

Towards Corporate Liability  
in International Criminal Law

SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 38.

The titles published in this series are listed at the end of this volume.

Towards Corporate Liability  
in International Criminal Law

Desislava Stoitchkova



Antwerp – Oxford – Portland

This book has been defended at Utrecht University on 26 February 2010.

Desislava Stoitchkova  
Towards Corporate Liability in International Criminal Law

Cover illustration © Danny Juchtmans

Typesetting: Wieneke Matthijsse, Willem Pompe Institute for Criminal Law and  
Criminology, Utrecht University, the Netherlands

ISBN 978-94-000-0024-7  
D/2010/7849/36  
NUR 828

© 2010 Intersentia  
[www.intersentia.com](http://www.intersentia.com)

Behoudens uitzondering door de wet gesteld, mag zonder schriftelijke toestemming van de rechthebbende(n) op het auteursrecht c.q. de uitgevers van deze uitgave, door de rechthebbende(n) gemachtigd namens hem (hen) op te treden, niets uit deze uitgave worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of anderszins, hetgeen ook van toepassing is op de gehele of gedeeltelijke bewerking. De uitgevers zijn met uitsluiting van ieder ander onherroepelijk door de auteur gemachtigd de door derden verschuldigde vergoedingen van kopiëren, als bedoeld in artikel 17 lid 2 der Auteurswet 1912 en in het KB van 20-6-'64 (Stb. 351) ex artikel 16b der Auteurswet 1912, te doen innen door (en overeenkomstig de reglementen van) de Stichting Reprorecht te Amsterdam.

Niets uit deze uitgave mag worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of op welke andere wijze ook, zonder voorafgaande schriftelijke toestemming van de uitgevers.

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the publishers.

## ACKNOWLEDGEMENTS

In seeing this book come to fruition, I benefitted greatly from the guidance and encouragement of Professor Chrisje Brants and Professor Alexander Knoops. Their constructive comments and stimulating insights into a vast array of themes, ranging from international criminal law through criminology to legal philosophy, enriched my views and the research put forward hereafter. I would also like to thank Professor Fried van Hoof, Professor François Kristen, Professor Héctor Olásolo, Professor Elies van Sliedregt and Professor Harmen van der Wilt for their thorough reading and perceptive advice on the final manuscript. They have been a tremendous source of inspiration to me and I am honoured to have them on my board of examiners. The assistance which I have received in practical matters from my colleagues at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University has been indispensable over the past years. I am most grateful to Wieneke Matthijsse for scrupulously generating the layout of this book. Special thanks also to my dear friends, Jill Coster van Voorhout, Tsvetelina Petrunova, Lorna Pope, Jovanka Bestebroer, Alberdina Kregel and Werner Lycklema, who have stood by me and have been a welcome distraction from solitary academic work. I am particularly indebted to Antony James Botting for his patience and moral support in moments of dire need. To my parents – Slava and Emanouil – whose unconditional love and faith in me have invariably accompanied the current and all my other endeavours, I dedicate this book.

Utrecht, January 2010

Desislava Stoitchkova



# TABLE OF CONTENTS

List of abbreviations	xi
<b>1 INTRODUCTION</b>	<b>1</b>
I Corporations, conflicts and human rights	1
II The rise of corporate social responsibility	5
III Regulation at the domestic level	7
III.1 Criminal liability	7
III.2 Liability through civil courts	9
III.3 Non-mandatory mechanisms	11
IV International regulation	12
IV.1 ‘Soft-law’ initiatives	12
IV.2 The International Criminal Court	13
IV.3 Some post-Rome developments	17
V Central question	18
VI Method and structure	20
<b>2 CRIMINAL RESPONSIBILITY AND THE CORPORATE ENTITY</b>	<b>23</b>
I Introduction	23
II The criminology of international corporate crime	24
II.1 Conceptualising corporate crime	24
II.2 Corporate crime in international context	27
III The morality paradigm and corporate liability	28
III.1 Can corporations be regarded as persons?	29
III.2 Moral agency and moral responsibility	30
III.3 Legal personhood and moral responsibility	32
IV Guilt and punishment of collectives	33
IV.1 The moral guilt contention	35
IV.2 Collective legal guilt and the position of the individual	36
IV.3 Accountability, culpability and due process	38
V Conclusion	41

<b>3 CORPORATE ACCOUNTABILITY À LA NUREMBERG</b>	<b>43</b>
I Introduction	43
II The Nuremberg ‘collective criminality’ model	44
II.1 The doctrine of conspiracy	44
II.2 The concept of criminal organisations	46
II.3 A missed opportunity <i>vis-à-vis</i> corporate accountability?	50
III The Nuremberg prosecution of industrialists	53
III.1 An overview of domestic military trials	53
III.2 Synthesising the Nuremberg principles of individual criminal responsibility in relation to corporate officials	56
III.3 The implicit denunciation of corporations as accessories to Nazi crimes	58
IV The legacy of Nuremberg	61
V Conclusion	63
<b>4 COLLECTIVE CRIMINALITY AND THE ROME STATUTE</b>	<b>65</b>
I Introduction	65
II The ‘common purpose’ doctrine	67
II.1 Joint criminal enterprise: doctrinal overview	67
II.1.1 The elements of joint criminal enterprise as a mode of liability	68
II.1.2 Jurisprudential attempts at counteracting the drawbacks of the JCE doctrine	70
II.1.2a The customary law origins of JCE	70
II.1.2b The inherent complexities of extended JCE	72
II.1.2c Critical appraisal of the <i>ad hoc</i> tribunals’ approach to JCE	74
II.2 The ‘common purpose’ concept in the Rome Statute	76
II.2.1 The divergent nature of Article 25(3)(d) RS	78
II.2.2 A redundant provision?	79
III The concept of superior responsibility	82
III.1 Brief historical survey of the development of the doctrine	82
III.2 Superior responsibility under the Rome Statute	83
III.2.1 The components of superior responsibility as a mode of liability	84
III.2.1a The existence of a superior – subordinate relationship	85
III.2.1b The cognitive requirement for superior responsibility	87
III.2.1c Activities within the effective responsibility and control of superiors	89
III.2.1d The duty of superiors to act	91
IV Conclusion	93



