to the corporations. The concept of *ultra vires* is rooted in English corporate law where corporations need to name a specific purpose in their statutes to be incorporated. Acts outside this aim are then deemed as *ultra vires*. Without going into a detailed rebuttal of this argument, its rooting in English corporate law prevents a transposition to international criminal law. Furthermore the author does not elaborate on this argument beyond this brief statement.

70 *C. Roxin*, *Täterschaft und Tatherrschaft*, 8th ed., 2006 p. 242. For this argument, see also *van den Herik*, *Subjecting Corporations to the ICC Regime. Analyzing the Legal Counterarguments*, in: Burchard et al (eds.), *The Review Conference and the Future of the International Criminal Court*, p. 168; *Swart*, *Journal of International Criminal Justice* 6 (2008), 950.

71 ICC Pre-Trial Chamber Decision on the Confirmation of Charges Case 01/04-01/07 *Prosecutor v Katanga and Ngudjolo Chui* [2008] para 498 et seq.; ICC Pre-Trial Chamber Decision on Warrant of Arrest Case 02/05-01/09 *Prosecutor v Omar Al Bashir* [2009] paras 216 et seq. For a detailed description, see *K. Ambos*, *Command Responsibility and Organisationsherrschaft. Ways of Attributing International Crimes to the 'Most Responsible'*, in: van der Wilt/Nollkaemper (eds.), *System Criminality in International Law*, 2009, p. 127-157; *F. Jeßberger and J. Geneuss*, *On the Application of a Theory of Indirect Perpetration in Al Bashir - German Doctrine at the Hague?*, *Journal of International Criminal Justice* 6 (2008), 853 et seq.; *S. Manacorda and C. Meloni*, *Indirect Perpetration versus Joint Criminal Enterprise. Concurring Approaches in the Practice of International Criminal Law?*, *Journal of International Criminal Justice* 9 (2011), 159, 169 et seq.; *C. Meloni*, *Command Responsibility in International Criminal Law*, 2010 p. 239; *Swart*, *Journal of International Criminal Justice* 6 (2008), 951; *T. Weigend*, *Perpetration through Organization. The Unexpected Career of a German Legal Concept*, *Journal of International Criminal Law* 9 (2011), 91 et seq.