<b>5</b>	<b>THE CRIMINAL LIABILITY OF CORPORATIONS WITHIN THE ROME STATUTE FRAMEWORK</b>	<b>95</b>
I	Introduction	95
II	The ambit of <i>actus reus</i> and <i>mens rea</i> in the Rome Statute	96
II.1	Acts and omissions	96
II.2	The <i>dolus directus</i> facet of Article 30 RS	97
II.3	<i>Dolus eventualis</i> as a form of volition?	98
II.4	<i>Culpa</i> -type liability under the Rome Statute	101
III	Utilising the current Rome Statute provisions	102
III.1	Indirectly implicating MNCs on the basis of individual convictions	102
III.2	The notion of complicity as an avenue for corporate liability	103
IV	Direct corporate criminal liability <i>sui generis</i>	108
IV.1	The criminal responsibility of corporations ‘in the draft’	108
IV.1.1	Declarations of criminality	109
IV.1.2	Liability along vicarious lines	110
IV.2	Domestic approaches to corporate criminal liability	113
IV.2.1	The principle of aggregation	113
IV.2.2	Proactive and reactive fault	115
IV.2.3	The corporate ethos approach	117
IV.2.4	Constructive corporate fault	118
IV.3	The constructive method and international crimes	121
IV.3.1	Setting the subjective threshold of corporate liability	121
IV.3.1a	The <i>dolus eventualis</i> standard of corporate misconduct	122
IV.3.1b	<i>Culpa</i> as a benchmark for corporate criminal responsibility	125
IV.3.1c	A word on <i>dolus specialis</i>	133
IV.3.2	The scope of the objective element	134
V	Conclusion	137
<b>6</b>	<b>CULPABILITY BEYOND THE CONFINES OF THE CORPORATE FORM</b>	<b>139</b>
I	Introduction	139
II	Direct parent liability	140
II.1	The intrinsic protections of the corporate form	140
II.2	Justifying the attribution of criminal responsibility to parent companies	142
II.3	The criteria for ascribing direct liability to parent corporations	143
II.3.1	The duty to intervene	146
II.3.1a	Authority	147
II.3.1b	Awareness	148
II.3.2	The power to intervene	149
II.3.2a	Control	150
II.3.2b	Causality	155

III	Direct criminal responsibility and supply chain dynamics	156
IV	The superior responsibility of corporate officials	159
IV.1	Superior – subordinate relationships and the ‘effective responsibility and control’ test	161
IV.2	The cognitive requirement and the corresponding failure to act	163
V	Conclusion	165
<b>7</b>	<b>CONCLUSION</b>	<b>167</b>
I	Overview	167
II	Prospects along the regulatory continuum	169
II.1	The complementarity contention pertaining to ‘inaction’ and ‘inability’	170
II.2	Alternatives to corporate criminal liability and the implications for the principle of complementarity	171
II.3	Non-criminal regulation – a viable option for the ICC?	173
III	The pitfalls of collective criminality	174
III.1	The imperative of aligning accountability with due process	176
III.2	Collective punishment: effects on the ‘innocent’ bystander?	179
IV	Liability of MNCs in international criminal law: from aspiration to reality	182
V	Corporate accountability and the goals of international criminal justice	184
V.1	The ‘problem’ of plea bargaining	186
V.2	Deterrence, retribution and the expressive function of (international) criminal law	187
	Summary	191
	Samenvatting	197
	Selected legal provisions	205
	Bibliography	211
	Table of cases	223
	Table of UN and other documents	229
	Index	231
	Curriculum vitae	235

## LIST OF ABBREVIATIONS

AC	Appeal Cases
A Crim R	Australian Criminal Reports
ATCA	Alien Tort Claims Act
CEO	Chief Executive Officer
Cir.	Circuit
CLR	Common Law Reports
Cr App R	Criminal Appeal Report
CSR	Corporate Social Responsibility
DRC	Democratic Republic of the Congo
EC	European Council
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ESCOR	United Nations Economic and Social Council Official Records
EU	European Union
F 2d	Federal Reporter (Second Series)
F 3d	Federal Reporter (Third Series)
F Supp	Federal Supplement
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
ILO	International Labour Organisation
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
MNC	Multinational Corporation
NGO	Non-governmental Organisation
NW 2d	North-Western Reporter (Second Series)
OECD	Organisation for Economic Cooperation and Development
OTC	Oriental Timber Company
RS	Rome Statute
SATRC	South African Truth and Reconciliation Commission
SCR	Supreme Court Reports
TWC	Trials of War Criminals
UK	United Kingdom
UN	United Nations

List of abbreviations

UNITA	National Union for the Total Independence of Angola
UNWCC	United Nations War Crimes Commission
US	United States
USC	United States Code
USMT	United States Military Tribunal
VCLT	Vienna Convention on the Law of Treaties